# THE
# A. I. R. MANUAL

## (Civil and Criminal)

Third Edition

## Vol. 2

D. V. CHITALEY
&
S. APPU RAO

All India Reporter Ltd.
Nagpur.

A. I. R. PUBLICATION

# THE
# A. I. R. MANUAL
## UNREPEALED CENTRAL ACTS
## (CIVIL AND CRIMINAL)

**3rd Edition**


BY

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## VOLUME 2

**BUSINESS PROFITS TAX ACT, 1947**

**TO**

**CIVIL PROCEDURE CODE, S. 147**


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(1) This volume includes all Acts falling within its alphabetical limits and in existence on 1st May 1969.

(2) Each of the Acts included is brought up to the date mentioned below the title of that Act where such title first occurs.

(3) The case-law is complete till 30th June 1969.

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1ST EDITION

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2ND EDITION

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# PREFACE

*( Reprinted from Vol. I)*

When the A.I.R. entered the field with the first edition of its "Manual" in the year 1947, it at once leapt to the first rank and carved for itself an unrivalled position in the field of such publications, although it was a newcomer in that particular field. This was due to certain settled principles of the A.I.R. to which it has been adhering steadfastly since its foundation more than 50 years ago. These principles may be summed up in three rules, which the A.I.R. has been having as its watchwords since the beginning: (1) thoroughness, (2) exhaustiveness, and (3) meticulous study of all possible ways by which the usefulness of a publication to the legal profession can be enhanced. All these three principles were given full effect to in the A.I.R. Manual.

The publication proved to be the most exhaustive and reliable collection of central statute law together with all the relevant case-law bearing on it, summarised, arranged and presented in a most conscientious manner with a view to affording the maximum facilities to the legal profession, both on the Bench and at the Bar. These qualities meant very hard work both for the editorial staff engaged by the A.I.R. as well as for the management. But they have built up the reputation of the A.I.R. Manual on a most solid and enduring foundation. This reputation brought correspondingly good results as regards the actual sales of the publication and in less than 20 years after the A.I.R. entered the field, a third edition of the Manual has become necessary to meet the insistent demand of the legal profession.

It is needless to dilate, at length, on the special features of the publication. It gives, as in the previous editions, both civil and criminal Acts, and the inconvenient and illogical division into civil and criminal portions has been rejected as in the previous editions. The post-Independence period has been extraordinarily prolific in the matter of legislative output, both at the Centre and in the States. The A.I.R. Manual aims at placing within the reach of the profession, at a reasonable cost, the entire body of central statute law together with the relevant case-law arranged in a convenient form which has been developed, after patient thought and experimentation, as being the most suitable from the point of view of quick and efficient service to the profession, whenever its members may have to look up a point of law in the statutes of India. Needless to say that our statutes, unlike under the English system, constitute the staple of our law and, therefore, provide the most important and the bulkiest part of our law.

In the interval of about 8 years since the completion of the second edition, more than 100 new Acts have been added to the statute book and there have been also a very vast number of amendments and additions to the old Acts. This edition includes all the new Acts and all the up-to-date amendments, besides giving the State amendments also wherever it was possible to trace them.

Among the new Acts, special mention may be made of some which are of outstanding importance. Perhaps, the first place in this category will have to be

given to the Limitation Act of 1963 which has taken the place of the Act of 1908 and not only overhauled the entire Law of Limitation but has revolutionised and simplified the law in many respects as, for instance, in regard to suits for possession of immovable property and applications for execution, which were two of the toughest and most confusing topics under the previous Limitation Act. The Advocates Act, 1961, has repealed the Bar Councils Act, 1926, and the Legal Practitioners Act, 1879 and has brought into existence a single unified Bar for the whole of India—which is itself a revolutionary change in the constitution of the Indian Bar and has been looked forward to, for a very long period by the whole Bar as an ideal to be realised.

The Arms Act, 1959, is another important Act which, by liberalising the provisions of the Arms Act of 1878 in a marked way, has shown itself to be a product of the post-Independence period. The Income-tax Act of 1961 has overhauled the whole structure of the Income-tax Act, 1922, and made a real attempt at simplification of the provisions of the law. Other Acts of the period also reflect the spirit of the times, each in its own way.

Above everything, however, this edition of A.I.R. Manual will be of special value to the Bench and the Bar as perhaps the most exhaustive and up-to-date reference book on the Constitution of India. The period, after the last edition, has witnessed an enormous growth and development of the Constitutional Law of India. Not only have there been a very large number of important amendments of the Constitution during this period but a phenomenally voluminous body of case-law which has accumulated on the Constitution.

This edition will not only contain the most authoritative version of the Constitution but also the most exhaustive collection of the case-law bearing on it. The subject is so voluminous that no ordinary text-book can be expected to cope with it and do full justice to it. This edition will be found to be practically unequalled as a book of reference on the Constitution of India.

All the special features of the previous editions, such as synopsis, "at-paging" of the Reports, etc., are continued in this edition and have also been considerably improved. These special features have been enumerated elsewhere at the beginning of this volume.

Before concluding, it is our pleasant duty to place on record our sense of gratitude to all our colleagues without whose unstinted labour and co-operation it would have been impossible to bring out such a vast publication. The editorial work, as can be seen, consists mainly of two branches: (i) that relating to preparing and editing the text of the various Acts, and (ii) the collection and editing of the notes of case-law bearing on the different Acts.

The responsibility for preparing and editing the text of the various Acts has been ably shouldered and executed by Sarvashri D. R. Rajandekar, B.A., LL.B., and A. G. Tambe, B.A., LL.B., assisted by Sarvashri P. A. Bakre, B.A., LL.B., H. G. Pathak, B.A., LL.B., and S. G. Kulkarni, B.A., LL.B.

The entire credit for organising and managing the editorial work in connection with the case-law must go to Shri V. B. Bakhale, M.A., LL.B., who has been assisted by a band of devoted workers, among whom may be chiefly mentioned

Sarvashri R. G. Dhobley, B.A., LL.B., D. H. Zadgaonkar, B.A., LL.B., K. S. Bakre, B.Sc., LL.B., M. Kuppuswami, B.A., B.L., G. M. Jatar, B.A., LL.B., S. S. Guru, B.A., LL.B., M. V. Joshi, B.A., LL.B., L. G. Chavhan, B.A., LL.B., B. N. Pradhan, B.Sc., LL.B., C. W. Moharir, B.Com., LL.B., D. V. Thakre, B.Sc., LL.B., G. D. Ruikar, B.A., LL.B., Y. P. Baxi, B.A., LL.B., M. N. Thomare, B.A., LL.B., B. D. Bhave, B.Sc., LL.B., D. G. Bhagwat, B.Sc. LL.B., N. N. Harshe, M.A., LL.B. F.I.A., V. R. Buche, B.A., LL.B., G. G. Modak, B.Sc., LL.B., and S. V. Golwalkar, B.A., LL.B.

Shri Gopalrao Udar and his team including among others Sarvashri P. K. Thosar, H. W. Mendhi, Govindrao Udar, D. R. Landge, Ku. S. Naidu, Ku. K. G. Deshpande and Ku. S. Deshpande have done the very arduous and responsible work of correcting and passing the proofs and our thanks are due to them for this.

Scarcely less important than the work of the editors has been the work of Shri B. R. Abhyankar, who, with his devoted band of workers including Sarvashri M. S. Savarkar, B. R. Katankar, D. P. Alshi, W. J. Joshi, P. N. Deo, G. D. Deshpande, S. M. Lambe, L. S. Wavde and D. T. Joshi and others has manned the responsibility of preparing the manuscript for the press.

Thanks must also be given to Sarvashri M. W. Chitaley, C. R. Banerjee, and G. G. Padhye, M. M. Kanitkar and others of the A.I.R. Rotary Printing Press, who, under the leadership and guidance of Shri J. W. Chitaley, finished the printing of the work in record time.

Last, but by no means least, our thanks are due to Shri W. W. Chitaley, B.A., LL.B., who has been in overall charge of the whole undertaking and whose exceptional talents, in organising and managing the business side of the undertaking are of inestimable value for the success of the gigantic undertaking that this publication obviously is.

13th June, 1969.

D.V.C.
S.A.R.

## SCHEME OF PUBLICATION

1. Only existing Central Acts of all-India importance are given.
2. Acts are arranged in the alphabetical order of their short titles.
3. The prefixes 'The' or 'The Indian' in the short title of an Act are not taken into consideration in the alphabetical arrangement.
4. After all the Acts, the existing non-temporary Central Ordinances are given and arranged also alphabetically.
5. Provincial or State Amendments to the provisions of the Central Acts or the State Acts which repeal or replace a Central Act are given in their appropriate places wherever it is possible. But it is not possible to guarantee completeness in this respect.
6. Rules made by the Central Government under an enactment are, wherever possible, indicated in appropriate places along with their Gazette references.
7. All the amendments, repeals and adaptations are carefully traced and incorporated in the text of the enactment.
8. Date of the commencement of an enactment or that of the amendment is given where published in the Gazette.
9. A verbatim reproduction of the Statement of Objects and Reasons is invariably given.
10. Useful notes on the provisions of an enactment culled from the Statement of Objects and Reasons and the Select Committee Report are given under those provisions.
11. A statement showing how an Act is affected by subsequent amendment, adaptation or repeal in part is given.
12. Wherever possible, cognate provisions are indicated.
13. A few Acts enacted by British Parliament but applicable to India or the information about which is useful in India are also included.
14. Notes of important case-law are given and arranged under appropriate headings under the respective statutory provisions.
15. Wherever necessary, comparative table showing the parallel provisions of the present and past Acts is given.
16. After giving all the existing Central Acts made applicable to the whole of India and enacted up to the end of the year 1968, an attempt will be made to include such Central Acts as have been enacted during the period intervening between the publications of the first and the last volumes of the series.
17. A complete list of all the Acts and Ordinances included in the series will be given in the last volume.
18. A consolidated Subject Index will form the last item of this series.

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## CORRECTION

**Volume 1 Page 891**

**Banking Regulation Act, 1949.**

In the statement under the title of the Act, for the date 30-4-1949 please *read*: '30-4-1969.'

**Volume 2 Page 661**

**Civil P. C., S. 9, Note 47 Pt. (6)**

*Read* the remark at the end as 'Reversed on another point in A I R 1963 S C 222.'

# ABBREVIATIONS

*(i) Relating to Indian Journals and Reports.*

A. I. R. 1914 All., Bom., etc. ... All India Reporter, Allahabad, Bombay, etc., sections of the respective years.
A. H. C. R. ... Agra High Court Reports.
A. M. L. J. ... Ajmer-Merwara Law Journal.
All. or I.L.R. All. ... Indian Law Reports, Allahabad Series.
All. Cri. R. ... Allahabad Criminal Reports.
All. L. Jour. ... Allahabad Law Journal.
All. W. N. ... Allahabad Weekly Notes.
All. W. R. ... Allahabad Weekly Reporter.
A. I. T. C. ... All India Tribunal Cases.
I. L. R. Andhra (Andh. Pra.) ... Indian Law Reports, Andhra (Andhra Pradesh) Series.
Andh. L. T. ... Andhra Law Times.
Andhra (or Andh.) W. R. ... Andhra Weekly Reporter.
I. L. R. Assam ... Indian Law Reports, Assam Series.
Assam L. R. ... Assam Law Reports.
Beng. L. R. ... Bengal Law Reports.
B. L. J. or Bihar L. J. R. ... Bihar Law Journal Reports.
B. R. ... Bihar Reports.
Bom. or. I. L. R. Bom. ... Indian Law Reports, Bombay Series.
B. H. C. R. ... Bombay High Court Reports.
Bom. L. R. ... Bombay Law Reporter.
Bom. P. J. ... Bombay Printed Judgments.
Bur. L. J. ... Burma Law Journal.
Bur. L. R. Burma Law Reports.
Bur. L. T. Burma Law Times.
Cal. or I. L. R. Cal. ... Indian Law Reports, Calcutta Series.
Cal. L. Jour. ... Calcutta Law Journal.
Cal. L. R. ... Calcutta Law Reports.
Cal. W. N. ... Calcutta Weekly Notes.
C. P. L. R. ... Central Provinces Law Reports.
Com. Cas. ... Company Cases.
Com. L. J. ... Company Law Journal.
Cr. or Cri L. Jour ... Criminal Law Journal.
Cur. L. J. ... Current Law Journal (Punjab).
C. I. S. ... Current Indian Statutes (Important Judgments).
I. L. R. Cut. ... Indian Law Reports, Cuttack Series.
Cut. L. T. ... Cuttack Law Times.
East. L. R. ... Eastern Law Reporter.
E. L. R. ... Election Law Reports (Delhi).
E. P. or East Punj. ... East Punjab.
I. L. R. E. P. or East Punj. ... Indian Law Reports, East Punjab Series.
Fac. L. R. ... Factories and Labour Reports (All.).
F. J. R. ... Factories Journal Reports (Mad.).
F. C. R. ... Federal Court Reports.
F. L. J. ... Federal Law Journal.
I. L. R. Guj. ... Indian Law Reports, Gujarat Series.
Guj. H. C. R. ... Gujarat High Court Reporter.
Guj. L. R. ... Gujarat Law Reports.
Him. Pra. ... Himachal Pradesh.
Hyd. ... Hyderabad.
I. L. R. Hyd. ... Indian Law Reports, Hyderabad Series.
H. R. ... Hyde's Reports.
Ind. App. ... Law Reports, Indian Appeals.
Ind. Cas. ... Indian Cases.
Ind. J. ... Indian Jurist.
Ind. R. ... Indian Rulings.
I. T. J. ... Income-Tax Journal.
I. T. R. ... Income-tax Reports.
Jab. L. J. ... Jabalpur Law Journal.
J. & K. ... Jammu & Kashmir.
J. & K. L. R. ... Jammu & Kashmir Law Reports.
J. L. R. or Jaipur L. R. ... Jaipur Law Reports.
(I. L. R.) Karachi ... Indian Law Reports, Karachi.
Kant. L. J. ... Karnatak Law Journal.
Kash. L. J. ... Kashmir Law Journal.
I. L. R. Ker. (or Kerala) ... Indian Law Reports, Kerala Series.
Ker. L. J. ... Kerala Law Journal.
Ker. L. R. ... Kerala Law Reports.
K. L. T. or Ker. L. T. ... Kerala Law Times.
Kn. R. P. C. ... Knapp's Reports, Privy Council.
Lab. A. C. ... Labour Appeal Cases.
Lab. I. C. ... Labour and Industrial Cases [Published by A. I. R.].
Lab. L. J. ... Labour Law Journal.
I. L. R. Lahore ... Indian Law Reports, Lahore.

(Pak. L. R.) Lahore ... (Pakisthan Law Reports) Lahore.
Lahore L. J. ... Lahore Law Journal.
L. R. ... Law Reporter (All.).
Law Rep. ... Law Reports (Mys).
Low. Bur. R. ... Lower Burma Rulings.
Luck. or I. L. R. Luck. ... Indian Law Reports, Lucknow Series.
Madh. B. or M. B. ... Madhya Bharat.
I. L. R. Madh. B. ... Indian Law Reports, Madhya Bharat Series.
Madh. B. L. J. ... Madhya Bharat Law Journal.
Madh. B. L. R. ... Madhya Bharat Law Reporter.
I. L. R. Madh Pra. or M. P. ... Indian Law Reports, Madhya Pradesh Series.
M. P. C. ... Madhya Pradesh Cases.
M. P. L. J. ... Madhya Pradesh Law Journal.
M. P. W. R. ... Madhya Pradesh Weekly Reporter.
Mad. or I. L. R. Mad. ... Indian Law Reports, Madras Series.
Mad. H. C. R. ... Madras High Court Reports.
Mad. L. Jour. ... Madras Law Journal.
Mad. L. Tim. ... Madras Law Times.
Mad. L. W. ... Madras Law Weekly.
Mad. W. N. ... Madras Weekly Notes.
Mah. L. J. ... Maharashtra Law Journal.
M. L. R. or Marwar L. R ... Marwar Law Reporter.
Moo. I. A. ... Moore's Indian Appeals.
Mun. L. J. ... Municipal Law Journal.
Mys. ... Mysore.
I. L. R. Mys. ... Indian Law Reports, Mysore Series.
Mys. C. C. R. ... Mysore Chief Court Reports.
Mys. H. C. R. ... Mysore High Court Reports.
Mys. L. J. ... Mysore Law Journal.
Mys. L. R. ... Mysore Law Reports.
I. L. R. Nag. ... Indian Law Reports, Nagpur Series.
Nag. L. Jour. ... Nagpur Law Journal.
Nag. L. R. ... Nagpur Law Reports.
N. W. P. H. C. R. ... North West Provinces High Court Reports.
Orissa J. D. ... Orissa Judicial Decisions.
Oudh Cas. ... Oudh Cases.
Oudh L. J. ... Oudh Law Journal.
Oudh L. R. ... Oudh Law Reports.
Oudh W. N. ... Oudh Weekly Notes.
I. L. R. Patiala ... Indian Law Reports, Patiala Series.
Pat. or I. L. R. Pat. ... Indian Law Reports, Patna Series.
Pat. H. C. C. ... Patna High Court Cases.
Pat. L. J. ... Patna Law Journal.
Pat. L. J. R. ... Patna Law Journal Reports.
Pat. L. R. ... Patna Law Reporter.
Pat. L. T. ... Patna Law Times.
Pat. L. W. ... Patna Law Weekly.
Pat. W. N. ... Patna Weekly Notes.
Pepsu L. R. ... Pepsu Law Reports.
I. L. R. Punj. ... Indian Law Reports, Punjab Series.
Punj. L. J. ... Punjab Law Journal.
Pun. L. R. ... Punjab Law Reporter.
Pun. L. R. (D.) ... Punjab Law Reporter (Delhi Section).
Pun. Re. ... Punjab Records.
Pun. W. R. ... Punjab Weekly Reporter.
Raj. ... Rajasthan.
I. L. R. Raj. ... Indian Law Reports, Rajasthan Series.
R. L. W. or Raj. L. W. ... Rajasthan Law Weekly.
I. L. R. Rang. ... Indian Law Reports, Rangoon.
Rang. L. R. ... Rangoon Law Reports.
Rat. Un. Cr. C. ... Ratanlal Unreported Criminal Cases.
R. D. ... Revenue Decisions.
S. T. C. ... Sales Tax Cases (Madras).
Sau. ... Saurashtra.
Sau. L. R. ... Saurashtra Law Reporter.
Sind L. R. ... Sind Law Reporter.
S. C. A. ... Supreme Court Appeals.
S. C. C. ... Supreme Court Cases.
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S. C. J. ... Supreme Court Journal.
S. C. R. ... Supreme Court Reports.
S. C. W. R. ... Supreme Court Weekly Reports.
Suth. W. R. ... Sutherland's Weekly Reporter.
Trav.-Co. or T. C. ... Travancore-Cochin.
I. L. R. Trav.-Co. or T. C. ... Indian Law Reports, Travancore-Cochin Series.
T. C. L. R. or Trav.-Co. L. R. ... Travancore-Cochin Law Reports.
T. L. J. or Trav. L. J. ... Travancore Law Journal.
Um. N. P. ... Uchchatam Nyayalaya Nirnaya Patrika.
U. P. L. R. ... United Provinces Law Reports.
Upp. Bur. Rul. ... Upper Burma Rulings.
Vind. Pra. or V. P. ... Vindhya Pradesh.
Weir. ... Weir's Criminal Rulings.

*(ii) Relating to Adaptation Orders.*

| | |
|---|---|
| A. C. A. O., 1948 | ... Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948. |
| A. L. O., 1950 | ... Adaptation of Laws Order, 1950. |
| 1 A. L. O., 1956 | ... Adaptation of Laws (No. 1) Order, 1956. |
| 2 A. L. O., 1956 | ... Adaptation of Laws (No. 2) Order, 1956. |
| 3 A. L. O., 1956 | ... Adaptation of Laws (No. 3) Order, 1956. |
| 4 A. L. O., 1957 | ... Adaptation of Laws (No. 4) Order, 1957. |
| 5 A. L. O., 1957 | ... Adaptation of Laws (No. 5) Order, 1957. |
| Andhra A. L. O., 1953 | ... Andhra Adaptation of Laws Order, 1953. |
| An. P. A. L. O., 1957 | ... Andhra Pradesh Adaptation of Laws Order, 1957. |
| A. O., 1937 | ... Government of India (Adaptation of Indian Laws) Order, 1937, as modified by the Government of India (Adaptation of Indian Laws) Supplementary Order, 1937. |
| A. O. (P), 1937 | ... The Government of India (Adaptation of Acts of Parliament) Order, 1937. |
| Bih. A. L. O., 1957 | ... Bihar Adaptation of Laws Order, 1957. |
| Bom. A. L. O., 1957 | ... Central Acts on State and Concurrent Subjects (Bombay Adaptation) Order, 1957. |
| Kerala A. L. O., 1956 | ... Kerala Adaptation of Laws Order, 1956. |
| Kerala A. L. O., 1957 | ... Kerala Adaptation of Laws (No. 2) Order, 1957. |
| M. P. A. L. O., 1956 | ... Madhya Pradesh Adaptation of Laws (State and Concurrent Subjects) Order, 1956. |
| Madras A. L. O., 1954 | ... Madras Adaptation of Laws Order, 1954. |
| Madras A. L. O., 1957 | ... Madras (Adaptation of Laws) (Central Acts) Order, 1957. |

*(iii) Other Abbreviations.*

| | |
|---|---|
| A or * | ... Superior A or * placed above the word or words in a square bracket indicates that the word or words is or are the last in the series of general adaptations directed to be made by one or more of the Adaptation Orders published in the Gazette of India from 1937 to 1957. |
| A. C. | ... Appellate Jurisdiction, Civil. |
| A. Cr. | ... Appellate Jurisdiction, Criminal. |
| App. | ... Appendix or Appeal. |
| Appr. | ... Approved. |
| Art. or A. | ... Article. |
| B. R. | ... Board of Revenue. |
| C. A. | ... Court of Appeal. |
| Civ. | ... Civil. |
| Cl. | ... Clause. |
| Cons. | ... Considered. |
| Cr. | ... Criminal. |
| Diss. | ... Dissented. |
| Dist. | ... Distinguished. |
| D. B. | ... Division Bench. |

E. ... Entry.
Expl. ... Explained.
F. A. ... First Appeal.
F. B. ... Full Bench.
F. C. ... Federal Court.
F. N. ... Foot Note.
Foll. ... Followed.
G. I. ... Government of India.
I. O. ... The India (Adaptation of Existing Indian Laws) Order, 1947.
Illus. ... Illustrations.
J. C. R. ... Joint Committee Report.
Jour. ... Journal.
L. ... List.
L. P. ... Letters Patent.
N. ... Note.
No. ... Number.
O. ... Order.
O. C. ... Original Jurisdiction, Civil.
O. Cr. ... Original Jurisdiction, Criminal.
Over. ... Overruled.
P. ... Page.
Pr. or P. ... Para.
Pt. ... Point.
P. C. ... Privy Council.
Pre. ... Preamble.
R. ... Rule.
Ref. ... Referred or Reference.
Rel. on. ... Relied on.
R. S. C. ... Rules of Supreme Court.
Rev. ... Revenue.
S. ... Section.
S. A. ... Second Appeal.
S. B. ... Special Bench.
S. C. ... Supreme Court.
S. C. R. ... Select Committee Report.
S. O. R. ... Statement of Objects and Reasons.
S. N. ... Short Notes of Cases.
U. P. B. R. ... United Provinces Board of Revenue.
w. r. e. f. ... With retrospective effect from.

IN FOOT-NOTES.—

('66) means (1866); ('04) means (1904); ('27) means (1927); ('39) means (1939).

Full year reference is given prior to 1866, like (1818) and *not* ('18); (1865) and *not* ('65) and so on, and to all Foreign cases.

✠ Indicates that citation of a different case begins.

FOR PERSONAL NOTES

# A. I. R. MANUAL

## UNREPEALED CENTRAL ACTS

## (CIVIL & CRIMINAL)

## VOLUME II

## [THE] BUSINESS PROFITS TAX ACT, 1947

(ACT XXI OF 1947)

[The text of the Act printed here is as on 15-4-1969.]

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SCHEDULE I

**Rules for the computation of profits for purposes of Business Profits Tax.**

SCHEDULE II

**Rules for computing the capital of a company for purposes of Business Profits Tax.**


### STATEMENT OF OBJECTS AND REASONS

"The object of this Bill is to impose a special income-tax on the profits exceeding one lakh of rupees of businesses, professions and vocations...."—Gazette of India, 1947, Pt. V, p. 211.

### SELECT COMMITTEE REPORT

"Clause 2 and Schedule II. — We consider that the flat figure of one lakh of rupees by way of abatement contained in the Bill is not suitable for all classes of business ownership, and we accordingly introduce as sub-cl. (1) of Cl. 2 a definition of abatement, fixing differing criteria of abatement in respect of companies, firms, Hindu undivided families and others, together with a second schedule laying down the basis on which the capital of a company will be computed, where the abatement is expressed as a percentage of capital."

—Ibid page 279.

## ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Amended by Acts 44 of 1947; 20 of 1948; 48 of 1948; 14 of 1949; 67 of 1949.
—Amended by Order: India (Adaptation of Income-tax, Profits Tax and Revenue Recovery Acts) Order, 1947.
—Adapted by A.L.O., 1950; 3 A.L.O., 1956.
—Extended by Act 67 of 1949.

## COGNATE ACTS AND PROVISIONS

See under Income-tax Act, 1961.

# [THE] BUSINESS PROFITS TAX ACT, 1947

## (ACT XXI OF 1947)[a]

[11th April, 1947.]

**An Act to impose a special tax on a certain class of income.**

Whereas it is expedient to impose a special tax on income arising from business;

It is hereby enacted as follows:—

[a] For Statement of Objects and Reasons, see Gazette of India, 1947, Pt. V, p. 211 and for the Select Committee Report, see ibid, p. 279.
This Act and all the rules and orders made thereunder which are in force immediately before the commencement of the Taxation Laws (Extension to Merged States and Amendment) Act, 1949, are extended to, and shali be in force in, all the merged States. For the definition of the expression "merged States", see S. 2 (1) of that Act.
This Act and all rules and orders made thereunder shall operate as if they had been extended to, and brought into force in, all the merged States on the 1st day of April, 1949—See Sec. 3 of the Taxation Laws (Extension to Merged States and Amendment) Act, 1949 (67 of 1949).
For the interpretation of laws as extended to the merged States, for the removal of difficulties in giving effect to the provisions of any Act, etc., extended to the merged States and for repeal of corresponding laws in force in any of the merged States and savings in consequence of such repeal, see Secs. 4, 6 and 7, respectively, of Act 67 of 1949.

**1. Short title, extent and commencement.**—(1) This Act may be called THE BUSINESS PROFITS TAX ACT, 1947.

(2) It extends to the whole of [a][India except [b][the territories which, immediately before the 1st November, 1956, were comprised in Part B States[c]].]

(3) It shall come into force on such date[d] as the Central Government may, by notification in the official Gazette, appoint.

[a] Substitured for "British India" by A.L.O., 1950.
[b] Substituted for "Part B States" by 3 A.L.O., 1956.
[c] Immediately before the 1st of November 1956, the following were the Part B States in India: Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Pepsu, Rajasthan, Saurashtra and Travancore-Cochin.
[d] The Act came into force on 12-4-1947—See Gazette of India, 1947, Part I, p. 537.

**2. Interpretation.**—In this Act, unless there is anything repugnant in subject, or context,—

(1) "abatement" means, in respect of any chargeable accounting period,

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**Section 2 — Note 1**

(1) Amount of profits lying unutilized and not specially set apart for any purpose cannot be treated as a reserve and added to the paid up share capital for the purposes of computing abatement under Section 2 (1) of the Act. ('53) AIR 1953 SC 501 (503): 1954 SCR 203 * ('55) AIR 1955 Cal 550 (552) (DB). (Computation of capital — Unappropriated balance of previous

[a][ending on or before the 31st day of March, 1947,] a sum which bears to a sum equal to—

(a) in the case of a company, not being a company deemed for the purposes of Section 9 to be a firm, six per cent of the capital of the company on the first day of the said period computed in accordance with Schedule II, or one lakh of rupees, whichever is greater, or

(b) in the case of a firm having—
(i) not more than two working partners, one lakh of rupees, or
(ii) three working partners, one and a half lakhs of rupees, or
(iii) four or more working partners, two lakhs of rupees, or

(c) in the case of a Hindu undivided family, two lakhs of rupees, or

(d) in any other case, one lakh of rupees,—the same proportion as the said period bears to the period of one year [b][and, in respect of any chargeable accounting period beginning after the 31st day of March, 1947, such sum as may be fixed by the annual Finance Act];

[a] Inserted by the Finance Act, 1948 (20 of 1948), S. 10 (30-3-1948).
[b] Added ibid.

(2) "accounting period" in relation to any business means any period which is or has been determined as the previous year for that business for the purposes of the Indian Income-tax Act, 1922;

[a][(2A) • • • •]

[a] Clause (2A) was omitted by A.L.O., 1950.

(3) "business" includes any trade, commerce or manufacture, or any adventure in the nature of trade, commerce or manufacture, or any profession or vocation the profits of which are chargeable according to the provisions of Section 10 of the Indian Income-tax Act, 1922[a]:

Provided that where the functions of a company or of a society incorporated by or under any enactment consist wholly or mainly in the holding of investments or other property, the holding of the investments or property shall be deemed for the purpose of this definition to be a business carried on by such company or society:

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**Section 2 — Note 1 (contd.)**

year simply carried forward without allocation for specific purpose — Not a reserve.)

(2) What Section 2 (1) (a) requires is an ascertainment of the computed capital on the first day of the chargeable accounting period in question. It is a factual ascertainment that is contemplated and required. What was the paid-up capital on that date and what were the reserves on that date; the two together make up the capital of the company within the meaning of Section 2 (1). ('58) AIR 1958 Mad 326 (329): ILR (1957) Mad 1163 (DB). (AIR 1957 Bom 26, Dissented from.)

(3) In dealing with the question, when was an effective and valid allocation made of the sums with reference to which the abatement was claimed under Section 2 (1) of the Act what has to be examined is whether any one possessed of the requisite authority indicated on or before the crucial date the manner of disposal or the destination of the funds of the company which constituted its profits. ('58) AIR 1958 Mad 326 (327, 328): ILR (1957) Mad 1163 (DB). (Held on facts that the Directors only and not shareholders possessed requisite authority to order allocation to reserve fund.)

(4) The provisions of the Act import a restrictive factor in considering what constitutes business for purpose of business profits tax. Unless the profits of the business are chargeable under section 10 of the Income-tax Act, 1922 they have to be left out of account for the levy of business profits tax. AIR 1961 Mad 72 (74): (1960) 39 ITR 327 (DB). (Houses acquired in money lending business treated as stock-in-trade — But income from them assessed under Section 9, Income-tax Act — Income cannot be charged to business profits tax.)

(5) The proviso to Section 2 (3) creates a legal fiction. Income from property is deemed to be income from business only in the circumstances specified in the proviso, emphasising the main feature of Section 2 (3) that but for that legal fiction such income from property which could not be charged under Section 10 of the Income-tax Act, 1922 would not constitute profits from business for purposes of Business Profits Tax Act. AIR 1961 Mad 72 (74): (1960) 39 ITR 327 (DB).

Provided further that all businesses to which this Act applies carried on by the same person shall be treated as one business for the purposes of this Act;

[a] Now Income-tax Act, 1961.

(4) "chargeable accounting period" means—

(a) any accounting period falling wholly within the terms beginning on the first day of April 1946, and ending on the 31st day of March, [a][1949];

(b) where any accounting period falls partly within and partly without the said term, such part of that accounting period as falls within the said term:

[b][Provided that where an accounting period falls partly before, and partly after, the end of March, 1947, so much of that accounting period as falls before and so much of that accounting period as falls after, the end of March, 1947, shall be deemed each to be a separate chargeable accounting period];

[a] Substituted for '1948' by the Finance Act, 1949 (14 of 1949), Section 11 (31-3-1949).

[b] Added ibid.

(5) "company" means a company as defined in the Indian Companies Act, 1913,[a] [b][ or a company formed and registered under a law in force in any of the [c][merged territories]] or formed in pursuance of an Act of Parliament [d][of the United Kingdom] or of Royal Charter or Letters Patent or of an Act of the Legislature of a British possession or of a law of a [e][ ] State, and includes any foreign association, whether incorporated or not, which the Central Board of Revenue may, by general or special order, declare to be a company for the purposes of this Act;

[a] Now see the Companies Act, 1956 (1 of 1956).

[b] Inserted by the Taxation Laws (Extension to Merged States and Amendment) Act, 1949 (67 of 1949), S. 26 (2).

[c] Substituted for "merged States" by A.L.O., 1950.

[d] Inserted ibid.

[e] Words "Part B" were omitted by 3 A.L.O., 1956.

(6) "control of a company" means control direct or indirect of more than one-half of the voting power attached to the total issued paid-up share capital of the company, or control vested by its Memorandum and Articles of Association otherwise than by reference to such voting power:

Provided that the voting power attached to shares held by a nominee or trustee for any person shall be deemed for the purpose of this definition to be held by that person;

(7) "deficiency of profits" means—

(i) where profits have been made in any chargeable accounting period, the amount by which such profits fall short of the abatement in respect of that period;

(ii) where a loss has been made in any chargeable accounting period, the amount of the loss added to the abatement in respect of that period;

(8) "director" includes any person occupying the position of a director by whatever name called and also includes any person who—

(i) is a manager of the company or concerned in the management of the business; and

(ii) is remunerated out of the funds of the business, and

(iii) is the beneficial owner of not less than twenty per cent of the ordinary share capital of the company;

[a][(8A) "director's remuneration" includes all remuneration payable by a company to a director thereof in respect of any services rendered to or employment with the company in any capacity whatever;]

[a] This clause was inserted by the Income-tax and Business Profits Tax (Amendment) Act, 1948 (48 of 1948), S. 13 (w.r.e.f. 12-4-1947).

(9) "dividend" has the same meaning as in Section 2 of the Indian Income-tax Act, 1922[a];

[a] Now Income-tax Act, 1961.

(10) "firm", "partner" and "partnership" have the same meanings, respectively, as in the Indian Partnership Act, 1932.

(11) "fixed rate" in relating to dividends on share capital, other than ordinary share capital, includes a rate fluctuating in accordance with the maximum rate of income-tax;

(12) "loss" means a loss computed in the same manner as for the purposes of this Act, profits are to be computed.

[a][(12A) ° ° ° °].

[a] Definition of "merged States" inserted by Act 67 of 1949 was omitted by by A.L.O., 1950.

(13) "ordinary share capital", in relation to a company, means all the issued share capital (by whatever name called) of the company, other than capital the holders whereof have a right to a dividend at a fixed rate but have no other right to share in the profits of the company;

(14) "person" includes a Hindu undivided family;

(15) "prescribed" means prescribed by rules made under this Act;

(16) "profits" means profits as determined in accordance with Schedule I;

(17) "taxable profits" means the amount by which the profits during a chargeable accounting period exceed the abatement in respect of that period;

[a][(17A) "taxable territories" shall have the meaning assigned to that expression by clause (14A) of Section 2 of the Indian Income-tax Act, 1922.]

[a] Inserted by A.L.O., 1950.

(18) "working partner" of a firm means a partner thereof who is required by the terms of the contract of partnership to devote substantially the whole of his time to the business of the firm.

**3. Tax Authorities.**—(1) Every Commissioner of Income-tax, Appellate Assistant Commissioner of Income-tax, Inspecting Assistant Commissioner of Income-tax and Income-tax Officer shall have the like powers under this Act and in relation to the same area and cases as he exercises under the Indian Income-tax Act, 1922.

(2) All officers and persons employed in the execution of this Act shall observe and follow the orders, instructions and directions of the Central Board of Revenue:

Provided that no such orders, instructions or directions shall be given so as to interfere with the discretion of the Appellate Assistant Commissioner of Income-tax in the exercise of his appellate functions.

**4. Charge of tax.**—Subject to the provisions of this Act, there shall, in respect of any business to which this Act applies, be charged, levied and paid on the amount of the taxable profits during any chargeable accounting period, a tax (in this Act referred to as "business profits tax") [a][which shall, in respect of any

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**Section 4 — Note 1**

(1) Under the Act the unit of taxation is the business i.e., any business to which the Act applies; and if a person carries on more than one business to all of which the Act applies all the business carried on by the same person shall be treated as one business for the purpose of the Act. AIR 1960 SC 1175 (1178): (1960) 3 SCR 727.

(2) The business profits tax is on the percentage allowed under the relevant

chargeable accounting period ending on or before the 31st day of March 1947, be equal to sixteen and two-thirds per cent of the taxable profits, and in respect of any chargeable accounting period beginning after that date, be equal to such percentage of the taxable profits as may be fixed by the annual Finance Act:]

Provided that—

(a) any profits which are, under the provisions of sub-section (3) of Section 4 of the Indian Income-tax Act, 1922, exempt from income-tax,

(b) all profits from any business of life insurance,

(c) any sum paid to a business by or through the Central Government by way of bonus or subsidy,—

shall be totally exempt from business profits tax under this Act:

[b][Provided further that where the profits include any profits from an industrial undertaking which are exempt from income-tax under Section 15C of the Indian Income-tax Act, 1922, the business profits tax otherwise payable on the whole of the taxable profits shall be reduced by an amount which bears to that business profits tax the same proportion as the amount of such inclusion bears to the whole profits.]

[a] Substituted for the words "which shall be equal to sixteen and two-thirds per cent of the taxable profits" by the Finance Act, 1948 (20 of 1948), Section 10 (3) (30-3-1948).

[b] Inserted by the Taxation Laws (Extension to Merged States and Amendment) Act, 1949 (67 of 1949), Sec 27.

**5. Application of Act.**—This Act shall apply to every business of which any part of the profits made during the chargeable accounting period is chargeable to income-tax by virtue of the provisions of sub-clause (i) or sub-clause (ii) of clause (b) of sub-section (1) of Section 4 of the Indian Income-tax Act, 1922, or of clause (c) of that sub-section:

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**Section 4 — Note 1 (contd.)**

Finance Act corresponding to the chargeable accounting period on taxable profits less the abatement computed in accordance with Schedule II of the Act. (1964) 5 Guj LR 837 (838) (DB).

(3) Agreement between Central Board of Revenue and Association in 1945 that profits of the association should not be assessed to Income-tax, Super tax and Excess Profits Tax — Held, neither the agreement nor the provisions of the Income-tax Act operated to exempt the profits of the Association from assessment under the Act. AIR 1960 SC 1320 (1322): (1960) 39 ITR 723.

(4) Income from house properties, acquired by the assessee in the course of money lending business, cannot be brought under levy to business profits tax under Section 4, because, even though the property has been treated by the assessee as a stock-in-trade, and the income from the houses accrued to him in the course of his business activities, it can be computed to income-tax only under Section 9 and not Section 10 of the Income-tax Act. AIR 1961 Mad 72 (74): (1960) 39 ITR 327 (DB).

(5) The use of the word 'bonus' or 'subsidy' in Section 4 Proviso (c) connotes that the payment is in the nature of a gift. As the payments made by the Government to an association incorporated under the Central Ordinance 82 of 1945 to assist it in carrying on its trade or business in cotton piece goods in the Province of Bengal for the services it was rendering to Government could not be regarded as payments by the Government to itself or as payments in the nature of a gift they were not exempt under Section 4 Proviso (c). AIR 1960 SC 1320 (1323): (1960) 39 ITR 723.

**Section 5 — Note 1**

(1) Whereas for the excess profits tax profits earned in an Indian State cannot be taken into consideration at all, such profits can be taken into account if brought into taxable territories for assessing business profits tax. As regards losses they can be taken into account in assessing the income from business whether they occurred in a State or in what was British India. AIR 1957 Punj 259 (261): ILR (1957) Punj 1137 (DB).

(2) The third proviso, to Section 5 does not exclude from the purview of the Act the business carried on by an assessee in any part of India to which the Act does not extend but exempts only the income, profits or gains of that business unless they are received in or brought into the taxable territories. The business is still one to which the Act applies under the substantive part of Section 5. Hence the losses of such business can be set off against the profits of the business in the taxable territories. AIR 1960 SC 1175 (1181): (1960) 3 SCR 727.

Provided that this Act shall not apply to any business the whole of the profits of which accrue or arise without [a][the taxable territories] where such business is carried on by or on behalf of a person who is resident but not ordinarily resident in [a][the taxable territories], unless the business is controlled in India:

[b][Provided further that where the profits of a part only of a business carried on by a person who is not resident in [a][the taxable territories] or not ordinarily so resident accrue or arise in [a][the taxable territories] or are deemed under the Indian Income-tax Act, 1922, so to accrue or arise, then, except where the business being the business of a person who is resident, but not ordinarily resident, in [a][the taxable territories] is controlled in India, this Act shall apply only to such part of the business, and such part shall for all the purposes of this Act be deemed to be a separate business.]

Provided further that this Act shall not apply to any income, profits or gains of business accruing or arising within [c][any part of India to which this Act does not extend] unless such income, profits or gains are received or deemed under the provisions of the aforesaid Act to be received in or are brought into [a][the taxable territories] in any chargeable accounting period, or are assessable under Section 42 of that Act.

[a] Substituted for "British India" by A.L.O., 1950.
[b] Inserted by the Income-tax and Business Profits Tax (Amendment) Act, 1947 (44 of 1947), S. 3 (w.r.e.f. 12-4-1947).
[c] Substituted for "a Part B State" by 3 A.L.O., 1956.

**6. Relief on occurrence of deficiency of profits.**—Where a deficiency of profits occurs in any chargeable accounting period in any business, the taxable profits of the business shall be deemed to be reduced and relief shall be granted in accordance with the following provisions:—

(a) the aggregate amount of the taxable profits for the previous chargeable accounting periods shall be deemed to be reduced by the amount of the deficiency of profits and the amount of business profits tax payable in respect thereof shall be deemed to be reduced accordingly and the relief necessary to give effect to the reduction shall be given by repayment or otherwise;

(b) where the amount of the deficiency of profits exceeds the aggregate amount of the taxable profits for the previous chargeable accounting periods or where there is no previous chargeable accounting period, the balance of the deficiency of profits or the whole of the deficiency, as the case may be, shall be applied in reducing any taxable profits for the next subsequent chargeable accounting period, and if and so far as it exceeds the amount of those profits, any taxable profits for the next subsequent chargeable accounting period and so on.

**7. Change in persons carrying on business.**—As from the date of any change in the persons carrying on a business, the business shall be deemed for all the purposes of this Act to have been discontinued and a new business to have been commenced:

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**Section 6 — Note 1**

(1) When the assessee makes profits in the business in any part of India to which the Act does not extend but sustains loss in the business in the taxable territories the Act will not apply to such profits unless they are brought into the taxable territories and if they are so brought Section 6 will apply with regard to relief on the ground of deficiency of profits. AIR 1960 SC 1175 (1182): (1960) 3 SCR 727.

(2) Per S. K. Das and Kapur, JJ.— Sections 11 and 14 of the Act have to be read together. Income escapes assessment when the process of assessment has not been initiated as also in a case where it has resulted in no assessment after completion of the process of assessment. Hence even in the former case the Income-tax officer has no jurisdiction to assess an assessee by issuing a notice under Section 11 more than four years after such accounting period. AIR 1960 SC 1232 (1235): (1960) 3 SCR 988.

Provided that where a change takes place in the persons carrying on a business and where, except for such change, relief would be allowable under Sec. 6, the Central Board of Revenue may, if it thinks fit, allow such relief under that section as it considers just, having regard to the extent to which the persons directly or indirectly interested in the business before the change remain interested therein after the change.

**8. Interconnected companies.**—(1) Where any interest, annuity or other annual payment or any royalty or rent is payable by one company to another company, and one of those companies is a subsidiary of the other or both are subsidiaries of a third company, and the recipient company is resident outside [a][the taxable territories], no allowance shall be made in respect of such payment in computing the profits or losses of the paying company.

(2) Where—

(a) a company (hereinafter referred to as "the principal") is resident in [a][the taxable territories] and is not a subsidiary of any other company resident in [a][the taxable territories]; and

(b) during the whole or any part of any chargeable accounting period of the principal, another company resident or carrying on business within [a][the taxable territories] (hereinafter referred to as "the subsidiary") is a subsidiary of the principal,

the capital or profits or losses of the subsidiary for such chargeable accounting period or part thereof shall be treated for the purposes of this Act as if they were the capital of, or, as the case may be, profits or losses arising from the business of the principal:

Provided that the profits of the subsidiary so treated shall not be exempted from business profits tax in the hands of the principal by reason of any exemption applicable to the principal under the proviso to Section 4.

(3) Where the chargeable accounting periods of the principal and subsidiary are not conterminous, such division and apportionment of the profits or losses of the subsidiary for any chargeable accounting period shall be made as will allocate the due proportion thereof to the relative chargeable accounting period or periods of the principal; and such division and apportionment shall be by reference to the proportion that the number of days of the chargeable accounting periods of the subsidiary falling within the relative chargeable accounting period or periods of the principal bears to the total number of days in the chargeable accounting period of the subsidiary.

(4) For the purposes of this section a company shall be deemed to be a subsidiary of another company if and so long as not less than four-fifths of its ordinary share capital is beneficially owned by that other company, whether directly or through another company or other companies, or partly directly and partly through another company or other companies.

(5) The business profits tax payable by virtue of this section by the principal shall, for the purposes of Section 10, be allocated by the Income-tax Officer to the respective companies concerned in such proportion as in his opinion is just:

Provided that the principal shall have the same rights of appeal against an order of allocation made under this sub-section as it has under this Act against the amount of its business profits tax assessment.

[a] Substituted for "British India" by A.L.O., 1950.

**9. Aggregation of profits in certain cases.**—Where an individual [a][or a Hindu undivided family] is entitled to profits arising from more than one business, of which at least one is carried on by a firm in which he [b][or it] is a partner [c][or by a company which for the purposes of this section is deemed to be a firm in which he or it is interested], the Income-tax Officer may with the prior sanction of the Inspecting Assistant Commissioner of Income-tax, aggregate the shares of such

individual [d][or Hindu undivided family] in the profits or losses of all of such businesses and treat the sum of such aggregation as the profits of a business carried on by such individual [d][or Hindu undivided family] and assess him [b][or it] accordingly:

Provided that if the accounting periods of such businesses are not conterminous, the Income-tax Officer shall determine in respect of such individual [d][or Hindu undivided family] his [e][or its] chargeable accounting period and shall make such divisions, apportionment and aggregation of the shares of such individual [d][or Hindu undivided family] in the profits or losses of the several businesses as may be necessary to determine for such chargeable accounting period the total profits and gains of such individual [d][or Hindu undivided family] therefrom:

Provided further that for the purposes of this section, a company, which is neither one in which the public are substantially interested, as defined in the Explanation to sub-section (1) of Section 23A of the Indian Income-tax Act, 1922, nor a subsidiary company as defined in sub-section (4) of Section 8 of this Act, shall be deemed to be a firm in which the person having an interest in the company are partners, or in the case of a sole-share-holder, a business carried on by that sole-share-holder, and the profits of such company shall be computed accordingly:

Provided further that any profits or losses so aggregated for assessment upon an individual [a][or a Hindu undivided family] shall be excluded from the profits or losses of the respective businesses for the purposes of this Act; and no assessment under this Act shall be made in respect of any such business save in the names of the other partners therein [f][and such individual or Hindu undivided family shall not be treated as a working partner in relation to such business for the purposes of sub-clause (b) of clause (1) of Section 2.]

[a] Inserted by the Income-tax and Business Profits Tax (Amendment) Act, 1948 (48 of 1948), S. 14 (w.r.e.f. 12-4-1947).
[b] Inserted, ibid.
[c] Inserted, ibid.
[d] Inserted, ibid.
[e] Inserted, ibid.
[f] Added, ibid.

**10. Allowance of business profits tax in computing income for income-tax purposes.**—The amount of the business profits tax payable by any person for any chargeable accounting period shall, in computing total income for the purposes of the relevant income-tax or super-tax assessment, be allowed as a deduction:

Provided that where, under the provisions of this Act relating to deficiencies of profits relief is given by way of repayment from business profits tax chargeable for any chargeable accounting period previous to that in which the deficiency occurs, the amount of the deduction allowed shall not be altered, but the amount repayable shall be taken into account in computing the profits and gains of the business for the purposes of income-tax as if it were a profit of the business accruing in the previous year (as determined for that business for the purposes of the Indian Income-tax Act, 1922) in which the deficiency of profit occurs.

**11. Issue of notice for assessment.**—(1) The Income-tax Officer may, for the purposes of this Act, require any person whom he believes to be engaged in any

**Section 11 — Note 1**

(1) The Act being a taxing statute, if the Court can reconcile Section 11 and Sec. 14 and reconcile it in a manner which is beneficial to the subject, then it is its duty to do so. ('57) AIR 1957 Bom 1 (3): ILR (1957) Bom 91 (DB).

(2) Inasmuch as Section 11 does not indicate any period of time with regard to the issuing of a notice, it would be right for the Court to import into Section 11 the consideration which led the Legislature to fix a limitation of time for the purpose of issuing a notice under Section 14. Therefore a notice issued four years after the close of the chargeable accounting period, being beyond the time mentioned in Section 14, is not a valid notice under Section 11. ('57) AIR 1957 Bom 1 (2, 3): ILR (1957) Bom 91 (DB).

business to which this Act applies, or to have been so engaged during any chargeable accounting period, or to be otherwise liable to pay business profits tax, to furnish within such period, not being less than forty-five days from the date of the service of the notice, as may be specified in the notice, a return in the prescribed form and verified in the prescribed manner setting forth (along with such other particulars as may be provided for in the notice) with respect to any chargeable accounting period specified in the notice, the profits [a][and taxable profits] of the business or the amount of deficiency, if any, available for relief under Section 6:

Provided that the Income-tax Officer may, in his discretion, extend the date for the delivery of the return.

(2) The Income-tax Officer may serve on any person, upon whom a notice has been served under sub-section (1), a notice requiring him on a date to be therein specified to produce, or cause to be produced, such accounts or documents as the Income-tax Officer may require, and may from time to time serve further notices in like manner requiring the production of such further accounts or documents or other evidence as he may require.

[a] Inserted by the Income-tax and Business Profits Tax (Amendment) Act, 1947 (44 of 1947), S. 3 (w.r.e.f. 12-4-1947).

**12. Assessments.**—(1) The Income-tax Officer shall, by an order in writing after considering such evidence, if any, as he has required under Section 11, assess to the best of his judgment the profits liable to business profits tax and the amount of business profits tax payable on the basis of such assessment, or if there is a deficiency of profits, the amount of that deficiency and the amount of business profits tax, if any repayable, and shall furnish a copy of such order to the person on whom the assessment has been made.

(2) Business profits tax payable in respect of any chargeable accounting period shall be payable by the persons carrying on, or treated as carrying on, the business in that period.

(3) Where two or more persons were carrying on the business jointly in the chargeable accounting period, the assessment shall be made upon them jointly and, in the case of a partnership, may be made in the partnership name.

(4) Where by virtue of the foregoing provisions an assessment could, but for his death, have been made on any person either solely or jointly with any other person or persons, the assessment may be made on his legal representative either solely or jointly with that other person or persons, as the case may be.

**13. Power to make provisional assessments.**—(1) The Income-tax Officer, before proceeding to make an assessment (in this section referred to as the regular assessment) under Section 12, may, at any time after the expiry of the period specified in the notice issued under sub-section (1) of Section 11 as that within which the return therein referred to is to be furnished, and whether the return has or has not been furnished, proceed to make in summary manner a provisional assessment of the taxable profits and the amount of business profits tax payable thereon.

(2) Before making such provisional assessment, the Income-tax Officer shall give notice in the prescribed form to the person on whom assessment is to be made of his intention to do so, and shall with the notice forward a statement of the amount of the proposed assessment, and the said person shall be entitled to deliver to the Income-tax Officer at any time within fourteen days of receipt of the said notice a statement of his objections, if any, to the amount of the proposed assessment.

(3) On expiry of one month from the date of service of the notice referred to in sub-section (2), or earlier, if the assessee agrees to the proposed assessment,

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**Section 11 — Note 1 (contd.)**

(3) When the Income-tax Officer issues a notice four years after the close of the chargeable accounting period he is not exercising his statutory authority in a reasonable manner. ('57) AIR 1957 Bom 1 (3): ILR (1957) Bom 91 (DB).

the Income-tax Officer may, after taking into account the objections, if any, made under sub-section (2), make a provisional assessment, and shall furnish a copy of the order of assessment to the assessee:

Provided that assent to the amount of the assessment, or failure to make objection to it, shall in no way prejudice the assessee in relation to the regular assessment.

(4) In making any such provisional assessment the Income-tax Officer shall make allowance for any deficiencies of profits for the previous chargeable accounting periods which are under the provisions of Section 6 to be set off against the taxable profits of the chargeable accounting period in respect of which the assessment is being made:

Provided that, where such deficiencies of profits have not been determined under sub-section (1) of Section 12, the Income-tax Officer shall estimate the amount thereof to the best of his judgment.

(5) There shall be no right of appeal against a provisional assessment made under this section and it shall, until a regular assessment is made in due course under Sec. 12, determine the amount of business profits tax due from the assessee.

(6) If, when a regular assessment is made in due course under Section 12, the amount of business profits tax payable thereunder is found to exceed that determined as payable by the provisional assessment, it shall be reduced by the amount determined as payable by the provisional assessment.

(7) If, when a regular assessment is made in due course under Section 12, the amount of business profits tax payable thereunder is found to be less than that determined as payable by the provisional assessment, any excess of tax paid as a result of the provisional assessment shall be refunded to the assessee, together with interest at two per cent per annum calculated from the date of payment of such excess tax to the date of the order of refund, both days inclusive.

**14. Profits escaping assessment.**—If, in consequence of definite information which has come into his possession, the Income-tax Officer discovers that profits of any chargeable accounting period chargeable to business profits tax have escaped assessment, or have been under-assessed, or have been the subject of excessive relief, he may at any time within four years of the end of the chargeable accounting period in question serve on the person liable to such tax a notice containing all or any of the requirements which may be included in a notice under Section 11, and may proceed to assess or reassess the amount of such profits liable to business profits tax, and the provisions of this Act shall, so far as may be, apply as if the notice were a notice issued under that section.

**15. Penalties.**—If the Income-tax Officer, the Appellate Assistant Commissioner of Income-tax or the Commissioner of Income-tax, in the course of any proceedings under this Act, is satisfied that any person has, without reasonable cause, failed to furnish the return required under sub-section (1) of Section 11, or to produce or cause to be produced the accounts or documents or other evidence required by the Income-tax Officer under sub-section (2) of that section, or has

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**Section 14 — Note 1**

(1) There must be some point of time when it could be said that income of an assessee has escaped assessment, and whatever the inner limit of time may be there can be no doubt that the outer limit of time as suggested by the Legislature in Section 14 must be four years. ('57) AIR 1957 Bom 1 (2, 3): ILR (1957) Bom 91 (DB).

(2) The Business Profits Tax Act being a taxing statute, if the Court can reconcile, Section 11 and S. 14 and reconcile it in a manner which is beneficial to the subject, then it is its duty to do so. ('57) AIR 1957 Bom 1 (2, 3): ILR (1957) Bom 91 (DB).

(3) Any advantage of relief which was available to the assessee under Section 11 as to allowable deductions, deficiency, etc., would be equally available, if the notice is issued under Section 14. AIR 1960 SC 1232 (1235, 1236): (1960) 3 SCR 988.

[See also AIR 1968 SC 565 (572): (1968) 1 SCR 601. (Expression "escaped assessment" in Section 11-A, C. P. and Berar Sales Tax Act includes that of turnover which has not been assessed at all because for one reason or other no assessment proceedings were initiated.)

concealed particulars of the profits of the business, or has deliberately furnished inaccurate particulars of such profits, he may direct that such person shall pay by way of penalty, in addition to the amount of any business profits tax payable, a sum not exceeding—

(a) where the person has failed to furnish the return required under sub-section (1) of Section 11, the amount of the business profits tax payable;

(b) in any other case, the amount of business profits tax which would have been avoided if the return made had been accepted as correct:

Provided that the Income-tax Officer shall not impose any penalty under this section without the previous approval of the Inspecting Assistant Commissioner of Income-tax.

**16. Appeals to Appellate Assistant Commissioner of Income-tax.**—(1) Any person objecting to the amount of business profits tax for which he is liable as assessed by the Income-tax Officer or denying his liability to be assessed under this Act, or objecting to any penalty imposed by the Income-tax Officer, or to the amount of any deficiency of profits as assessed by the Income-tax Officer, or to the amount allowed by the Income-tax Officer by way of relief under any provision of this Act or to any refusal by the Income-tax Officer to grant relief, may appeal to the Appellate Assistant Commissioner of Income-tax.

(2) An appeal shall ordinarily be presented within forty-five days of receipt of the notice of demand relating to the assessment or penalty objected to, or in the case of an appeal against the assessment of a deficiency of profits, within thirty days of the receipt of the copy of the order determining the deficiency, or in the case of an appeal against the amount of a relief granted or a refusal to grant relief, within forty-five days of the receipt of the intimation of the order granting or refusing to grant the relief, but the Appellate Assistant Commissioner of Income-tax may admit an appeal after the expiration of that period if he is satisfied that the appellant had sufficient cause for not presenting it within that period.

(3) An appeal shall be in the prescribed form and shall be verified in the prescribed manner.

(4) The Appellate Assistant Commissioner of Income-tax shall hear and determine the appeal and, subject to the provisions of this Act, shall pass such orders as he thinks fit, and such orders may include an order enhancing the assessment or a penalty:

Provided that an order enhancing an assessment or penalty shall not be made unless the person affected thereby has been given a reasonable opportunity of showing cause against such enhancement.

(5) The procedure to be adopted in the hearing and determination of appeals shall be in accordance with the rules made by the Central Board of Revenue in relation to income-tax.

**17. Appeal to Appellate Tribunal.**—Any Income-tax Officer or any person in respect of whose business an order under Section 12 has been passed and who objects to an order passed by an Appellate Assistant Commissioner of Income-tax under Section 15 or Section 16 may, within the prescribed time and in the prescribed manner, appeal against such order to the Appellate Tribunal constituted

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**Section 17 — Note 1**

(1) When the order is made against the Income-tax Officer the Income-tax Officer himself is the appellant and hence for the purposes of filing an appeal under Sec. 17 read with the Business Profits Tax Rules, the period of limitation is to be computed from the date the order of the Appellate Assistant Commissioner is communicated to the Income-tax Officer filing the appeal and not to the Commissioner of Income-tax. ('55) AIR 1955 Bom 404 (405, 406): ILR (1955) Bom 597 (DB).

(2) The powers conferred by Section 17 are only with regard to disposing of appeals. The Appellate Tribunal has no power to condone delay in the case of an appeal which was barred by limitation. ('55) AIR 1955 Bom 404 (406): ILR (1955) Bom 597 (DB).

under the Indian Income-tax Act, 1922, and that Tribunal shall have all such powers in disposing of the appeal as it has in respect of appeals preferred to it under the said Act.

**18. Rectification of mistakes.**—The Commissioner of Income-tax may, at any time within four years from the date of any order passed by any Appellate Assistant Commissioner of Income-tax or Income-tax Officer under this Act, rectify any mistake in any evidence recorded during assessment or appellate proceedings, or any mistake apparent from the record and shall within the like period rectify any mistake apparent from the record which has been brought to his notice by a person to whose business this Act applies:

Provided that no such rectification shall be made having the effect of enhancing the liability of any person unless that person has been given a reasonable opportunity of being heard.

[a][18A. **Agreement for avoidance of double taxation in India and Pakistan.**—The Central Government may enter into an agreement with Pakistan for the avoidance of double taxation of profits under this Act and under the corresponding law in force in Pakistan, and may, by notification in the official Gazette, make such provisions as may be necessary for implementing the agreement.]

[a] This section was added by the India (Adaptation of Income-tax, Profits Tax and Revenue Recovery Acts) Order, 1947 [w. e. f. 15-8-1947].

**19. Application of provisions of Act XI of 1922.**—The sections of the Indian Income-tax Act, 1922, as applied to excess profits tax by virtue of [a][Sections 21 and 21A] of the Excess Profits Tax Act, 1940, shall, in so far as they are not repugnant to the provisions of this Act, [b][and with such modifications, if any, as may be prescribed,] apply to business profits tax as they apply to excess profits tax.

[a] Substituted for 'Section 21' by the India (Adaptation of Income-tax, Profits Tax and Revenue Recovery Acts) Order, 1947 (w. e. f. 15-8-1947].

[b] Inserted by the Income-tax and Business Profits Tax (Amendment) Act, 1947 (44 of 1947), S. 3 [w. r. e. f. 12-4-1947].

**20. Income-tax papers to be available for the purposes of this Act.**—(1) Notwithstanding anything contained in the Indian Income-tax Act, 1922, all information contained in any statement or return made or furnished under the provisions of that Act or obtained or collected for the purposes of that Act may be used for the purposes of this Act.

(2) All information contained in any statement or return made or furnished under the provisions of this Act or obtained or collected for the purposes of this Act may be used for the purposes of the Indian Income-tax Act, 1922.

**21. Failure to deliver returns or statements.**—If any person fails, without reasonable cause or excuse, to furnish in due time any return or statement, or to produce, or cause to be produced, any accounts or documents required to be produced under Section 11, he shall be punishable with fine which may extend to five hundred rupees, and with a further fine which may extend to fifty rupees for every day during which the default continues.

**22. False statements.**—If a person makes in any return required under Section 11 any statement which is false, and which he either knows or believes to be false or does not believe to be true, he shall be punishable with simple imprison-

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**Section 19 — Note 1**

(1) Where the point as regards the nature of the fund was never raised by the department at any stage and it was not a ground mentioned by the Income-tax Officer nor did it figure in the orders of the Appellate Assistant Commissioner or of the Tribunal and it was not indicated even in the statement of the case or did not form part of the question, referred to the High Court and, moreover, the question involved an investigation of facts such point could not be allowed to be raised for the first time before the High Court. ('58) AIR 1958 Mad 328 (330): ILR (1958) Mad 1163 (DB).

ment which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

**23. Institution of proceedings and composition of offences.**—(1) A person shall not be proceeded against for an offence under Section 21 or Section 22 except at the instance of the Inspecting Assistant Commissioner of Income-tax.

(2) No prosecution for an offence punishable under Section 21 or Section 22 or under the Indian Penal Code shall be instituted in respect of the same facts as those in respect of which a penalty has been imposed under this Act.

(3) The Inspecting Assistant Commissioner of Income-tax may, either before or after the institution of proceedings, compound any offence punishable under Section 21 or Section 22.

[a][**23A. Power to make exemption, etc., in relation to merged territories.**—If the Central Government considers it necessary or expedient so to do, for avoiding any hardship or anomaly, or removing any difficulty, that may arise as a result of the extension of this Act to the [b][merged territories], the Central Government may, by general or special order,[c] make an exemption, reduction in rate or other modification in respect of business profits tax in favour of any class of profits, or in regard to the whole or any part of the profits of any person or class of persons.]

[a] Inserted by the Taxation Laws (Extension to Merged States and Amendment) Act, 1949 (67 of 1949), S. 28.

[b] Substituted for "Merged States" by A. L. O., 1950.

[c] See Merged States (Taxation Concessions) Order, 1949, published in Gaz. Ind., Extra., of 3-12-1949, page 2623 and subsequent amendments thereto.

**24. Power to make rules.**—(1) The Central Board of Revenue may, subject to the control of the Central Government, make rules[a] for carrying out the purposes of this Act.

(2) Without prejudice to the generality of the foregoing power, such rules may—

(a) prescribe the procedure to be followed on appeals, applications for rectification of mistakes, and applications for refunds;

(b) provide for any matter which by, or under, this Act is to be prescribed.

(3) The power to make rules conferred by this section shall be exercised in like manner as the power to make rules under Section 59 of the Indian Income-tax Act, 1922.

[a] For the Business Profits Tax Rules, 1947, see Gaz. Ind., 1947, Pt. I, p. 1439 and ibid, 1948, Pt. I, page 82.

## SCHEDULE I

[See Section 2 (16).]

**Rules for the computation of profits for purposes of Business Profits Tax.**

1. The profits of a business during any chargeable accounting period shall be separately computed, and shall, subject to the provisions of this Schedule, be computed in accordance with the provisions of Section 10 of the Indian Income-tax Act, 1922:

Provided that any sums other than any interest paid by a firm to a partner of the firm excluded under the proviso to Clause (iii) of sub-section (2) or Clause (a) of sub-section (4) of that section from the allowances made in computing the profits of the business for the purposes of income-tax shall, if paid, be included in

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**Sch. 1, Rule 1 — Note 1**

(1) Employees of company in jail during trial of murder case — Salary and bonus for such period of jail custody paid to them cannot be deducted under Section 10 (2) (xv) of the Income-tax Act, 1922 or under Business Profits Tax Act except for the periods they are entitled to leave under their terms of service. **AIR 1967 All 513 (514): (1967) 1 ITJ 937 (DB).**

those allowances when computing the profits of the business for the purposes of business profits tax :

Provided further—

(a) that any sums received or credited in a chargeable accounting period which by virture of Rule 9 of Schedule I to the Excess Profits Tax Act, 1940, have been treated as business receipts for the purpose of assessment to excess profits tax, and

(b) any expenditure or loss incurred in any chargeable accounting period, allowance in respect of which has been made for excess profits tax purposes,

shall be disregarded in computing the profits or losses of the chargeable accounting period :

Provided further that where a chargeable accounting period is not an accounting period, the profits or losses of the business during the accounting periods wholly or partly included within the chargeable accounting period shall be so computed as aforesaid, and such division and apportionment to specific periods of those profits or losses and such aggregation of those profits and losses, or any apportioned part thereof, shall be made as appears necessary to arrive at the profit during the chargeable accounting period; and any such apportionment shall be made in proportion to the number of days in the respective periods.

2. (1) The principle of adding the allowance for depreciation for any one period to the allowance for depreciation for any subsequent period and deeming it to be part of the allowance for such subsequent period shall not be followed.

(2) Nothing in this Act shall be construed as permitting the application, in computing profits for the purposes of business profits tax, of the provisions of sub-section (2) of Section 24 of the Indian Income-tax Act, 1922.

3. Income received from investments or other property shall be included in the profits only as provided in this rule, that is to say,—

(a) in the case of the business of a building society, or a banking business, insurance business or business consisting wholly or mainly in the dealing in or holding of investments or other property, the profits shall include all income received from investments or other property; or

(b) in the case of a business part of which consists in banking, insurance or dealing in investments or other property, not being a business to which Clause (a) applies, the profits shall include all income received from investments or other property held for the purposes of that part of that business :

Provided that—

(i) income received directly or indirectly by way of dividend or distribution of profits from a body corporate carrying on business as defined in this Act, and

(ii) income to which the persons carrying on the business are not beneficially entitled,

shall in no case be included.

4. (1) In the case of a business carried on in any accounting period which constitutes or includes a chargeable accounting period, by a company, the directors whereof have throughout that accounting period a controlling interest therein, no deduction shall be made in respect of directors' remuneration in computing the profits for that accounting period.

(2) Where, in the case of a business carried on by a company in any accounting period which constitutes or includes a chargeable accounting period, the directors of the company have during any part of that accounting period a controlling interest therein, and the case is not one to which sub-rule (1) applies, the profits of the accounting period shall be computed as if the directors of the company had

no controlling interest therein, and to the part thereof appropriate to the chargeable accounting period ascertained in accordance with the third proviso to Rule 1 shall be added the directors' remuneration for that part of the chargeable accounting period during which the directors of the company had a controlling interest therein.

(3) In this rule the expression "directors' remuneration" does not include—

(a) the remuneration of any director who is required to devote substantially the whole of his time to the service of the company in a managerial or technical capacity and is not the beneficial owner of, or able, either directly or through the medium of other companies or by any other indirect means, to control more than five per cent. of the ordinary share capital of the company, or

(b) the remuneration of any managing agent where such remuneration is included in the profits of the managing agent's business for the purposes of the business profits tax.

5. (1) In computing the profits of any chargeable accounting period no deduction shall be allowed in respect of expenses in excess of the amount which the Income-tax Officer considers reasonable and necessary, having regard to the requirements of the business, and, in the case of directors' fees or other payments for services, to the actual services rendered by the person concerned:

Provided that no disallowance under this rule shall be made by the Income-tax Officer unless he had obtained the prior authority of the Inspecting Assistant Commissioner of Income-tax.

(2) Any person who is dissatisfied with the decision of the Income-tax Officer under this rule may appeal in the prescribed time and manner to the Appellate Tribunal referred to in Section 17.

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## SCHEDULE II

[See Section 2 (1).]

**Rules for computing the capital of a company for purposes of Business Profits Tax.**

1. For the purposes of ascertaining the abatement under this Act in respect of any chargeable accounting period, the capital of a company shall be computed in accordance with the following rules.

2. *[(1) Where the company is one to which R. 3 of Schedule I applies, its capital shall be the sum of the amounts of its paid-up share capital and of its reserves in so far as they have not been allowed in computing the profits of the

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**Schedule II, Rule 2 — Note 1**

(1) Term 'reserve' is not defined in the Act and should be given the ordinary natural meaning as understood in common parlance. The reserve may be a general reserve or a specific reserve but there must be a clear indication to show that it was a reserve either of the one or the other kind. ('53) AIR 1953 SC 501 (502): 1954 SCR 203 * AIR 1958 Mad 328 (330).

(2) The word 'reserve' or 'reserves' has a technical sense in the Companies Act. The word cannot be given a wider meaning in this Act than the one given under Regulation 9 of Table A or S. 131-A of the Companies Act, 1913. ('54) AIR 1954 Pat 139 (140) (DB).

(3) Profits lying unutilized and not specially set apart for any purpose on the crucial date would not constitute reserves within Rule 2 (1). ('53) AIR 1953 SC 501 (502): 1954 SCR 203. (AIR 1951 Bom 420, Reversed.) * ('55) AIR 1955 Cal 289 (290) (DB) * ('55) AIR 1955 Cal 550 (551, 552) (DB). (Computation of capital — Unappropriated balance of previous year simply carried forward without allocation for specific purpose — Not a reserve.)

(4) In dealing with the question, when was an effective and valid allocation made of the sums with reference to which abatement was claimed under Section 2 (1), what has to be examined is whether any one possessed of the requisite authority indicated on or before the crucial date the manner of disposal or the destination of the funds of the company which constituted its profits. ('58) AIR 1958 Mad 326 (327, 328): ILR (1957) Mad 1163 (DB). (Held in view of Articles of the company that Directors only and not share-

company for the purposes of the Indian Income-tax Act, 1922, diminished by the cost to it of its investments or other property the income from which is not includable in the profits, so far as that cost exceeds any debt for money borrowed by it.]

[b][(2)] In all other cases, the capital shall be the sum ascertained in accordance with the said sub-rule, diminished by the cost to the company of its investments so far as that cost exceeds any debt for money borrowed by it.

[c][Explanation.—A reserve or paid-up share capital brought into existence by creating or increasing (by revaluation or otherwise) any book asset is not capital for the purposes of ascertaining the abatement under this Act in respect of any chargeable accounting period.]

[a] Substituted for former sub-rules (1) and (2) by the Income-tax and Business Profits Tax (Amendment) Act, 1948 (48 of 1948), S. 15 (w. r. e. f. 12-4-1947).

[b] Sub-rule (3) was renumbered as sub-rule (2), ibid.

[c] Added by the Taxation Laws (Extension to Merged States and Amendment) Act, 1949 (67 of 1949), S. 29 (w. r. e. f. 12-4-1947).

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**Schedule II, Rule 2 — Note 1 (contd.)**

holders possessed the requisite authority to order allocation to reserve fund.) * ('55) AIR 1955 Cal 289 (290) (DB) * AIR 1960 Mad 137 (140): (1960) 2 Mad LJ 1 (DB).

(5) Unless directors apply their mind to the question and unless they make appropriation of balance to payment of dividends or to building up reserves it is difficult to say that any portion of the amount of balance in profits and loss account could be treated as reserve or reserves for purpose of computing the amount of capital under Rule 2. ('54) AIR 1954 Pat 139 (141) (DB).

(6) What Rule 2 (1) requires is that the reserve should be factually in existence on first day of relevant chargeable accounting period. No retrospective effect can be given to the factual allocation. ('58) AIR 1958 Mad 326 (329): ILR (1957) Mad 1163 (DB). (AIR 1957 Bom 26, Dissented from.)

(7) Function of Directors under the Companies Act is to make a recommendation as to how the profits should be distributed or allocated and it is the right of the shareholders ultimately to decide at a general meeting. When the shareholders accept and adopt the recommendations of the Directors in the form of a resolution that certain amounts should constitute reserve as on an earlier accounting period, the resolution obviously has a retrospective effect. ('57) AIR 1957 Bom 26 (27): ILR (1957) Bom 38 (DB). (Mere fact that shareholders passed a resolution at a later date could not affect the merits of the question.)

(8) True nature and character of a sum disputed as reserve is to be determined with reference to the substance of the matter. A reserve as used in Rule 2 can only mean profit earned by a company and not distributed as dividend to shareholders but kept back by directors for any purpose to which it may be put in future. AIR 1961 SC 812 (815, 816): (1961) 3 SCR 371 * AIR 1958 Cal 664 (667, 668) (DB).

(9) Even if the passing by general body of shareholders of profit and loss accounts submitted by the directors might be taken as evidence of appropriation of various amounts to various heads shown in profit and loss account, the question remains whether inclusion of any amount under the head, 'capital profit account', amounts to authorisation of a reserve fund. Where the real position is that a portion of the profits of the company was taken over to the capital profit account only to be available for a deferred distribution of dividends to share-holder, it only means that a portion of the profits were kept undistributed, and merely because they were included in a separate head account, they were not taken out of what is called 'amorphous and undistributed profits.' Such an amount would not be a reserve within meaning of Rule 2 (1). AIR 1960 Mad 351 (352): (1960) 38 ITR 428 (DB).

(10) The allocation of a specified sum out of the profits of the company to be kept back for utilisation towards the payment of tax is sufficient to make the sum so set apart a reserve within the meaning of Rule 2 (1). ('58) AIR 1958 Mad 326 (330): ILR (1957) Mad 1163 (DB).

(11) Payments made for taxes, until the assessment is finalised must be shown as advances and made from the common fund and such payments, are not debitable to the reserve. The assessee is entitled to select his own system of accounting and if he chooses to pay the taxes during any current year from out of unreserved and undemarcated funds and does not look to the tax reserve fund for the payment of such taxes, in particular advance taxes, there is nothing either in the provisions of the Act or in Rule 2 to justify the Income-tax Department to treat such payment as having been made from the reserve fund and to proceed to deduct such amount from out of the reserve fund for the purposes of the computation of capital under

[a][(2A) Notwithstanding anything contained in Rule 2, where only a part of the profits of a company is chargeable under the provisions of the Act, its capital shall be the sum ascertained in accordance with the said rule diminished by an amount which bears to that sum the same proportion as the amount of its profits not so chargeable bears to its total profits.]

[a] Added by the Income-tax and Business Profits Tax (Amendment) Act, 1947 (44 of 1947), S. 3 (w. r. e. f. 12-7-1947).

3. So much of the premium realized by a company from the issue of any of its shares as is retained in the business shall be regarded as forming part of its paid-up capital for the purposes of Rule 2.

**Schedule 2, Rule 2 — Note 1 (contd.)**

Rule 2 (1) of Schedule II. (1964) 5 Guj LR 837 (844, 845, 846): (1965) 58 ITR 854 (DB).

(12) The creation and maintenance of the item known, as 'undivided profits' by a non-resident Bank incorporated in U. S. A. being a requirement of the Treasury Rules which are made under the Statute of that country it cannot be said that the amount of Undivided Profits in the Balance sheet was not allocated as a result of either a resolution of the Directors, accepted by the shareholders or on account of the requirements of the law. The amount designated as 'Undivided Profits' was a part of the reserves and had to be taken into account when computing the capital and reserves within Rule 2 (1) of Schedule II of the Act. AIR 1961 SC 812 (815): (1961) 3 SCR 371. (1957-3 ITR 836 (Bom), Reversed.)

(13) Whatever was given as a refund of excess profits tax in the United Kingdom was available only for use for a limited purpose, as specified in Section 40 of the English Finance Act (2 of 1945) and the assessee was under a statutory liability to utilise this amount only for those purposes. When the amount refunded was shown in the balance sheet under a separate head of account as 'excess profits tax post-war refund suspense account' it meant that the amount was held in reserve, but in suspense, to be utilised for the statutory purposes as directed by Section 40 of the English Finance Act of 1945. The very inclusion of this amount under this head of account would be proof of an appropriation for a specified purpose. That amount was, a reserve within Rule 2. AIR 1960 Mad 351 (353): (1960) 38 ITR 428 (DB).

(14) Non-resident assessee Company taking over assets of two Companies — In consideration of transfer of assets assessee Company allotting shares to transferor Companies — Excess of book value of assets transferred over face value of shares issued shown as "Capital paid in Surplus" — "Capital paid in Surplus", held represented "premium" within Rule 3 or in alternative "reserve" within Rule 2 (1) — "Earned Surplus" representing net profits earned year after year, subject to certain appropriations, held should be treated as "reserve" within Rule 2 (1). AIR 1966 SC 1393 (1399. 1401. 1402): (1966) 2 SCR 367.

(15) Payments under Section 18-A do not satisfy that test and cannot therefore be treated as part of its reserve. Their true nature is that they are payments on account, made under the compulsion of a statute, towards the discharge of an instant liability for liquidating a charge, the precise measure of which is to be determined at a later date. ('58) AIR 1958 Cal 664 (667, 668) (DB).

**Schedule 2, Rule 2-A — Note 1**

(1) Under Rule 2-A, if part of the profits of a business in an Indian State are brought into the taxable territories, then a portion of the capital of the business in the Indian State proportionate to the profits would have to be taken into consideration for the purpose of abatement. The Legislature under this rule has clearly contemplated a case of part of the profits under the third proviso to Section 5 coming into the taxable territories and becoming liable to tax, and to that extent it has given the assessee the right of abatement. On a true construction of Rule 2-A it must follow that if a part of the profits is brought within the taxable territories, the abatement to which the assessee would be entitled would be only with regard to the capital proportionate to the profits; then if no profits are brought within the taxable territories the assessee would not be entitled to any abatement at all with regard to the capital utilised by him in the Indian State business. (1956) 30 ITR 849 (857, 858) (DB) (Bom).

(2) Assessee sustaining loss in business in part of India to which the Act does not extend — Computation of capital — No difficulty arises by reason of Rule 2-A. AIR 1960 SC 1175 (1182): (1960) 3 SCR 727.

**Schedule 2, Rule 3 — Note 1**

(1) Non-resident assessee company taking over assets of two companies — In consideration of transfer of assets assessee company allotting shares to transferor companies — Excess of book value of assets over face value of shares shown as "Capital paid in surplus" — "Capital paid in surplus" held represented "premium" within Rule 3. AIR 1966 SC 1393 (1397): (1966) 2 SCR 367.

(2) There is nothing in any Act of

4. Any deposits with the Central Government under Section 10 of the Indian Finance Act, 1942, or Section 2 of the Excess Profits Tax Ordinance. 1943, shall not be regarded as investment or other property for the purposes of this Schedule.

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## [THE] CALCUTTA HIGH COURT (EXTENSION OF JURISDICTION) ACT, 1953
## (ACT XLI OF 1953)

[The text of the Act printed here is as on 15-4-1969.]

### STATEMENT OF OBJECTS AND REASONS

The Bill seeks to extend the jurisdiction of the Calcutta High Court to Chandernagore and the Andaman and Nicobar Islands.

2. In the case of Chandernagore, the Calcutta High Court has been the High Court for purposes of certain laws which were extended to the area after its de facto transfer to India by an order made by the Central Government under the Foreign Jurisdiction Act, 1947. Now that de jure transfer of the area to India has been effected, it is considered that the jurisdiction of that High Court should extend to that area for all purposes by an Act of Parliament as contemplated in Art. 230 of the Constitution.

3. In relation to the Andaman and Nicobar Islands also, the Calcutta High Court is the High Court for the purposes of a limited number of laws including the Codes of Civil and Criminal Procedure. The Bill is designed to confer on the High Court jurisdiction for all purposes."

—Gaz. Ind. Extra, 1953, Pt. II, S. 2, p. 308.

### COGNATE ACTS AND PROVISIONS

(1) Goa Daman and Diu (Administration) Act, 1962 (1 of 1962), Section 7 read with S. 8 of the Goa, Daman and Diu J. C's Court (Declaration as High Court) Act, 16 of 1964, S. 8.

(2) Dadra and Nagar Haveli Act, 35 of 1961, S. 11.

(3) Pondicherry (Administration) Act, 49 of 1962, S. 9 read with S. 2(d).

(4) Delhi High Court Act, 26 of 1966, S. 17.

(5) State of Nagaland Act, 27 of 1962, S. 13.

(6) Punjab Reorganisation Act, 31 of 1966, Ss 29, 30.

## [THE] CALCUTTA HIGH COURT (EXTENSION OF JURISDICTION) ACT, 1953
## (ACT 41 OF 1953)[a]

[18th December, 1953.]

An Act to extend the jurisdiction of the High Court at Calcutta to Chandernagore and the Andaman and Nicobar Islands.

Be it enacted by Parliament as follows :—

[a] For Statement of Objects and Reasons, see Gaz. Ind., Extra, 1953, Pt. II, S. 2, page 808.

**1. Short title.**—This Act may be called THE CALCUTTA HIGH COURT (EXTENSION OF JURISDICTION) ACT, 1953.

**2. Extension of jurisdiction of Calcutta High Court to Chandernagore and Andaman and Nicobar Islands.**[a]—The jurisdiction of the High Court at Calcutta shall extend to Chandernagore and the Andaman and Nicobar Islands and shall, as from the 2nd day of May, 1950, be deemed to have extended to Chandernagore, and the said High Court shall, for all purposes be deemed to be the High Court for Chandernagore and the Andaman and Nicobar Islands.

[a] See S. 2 (7A) of Civil P. C. (1908), as inserted by Act 2 of 1951, S. 4.

**3. Effect of certain orders.**—Any order made—

(i) by the highest Court of appeal in relation to Chandernagore before the 2nd day of May 1950, or in any proceeding pending before that Court on that day, or

(ii) by the Chief Commissioner of the Andaman and Nicobar Islands before the commencement of this Act in the discharge of his functions as the High Court for those Islands,

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**Schedule 2, Rule 3 — Note 1 (contd.)**

Indian Legislature before 1956 to indicate that the word premium was restricted to a cash transaction alone. Therefore shares issued for consideration other than cash could also be said to have been issued at a premium. 1962 Cal LJ 29 (39): (1963) 47 ITR 642.

shall for all purposes have effect, not only as an order of that Court, or as the case may be, of the Chief Commissioner, but also as if it were an order made by the High Court at Calcutta.

4. **Power to make rules.**—Subject to the provisions of any law for the time being in force, the High Court at Calcutta may make rules to carry out the purposes of this Act and for the purpose of effectively exercising its jurisdiction in or in relation to Chandernagore and the Andaman and Nicobar Islands.

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## [THE] CALCUTTA HIGH COURT (JURISDICTIONAL LIMITS) ACT, 1919

(ACT XV OF 1919)[a]

[17th September, 1919.]

[The text of the Act printed here is as on 15-4-1969.]

An Act to declare and prescribe the limits of the ordinary original civil jurisdiction of the High Court of Judicature at Fort Wlliam in Bengal.

WHEREAS Clause 11 of the Letters Patent for the High Court of Judicature at Fort William in Bengal, dated the 28th December, 1865, provides that the said High Court shall have and exercise ordinary original civil jurisdiction within such local limts as may from time to time be declared and prescribed by any law made by competent legislative authority for India;

AND WHEREAS it is expedient so to declare and prescribe the local limits of the ordinary original civil jurisdiction of the said High Court;

It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, see Gaz. Ind., 1919. Pt. V, page 74; and for Proceedings in Council, see ibid, Pt. VI, pages 876 and 1101.

1. **Short title.**—This Act may be called THE CALCUTTA HIGH COURT (JURISDICTIONAL LIMITS) ACT, 1919.

2. **Limits of ordinary original civil jurisdiction.**—The ordinary original civil jurisdiction of the High Court of Judicature at Fort William in Bengal shall be exercised within the limits set out in the Schedule :

Provided that nothing in this Act shall affect any suit or other legal proceeding pending in any Court at the date of the commencement of this Act.

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## THE SCHEDULE

(See Section 2)

1. The limits within which the ordinary original civil jurisdiction of the High Court shall be exercised are as follows:—

North. — A line commencing on the Western side of the river Hoogly at a point where the straight line joining reference pillar No. I (in a compound on the river side of the Ghusri Cotton Mill, Howrah) and reference pillar No. II (near the south-western end of Chitpur Toll Bridge) meets the western water-line of the river Hoogly, and thence along the said line to the point where it meets the eastern water line of the river Hoogly near the south bank of the opening of Circular Canal; thence along the water-line of the south bank of Circular Canal passing under the Chitpur Toll Bridge, the Chitpur or Baghbazar Bridge to boundary pillar A on the eastern side of the southern pile of Barrackpore Bridge.

East. — A line commencing from the said boundary pillar A following the eastern edge of the steps of the bridge to a point near the south-eastern corner of the immediate approach to the bridge marked by reference pillar III, which is on the boundary; thence by a straight line to boundary pillar B on the south-eastern corner of the junction of Cornwallis Street and Galif Street (now marked with a Publie Works Department stone); thence along the eastern side and the eastern side of the eastern pavement of Cornwallis Street in a series of regular links joining points marked by posts 1-3 to boundary pillar C at the north corner of the junction of Shambazar Street with Cornwallis Street; thence by a straight line to boundary pillar D on the solid south corner of the said junction; thence in an approximately straight line along the solid eastern side of Upper Circular Road marked by posts 4-9; thence eastward following the corner round to boundary pillar E on the north corner of the junction of the unnamed road (which runs into Jadu Nath Mitra Lane) with Upper Circular Road; and

thence by a straight line to boundary Pillar F at the solid south corner of the junction of Jadu Nath Mitra Lane with Upper Circular Road; thence by posts 10-13 to boundary pillar G on the solid south corner of the junction of Ultadingi Road with Upper Circular Road; thence along the solid south side of Ultadingi Road in a series of continuous and approximately straight lines joining points marked by posts 14-16 to boundary pillar H at the solid western corner of the junction of Ultadingi Road and Gauribere Lane; thence by the solid western side of Gauribere Lane; marked by posts 17-21; thence by a straight line crossing the road diagonally to boundary pillar I on the solid south-eastern corner of the junction of Gauribere Lane and Ultadingi Junction Lane; thence along the solid eastern side of Ultadingi Junction Lane marked by posts 22-24 to boundary pillar J on the solid eastern corner of the junction of Ultadingi Junction Lane with Halsibagan Road; thence by a straight line to post 25 at the solid western corner of the said junction; thence along the solid north side of Halsibagan Road marked by post 26 to boundary pillar K on the north side of Halsibagan Road directly opposite the solid eastern side Upper Circular Road south of it; thence by a straight line to post 27 at the solid south corner of the junction of Halsibagan Road with Upper Circular Road; thence by the solid eastern side of Upper Circular Road marked by posts 28-34 to post 35; thence turning east to boundary pillar L on the north side of Maniktola Road; thence by a straight line to post 36 at the south corner of the junction of Maniktola Road with Upper Circular Road at the north-western corner of the garden of Kali Pada Barik; thence along the eastern side of the lane on the eastern side of the raised platform road and marked by posts 37-49 to boundary pillar M at the solid north corner of the junction of Gas Street and Upper Circular Road; thence by a straight line to boundary pillar N at the solid south corner of the said junction; thence keeping again to the eastern side of the lane on the eastern side of the raised platform road along a line marked by posts 50-61 excluding the recently made Ladies' Park to boundary pillar O near the north pillar of the north entrance to North Station, Sealdah; thence by a straight line to boundary pillar P at the south corner of that entrance; thence by the comparatively straight line from pillar to pillar connecting boundary pillars P, Q, R, S, and T adjacent to the pillars forming the corners of the various approaches Sealdah Station; thence along the solid eastern side of Lower Circular Road marked by posts 62-64 to pillar 65; thence turning west to boundary pillar U at the north-western corner of the outpatients' department of the Campbell Hospital; thence by a straight line marked by posts 66-68 to boundary Pillar V on the corner of the platform to the right of the north entrance to the Calcutta Corporation Central Stores; thence by post 69 turning east to post 70; thence by posts 71-76, boundary pillars W and X at the solid corners of the southern junction of Police Hospital Road with Lower Circular Road; thence by posts 77 80, to boundary pillars Y and Z on the solid corners of the junction of Bonapukur Lane with Lower Circular Road, by posts 81-86 to boundary pillars A1 and B1, at the solid corners of the junction of Nonapukur or Bijli Road and Lower Circular Road, posts 87, 88, to boundary pillar C1, near the south-western corner of the Circular Road burial ground; thence by a straight line to boundary pillar D1, on the other side of the tramway lines; thence post 89 eastward to post 90; thence to boundary pillars E1, and F1, at the solid corners of the junction of Karaya Bazar Road and Lower Circular Road, posts 91, 92, to boundary pillar G1, opposite to Theater Road, posts 93, 94, to boundary pillar H1, a few feet south of the point directly opposite the junction of Auckland Place and Lower Road, following the curve of the road by posts 95 and 96 to reference pillar IV (which is on the boundary) on the eastern side of the junction of Beck Bagan Lane with Lower Circular Road.

South. — A line commencing from the said reference pillar IV in a straight line to boundary pillar II, western corner of the junction of Beck Bagan Lane with Lower Circular Road; thence along the solid south side of Lower Circular Road to boundary pillar J1, and K1, at the solid corners of the junction of Ballyganj Circular Road and Lower Circular Road; thence by the solid south side of Lower Circular Road marked by posts 97, 98, boundary pillars L1, M1, at the solid corners of the junction of Lansdowne Road with Lower Circular Road, post 99 southward to posts 100 westward to post 101, northward to post 102 and westward to post 103, boundary pillars N1 and O1 at the solid corners of the junction of Woodburn Road with Lower Circular Road, posts 104, 105 boundary pillars P1 and Q1 at the solid corners of the junction of Lee Road with Lower Circular Road; thence by the straight line links but broken boundary line formed by posts 106-113, to boundary pillar R1, on the south-eastern corner of the junction of Chowringhee with Lower Circular Road; thence by an oblique straight line to boundary pillar S1 on the south-western corner of the said junction near a stone marked F. W. B. 26); thence by a line representing the present limits of the holdings on the south of Circular Road and marked by posts 114-116 boundary pillars T1 and U1 at the solid corners of the junction of Haris Chandra Mukharji Road and Lower Circular Road, posts 117-121; thence to boundary pillar V1, near the north corner of the junction of Bhowanipore Road and Lower Circular Road; thence following the curve of the corner and the eastern side of Bhowanipore Road and the surplus lands

attached thereto by a series of straight line links joining points marked by posts 122-124, boundary pillars W1, and X1, at the junction of Shambunath Pandit Street and Bhowanipore Road, posts 125-128 turning eastward to boundary pillar Y1 on the north side of Sankaripara Road posts 129, 130 to boundary pillars Z1 and A2 across the entrance of Ketrapati Road into Bhowanipore Road, thence by posts 131, 132 to boundary pillar B2 on the north-eastern side of Alipore Bridge; thence along a straight line joining the said boundary pillar B2 with subsidary reference pillar VII on the south-eastern side of the said bridge to a point where that straight line meets the water-line of Tolly's Nala; thence along the water-line of Tolly's Nala to the north-eastern corner of the District Magistrate's compound, near which is boundary pillar C2; thence along the irregular northern boundary of the Magistrate's compound marked by posts 133-141 to boundary pillar D2 at the south corner of the entrance to the Civil Surgeon's house from Thackeray Road; thence southward along the western boundary of the Magistrate's compound by posts 142-145 and along the southern boundary of that compound marked by posts 147, 148 to boundary pillar E2 on the bank of Tolly's Nala; thence continuing the straight line from post 148 to boundary pillar E2 till it meets the water-line of Tolly's Nala; thence along the water-line of Tolly's Nala to a point in a direct line with the north side of the masonry drain running outside the Jail Garden near which is boundary pillar F2; thence along the north side of the said drain in a straight line across Motee Zeel to post 149 against the boundary of the compound of the Magistrate's Court; thence northward along that boundary to post 150 and westward to post 151 and northward again along the boundary of the Army Clothing Agency to post 152; thence westward on the south side of the lane to boundary pillar G2 at the north-western corner of the Police Hospital Compound; thence along the wall of the Alipore Central Jail, facing Belvedere Road and marked by pillars 153-157 to the north-western corner of the junction of Belvedere Road and Jail Lane following the corner eastward to post 158 and continuing along the south side of Jail Lane to post 159; thence by a straight line to boundary pillar H2 at the acute corner of the junction of Reformatory Street with Jail Lane; thence to boundary pillar 12 on the north-western side of Alipore Bridge; thence to boundary pillar J2 on the north-eastern side of the said bridge; thence by the solid south-western and western side of Bhowanipore Road marked by posts 160-167; thence following the western corner of the junction of Bhowanipore Road and Lower Circular Road to boundary pillar K2; thence along the solid south side of Lower Circular Road following the Sweep of the railings and marked by posts 168-172 to boundary pillar L2 on Lower Circular Road and east of its junction with Belvedere Road; thence following the natural bends of the corner marked by posts 173 and 174 to boundary pillar M2 on the eastern side of Belvedere Road; thence along the eastern side of Belvedere Road now indicated by wooden railings and marked by post 175 to boundary pillar N2 on the north-eastern side of Zeerut Bridge; thence along the railings of the footpath on the eastern side of the bridge to boundary pillar O2 near its south-eastern end; thence along a bent line following the shape of the bridge and marked by posts 176, 177 to post 178 on the eastern side of the south extremity of the immediate approach to the bridge; thence by a straight line to boundary pillar P2 on the western side of the said extremity; thence turning north along the railings of the footpath on the western side of the bridge, till it meets the water-line underneath the bridge, thence along the water-line of the south or Alipore bank of Tolly's Nala trending northwards under Hastings Bridge, to a point where a straight line joining reference pillar V (near the south-western end of Hastings Bridge), to reference pillar VI (on the Howrah side of the river in a line with the northern wall of the Bengal Nagpur Railway Goods Yard) meets the water-line of the south bank of the bend of the Hoogly River, near the western side of the opening of Tolly's Nala; thence continuing the said straight line till that said straight line meets the water-line of the Howrah side of the river Hoogly.

West. — A line commencing from the point last defined along the water-line of the Howrah side of the River Hoogly to the western extremity of the northern boundary.

2. (a) When the expression "water-line" is used in this Schedule all pucca ghats and other objects permanentiy attached to the bank and in contact with the water shall be deemed to appertain to the area to which the land on that bank appertains, and the water in contact with such objects shall be deemed to appertain to the other side of the boundary. In the places in the Schedule where the boundary is thus described the boundary line shall be the moving edge of the water wherever it may be at any time. In the case of bridges, however, the supporting pile in contact with the bank only shall be deemed to be permanently attached to the bank and the boundary line across the bridge to be immediately above the water-line so described.

(b) The expression "solid side" or "solid corner" means the line or spot marked out by solid objects, such as a pucca wall or the face of a house, the wayside lands and pavements thus being all included in the adjacent road, street or lane.

# [THE] CALCUTTA PILOTS ACT, 1859

## (ACT XII OF 1859)

[The text of the Act printed here is as on 15-4-1969.]

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## [THE] CALCUTTA PILOTS ACT, 1859

## (ACT XII OF 1859)[a]

[4th May, 1859.]

An Act to make better provision for the trial of pilots at the Presidency of Fort William in Bengal[b] for breach of duty.

**Preamble.**

WHEREAS it is expedient to amend the law for the trial of persons employed in [c][the Hooghly Pilot Service of the Commissioners for the Port of Calcutta], when accused of breach of duty, and to extend the same to persons licensed to act as pilots at the said Presidency[b]. It is enacted as follows :

[a] Short title given by the Repealing and Amending Act, 1903 (I of 1903), S. 2 and Sch. I, Pt. II.

This Act applies to all persons employed in the Pilot Service at the Presidency (i. e., at Calcutta) and borne on the rolls of the Goverument establishment, and to all persons licensed to act as pilots at the Presidency (i e., at Calcutta). See S. 23.

[b] That is, at Calcutta.

[c] Substituted for the words "the Pilot Service of Government at the Presidency of Fort William in Bengal" by the Calcutta Port (Pilotage) Act, 1948 (XXXIII of 1948), S. 11 [w. e. f. 16-5-1948].

**1. Repeal of Acts XXIV of 1845 and I of 1851.**—[Repealed by the Repealing Act, 1870 (XIV of 1870), S. 1 and Sch., Pt. II.]

**2. Trial of pilots accused of breach of duty.**—When any person employed in [a][the Hooghly Pilot Service of the Commissioners for the Port of Calcutta], or licensed to act as a pilot at the said Presidency,[b] shall be accused of having committed any breach of duty while engaged in such service or acting under such license, and it shall appear to the [c][Port Officer], or to the [d][Central Government] that such person ought to be brought to trial for such breach of duty, such person shall be brought to trial upon a charge or charges framed by the said [c][Port Officer], or such other person as the [d][Central Government] shall direct, before a Court constituted under the provisions of this Act.

[a] Substituted for the words "the Pilot Service of Government at the Presidency of Fort William in Bengal" by the Calcutta Port (Pilotage) Act, 1948 (XXXIII of 1948), S. 11 [w. e. f. 16-5-1948].
[b] That is, at Calcutta.
[c] Substituted for "Superintendent of Marine" by the Amending Act, 1903 (I of 1903), S. 3 and Sch. II, Pt. II.
[d] Substituted for "Governor-General in Council" by A. O., 1937.

**3. Appointment of Judge.**—The [a][Central Government] shall appoint a fit person to be Judge of the said Court.

[a] Substituted for "Governor-General in Council" by A. O., 1937.

**4. Appointment of prosecutor.**—The [a][Central Government] shall appoint such person as [b][it] may think proper to conduct the proceedings before the Court as prosecutor on the part of Government.

[a] Substituted for "Governor-General in Council" by A. O., 1937.
[b] Substituted for "he", ibid.

**5. Trial to be held before Judge and jury.**—Every trial under this Act shall be held before the said Judge and a jury composed of two merchants of Calcutta, a master of a merchantship lying the Port of Calcutta, and a pilot of not less than twenty years' service.

**6. Lists of merchants and pilots liable to serve on jury.**—The Judge shall cause to be prepared and shall keep two separate lists, one containing the names of merchants, the other containing the names of pilots, liable to serve on such jury.

The names in each list shall be arranged in alphabetical order, and the place of abode and quality or business of each person named shall be stated.

**7. Notice to prosecutor and accused of time and place for appointing jury.**—When the Judge shall be about to hold a trial under this Act, he shall give notice to the prosecutor and to the party accused of a time and place to be fixed by the Judge for appointing a jury to serve at such trial.

**8. Appointment of jury.**—At the time and place mentioned in the notice, the Judge in the presence of the prosecutor and the person accused shall read over the names which first occur in each of the said lists of those merchants and pilots who he has reason to believe are present in Calcutta and capable of attending as jurors at the trial; and shall also propose the name of a master of a merchantship lying in the Port of Calcutta, whom he deems qualified to serve on such jury.

If no objection be made and allowed, the persons so nominated shall be the jury to serve at the trial.

If the prosecutor or the party accused shall object to any of the persons named as jurors, he shall assign the grounds of his objection and such objection shall forthwith be decided by the Judge.

If the objection be allowed, the Judge shall read from the said lists or propose (as the case may be) another name in the place of the one objected to, and the

person so nominated shall serve on the jury provided no objection to such person be made and allowed as aforesaid.

**9. Day of trial to be fixed and summons to issue to jurors. Penalty for non-attendance.**—When a jury has been appointed under the last preceding section, the Judge shall fix a day for the trial and shall summon by writing under his hand the persons so appointed to sit as a jury.

If any such person when duly summoned shall, without such excuse as the Judge shall allow to be sufficient, neglect or refuse to attend at the time appointed or to remain in attendance until the trial shall be completed, it shall be lawful for the said Judge to impose upon any such person a fine not exceeding two hundred rupees for every such default; and such fine, if not paid, shall be levied by distress and sale of the goods and chattels of the defaulter under a warrant to be issued for that purpose by the Judge.

Such warrant may be transmitted by the Judge to any [a][Presidency Magistrate] for the town of Calcutta, and thereupon such Magistrate shall endorse the same and shall cause it to be executed in the same manner as if the warrant had been issued by such Magistrate.

[a] Substituted for "Magistrate of Police" by the Bengal Pilot Service (Centralisation of Administration) Act, 1929 (XI of 1929), S. 2.

**10. Trial how to proceed if any juror does not attend.**—If for any cause any of the persons summoned to attend as jurors shall not be in attendance at the time fixed for the commencement of the trial, the trial may with the consent of the prosecutor and the party accused be held before the Judge and such jurors as shall be in attendance.

If such consent be not given, the place of the absent juror shall be supplied by some other person selected by the Judge from the same profession or calling as the person originally summoned and who shall consent to serve, provided no objection to such person be made and allowed in manner aforesaid.

If the parties or either of them do not consent that the trial shall be held before the Judge and such jurors as may be in attendance and the place of the absent juror cannot be supplied by a person consenting to serve, the trial shall be postponed to another day and the Judge shall either re-summon the same jury or appoint and summon another jury in the manner hereinbefore provided.

**11. Register of jurors who have served.**—The Judge shall register in a book the names of all jurors mentioned in either of the said two lists who have attended and served on a trial held under this Act.

A juror who has served shall not be required again to serve and his name shall be excluded in reading over the jury lists until all the persons named in the said lists who are present in Calcutta and capable of attending as jurors shall have served.

**12. Jurors to be sworn.**—[Repealed by the Indian Oaths Act, 1873 (X of 1873), S. 2 and Sch., Pt. II.]

**13. Judge may summon witnesses to attend at certain time and place. Examination of witnesses about to leave Calcutta.**—It shall be lawful for the Judge of the said Court, at the instance of the prosecutor, or of the party accused, or of his own motion, by writing under his hand, to summon any person to attend as a witness at a time and place to be specified in the summons, for the purpose of being examined at any trial before the said Court; or if such person shall be about to depart from Calcutta, so as to be unable to attend at such trial without serious inconvenience, then to be examined before the Judge of the said Court before the day fixed for the trial:

Provided always that due notice of the time and place of such examination shall be given to the accused party; provided also that such witness may neverthe-

less be examined at the trial if he shall be able to attend thereat in which case his previous examination may also be read at the trial.

**14. Penalty for witnesses not attending or refusing to give evidence.**—If any person who shall have been duly summoned to attend as a witness shall, without sufficient excuse, neglect or refuse to attend, or attending shall refuse to give evidence or to answer any question which may be lawfully put to him, such person shall forfeit and pay such fine, not exceeding five hundred rupees, as the Judge of the said Court shall order; and such fine, if not paid, shall be levied by distress and sale of the goods and chattels of the person ordered to pay the same in the manner prescribed in Section 9 of this Act.

[a][**15. Arrest.**—(1) Whenever the Judge of the said Court thinks it necessary for obtaining evidence that any person should be arrested, he may issue a warrant for his arrest, and may, for the purpose of effecting the arrest, authorize any officer (subject, nevertheless, to any general or special instructions from the [b][Central Government]) to enter any vessel.

(2) Any officer so authorized may, for the purpose of enforcing the entry, call to his aid any officers of Police or Customs, or any other persons, and may seize and detain the vessel for such time as is reasonably necessary to effect the arrest; and every such officer or other person shall be deemed to be a public servant within the meaning of the Indian Penal Code, Section 186.

(3) No person shall be detained under this section for more than forty-eight hours.]

[a] Inserted by the Calcutta Pilots (Amendment) Act, 1883 (VI of 1883), S. 1 [w. e. f. 1-1-1884].

The original S. 15, relating to examination of witnesses on oath, affirmation or otherwise, was repealed by the Indian Oaths Act, 1873 (X of 1873), S. 2 and Sch., Pt. II.

[b] Substituted for "Governor-General in Council" by A. O., 1937.

**16. Verdict of jurors.**—Upon the completion of the trial, the jurors shall give their verdict upon the charge, or, if there be more than one, upon each separate charge.

The verdict shall be according to the opinion of the majority of jurors. If the jurors are equally divided, the Judge shall declare his opinion, and the verdict shall be according to the opinion of the Judge and the jurors with whom he concurs.

**17. Sentence if accused found guilty.**—If by such verdict the accused person is found guilty of the charge or of any one or more of the charges preferred against him, the Judge of the Court shall sentence him to be dismissed from the said pilot service, or to have his license withdrawn, or shall award such other punishment, by loss of rank [a][° °], or by change of a license from a higher to a lower grade, or suspension from employment for a specified period, as to the Judge shall appear fit.

**Preparation of schedule of offences and punishments.**

The [b][Central Government], [c][° °] may prepare a schedule of offences and punishments (such punishments being of the same nature as those hereinbefore mentioned) for the guidance of the said Court; and if such schedule be prepared [d][° °] and the charge proved before the said Court is an offence specified in such schedule, the Judge of the said Court shall award such punishment as is prescribed for such offence in the said schedule, and no other.

**Acquittal.**

If by such verdict as aforesaid the accused person is found not guilty of the charge or charges preferred against him, the Judge shall declare him acquitted of the same.

[a] The words "or pay" were omitted by the Calcutta Pilots (Amendment) Act, 1920 (Beng. IV of 1920), S. 2.

[b] Substituted for "Governor-General in Council" by A. O., 1937.
[c] The words "with the previous sanction of the Governor-General in Council" were omitted by the Decentralisation Act, 1914 (IV of 1914), S. 2 and Sch., Pt. I.
[d] The words "and sanctioned" were omitted, ibid.

**18. No sentence final till approved by Government.**—The proceedings of the Court shall be sent by the Judge to the [a][Port Officer] for submission to the [b][Central Government;] and no sentence of punishment pronounced by the Judge of said Court shall be final until it has been approved of by the [b][Central Government.]

**Government may remit sentence or mitigate punishment.**

The [b][Central Government] may remit the whole or any part of such sentence, or may direct the substitution of any mitigated punishment in lieu of the punishment awarded by the said Court as [c][it] shall think fit.

[a] Substituted for "Superintendent of Marine" by the Amending Act, 1903 (I of 1903), S. 3 and Sch. II, Pt. II.
[b] Substituted for "Governor-General in Council" by A. O., 1937.
[c] Substituted for "he", ibid.

**19. If verdict of jurors be manifestly contrary to evidence, or trial otherwise insufficient.**—If it shall appear to the Judge of the said Court that the verdict of the jurors is manifestly contrary to the evidence, or that the trial is otherwise insufficient, the Judge, instead of passing sentence on the accused person or declaring him acquitted, as the case may be, may certify the same to the [a][ Central Government], and the [a][Central Government] may either order a new trial before another jury or acquit the accused person, as [b][it] shall think fit.

[a] Substituted for "Governor General in Council" by A.O., 1937.
[b] Substituted for "he", ibid.

**20. Power to make rules.**—It shall be lawful for the [a][Central Government] to make such rules as [b][it] shall think proper, not inconsistent with the provisions of this Act, for conducting the proceedings and regulating the practice of the said Court.

[a] Substituted for "Governor General in Council" by A.O., 1937.
[b] Substituted for "he", ibid.

**21. Commissioners of Port of Calcutta may pass orders upon charge of breach of duty where trial unnecessary.**—Nothing contained in this Act shall be held to restrict [a][the Commissioners for the Port of Calcutta] from passing such orders as may be deemed proper upon any charge of breach of duty preferred against any person employed in the said pilot service, when it shall not be deemed necessary that such person should be brought to trial for such breach of duty under the provisions of this Act; [b][provided that no order for suspension, reduction or deprivation of appointment shall be made without the previous sanction of the Central Government].

[a] Substituted for the words "the marine authorities of the Government" by the Calcutta Port (Pilotage) Act, 1948 (XXXIII of 1948), S. 11 (w.e.f. 16-5-1948).
[b] These words were added, ibid.

**22. Withdrawal of licence from licensed pilot.**—If any person licensed to act as a pilot when duly charged with breach of duty as aforesaid, shall refuse to submit himself to trial under the provisions of this Act, the licence of such person shall be withdrawn, and he shall be incapable of being again licensed to act as a pilot at the said Presidency.[a]

[a] That is, at Calcutta.

**23. Act applicable to persons in pilot service and to licensed pilots.**—The provisions of this Act shall extend to [a][all persons employed in the Hoogly Pilot Service and borne on the rolls of the Commissioners for the Port of Calcutta],

whether such persons receive fixed salaries, or are remunerated by a portion of the pilotage charged on the vessels piloted by them, or in any other manner, and to all persons licensed to act as pilots at the said Presidency.[b]

[a] Substituted 'for the words "all persons employed in the Pilot service at the said Presidency and borne on the rolls of the Government establishment" by the Calcutta Port (Pilotage) Act, 1948 (XXXIII of 1948), S. 11 (w.e.f. 16-5-1948).

[b] That is, at Calcutta.

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# [THE] CALCUTTA PORT (PILOTAGE) ACT, 1948

(ACT XXXIII OF 1948)

[The text of the Act printed here is as on 15-4-1969.]

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SECTIONS
1. Short title and commencement.
2. Definitions.
3. Commissioners' duty to maintain pilots.
4. Appointment of pilots.
5. Rules regarding pilots.
6. Levy of pilotage fees.
7. Pilotage fees and fines and penalties levied under the Act.
8. [Repealed.]
9. Power to transfer moneys from the general account to pilotage account and vice versa.
10. Application of certain provisions of Bengal Act III of 1890.
11. [Repealed.]

## STATEMENT OF OBJECTS AND REASONS

"At present the responsibility for administrative control over pilotage on the river Hooghly from the sea to the Calcutta Port limits rests with Government while the Commissioners for the Port of Calcutta are responsible for the conservation and improvement of the Hooghly river and its approaches. The two functions are inter-dependent and, in the light of experience, it is considered that in the interests of better administration the Port Commissioners should be made responsible for pilotage also. The Commissioners have agreed to this proposal and the present Bill gives them the necessary legal powers for maintaining a cadre of pilots collecting pilotage fees from vessels, and provides for certain incidental matters."

——Gaz., Ind., 1948, Pt. V, page 373.

## ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Amended by Act XXXV of 1951.
—Repealed in part by Act XXXV of 1950.

## COGNATE ACTS AND PROVISIONS

(1) Coasting Vessels Act, 1838 (19 of 1838);
(2) Calcutta Pilots Act, 1859 (12 of 1859);
(3) Inland Steam-Vessels Act, 1917 (1 of 1917).
(4) Indian Ports Act, 15 of 1908.

# [THE] CALCUTTA PORT (PILOTAGE) ACT, 1948

(ACT XXXIII OF 1948)[a]

[16th April, 1948.]

**An Act to provide for the transfer of control over pilotage on the River Hooghly to the Commissioners for the Port of Culcutta.**

Whereas it is expedient to provide for the transfer of control over pilotage on the River Hooghly to the Commissioners for the Port of Calcutta and for other matters incidental thereto, and to make certain consequential amendments in the Calcutta Pilots Act XII of 1859;

It is hereby enacted as follows:—

[a] For Statement of Objects and Reasons, see Gazette of India, 1948, Pt. V, page 373.

**1. Short title and commencement.**—(1) This Act may be called THE CALCUTTA PORT (PILOTAGE) ACT, 1948.

(2) It shall come into force on such date[a] as the Central Government may, by notification in the Official Gazette, appoint in this behalf.

[a] 16th May, 1948, vide Notification No. 27-M (III)/47, dated 19th May, 1948, see Gazette of India, 1948, Pt. I, p. 556.

**2. Definitions.**—In this Act, unless there is anything repugnant in the subject or context,—

(a) "appointed day" means the date on which this Act comes into force;

(b) "Commissioners" means the Commissioners for the Port of Calcutta incorporated under the Calcutta Port Act,[a] 1890;

(c) "Hooghly area" means the part of the Hooghly River extending from the Port of Calcutta to the sea to which Section 31 of the Indian Ports Act, 1908, has been extended.

[a] Bengal Act III of 1890.

**3. Commissioners' duty to maintain pilots.**—As from the appointed day it shall be the duty of the Commissioners to maintain pilots for the safe navigation of vessels in the Hooghly area and the Commissioners shall be bound to maintain a sufficient number of pilots for the purpose as may be prescribed by the Central Government from time to time.

**4. Appointment of pilots.**—No person shall be appointed to be a pilot by the Commissioners who is not for the time being authorised by the Central Government under the provisions of the Indian Ports Act, 1908, to pilot vessels.

**5. Rules regarding pilots.**—(1) The Commissioners may from time to time make rules—

(a) for fixing and regulating the salaries, wages and allowances for pilotage to be received by the pilots, and

(b) for regulating the behaviour and conduct of pilots,

and may enforce the observance of such rules by the imposition of pecuniary penalties not exceeding two hundred rupees for every breach thereof or by suspension or deprivation of appointment or otherwise, as to them may appear expedient:

Provided that any such order made by the Commissioners shall, as respects any officer whose salary amounts to or exceeds one thousand rupees, be subject to the previous sanction of the Central Government.

(2) No such rules shall take effect until they are approved by the Central Government and published in the Official Gazette.

**6. Levy of pilotage fees.**—As from the appointed day the Commissioners shall be entitled to levy fees for the pilotage of vessels in the Hooghly area at rates fixed under the Indian Ports Act, 1908.

[a][**7. Pilotage fees and fines and penalties levied under the Act.**—All fees for pilotage and all fines and penalties levied under this Act from pilots or other persons employed in the pilot service, except fines and penalties imposed by a Court, shall be accounted for and expended by the Commissioners in accordance with the provisions of Section 36 of the Indian Ports Act, 1908.]

[a] Substituted for the original Section 7 by the Port Trusts and Ports (Amendment) Act, 1951 (XXXV of 1951), S. 193 (16-7-1951).

**8. Expenditure in pilotage account.** [Repealed by the Port Trusts and Ports (Amendment) Act, 1951 (XXXV of 1951), S. 194 (16-7-1951).

**9. Power to transfer moneys from the general account to pilotage account and vice versa.**—The Commissioners shall have the power, with the previous sanction of the Central Government, to apply [a][any sum out of] the moneys credited to the general account towards meeting deficits, if any, in the pilotage account [a][maintained under Section 36 of the Indian Ports Act, 1908] and to transfer the

whole or [b][part of the surplus funds, if any, in such pilotage account] to the general account.

[a] Inserted by the Port Trusts and Ports (Amendment) Act, 1951 (XXXV of 1951), S 195 (16-7-1951).
[b] Substituted for the words "part of the surplus funds in the pilotage account", ibid.

[a][**10. Application of certain provisions of Bengal Act III of 1890.**—Secs. 18, 19, 24B, 29 to 34 (both inclusive), 47 to 54 (both inclusive), 55, 57, 58 and 69 to 80A (both inclusive) of the Calcutta Port Act, 1890, are hereby incorporated in this Act subject to the following modifications, namely:—

(a) that the references to the said sections to the Calcutta Port Act, 1890,[b] shall be taken as references to this Act;

(b) that in clause (b) of Section 19, for the words "the tolls, dues, rates, rents and charges", the words "the pilotage fees" shall be substituted;

(c) that the proviso to sub-section (2) of Section 30 shall be omitted;

(d) that in sub-section (1) of Section 34, the words "the Deputy Chairman or to" shall be omitted.

(e) that sub-section (2) of Section 34 shall be omitted.]

[a] Substituted for the original Section 10 by the Port Trusts and Ports (Amendment) Act, 1951 (XXXV of 1951), S. 196 (16-7-1951).
[b] Bengal Act III of 1890.

**11. Amendment of the Calcutta Pilots Act XII of 1859.** [Repealed by the Repealing and Amending Act, 1950 (XXXV of 1950), S. 2 and Sch. I].

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# [THE] CANTONMENTS ACT, 1924
## (ACT II OF 1924)

[The text of the Act printed here is as on 1-5-1969.]

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## STATEMENT OF OBJECTS AND REASONS

"A committee which was appointed by the Government of India in January 1921 to consider what changes were necessary in order to introduce into the administration of cantonments the spirit of the reformed scheme of Government, recommended a complete revision and amalgamation of the Cantonments Act (Act 15 1910) and the Cantonment Code, 1912, in order to bring into conformity with ordinary municipal law the system under which military cantonments are administered.

The recommendations of the committee have now been examined by the Government of India and the conclusions arrived at are embodied in the Bill.

The main features of the Bill are as follows :—

(a) It is proposed to take power to municipalize the Government of those cantonments which contain a substantial civil population having no essential connection with or dependence upon the military administration. In other cantonments where these circumstances do not fully exist the administration of cantonment affairs will be vested in the hands of the commanding officer of the cantonment, who, for the purpose of the Act, will be constituted a corporation sole. The general effect will be that the Government authority will cease to be the purely executive agency at present. In the larger cantonments the existing cantonment committee will be replaced by a cantonment Board which will be municipal in character and an essentially local self-Government body.

(b) The reformed cantonment authorities will have a separate legal person, will be capable of suing and being sued in their own name and of making contracts. They will also be empowered to make bye-laws to govern local matters of administration which require different treatment in different cantonments.

(c) The cantonment fund under the reformed system will be a local fund vested in the cantonment authority.

(d) In the reformed cantonments where a Board is constituted a proportion of the cantonment Board will be elected representatives of the civil inhabitants of the cantonment. An official majority will, however, be maintained.

(e) The cantonment Magistrate, as such, will be eliminated. In his place an "executive officer" will be appointed. He will be paid by Government. He will perform, amongst other things, the duties of Secretary of the Board and he will have no judicial powers or functions.

(f) The Local Governments will exercise certain larger powers of superintendence and control over cantonment affairs than they do at present.

(g) The military authorities will retain certain special powers in matters affecting the health, welfare and discipline of troops."

—Gazette of India, 1923, Part V, p. 220.

## SELECT COMMITTEE REPORT

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"3. The non-official members of the Select Committee desire to express the following opinion on two questions of administration connected with the policy which the Bill seeks to introduce. They hold very strongly that the ultimate control of cantonment administration under the reformed system should be exercised by the Government of India in the Army Department, and not by any executive military authority. They also hold that the executive officer, though he may be a military officer subordinate to the Army Department, should be like the Cantonment Magistrate of the present, be an

officer in civil employ. It is recognized that it would be inappropriate to embody in the Bill provisions cn these two points: but they desire it to be recorded that, in aggreeing to the Bill as amended, they hope that the further administrative arrangements to be made will conform to the views here expressed."

* * * * * *

—Gazette of India, 1923, Part V, p. 270.

## ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Amended by Acts VII of 1925, XXXV of 1926; X of 1927; XXVI of 1927, VIII of 1930; VII of 1931; XVII of 1932; XXIV of 1934; XII of 1935; XXIV of 1936; XXXIV of 1939; XXXI of 1940; XXXII of 1940; XV of 1942; VIII of 1944; L of 1948; LIII of 1950; II of 1954; LVIII of 1960.

— Adapted by A. O. 1937; A. C. A. O., 1948; A. L. O., 1950.

—Extended by Acts LIX of 1949; XXX of 1950.

—Repealed in part by Acts XII of 1927; II of 1948.

## COGNATE ACTS AND PROVISIONS

1. Cantonments (Extension of Rent Control Laws) Act, XL of 1957.
2. Cantonments (House Accommodation) Act, VI of 1923.
3. Uttar Pradesh Cantonments (Control of Rent and Eviction) Act, X of 1952.

# [THE] CANTONMENTS ACT, 1924
## (ACT II OF 1924)[a]

[16th February, 1924.]

**An Act to consolidate and amend the law relating to the administration of cantonments.**

Whereas it is expedient to consolidate and amend the law relating to the administration of cantonments;

It is hereby enacted as follows:—

[a] For Statement of Objects and Reasons, see Gazette of India, 1923, Pt. V, p. 220; and for Select Committee Report, see ibid, p. 270.

This Act has been extended to the new Provinces and merged States by the Merged States (Laws) Act, 1949 (59 of 1949), S. 3 (1-1-1950) and to the Union Territories of Manipur, and Tripura by the Union Territories (Laws) Act, 1950 (30 of 1950), S. 3 (16-4-1950). Vindhya Pradesh now forms part of State of Madhya Pradesh—See Act 37 of 1956, S. 9 (1) (e) (1-11-1956).

This Act has now been extended to the Union Territory of Pondicherry by Reg. 7 of 1963 (w.e.f. 1-10-1963).

## CHAPTER I
## PRELIMINARY

**1. Short title, extent and commencement.**—(1) This Act may be called THE CANTONMENTS ACT, 1924.

(2) It extends to [c][the whole of India, [a][* *] [a][* *].]

(3) The [c][Central Government] may, by notification in the [c][Official Gazette], direct that this Act, or any provisions thereof which [b][it] may specify, shall come into force on such date[c] as [b][it] may appoint in this behalf.

[a] The words "except Part B States" were omitted by the Cantonment Laws (Extension and Amendment) Act, 1950 (53 of 1950), S. 4 (18-8-1950). If immediately before the 19th day of June 1950, there was in force in any

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**Section 1 — Note 1**

(1) The first general Cantonments Act, a consolidating and amending measure, was passed in 1889 and repealed a large number of existing Acts and Regulations. The Act of 1889 was followed by another consolidating and amending Act in 1910, namely, the Cantonments Act, 15 of 1910 and later by a very elaborate Code of 1924. This supersedes all previous legislation and is, though it has not itself escaped amendment, the principal Act relating to the subject. ('39) AIR 1939 FC 58 (60): ILR (1939) Kar (FC) 98: 1939 FCR 124.

of the Part B States any law corresponding to the Cantonments Act, 1924, such corresponding law is repealed by S. 10 of the said Act.

[aa] The words "including British Baluchistan" were omitted by A. C. A. O., 1948.

[b] Substituted by A.O., 1937, for "he".

[c] 1st May, 1924; Gazette of India, 1924, Pt. I, p. 217.

**2. Definitions.**—In this Act, unless there is anything repugnant in the subject or context,—

(i) "Assistant Health Officer" means the medical officer appointed by the [a][Officer Commanding-in-Chief, the Command,] to be the Assistant Health Officer for a cantonment;

[a] Substituted by the Cantonments (Amendment) Act, 1926 (35 of 1926), S. 2 for "Officer Commanding the District".

(ii) "Board" means a Cantonment Board constituted under this Act;

[a][(iia) "boundary wall" means a wall which abuts on a street and which does not exceed eight feet in height;]

[a] Inserted by the Cantonments (Amendment) Act, 1953 (2 of 1954), S. 2 (2-1-1954).

(iii) "brigade area" means one of the brigade areas; whether occupied by a brigade or not, into which India is for military purposes for the time being divided, and includes for all or any of the purposes of this Act any area which the [c][Central Government] may, by notification in the [c][Official Gazette], declare to be a brigade area for such purpose or purposes;

[a][(iv) "building" means a house, outhouse, stable, latrine, shed, hut or other roofed structure, whether of masonry, brick, wood, mud, metal or other material, and any part thereof, and includes a well and a wall [b][(other than a boundary wall)] but does not include a tent or other portable and temporary shelter;]

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 2, for the original clause.

[b] Substituted for "(other than a boundary wall not exceeding eight feet in height and not abutting on a street)" by the Cantonments (Amendment) Act, 1953 (2 of 1954), S. 2 (2-1-1954).

[a][° ° ° °]

[a] Clause (v) was repealed by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 2.

(vi) "casual election" means an election held to fill a casual vacancy;

(vii) "casual vacancy" means a vacancy occurring otherwise than by efflux of time in the office of an elected member of a Board;

(viii) "Command" means one of the Commands into which India is for military purposes for the time being divided, and includes any area which the [c][Central Government] may, by notification in the [c][Official Gazette], declare to be a Command for all or any of the purposes of ths Act;

[a][° ° ° °]

[a] Clause (ix) was repealed by the Repealing and Amending Act, 1935 (12 of 1935), S. 2 and Sch. I.

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**SECTION 2 — SYNOPSIS**

**1. Section 2 (xvii).**
**2. Section 2 (xxxvii).**

**1. Section 2 (xvii).**— (1) "In sub-clause (xvii) of this clause we have included venereal disease among the catalogue of infections or contagious diseases and have made the definition comprehensive instead of merely illustrative as it was before." — Select Committee Report.

**2. Section 2 (xxxvii).**— (1) Space having gates on both sides for number of years cannot be presumed to be street. ('35) AIR 1935 Lah 588 (589): 36 Cri L Jour 1475.

(x) "dairy" includes any farm, cattle-shed, milk-store, milk-shop or other place from which milk is supplied or in which milk is kept for purposes of sale or is manufactured for sale into butter, ghee, cheese or curds, and, in relation to a dairyman who does not occupy any premises for the sale of milk, includes any place in which he keeps the vessels used by him for the storage or sale of milk;

(xi) "dairyman" includes the keeper of a cow, buffalo, goat, ass or other animal, the milk of which is offered or is intended to be offered for sale for human consumption, and any purveyor of milk and any occupier of a dairy;

[a][(xia) "entitled consumer" means a person in a cantonment who is paid from the Defence Services Estimates and is authorised by general or special order of the [b][Central Government] to receive a supply of water for domestic purposes from the Military Engineer Services or the Public Works Department on such terms and conditions as may be specified in the order;]

[a] Clause (xia) was inserted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 2.

(xii) "Executive Engineer" means the Public Works officer of that grade, or the [a][Officer of the Military Engineer Services] of the corresponding grade, having charge of the military works in a cantonment [b][or where more than one such officer has charge of the military works in a cantonment such one of those officers as the Officer Commanding the Station may designate in this behalf], and includes the officer of whatever grade in immediate executive engineering charge of a cantonment;

[a] Substituted by the Cantonments (Amendment) Act, 1925 (7 of 1925), S. 2, for "Military Works Officer".

[b] These words were inserted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 2.

(xiii) "Executive Officer" means the person appointed under this Act to be the Executive Officer of a cantonment;

(xiv) "Health Officer" means the senior executive medical officer in military employ on duty in a cantonment;

[a][ • • • • ]

[a] Clause (xv) was repealed by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 2.

(xvi) "hut" means any building, no material portion of which above the plinth level is constructed of masonry or of squared timber framing or of iron framing;

(xvii) "infectious or contagious disease" means cholera, leprosy, enteric fever, small-pox, tuberculosis, diphtheria, plague, influenza, venereal disease, and any other epidemic, endemic or infectious disease which the [b][Central Government] may, by notification in the [b][Official Gazette], declare[a] to be, an infectious or contagious disease for the purposes of this Act;

[a] 'Yellow fever' declared to be infectious disease for the purposes of the Act—See Gazette of India, 1941, Pt. I, p. 1739.

(xviii) "inhabitant", in relation to a cantonment, or local area, means any person ordinarily residing or carrying on business or owning or occupying immoveable property therein, and in case of a dispute means any person declared by the District Magistrate to be an inhabitant;

(xix) "intoxicating drug" means opium, ganja, bhang, charas and any preparation or admixture thereof, and includes any other intoxicating substance, or liquid which the [b][Central Government] [a][ • • • ] may,

by notification in the °[Official Gazette], declare to be an intoxicating drug for the purposes of this Act;

[a] The words "with the previous sanction of the Governor-General in Council" were repealed by the Cantonments (Amendment) Act, 1925 (7 of 1925), S. 2.

(xx) "market" includes any place where persons assemble for the purpose of selling meat, fish, fruit, vegetable, live-stock or any other article of food;

•[(xxa) "Military Estates Officer" means the officer appointed by the °[Central Government] to perform the duties of the Military Estates Officer under rules made under clauses (a) and (b) of sub-section (2) of Section 280:]

[a] Clause (xxa) was inserted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 2.

(xxi) "Military officer" means—

(a) a person who, being an officer within the meaning of [a][° °] the Indian Army Act, 1911[b] °[° °], [d][or the Indian Air Force Act, 1932[e],] is commissioned and in pay as an officer doing military or air force duty with [f][the Indian] military or air forces, or is an officer doing such duty in any arm, branch or part of those forces; or

(b) a person doing miliary or air force duty as a warrant officer with either of those forces or with any arm, branch, or part thereof, whether he is or is not an officer within the meaning of [a][° °] the Indian Army Act, 1911,[b] °[° °], [d][or the Indian Air Force Act, 1932;]

[a] The words "the Army Act or" were omitted by A. L. O., 1950.
[b] Now see the Army Act 1950 (46 of 1950).
[c] The words "or the Air Force" were omitted by A. L. O., 1950.
[d] Inserted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 2.
[e] Now see the Air Force Act, 1950 (45 of 1950).
[f] Substituted for "His Majesty's" by A. L. O., 1950.

(xxii) "nuisance" includes any act, omission, place or thing which causes or is likely to cause injury, danger, annoyance or offence to the sense of sight, smell or hearing, or which is or may be dangerous to life or injurious to health or property;

(xxiii) "occupier" includes an owner in occupation of, or otherwise using his own land or building;

(xxiv) "Officer Commanding the District" means the Officer Commanding any one of the districts into which India is for military purposes for the time being divided, or any brigade area which does not form part of any such district, or any area which the °[Central Government] may, by notification in the °[Official Gazette], declare to be such a district for all or any of the purposes of this Act;

•[(xxiva) "Officer Commanding the station" means the military officer for the time being in command of the forces in a cantonment, or, if that officer is the Officer Commanding the District or Officer Commanding-in-Chief, the Command, the military officer who would be in command of those forces in the absence of the Officer Commanding the District and Officer Commanding-in-Chief, the Command;]

[a] Clause (xxiva) was inserted by the Repealing and Amending Act, 1935 (12 of 1935), S. 2 and Schedule I.

(xxv) "ordinary election" means an election held to fill a vacancy in the office of an elected member of a Board arising by efflux of time;

(xxvi) "owner" includes any person who is receiving or is entitled to receive the rent of any building or land whether on his own account or on

behalf of himself and others or an agent or trustee, or who would so receive the rent or be entitled to receive it if the building or land were let to a tenant ;

(xxvii) "party wall" means a wall forming part of a building and used or constructed to be used for the support or separation of adjoining buildings belonging to different owners, or constructed or adapted to be occupied by different persons;

(xxviii) "private market" means a market which is not maintained by a [a][Board] and which is licensed by a [a][Board] under the provisions of this Act;

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

(xxix) "private slaughter-house" means a slaughter-house which is not maintained by a [a][Board] and which is licensed by a [a][Board] under the provisions of this Act;

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

(xxx) "public market" means a market maintained by a [a][Board];

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

(xxxi) "public place" means any place which is open to the use and enjoyment of the public, whether it is actually used or enjoyed by the public or not;

(xxxii) "public slaughter-house" means a slaughter-house maintained by a [a][Board];

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[a][(xxxiia) a person is deemed to reside in a cantonment if he maintains therein a house or a portion of a house which is at all times available for occupation by himself or his family even though he may himself reside elsewhere, provided that he has not abandoned all intention of again occupying such house either by himself or his family;]

[a] Clause (xxxiia) was inserted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 2.

(xxxiii) "shed" means slight or temporary structure for shade or shelter;

(xxxiv) "slaughter-house" means any place ordinarily used for the slaughter of animals for the purpose of selling the flesh thereof for human consumption;

(xxxv) "soldier" means a person who is a soldier or airman within the meaning of the [a][Army Act or the Air Force Act], or is subject to the Indian Army Act, 1911,[b] and who is not a military officer;

[a] There is no direction for adaptation of these words in A. L. O., 1950.
[b] Now see the Army Act, 1950 (46 of 1950).

(xxxvi) "spirituous liquor" means any fermented liquor, any wine, or any alcoholic liquid obtained by distillation or the sap of any kind of palm tree, and includes any other liquid containing alcohol which the [c][Central Government], [a][• • •] may, by notification in the [c][Official Gazette], declare to be a spirituous liquor for the purposes of this Act;

[a] The words "with the previous sanction of the Governor-General in Council" were repealed by the Cantonments (Amendment) Act, 1925 (7 of 1925), S. 2.

(xxxvii) "street" includes any way, road, lane, square, court, alley, [a][or passage] in a cantonment, whether a thoroughfare or not and whether

built upon or not, over which the public have a right-of-way and also the road-way or foot-way over any bridge or causeway;

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 2 for "passage or open space".

(xxxviii) "vehicle" means a wheeled conveyance of any description which is capable of being used on a street, and includes a motor-car, motor lorry, motor omnibus, cart, locomotive, tram-car, hand-cart, truck, motor-cycle, bicycle, tricycle and rickshaw; [a][° °]

[a] The word "and" was repealed by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 2.

(xxxix) "water-works" includes all lakes, tanks, streams, cisterns, springs, pumps, wells, reservoirs, aqueducts, water-trucks, sluices, mains pipes, culverts, hydrants, stand pipes, and conduits and all machinery, lands, buildings, bridges and things, used for, or intended for the purpose of, supplying water to a cantonment; [a][and

(xl) "year" means the year commencing on the first day of April.]

[a] The word "and" and Cl. (xl) were inserted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 2.

**2A. Rule of construction.**—[Repealed by the Cantonments (Amendment) Act, 1953 (2 of 1954), S. 3. (2-1-1954).]

## CHAPTER II

## DEFINITION AND DELIMITATION OF CANTONMENTS

**3. Definition of cantonments.**—(1) The [°][Central Government] [a][° ° °] may, by notification in the [°][Official Gazette], declare any place or places in which any part of [b][the Indian Army or the Indian Air Force] is quartered or which, being in the vicinity of any such place or places, is or are required for the service of such forces to be a cantonment for the purposes of this Act and of all other enactments for the time being in force, and [°][° ° ° • °] may, by a like notification, declare that any cantonment shall cease to be a cantonment.

(2) The [°][Central Government] [c][° ° °] may, by a like notification, define the limits of any cantonment for the aforesaid purposes.

[d][(3) When any place is declared a cantonment for the first time, the [°][Central Government] may, until a Board is constituted in accordance with the provisions

**Section 3 — Note 1**

(1) Much of the land comprised in the cantonments in different parts of India was originally acquired by Government for military purposes. Private individuals were allowed to erect houses upon various plots. Thus the Government recognised, subject to certain restrictions, rights of private ownership in the buildings, while at the same time retaining in themselves the property in soil. ('31) AIR 1931 PC 1 (1, 2): 57 Ind App 339: 58 Cal 858.

(2) The Secretary of State is absolute owner of all cantonment land, unless it can be proved that he parted with it. A person occupying land in cantonments not specifically transferred to him by the Secretary of State can only hold it as a licensee from him. ('22) AIR 1922 All 57 (58, 59).

(3) Ownership of cantonment land vests in Secretary of State subsequent to establishment of cantonment. ('30) AIR 1930 All 587 (589).

(4) A cantonment Board, as representing the Secretary of State, is to be regarded as the owner of all the sites in the cantonment. It is entitled to eject its licensee on payment of compensation. ('33) AIR 1933 Pesh 56 (57).

(5) As to the result that follows from the transfer of property situate in cantonment area, see ('24) AIR 1924 All 415: 46 All 427.

(6) Where it is shown that Government did actually acquire certain land for the Cantonment in 1849-50 and it is established that the site in dispute is in the centre of the Cantonment area, that no other land in the centre of the area is privately owned, that in 1849-50 the site was already built upon or was about to be built upon and was included in the plan of the land which Government was proposing to acquire for the Cantonment, the proper conclusion is that the site was acquired by the Government. ('47) AIR 1947 PC 178 (182).

(7) See also Section 108.

of this Act, by order make any provision which appears necessary to °[it] either for the administration of the cantonment or for the constitution of the Board.]

[1][(4) The °[Central Government] may, by notification in the °[Official Gazette], direct that in any place declared a cantonment under sub-section (1) the provisions of any enactment relating to local self-Government other than this Act shall have effect only to such extent or subject to such modifications, or that any authority constituted under any such enactment shall exercise authority only to such extent, as may be specified in the notification.]

[a] The words "with the previous sanction of the Governor-General in Council" were repealed by A. O., 1937.
[b] Substituted for "His Majesty's regular forces or regular air force" by A. L. O., 1950.
[c] The words "with the like sanction" were repealed by A. O., 1937.
[d] Inserted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 3.
[e] Substituted for "him" by A. O., 1937.
[f] Added by the Cantonments (Amendment) Act, 1944 (8 of 1944), S. 2. [17-3-1944.]

**4. Alteration of limits of cantonments.**—(1) The °[Central Government] [a][° ° °] may [b][after consulting the State Government and the Board concerned], by notification in the °[Official Gazette], declare its intention to include within [c][the cantonment] any local area situated in the [d][°] vicinity thereof or to exclude from [c][the cantonment] any local area comprised therein.

(2) Any inhabitant of a cantonment or local area in respect of which a notification has been published under sub-section (1) may, within six weeks from the date of the notification, submit in writing to the °[Central Government] through the Official Commanding-in-Chief, the Command, an objection to the notification, and the °[Central Government] shall take such objection into consideration.

(3) On the expiry of six weeks from the date of the notification, the °[Central Government] may [a][° °] after considering the objections, if any, which have been submitted under sub-section (2), by notification in the °[Official Gazette], include the local area in respect of which the notification was published under sub-section (1), or any part thereof, in the cantonment or, as the case may be, exclude such area or any part thereof from the cantonment.

[a] The words "with the previous sanction of the Governor-General in Council" were repealed by A. O., 1937.
[b] Inserted by the Cantonments (Amendment) Act, 1953 (2 of 1954), S. 4 [2-1-1954].
[c] Substituted for "a cantonment", ibid.
[d] The word "immediate" was repealed by the Cantonments (Amendment) Act, 1927 (26 of 1927), S. 2.

**5. The effect of including area in cantonment.**—When, by a notification under Section 4, any local area is included in a cantonment such area shall thereupon become subject to this Act and to all other enactments for the time being in force throughout the cantonment and to all notifications, rules, regulations, bye-laws, orders and directions issued or made thereunder.

**6. Disposal of cantonment fund when area ceases to be a cantonment.**—(1) When, by a notification under Section 3, any cantonment ceases to be a cantonment and the local area comprised therein is immediately placed under the control of a local authority, the balance of the cantonment fund and other property vesting in the [a][Board] shall vest in such local authority, and the liabilities of the [a][Board] shall be transferred to such local authority.

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**Section 5 — Note 1**

(1) Mere declaration of lands to be within Cantonment area does not vest their ownership in Government. Acquisition by Government for the purpose must be proved. ('27) AIR 1927 Cal 786 (787).

(2) When, in like manner, any cantonment ceases to be a cantonment and the local area comprised therein is not immediately placed under the control of a local authority, the balance of the cantonment fund and other property vesting in the [a][Board] shall vest in [°][Government], and the liabilities of the [a][Board] shall be transferred to the [°][Central Government].

[a] Substituted by S. 69 of the Cantonments (Amendment) Act, 1936 (24 of 1936), for "Cantonment Authority".

**7. Disposal of cantonment fund when area ceases to be included in a cantonment.**—(1) When, by a notification under Section 4, any local area forming part of a cantonment ceases to be under the control of a particular [a][Board] and is immediately placed under the control of some other local authority, such portion of the cantonment fund and other property vesting in the [a][Board] and such portion of the liabilities of the [a][Board], as the [°][Central Government] may, by general or special order, direct, shall be transferred to that other local authority.

(2) When, in like manner, any local area forming part of a cantonment ceases to be under the control of a particular [a][Board] and is not immediately placed under the control of some other local authority, such portion of the cantonment fund and other property vesting in the [a][Board] shall vest in [°][Government], and such portion of the liabilities of the [a][Board] shall be transferred to the [°][Central Government], as the [°][Central Government] may, by general or special order, direct.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69 for "Cantonment Authority".

**8. Application of funds and property transferred under Sections 6 and 7.**—Any cantonment fund or portion of a cantonment fund or other property of a [a][Board] vesting in [°][Government] under the provisions of Section 6 or Section 7 shall be applied in the first place to satisfy any liabilities of the [a][Board] transferred under such provisions to the [°][Central Government] and in the second place for the benefit of the inhabitants of the local area which has ceased to be a cantonment or, as the case may be, part of a cantonment.

[a] Substituted by S. 69 of the Cantonments (Amendment) Act, 1936 (24 of 1936), for "Cantonment Authority".

**9. Limitation of operation of Act.**—The [°][Central Government] may, [a][[°] [°][ by notification in the [°][Official Gazette], exclude from the operation of any part of this Act the whole or any part of a cantonment, or direct that any provision of this Act shall, in the case of any cantonment—

[b][(a) situated within the limits of a Presidency-town; or

(b) in which the Board is superseded under section 54],

apply with such modifications as may be specified.

[a] Words "with the previous sanction of the Governor-General in Council" were repealed by A. O., 1937.

[b] Substituted by S. 4 of the Cantonments (Amendment) Act, 1936 (24 of 1936), for "specified in the notification in which there is no Board".

## CHAPTER III
## [a][CANTONMENT BOARDS]
### Boards.

**[b]10. Cantonment Board and Executive Officer.**—For every cantonment there shall be a Cantonment Board and an Executive Officer.

[a] The chapter heading was substituted by the Repealing and Amending Act, 1939 (34 of 1939), S. 2 and Sch. 1 for "Boards and Cantonment Boards".

### Section 9 — Note 1

(1) "We have here provided a power to exclude from the operation of any particular provision of the Act not only any specified part of a cantonment, but, where necessary, the whole of a cantonment." — Select Committee Report.

[b] Section 10 was substituted by the Cantonment (Amendment) Act, 1936 (24 of 1936), S. 5, for the original section.

[a][11. **Incorporation of Cantonment Board.**—Every Board shall, by the name of the place by reference to which the cantonment is known, be a body corporate having perpetual succession and a common seal with power to acquire and hold property both moveable and immovable and to contract and shall, by the said name, sue and be sued.]

[a] Section 11 was substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 5.

[a][12. **Appointment of Executive Officer.**—(1) The Executive Officer of every cantonment shall be appointed by the [c][Central Government], or by such person as the [c][Central Government] may authorise in this behalf, from the [aa][Military Lands and Cantonments Service] constituted by rules made under Section 280:

[b][Provided that where a member of the Military Lands and Cantonments Service is not readily available for such appointment, a Military Officer may be appointed as the Executive Officer for a period not exceeding three months:

Provided further that] an Executive Officer appointed before the commencement[c] of the Cantonments (Amendment) Act, 1936, shall, unless the [c][Central Government] otherwise directs in any case, be deemed to have been duly appointed in accordance with this sub-section.

(2) Not less than half the cost of the salary of the Executive Officer shall be paid [c][by the Central Government] and the balance from the cantonment fund:

Provided that the salary of an Executive Officer appointed before the commencement[c] of the Cantonments (Amendment) Act, 1936, shall, until the [c][Central Government] otherwise directs, continue to be paid from the source from which it was being paid at the commencement of the said Act.

(3) The Executive Officer shall be the Secretary of the Board and of every committee of the Board, but shall not be a member of the Board or of any such committee.]

[a] Section 12 was substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 5.
[aa] Substituted for the words "Service of Executive Officers" by the Cantonments (Amendment) Act, 1948 (50 of 1948), S. 2. [3-9-1948].
[b] Substituted for the words "Provided that" by the Cantonments (Amendment) Act, 1953 (2 of 1954), S. 5 [2-1-1954].
[c] The Cantonments (Amendment) Act, 1936 (24 of 1936) came into force on the 31st October 1936.

[a][13. **Constitution of Cantonment Boards.**—(1) Cantonments shall be divided into three classes, namely:—

(i) Class I Cantonments, in which the civil population exceeds ten thousand;

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**Section 11 — Note 1**

(1) A Cantonment Committee is a public officer within Section 2, Civil P. C. Hence before a Committee can be sued the notice prescribed under Section 80, Civil P. C., must be given. ('10) 34 Bom 583 (588).

**Section 12 — Note 1**

(1) The Cantonments (Amendment) Act, 1936, came into force on 31-10-1936. Sub-section (3) of Section 1 of that Act runs as follows: — "It shall come into force at once, but the Central Government may, by notification in the Official Gazette, direct either generally or in respect of a particular cantonment that a specified section or sections shall not take effect until such date as it may by a like notification appoint in this behalf."

**Section 13 — Note 1**

(1) Proviso to sub-section (1) of Section 13 gives power to the Central Government to alter the classification of cantonments in order to meet the difficulty apprehended in the N. W. F. P. and Baluchistan that owing to the military duties and frequent movements of military personnel, it might not always be possible or convenient to supply members for a more numerous Board.— Report of Second Select Committee on the Cantonments (Amendment) Act, 1936.

(ii) Class II Cantonments, in which the civil population exceeds two thousand five hundred, but does not exceed ten thousand; and

(iii) Class III Cantonments, in which the civil population does not exceed two thousand five hundred :

[b][* * * * *]

(2) For the purposes of sub-section (1), the civil population shall be calculated in accordance with the latest official census, or, if the *[Central Government], by general or special order, so directs, in accordance with a special census taken for the purpose.

(3) In Class I Cantonments, the Board shall consist of the following members, namely :—

(a) the Officer Commanding the station or, if the *[Central Government] so directs in respect of any cantonment, such other military officer as may be nominated in his place by the Officer Commanding-in-Chief, the Command;

(b) a Magistrate of the first class nominated by the District Magistrate;

(c) the Health Officer;

(d) the Executive Engineer;

(e) four military officers nominated by name by the Officer Commanding the station by order in writing;

(f) seven members elected under this Act.

(4) In Class II Cantonments, the Board shall consist of the following members, namely :—

(a) the Officer Commanding the station, or, if the *[Central Government] so directs in respect of any cantonment, such other military officer as may be nominated in his place by the Officer Commanding-in-Chief, the Command;

(b) a Magistrate of the first class nominated by the District Magistrate;

(c) the Health Officer;

(d) the Executive Engineer;

(e) (i) in cantonments of which the civil population exceeds seven thousand five hundred, three military officers;

(ii) in cantonments of which the civil population exceeds five thousand, but does not exceed seven thousand five hundred, two military officers;

*[(iii) in cantonments of which the civil population does not exceed five thousand, one military officer] nominated by name by the Officer Commanding the station by order in writing;

(f) such number of members elected under this Act as is equal to the number of members constituted or nominated by or under Clauses (b) to (e).

(5) In Class III Cantonments, the Board shall consist of the following members, namely :—

(a) the Officer Commanding the station, or if the *[Central Government] so directs in respect of any cantonment, such other military officer as may be nominated in his place by the Officer Commanding-in-Chief, the Command;

(b) one military officer nominated by name by the Officer Commanding the station by order in writing;

(c) one member elected under this Act.

(6) The Officer Commanding the station may, if he thinks fit, with the sanction of the Officer Commanding-in-Chief, the Command, nominate in place of any military officer whom he is empowered to nominate under Clause (e) of sub-section (3), Clause (e) of sub-section (4) or Clause (b) of sub-section (5), any person,

whether in the service of the °[Government] or not, who is ordinarily resident in the cantonment or in the vicinity thereof.

(7) Every election or nomination of a member of a Board and every vacancy in the membership thereof shall be notified by the °[Central Government] in the °[Official Gazette.]]

[a] Section 13 was substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 5.

[b] Proviso was omitted by A. C. A. O., 1948.

[c] Substituted for the former (4) (e) (iii) by A. L. O., 1950.

[14. Power to vary constitution of Boards in special circumstances.—(1) Notwithstanding anthing contained in Section 13, if the °[Central Government] is satisfied—

(a) that, by reason of military operations it is necessary, or

(b) [b][° ° °] that, for the administration of the cantonment, it is desirable, to vary the constitution of the Board in any cantonment under this section, the °[Central Government] may, by notification in the °[Official Gazette], make a declaration to that effect.

(2) Upon the making of a declaration under sub-section (1), the Board in the cantonment shall consist of the following members, namely :—

(a) the Officer Commanding the Station;

(b) one military officer nominated by name by the Officer Commanding the station by order in writing;

(c) one member, not being a person in the service of the Government, nominated by the Officer Commanding the station.

(3) Every nomination of a member of a Board constituted under this section and every vacancy in the membership thereof, shall be notified by the °[Central Government] in the °[Official Gazette.]

(4) The term of office of a Board constituted by a declaration under sub-section (1) shall not ordinarily extend beyond one year :

Provided that the °[Central Government] may from time to time, by a like declaration, extend the term of office of such a Board by any period not exceeding one year at a time :

Provided also that the °[Central Government] shall forthwith direct that the term of office of such a Board shall cease if, in the opinion of the °[Central Government], the reasons stated in the declaration whereby such Board was constituted, or its term of office was extended, have ceased to exist.

(5) When the term of office of a Board constituted under this section has expired or ceased, the Board shall be replaced by the former Board which, but for the declaration under sub-section (1), would have continued to hold office, or, if the term of office of such former Board has expired, by a Board constituted under Section 13.]

[a] Section 14 was substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 5.

[b] Words "after consultation with the Local Government" were repealed by A. O.

**15. Term of office of members.**—(1) Save as otherwise provided in this section, the term of office of a member of a Board shall be three years and shall commence from the date of the notification of his election or nomination under [a][sub-section (7) of Section 13], or from the date on which the vacancy has occurred in which he is elected or nominated, whichever date is later :

[b][Provided that the °[Central Government] may, when satisfied that it is necessary in order to avoid administrative difficulty, extend the term of office of

all the elected members of a Board by such period, not exceeding one year, as [a][it] thinks fit]:

[a][• • • • •]

(2) The term of office of an ex officio member of a Board shall continue so long as he holds the office in virtue of which he is such a member.

(3) The term of office of a member elected to fill a casual vacancy shall commence from the date of election, and shall continue so long only as the member in whose place he is elected would have been entitled to hold office if the vacancy had not occurred.

(4) An outgoing member shall, unless the [c][Central Government] otherwise directs, continue in office until the election or nomination of his successor is notified under [a][sub-section (7) of Section 13.]

(5) Any outgoing member may, if qualified, be re-elected or re-nominated.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 6 for "sub-section (2) of Section 14".
[b] Inserted by S. 6, ibid.
[c] Substituted by A. O. for "he".
[d] The second proviso was repealed by the Repealing and Amending Act, 1947 (2 of 1948), S. 2 and Schedule [5-1-1948].

**16. Filling of vacancies.**—(1) Vacancies arising by efflux of time in the office of an elected member of a Board shall be filled by an ordinary election to be held on such date as the [c][Central Government] may, by notification in the [c][Official Gazette], direct.

(2) A casual vacancy shall be filled by a casual election the date of which shall be fixed by the [c][Central Government] by notification in the [c][Official Gazette], and shall be, as soon as may be, after the occurrence of the vacancy:

Provided that no casual election shall be held to fill a vacancy occurring within three months of any date on which the vacancy will occur by efflux of time, but such vacancy shall be filled at the next ordinary election.

**17. Vacancies in special cases.**—(1) If from any cause at an ordinary election no member is elected, or if the elected member is unwilling to serve on the Board, the outgoing member shall, if qualified and willing to serve, be deemed to have been re-elected:

[a][Provided that where there are more outgoing members qualified and willing to serve than there are vacancies to be filled under this sub-section, the outgoing members so deemed to have been re-elected shall, failing agreement amongst such members, be determined by lot under the supervision of the President of the Board and in such manner as he may decide.]

[b][(2) Vacancies arising in any of the following cases shall be filled by nomination by the Central Government after consultation with the Officer Commanding-in-Chief, the Command, namely :—

(a) where at a casual election no member is elected;

(b) where at an ordinary election no member or an insufficient number of members is elected, or an elected member is unwilling to serve on the Board and the outgoing member is not qualified or is not willing to serve or is dead or cannot be found within a reasonable time;

(c) where at an election held when a Board is constituted for the first time no member or an insufficient number of members is elected or an elected member is unwilling to serve on the Board.]

[c][(3) For the purposes of sub-section (2) of section 16, a member nominated in pursuance of sub-section (2) of this section shall, where there has been a division of the cantonment into wards or of the inhabitants thereof into classes, be

deemed to have been elected by such ward or class, as the case may be, as the Central Government may at the time of making the nomination or at any time thereafter declare.]

"[(4)] The term of office of a member nominated or deemed to have been re-elected under this section shall expire at the time at which it would have expired if he had been elected at the ordinary or casual election, as the case may be.

[a] Proviso was added to sub-section (1) by the Cantonments (Amendment) Act (1942) (15 of 1942), S. 2 (20-3-1942).
[b] Substituted by S. 2 ibid, for original sub-section (2).
[c] New sub-section (3) was added by S. 2, ibid.
[d] Sub-section (3) was renumbered as sub-section (4), ibid.

**18. Oath or affirmation.**—(1) Every person who is by virtue of his office, or who is nominated or elected to be, a member of a Board shall, before taking his seat, make at a meeting of the Board an oath or affirmation of his allegiance to the [a][Constitution of India] in the following form, namely:—

"I, A.B., having become/been elected/been nominated a member of this Board, do solemnly swear (or affirm) that I will be faithful and bear true allegiance to [b][the Constitution of India as by law established], and that I will faithfully discharge the duty upon which I am about to enter."

(2) If any such person fails to make the oath or affirmation within such time as the [c][Central Government] considers reasonable, the [c][Central Government] shall, by notification in the [c][Official Gazette], declare his seat to be vacant.

[a] Substituted for "Crown"' by A.C.A.O., 1948.
[b] Substituted for "His Majesty, the King, Emperor of India, his heirs and successors", ibid.

**19. Resignation.**—(1)Any nominated or elected member of a Board who wishes to resign his office may forward his resignation in writing through the President of the Board to the Officer Commanding-in-Chief, the Command, who shall forward it for orders to the [c][Central Government].

(2) If the [c][Central Government] accepts the resignation, such acceptance shall be communicated to the Board, and thereupon the seat of the member resigning shall become vacant.

**20. President and Vice-President.**—(1) The [a][Officer Commanding the station] [b][if a member of the Board] shall be the President of the Board:

[c][Provided that when a military officer holding the office of President ceases to be the Officer Commanding the station merely by reason of a temporary absence from the station on duty or on station leave, or during the transfer of his headquarters to a hill station, he shall not vacate the office of President.]

[d][(2) Where the Officer Commanding the station is not a member of the Board, the military officer nominated in his place under clause (a) of sub-sec. (3), sub-sec. (4) or sub-sec. (5) of Section 13 shall be President of the Board.

(3) In every Board in which there is more than one elected member, there shall be a Vice-President elected by the elected members only and from among their number [c][in accordance with such procedure as the Central Government may by rules prescribe].]

[a] Substituted by the Cantonments (Amendment) Act, 1925 (7 of 1925), S. 14, for "Commanding Officer of the Cantonment".
[b] Inserted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 7.
[c] Inserted by the Cantonments (Amendment) Act, 1927 (26 of 1927), S. 3.

**Section 20 — Note 1**

(1) The selection of the Vice-President by the votes of the elected members in a meeting of the Board is a decision of the Board, liable to supervision by the officer Commanding in Chief under Section 52 (1) (b). ('56) AIR 1956 Punj 147 (148).

[d] Substituted by S. 7 of Act 24 of 1936, for the original sub-section.
[e] These words were added to S. 20 (3) by the Cantonments (Amendment) Act, 1942 (15 of 1942), S. 3 (30-3-1942).

**21. Term of office of Vice-President.**—[a][(1) The term of office of a Vice-President shall be three years or the residue of his term of office as a member, whichever is less.]

(2) A Vice-President may resign his office by notice in writing to the President and, on the resignation being accepted by the Board, the office shall become vacant.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 8, for the original sub-section.

**22. Duties of President.**—(1) It shall be the duty of the President of every Board—

(a) unless prevented by reasonable cause, to convince and preside at all meetings of the Board and to regulate the conduct of business thereat;

(b) to exercise supervision and control over the financial and executive administration of the Board;

(c) to perform all the duties and exercise all the powers specifically imposed or conferred on the President by or under this Act; and

(d) subject to any restrictions, limitations and conditions imposed by this Act, to exercise executive power for the purpose of carrying out the provisions of this Act and to be directly responsible for the fulfilment of the purposes of this Act.

(2) The President may, by order in writing, empower the Vice-President to exercise all or any of the powers and duties referred to in clause (c) of sub-section (1) other than any power, duty or function which he is by resolution of the Board expressly forbidden to delegate.

(3) The exercise or discharge of any powers, duties or functions delegated by the President under this section shall be subject to such restrictions, limitations and conditions, if any, as may be laid down by the President and to the control of, and to revision by, the President.

(4) Every order made under sub-section (2) shall forthwith be communicated to the Board and the [a][Officer Commanding-in-Chief, the Command].

[a] Substituted by the Cantonments (Amendment) Act, 1926 (35 of 1926), S. 2, for "Officer Commanding the District".

**23. Duties of Vice-President.**—It shall be the duty of the Vice-President of every Board—

(a) in the absence of the President and unless prevented by reasonable cause, to preside at meetings of the Board and when so presiding to exercise the authority of the President under sub-section (1) of Section 22;

(b) during the incapacity or termporary absence of the President or pending his appointment or succession, to perform any other duty and exercise any other power of the President; and

(c) to exercise any power and perform any duty of the President which may be delegated to him under sub-section (2) of Section 22.

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**Section 22 — Note 1**

(1) Signing the sanction for prosecution of a member of the staff is not a statutory duty conferred on the President of the Board. Therefore where the resolution was passed by the meeting, which was presided over by the Vice-President, the signature put by the latter could not be considered to be something unauthorised according of sanction to prosecute. ('58) AIR 1958 Madh Pra 2 (3); 1958 Cri L Jour 41.

(2) Provisions of Section 22 do not confer on Cantonment Board an authority to pass a resolution to set up a Court of Enquiry. ILR (1965) Andh Pra 620.

**24. Duties of the Executive Officer.**—The Executive Officer shall perform all the duties imposed upon him by or under this Act, and shall be responsible for the custody of all the records of the [a][Board], and shall arrange for the performance of such duties relative to the proceedings of the Board or of any Committee of the Board or of any Committee of Arbitration constituted under this Act, as those bodies may respectively impose on him, and shall comply with every requisition of the [a][Board], on any matter pertaining to the administration of the cantonment.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**25. Special power of the Executive Officer.**—The Executive Officer may, in cases of emergency, direct the execution of any work or the doing of any act which would ordinarily require the sanction of the [a][Board] and the immediate execution or doing of which is, in his opinion, necessary for the service or safety of the public, and may direct that the expense of executing such work or doing such act shall be paid from the cantonment fund:—

Provided that—

(a) [b][* * *] he shall not act under this section without the previous sanction of the President or, in his absence, of the Vice-President;

(b) he shall not act under this section in contravention of any order of the [a][Board] prohibiting the execution of any particular work or the doing of any particular act; and

(c) he shall report forthwith the action taken under this section and the reasons therefor to the [a][Board].

[a] Substituted by the Cantonment (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] The words "where there is a Board" were repealed by S. 9, ibid.

## ELECTIONS

**26. Electoral rolls.**—(1) [a][* * *] [b][The Board or, where a Board is not constituted in any place declared by notification under sub-section (1) of Section 3 to be a cantonment, the Officer Commanding the station], shall prepare and publish an electoral roll showing the names of persons qualified to vote at election to the Board. Such roll shall be prepared, revised and finally published in such manner and on such date in each year as the [c][Central Government] may by rule prescribe.

(2) Every person whose name appears in the final electoral roll shall, so long as the roll remains in force, be entitled to vote at an election to the Board, and no other person shall be so entitled.

(3) When a cantonment has been divided into wards, [c][* * *] the electoral roll shall be divided into separate lists for each ward [d][* * *].

(4) If a new electoral roll is not published in any year on the date prescribed, the [c][Central Government] may direct that the old electoral roll shall continue in operation until the new roll is published.

[a] The words "Where a Board is constituted in any cantonment, otherwise than in accordance with the proviso to sub-section (1) of Section 14," were repealed by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 10.

[b] Substituted by S. 10, ibid, for "the Cantonment Authority".

[c] The words "or the inhabitants into classes" were omitted by the Cantonments (Amendment) Act, 1953 (2 of 1954), S. 6 (2-1-1954).

[d] The words "or class, as the case may be" were omitted, ibid.

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**Section 25 — Note 1**

(1) "We think that the exercise by the Executive Officer of the emergency powers conferred by this clause should be subject to the previous sanction of the President or in his absence of the Vice-President, and we have provided accordingly." — Select Committee Report.

**Section 26 — Note 1**

(1) For the meaning of the word 'person', see Section 29.

**27. Qualification of electors.**—[a][(1) Every person who, on such date as may be fixed by the Central Government in this behalf by notification in the Official Gazette (hereinafter in this section referred to as "the qualifying date"), is not less than twenty-one years of age and who has resided in the cantonment for a period of not less than six months immediately preceding the qualifying date shall, if not otherwise disqualified, be entitled to be enrolled as an elector.

Explanation —When any place is declared a cantonment, for the first time, or when any local area is first included in a cantonment, residence in the place or area comprising the cantonment on the aforesaid date shall be deemed to be residence in the cantonment for the purposes of this sub-section.]

(2) A person, notwithstanding that he is otherwise qualified, shall not be entitled to be enrolled as an elector if he on the [b][qualifying date]—

[c][(i) is not a citizen of India]; or

[d][(ii) * * *]

(iii) has been adjudged by a competent Court to be of unsound mind or

(iv) is an undischarged insolvent or

(v) has been sentenced by a Criminal Court to imprisonment for a term exceeding [e][two years] or to transportation [f][for an offence which is declared by the [g][Central Government] to be such as to unfit him to become an elector] [g][* * * *] or has been sentenced by a Criminal Court for any offence under Chapter IXA of the Indian Penal Code:

Provided that the [g][Central Government] may, by order in writing, remove any disqualification incurred by a person under clause (v):

[h][Provided further that any disqualification incurred by a person under cl. (v) shall terminate on the lapse of three years from the expiry of the sentence or order.]

(3) If any person having been enrolled as an elector in any electoral roll subsequently becomes subject to any of the disqualifications referred to in cls. (i), (iii), (iv) and (v) of sub-section (2), his name shall be removed from the electoral roll unless, in the case referred to in cl. (v), the disqualification is removed by [g][Central Government].

[a] Substituted for former sub-section (1) and Explanation by the Cantonment Laws (Extension and Amendment) Act, 1950 (53 of 1950), S. 6 (18-8-1950).
[b] Substituted for "aforesaid date", ibid.
[c] Substituted for former clause (i) by A.L.O., 1950.
[d] Clause (ii) was omitted by Act (53 of 1950), S. 6.
[e] Substituted for "six months" by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 11.
[f] Inserted, ibid, S. 11.
[g] The words "or has been ordered to find security for good behaviour under the Code of Criminal Procedure, 1898," were omitted by Act 24 of 1936, Sec. 11.
[h] Inserted, ibid, Sec. 11.

**Section 27 — Note 1**

(1) Under sub-clause (iii) of clause (b) as it stood before, the minimum qualification to be entitled to be enrolled as an elector was that the person should be a graduate. But by virtue of the amendment made in 1936, it is enough if he has passed the matriculation or other equivalent examination.

Under the new proviso added in 1936 to sub-section (2) any disqualification under clause (v) of sub-section (2) automatically terminates on the lapse of three years from the expiry of the sentence or order.

(2) For the meaning of the word 'person' and as to when 'a person shall be deemed to pay a tax directly', see Section 29. As to the removal of any member who becomes subject to any of the disqualifications mentioned in sub-sec. (2) of this section, see Section 34 (1) (a).

**28. Qualification for being a member of the Board.**—(1) Save as hereinafter provided, every person, not being [a][person [b][in receipt of pay] in the military or civil service of [c][Government] ], whose name is entered on the electoral roll of a cantonment shall be qualified for election as a member of the Board in that cantonment.

[d][(1A) No person shall be qualified for nomination as a member of a Board if he is subject to any of the disqualifications specified in sub-section (2) of Section 27.]

(2) No person shall be qualified for election or nomination as a member of a Board, if he—

(a) has been dismissed from [e][the service of the [c][Government] ] and is debarred from re-employment therein, or is a dismissed servant of [e][a Board or an authority which, before the commencement of the Cantonments (Amendment) Act, 1936, exercised and performed the powers and duties of a Cantonment Authority under this Act];

(b) is debarred from practising as a legal practitioner by order of any competent authority;

(c) holds any place of profit in the gift or at the disposal of the Board, or is [f][* * *] police officer, or is the servant or employer of a member of the Board; or

(d) is interested in a subsisting contract made with, or in work being done for, the Board except as a shareholder (other than a director) in an incorporated company; or

[g][(dd) is an officer or servant, permanent or temporary, of a Board; or]

[h][(ddd) is a member of any other local authority: or]

(e) is disqualified under any other provision of this Act:

Provided that—

(i) any of the disqualifications referred to in clauses (a) and (b) may be removed by an order of the [c][Central Government] in this behalf, and

(ii) a person shall not be deemed to have any interest in such a contract or work as is referred to in clause (d) by reason only of his having a share or interest in—

(a) any lease or sale or purchase of immovable property or any agreement for the same, or

(b) any agreement for the loan of money or any security for the payment of money only; or

(c) any newspaper in which any advertisement relating to the affairs of the Board is inserted; or

(d) the sale to the Board of any articles in which he regularly trades or the purchase from the Board of any articles, to a value in either case not exceeding Rs. 1,500 in the aggregate in any year during the period of the contract or work.

[a] Substituted by the Cantonments (Amendment) Act, 1938 (24 of 1936), S. 12, for a "stipendiary Magistrate or Military Officer or soldier".

[b] Added after the words "not being a person" by the Cantonments (Amendment) Act, 1944 (8 of 1944), S. 4 (17-3-1944).

[c] Sub-section (1A) was inserted by the Cantonments (Amendment) Act, 1942 (15 of 1942), S. 5 (30-3-1942).

[d] Substituted by A.O. for "Government service".

[e] Substituted by Act 24 of 1936, S. 12, for "the Cantonment Authority".

**Section 28 — Note 1**

(1) For the meaning of the word 'person', see Section 29. As to the removal of any member who becomes subject to any of the disqualifications mentioned in sub-section (2) of this section, see Sec. 34 (1) (a).

[f] Came into force on 31st October 1936.
[g] Words "stipendiary Magistrate or" were repealed by the Cantonments (Amendment) Act, 1925 (7 of 1925), S. 4.
[h] Inserted by Act 24 of 1936, S. 12.
[i] Inserted by the Cantonments (Amendment) Act, 1953 (2 of 1954), S. 7 (2-1-1954).

**29. Interpretation.**—For the purposes of Sections 26, 27 and 28—
(a) "person" means an individual human being, and
*[(b) • • • •]

[a] Clause (b) was omitted by the Cantonment Laws (Extension and Amendment) Act, 1950 (53 of 1950), S. 7.

**30. Joint families, etc.** [Repealed by the Cantonments (Amendment) Act, 1953 (2 of 1954), S. 8 (2-1-1954).]

**31. Power to make rules regulating elections.**—The °[Central Government] may, either generally or specially for any cantonment or group of cantonments, after previous publication, make rules consistent with this Act to regulate all or any of the following matters for the purpose of the holding of elections under this Act, namely:—

(a) the division of a cantonment into wards *[• • •];

(b) the determination of the number of members to be elected by each ward *[• •]

°[(c) • • • •];

(d) the preparation, revision and final publication of electoral rolls;

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**Section 31 — Note 1**

(1) Rules under, Rules 43, 47 — The fact that improper refusal of a nomination paper has been made specifically as a ground for challenging an election by Rule 47 is a necessary factor to be considered in interpreting the words "at the election" in Rule 43. ('56) AIR 1956 All 89 (94).

(2) Rules under, Rr. 44, 42, 43 and 45 — Language of Rule 44 is mandatory — Security deposit should accompany election petition — Deposit can be made at any time before case is taken up for hearing. AIR 1967 Bom 324 (325): 67 Bom LR 928 (DB).

(3) Rules under, Rule 20—Finding that nomination paper has been improperly rejected — It must be held that result of election has been materially affected. AIR 1957 Madh Pra 20 (24): 1957 Jab LJ 108 (DB).

(4) Rules under, Rule 20 — Seconder of nomination paper giving his serial number as printed in Hindi version of electoral roll — Number wrongly printed — Nomination paper cannot be rejected. AIR 1957 Madh Pra 20 (23, 24): 1957 Jab LJ 108 (DB).

(5) Rules under, Rules 16 and 20 — Nomination paper — Name of candidate prefixed with 'Shri' in electoral roll but not on nomination paper — Nomination paper cannot be rejected on that ground. AIR 1957 Madh Pra 20 (23, 24): 1957 Jab LJ 108 (DB).

(6) Rules under, Rules 16 and 20 — The prescribed nomination form does not require that in the case of a double-member constituency where a seat is reserved for a scheduled caste a candidate should enter in the nomination paper the seat which he is contesting. Failure to mention the seat is therefore no ground for rejection of nomination paper. AIR 1957 Madh Pra 20 (23): 1957 Jab LJ 108 (DB).

(7) The expression 'a candidate at the election' as used in Rule 43 of Cantonment Electoral Rules includes a candidate whose nomination paper has been rejected. AIR 1957 Madh Pra 20 (21, 22): 1957 Jab LJ 108 (DB).

(8) Rules under — The combined reading of Rules 9 to 12 of the Rules shows that the power of the Executive Officer of suo motu correcting the rolls is merely confined to the case of persons whom he knows to be dead and also to cases where he can make correction in pursuance of any claim provided that he has published the list of all such corrections with the list of claims and objections prescribed by Rule 11. (1961) 63 Punj LR 672.

(9) Rules under, Rules 43, 44, 45, 46 — Election Petitions — Forum — Additional District Judge to whom the District Judge transfers the petition cannot dispose of the same — State Government's notification designating the 'subordinate judicial officer' is necessary — 'District Judge' under Rule 43 is a persona designata. AIR 1967 Madh Pra 243 (245, 246): 1967 Jab LJ 69 (DB).

(e) the registration of electors, the nomination of candidates, the time and manner of holding elections and the method by which votes shall be recorded;

(f) the authority [d][(which may be an officer of the [c][State] Government)] by which and the manner in which disputes relating to electoral rolls or arising out of elections shall be decided, and the powers and duties of such authority and the circumstances in which such authority may declare a casual vacancy to have been created or any candidate to have been elected;

(g) any other matter relating to elections or election disputes in respect of which the [c][Central Government] is empowered to make rules under this Chapter or in respect of which this Act makes no provision or makes insufficient provision and provision is, in the opinion of the [c][Central Government], necessary.

[a] The words "or of the inhabitants of a cantonment into classes, or both" were omitted by the Cantonments (Amendment) Act, 1953 (2 of 1954), S. 9 (2-1-1954).

[b] The words "or class of persons" were omitted, ibid.

[c] Clause (c) was omitted by the Cantonment Laws (Extension and Amendment) Act, 1950 (53 of 1950), S. 8 (18-8-1950).

[d] Inserted by the Cantonments (Amendment) Act, 1944 (8 of 1944), S. 5 (17-3-1944).

## MEMBERS

**32. Member not to vote on matter in which he is interested.**—No member of a Board shall vote at a meeting of the Board [a][or of any committee of the Board] on any question relating to his own conduct or on any matter, other than a matter affecting generally the inhabitants of the cantonment, which affects his own pecuniary interest or the valuation of any property in respect of which he is directly or indirectly interested, or of any property of or for which he is a manager or agent.

[a] Inserted by the Cantonments (Amendment) Act, 1940 (31 of 1940), S. 3 (27-11-1940).

**33. Liability of members.**—Every member of a Board shall be liable for the loss, waste or misapplication of any money or other property belonging to the Board if such loss, waste or misapplication is a direct consequence of his neglect or misconduct while such member; and a suit for compensation for the same may be instituted against him either by the Board or by the [c][Central Government].

**34. Removal of members.**—[a][(1) The [c][Central Government] may remove from a Board any member thereof who—

(a) becomes [b][or is found to have been at the time of his election or nomination] subject to any of the disqualifications specified in sub-section (2) of Section 27 [c][or in Section 28]; or

(b) has absented himself for more than three consecutive months from the meetings of the Board and is unable to explain such absence to the satisfaction of the Board:

[a][Explanation.—In computing the aforesaid period of three consecutive months, no account shall be taken of any period of absence with the leave of the Board]; or

(c) has knowingly contravened the provisions of Section 32; or

(d) being a legal practitioner, acts or appears on behalf of any other person against the Board in any legal proceeding or against the [c][Govern-

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**Section 32 — Note 1**

(1) As to the removal of any member who has knowingly contravened the provisions of this section, see Section 34 (1) (c).

ment] in any such proceeding relating to any matter in which the Board is or has been concerned, or acts or appears on behalf of any person in any criminal proceeding instituted by or on behalf of the Board against such person.]

(2) The *[Central Government] may remove from a Board any member who, in the opinion of the *[Central Government], has so flagrantly abused in any manner his position as a member of the Board as to render his continuance as a member detrimental to the public interests.

*[(2A) The Central Government may, on receipt of a report from the officer Commanding the station, through the Officer Commanding-in-Chief, the Command, remove from a Board any military officer nominated a member of the Board who is, in the opinion of the Officer Commanding the station, unable to discharge his duties as member of the Board and has failed to resign his office.]

(3) No member shall be removed from a Board under [sub-section (1) or sub-section (2) of] this section unless he has been given a reasonable opportunity of showing cause against his removal.

[a] Substituted by the Cantonments (Amendment) Act, 1927 (26 of 1927), S. 4, for the original sub-section.

[b] Inserted by the Cantonments (Amendment) Act, 1942 (15 of 1942), S. 6 (30-3-1942).

[c] The words and figures were substituted by the Cantonments (Amendment) Act, 1940 (31 of 1940), S. 4, for the words, brackets and figures "or in sub-section (2) of Section 28" (27-11-1940).

[d] Added by the Cantonments (Amendment) Act, 1953 (2 of 1954), S. 10 (2-1-1954).

[e] Inserted by Act 31 of 1940, S 4 (27-11-1940).

[f] The words, brackets and figures were inserted by Act 15 of 1942, S. 6 (30-3-1942).

*[35. **Consequences of removal**—(1) A member removed under clause (b) of sub-section (1) [b][or under sub-section (2A)] of Section 34 shall, if otherwise qualified, be eligible for re-election or re-nomination.

(2) A member removed under clause (c) or clause (d) of sub-section (1) of Section 34 shall not be eligible for re-election or nomination for the period during which but for such removal, he would have continued in office.

(3) A member removed under sub-section (2) of Section 34 shall not be eligible for re-election or nomination until the expiry of three years from the date of his removal.]

[a] Substituted by the Cantonments (Amendment) Act, 1927 (26 of 1927), S. 5, for the original S. 35.

[b] Inserted by the Cantonments (Amendment) Act, 1940 (31 of 1940), S. 5 (27-11-1940).

## SERVANTS

**36. Disqualification of person as servant of Board.**—(1) No person who has directly or indirectly by himself or his partner any share or interest in a contract with, by or on behalf of a *[Board] or in any employment under, by or on behalf of a *[Board], otherwise than as a servant of the *[Board], shall become or remain a servant of such *[Board].

(2) A servant of a *[Board] who knowingly acquires or continues to have directly or indirectly by himself or his partner any share or interest in a contract with, by or on behalf of the *[Board] or, in any employment under, by or on behalf of the *[Board], otherwise than as a servant of the *[Board], shall be deemed to have committed an offence under Section 168 of the Indian Penal Code.

(3) Nothing in this section shall apply to any share or interest in any contract with, by or on behalf of, or employment under, by or on behalf of a *[Board], if the same is a share in a company contracting with, or employed by, or on be-

half of, the [a][Board] or is a share or interest acquired or retained with the permission of the [b][Officer Commanding-in-Chief, the Command,] in any lease or sale to, or purchase by, the [a][Board] of land or buildings or in any agreement for the same.

[c][(4) Every person applying for employment as a servant of a Board shall, if he is related by blood or marriage to any member of the Board or to any person not being a menial servant, in receipt of remuneration from the Board, notify the fact and the nature of such relationship to the appointing authority before the appointment is made, and if he has failed to do so, his appointment shall be invalid but without prejudice to the validity of anything previously done by him.]

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936) S. 69, for "Cantonment Authority".
[b] Substituted by the Cantonments (Amendment) Act, 1926 (35 of 1926), S. 2, for "Officer Commanding the District".
[c] Inserted by Act 24 of 1936, S. 13.

[a][36A. Cantonment servant to be deemed a public servant.—Every officer or servant, permanent or temporary, of a [b][Board] shall be deemed to be a public servant within the meaning of the Indian Penal Code, and in the definition of "Legal remuneration" in Section 161 of that Code the word "Government" shall, for the purposes of this section, be deemed to include a [b][Board].]

[a] Inserted by the Cantonments (Amendment) Act, 1925 (7 of 1925), S. 5.
[b] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

## PROCEDURE

**37. Meetings.**—(1) Every Board shall ordinarily hold at least one meeting in every month on such day as may be fixed, and of which notice shall be given in such manner as may be provided, by regulations made by the Board under this Chapter.

(2) The President may whenever he thinks fit and shall upon a requisition in writing by not less than one-fourth of the members of the Board, convene a special meeting.

(3) Any meeting may be adjourned until the next or any subsequent day, and an adjourned meeting may be further adjourned in like manner.

**38. Business to be transacted.**—Subject to any regulation made by the Board under this Chapter, any business may be transacted at any meeting:

Provided that no business relating to the imposition, abolition or modification of any tax shall be transacted at a meeting unless notice of the same and of the date fixed therefor has been sent to each member not less than seven days before that date.

**39. Quorum.** —(1) The quorum necessary for the transaction of business at a meeting of a Board [a][in which there is more than one elected member] shall be five or one-half of the number of members of the Board actually holding office at the time, whichever is the greater number:

[b][* * * *]

[a][(1A) The quorum necessary for the transaction of business at a meeting of a Board constituted under sub-section (5) of Section 13 or under sub-section (1) of Section 14, shall be two.]

(2) If a quorum is not present, the President shall adjourn the meeting and the business which would have been brought before the original meeting if there had been a quorum present thereat shall be brought before, and may be transacted at, an adjourned meeting, whether there is a quorum present or not.

[a] Inserted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 14.
[b] The proviso was repealed by S. 14, ibid.

[a][40. Presiding Officer.—In the absence of—

(a) both the President and the Vice-President from any meeting of a Board in which there is more than one elected member,

(b) the President from a meeting of a Board constituted under sub-sec. (5) of Section 13 or sub-section (1) of Section 14,

the members present shall elect one from among their own number to preside.]

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 15, for the original section.

**41. Minutes.**—(1) Minutes of the proceedings of each meeting shall be recorded in a book and shall be signed by the President before the close of the meeting, and shall, at such times and in such place as may be fixed by the Board, be open to inspection free of charge by any inhabitant of the cantonment.

(2) Copies of the minutes shall, as soon as possible after each meeting, be forwarded for information to [a][the Officer Commanding-in-Chief, the Command,] the Officer Commanding the District, the Officer Commanding the Brigade area, [b][the District Magistrate and the Military Estates Officer].

[a] Inserted by the Cantonments (Amendment) Act, 1926 (35 of 1926), S. 3.

[b] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 16, for "and the District Magistrate".

**42. Meetings to be public.**—Every meeting of a Board shall be open to the public unless in any case the President, for reasons to be recorded in the minutes, otherwise directs.

**43. Method of deciding questions.**—(1) All questions coming before a meeting shall be decided by the majority of the votes of the members present and voting.

(2) In the case of an equality of votes, the President shall have a second or casting vote.

(3) The dissent of any member from any decision of the Board shall, if the member so requests, be entered in the minutes, together with a short statement of the grounds for such dissent.

[a][43A. Committees for civil areas.—(1) Every Board constituted under Section 13 in a Class I Cantonment or Class II Cantonment shall appoint a committee consisting of the elected members of the Board, the Health Officer and the Executive Engineer for the administration of such areas in the cantonments as the [c][Central Government] may, by notification in the [c][Official Gazette], declare to be [b][civil areas], and may delegate its powers and duties to such committee in the manner provided in clause (e) of sub-section (1) of Section 44.

(2) The Vice-President of the Board shall be the Chairman of the committee appointed under sub-section (1).]

[a] Inserted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 17.

[b] Substituted for "bazar areas" by the Cantonments (Amendment) Act, 1953 (2 of 1954), S. 11 (2-1-1954).

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**Section 41 — Note 1**

(1) Where the minutes of the meeting were recorded on loose papers and not in minute book, contrary to the requirements of Rule 7 it is only an irregularity. ('58) AIR 1958 Madh Pra 2 (3): 1958 Cri L Jour 41.

**Section 42 — Note 1**

(1) A meeting of the Cantonment Board is usually open to the public, but the Act provides for holding it in camera if the President thinks it desirable to do so and records his reasons for doing so. Where the President had not recorded his reasons for holding a meeting in camera, it was a mere irregularity which could not vitiate the proceedings. ('58) AIR 1958 Madh Pra 2 (3): 1958 Cri L Jour 41.

**Section 43-A — Note 1**

(1) Section 43-A was newly added by the Cantonments (Amendment) Act, 1936. The Health Officer and the Executive Engineer have been made ex officio members of the Bazar Committee at the suggestion of the Second Select Committee. Prior to this they were left to be co-opted.

**44. Power to make regulations.**—(1) A Board may make regulations consistent with this Act and with the rules made thereunder to provide for all or any of the following matters, namely:—

(a) the time and place of its meetings;
(b) the manner in which notice of the meeting shall be given;
(c) the conduct of proceedings at meetings and the adjournment of meetings;
(d) the custody of the common seal of the Board and the purposes for which it shall be used; and
(e) the appointment of committees for any purpose and the determination of all matters relating to the constitution and procedure of such committees, and the delegation to such committees, subject to any conditions which the Board thinks fit to impose, of any of the powers or duties of the Board under this Act other than a power to make regulations or bye-laws.

(2) No regulation made under clause (e) of sub-section (1) shall take effect until it has been approved by the [7][Central Government]

(3) No regulation made under this section shall take effect until it has been published in such manner as the [8][Central Government] may direct.

**45. Joint action with other local authority.**—(1) [a][Board] may—

(a) join with any other local authority—

(i) in appointing a joint committee for any purpose in which they are jointly interested and in appointing a chairman of such committee;

(ii) in delegating to such committee power to frame terms binding on the [a][Board] and such other local authority as to the construction and future maintenance of any joint work or to exercise any power which might be exercised by [b][the Board or by such other local authority]; and

(iii) in making rules for regulating the proceedings of any such committee relating to the purposes for which it has been appointed; or

(b) with the previous sanction of [9][the Officer Commanding-in-Chief, the Command and] the [8][State Government] concerned, enter into an agreement with any other local authority regarding the levy of any tax or toll whereby the said tax or toll respectively leviable by the [d][Board and by such other local authority] may be levied together instead of separately within the limits of the aggregate area comprising the areas subject to the control of the [9][Board and such other local authority.]

(2) If any difference of opinion arises between any [1][Board and other local authority] acting together under this section, the decision thereon of the [8][Central Government] or of an officer appointed by the [8][Central Government] in this behalf shall be final.

(3) When any agreement such as is referred to in clause (b) of sub-section (1) has been entered into, then—

(a) where the agreement relates to an octroi or terminal tax or toll, the other local authority with which the [a][Board] has made such agreement shall have the same powers to establish octroi limits and octroi stations and places for the collection of the terminal tax and terminal toll within the cantonment, as it has within the area ordinarily subject to its control;

(b) such other local authority shall have the same power of collecting such tax or toll in the cantonment, and the provisions of any enactment in force relating to the levy of such tax or toll by such other local authority shall apply in the same manner, as if the cantonment were comprised within the area ordinarily subject to its control; and

(c) the total of the collection of such tax and toll made in the cantonment and in the area ordinarily subject to the control of such other local authority and the costs thereby incurred shall be divided between the cantonment fund and the fund subject to the control of such other local authority, in such proportion as may have been determined by the agreement.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".
[b] Substituted by ibid, S. 16, for "either of the said authorities".
[c] Inserted by ibid, S. 18.
[d] Substituted by S. 18 of Act (24 of 1936), for "authorities so contracting".
[e] Substituted by ibid, S. 18, for "said authorities".
[f] Substituted by ibid, S. 18, for "authorities".

'[45A. **Report on administration.**—Every board shall, as soon as may be after the close of the year and not later than the date fixed in this behalf by the *[Central Government], submit to the *[Central Government] through the Officer Commanding-in-Chief, the Command, a report on the administration of the cantonment during the preceding financial year, in such form and containing such details as the *[Central Government] may direct. The comments, if any, of the Officer Commanding-in-Chief, the Command, on such report shall be communicated by him to the Board which shall be allowed a reasonable time to furnish a reply thereto, and the comments together with the reply, if any, shall be forwarded to the *[Central Government] along with the report.]

[a] Inserted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 19.

## CONTROL

**46. Power of Central Government to require production of documents.**—The *[Central Government] a[* * *] may at any time require a b[Board]—

(a) to produce any record, correspondence, plan or other document in its possession or under its control;
(b) to furnish any return, plan, estimate, statement, account or statistics relating to its proceedings, duties or works;
(c) to furnish or obtain and furnish any report.

[a] The words "or the Local Government" were repealed by A. O.
[b] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**47. Inspection.**—The a[Central Government or the Officer Commanding-in-Chief, the Command], may depute any person in the service of the *[Government] to inspect or examine any department of the office of or any service or work undertaken by or thing belonging to, a b[Board], and to report thereon, and the b[Board] and its officers and servants shall be bound to afford the person so deputed access at all reasonable times to the premises and property of the b[Board] and to all records, accounts and other documents the inspection of which he may consider necessary to enable him to discharge his duties.

[a] The words "Governor-General in Council or the Officer Commanding-in-Chief, the Command" were substituted for the words "Officer Commanding the District" by the Cantonments (Amendment) Act, 1926 (35 of 1926), S. 4; and the words "Central Government" were substituted for the words "Governor-General in Council" by A. O.
[b] Substituted by the Cantonments (Amendment) Act 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**48. Power to call for documents.**—a[The Officer Commanding-in-Chief, the Command], may, by order in writing,—

(a) call for any book or document in the possession or under the control of the b[Board];

(b) require the [b][Board] to furnish such statements, accounts, reports and copies of documents relating to its proceedings, duties or works as he thinks fit.

[a] The words "Governor-General in Council or the Officer Commanding-in-Chief the Command", were substituted for the words "Officer Commanding the District" by S. 4 of the Cantonments (Amendment) Act, 1926 (35 of 1926); and the words "The Governor-General in Council or" were repealed by S. 20 of Act (24 of 1936).

[b] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**49. Power to require execution of work, etc.**—If, on receipt of any information or report obtained [a][under Section 46 or Sec. 47] or Section 48, the [b][Central Government or the Officer Commanding-in-Chief the Command,] is of opinion--

(a) that any duty imposed on a [c][Board] by or under this Act has not been performed or has been performed in an imperfect, inefficient or unsuitable manner, or

(b) that adequate financial provision has not been made for the performance of any such duty, [d][it or] he may [e][* * *] direct the [c][Board], within such period as [d][it or] he thinks fit, to make arrangements to [d][its or] his satisfaction for the proper performance of the duty, or, as the case may be, to make financial provision to [d][its or] his satisfaction for the performance of the duty:

Provided that, unless in the opinion of the [f][Central Government or the Officer Commanding-in-Chief, the Command, as the case may be,] the immediate execution of such order is necessary, [d][it or] he shall, before making any direction under this section, give the [c][Board] an opportunity of showing cause why such direction should not be made.

[a] Substituted by the Cantonments (Amendment) Act 1936 (24 of 1936), S. 21 for, "under S. 47".

[b] The words "Governor-General in Council or the Officer Commanding-in-Chief, the Command" were substituted for the words "Officer Commanding the District" by S. 5 of the Cantonments (Amendment) Act, 1926 (35 of 1926); and the words "Central Government" were substituted by A. O. for the words "Governor-General in Council".

[c] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[d] Inserted by A. O.

[e] The words "after consultation with the Local Government" were repealed by A O. The words "after consultation with" had been substituted by the Cantonments (Amendment) Act, 1926 (35 of 1926), S. 5, for the words "with the concurrence of the Officer Commanding-in-Chief, the Command, and of".

[f] The words "Governor-General in Council or the Officer Commanding-in-Chief, the Command as the case may be" were substituted by the Cantonments (Amendment) Act, 1926 (35 of 1926), Ss. 5 and 6 for the words "Officer Commanding the District", and the words "Central Government" were substituted by A. O. for the words "Governor-General in Council".

**50. Power to provide for enforcement of direction under Section 49.**—If, within the period fixed by a direction made under Section 49, any action the taking of which has been directed under that section has not been duly taken, the [a][Central Government or the Officer Commanding-in-Chief, the Command, as the case may be] may make arrangements for the taking of such action, and may direct that all expenses connected therewith shall be defrayed out of the cantonment fund.

[a] The words "Governor-General in Council or the Officer Commanding-in-Chief, the Command, as the case may be", were substituted for the words "Officer Commanding the District" by Ss. 5 and 6 of the Cantonments (Amendment) Act, 1926 (35 of 1926), and the words "Central Government" were substituted by A. O. for the words "Governor-General in Council".

**51. Power to override decision of Board.**—(1) If the President dissents from any decision of the Board, which he considers prejudicial to the health, welfare or discipline of the troops in the cantonment, he may, for reasons to be recorded in the minutes, by order in writing, direct the suspension of action thereon for any period not exceeding one month and, if he does so, shall forthwith refer the matter to the Officer Commanding-in-Chief, the Command, [a][the reference being made, save in cases where the Officer Commanding the District is himself the Officer Commanding-in-Chief the Command, for the purposes of this Act], through the Officer Commanding the District, who may make such recommendations thereon as he thinks fit.

(2) If the District Magistrate considers any decision of a [b][Board] to be prejudicial to the public health, safety or convenience, he may, after giving notice in writing of his intention to the [b][Board], refer the matter to the [c][Central Government]; and, pending the disposal of the reference to the [c][Central Government], no action shall be taken on the decision.

(3) If any Magistrate who is a member of a Board, being present at a meeting, dissents from any decision which he considers prejudicial to the public health, safety or convenience, he may, for reasons to be recorded in the minutes and after giving notice in writing of his intention to the President, report the matter to the District Magistrate; and the President shall, on receipt of such notice, direct the suspension of action on the decision for a period sufficient to allow of a communication being made to the District Magistrate and of his taking proceedings as provided by sub-section (2).

[a] Inserted by the Repealing and Amending Act, 1927 (10 of 1927), S. 2 and Sch. 1.

[b] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**52. Power of Officer Commanding-in-Chief, the Command, on reference under Section 51 or otherwise.**—(1) The Officer Commanding-in-Chief, the Command, may at any time—

[c][* * * * *]

(a) direct that any matter or any specific proposal other than one which has been referred to the [c][Central Government] under sub-section (2) of Section 51 be considered or reconsidered by the [b][Board]; or

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**Section 51 — Note 1**

(1) "We have also made an amendment to Clause 51 (i.e., Section 51) in order to confine the powers of the President in the matter of overriding decisions of the Board to cases where those decisions appear to him prejudicial to the health, welfare or discipline of the troops. This leaves the District Magistrate to exercise a similar power on behalf of the civil population generally" — Select Committee Report.

**Section 52 — Note 1**

(1) Section 52 (1) (b) does not provide for an individual notice to a member of the Board. ('56) AIR 1956 Punj 147 (148).

(2) The words "on any decision of a Board" in Section 52 (1) (b) are not 'ejusdem generis' to the words used in Sec. 51 of the Act. The powers to be exercised under Section 51 are limited to those decisions of the Board which affect health and welfare, etc., of the army or of the public. But under Section 52 there is no such restriction. It is, therefore, clear that under Section 52 the authority mentioned therein can pass orders irrespective of the nature of the decision of the Board. ('56) AIR 1956 Punj 147 (147).

(3) The word "decision" means only a concluded opinion. The opinion of the Board is to be gathered from the majority of the votes cast in the matter. The selection of the Vice-President by the votes of elected mmbers in a meeting of the Board is a decision of the Board over which Officer Commanding-in-Chief has full supervisory control under Section 52 (1) (b), Cantonments Act. ('56) AIR 1956 Punj 147 (148).

(b) direct the suspension, for such period as may be stated in the order, of action on any decision of a [b][Board], other than a decision which has been referred to him under sub-section (1) of Section 51, and thereafter cancel the suspension or [c][after giving the Board a reasonable opportunity of showing cause why such direction should not be made], direct that the decision shall not be carried into effect or that it shall be carried into effect with such modifications as he may specify.

(2) When any decision of a Board has been referred to him under sub-section (1) of Section 51, the Officer Commanding-in-Chief, the Command, may, by order in writing,—

(a) cancel the order given by the President directing the suspension of action; or

(b) extend the duration of the order for such period as he thinks fit; or

[d][(c) after giving the Board a reasonable opportunity of showing cause why such direction should not be made, direct that the decision shall not be carried into effect or that it shall be carried into effect by the Board with such modifications as he may specify.]

[a] Certain words were repealed by the Cantonments (Amendment) Act, 1931 (7 of 1931), S. 3.

[b] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[c] Inserted by S. 22, ibid.

[d] Substituted by S. 22, ibid, for the original clause.

**53. Powers of Central Government on a reference made under Section 51.—** When any decision of a [a][Board] has been referred to the [°][Central Government] under sub-section (2) of Section 51, the [°][Central Government] may, after consulting the Officer Commanding-in-Chief, the Command, by order in writing,—

(a) direct that no action be taken on the decision; or

(b) direct that the decision be carried into effect either without modification or with such modifications as it may specify.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**54. Supersession of Board.—**(1) If, in the opinion of the [°][Central Government], any Board is not competent to perform or persistently makes default in the performance of the duties imposed on it by or under this Act or otherwise by law, or exceeds or abuses its powers, the [°][Central Government may [a][° ° °]] by an order published, together with the statement of the reasons therefor, in the [°][Official Gazette], declare the Board to be incompetent or in default or to have exceeded or abused its powers, as the case may be, and supersede it for such period as may be specified in the order:

Provided that no Board shall be superseded unless a reasonable opportunity has been given to it to show cause against the supersession.

(2) When a Board is superseded by an order under sub-section (1),—

(a) all members of the Board shall on such date as may be specified in the order, vacate their offices as such members but without prejudice to their eligibilty for election or nomination under clause (c);

(b) during the supersession of the Board, all powers and duties conferred and imposed upon the Board by or under this Act or otherwise by law shall be exercised and performed by the [b][Officer Commanding the station] subject to such reservation, if any, as the [°][Central Government] may prescribe in this behalf; and

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**Section 54 — Note 1**

(1) Under Section 9 the Central Government may, by notification in the Official Gazette, direct that any provision of this Act shall, in the case of any cantonment in which the Board is superseded under Section 54, apply with such modifications as may be so specified.

(c) before the expiry of the period of supersession elections shall be held and nominations made for the purpose of reconstituting the Board.

[a] The words "with the previous sanction of the Governor-General in Council" were repealed by A. O.

[b] Substituted by the Cantonments (Amendment) Act, 1925 (7 of 1925), S. 14, for "Commanding Officer of the Cantonment".

## VALIDITY OF PROCEEDINGS

**55. Validity of proceedings, etc.**—(1) No act or proceeding of a Board or of any committee of a Board shall be invalid by reason only of the existence of a vacancy in the Board or committee.

(2) No disqualification or defect in the election, nomination or appointment of a person acting as the President or a member of a Board or of any such committee shall vitiate any act or proceeding of the Board or committee if the majority of the persons present at the time of the act being done or the proceeding being taken were duly qualified members thereof.

(3) Any document or minutes which purport to be the record of the proceedings of a Board or of any committee of a Board shall, if made and signed substantially in the manner prescribed for the making and signing of the record of such proceedings, be presumed to be a correct record of the proceedings of a duly convened meeting, held by a duly constituted Board or committee, as the case may be, whereof all the members were duly qualified.

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# CHAPTER IV

## SPIRITUOUS LIQUORS AND INTOXICATING DRUGS

**56. Unauthorised sale of spirituous liquor or intoxicating drug.**—If within a cantonment, or within such limits adjoining a cantonment as the °[Central Government] may by notification in the °[Official Gazette] define, any person not subject to military or air-force law or any person subject to military or air-force law otherwise than as a military officer or a soldier knowingly barters, sells or supplies, or offers or attempts to barter, sell or supply, any spirituous liquor or intoxicating drug to or for the use of any soldier or follower or soldier's wife or minor child without the written permission of the [a][Officer Commanding the station] or of some person authorised by the [a][Officer Commanding the station] to grant such permission, he shall be punishable with fine which may extend to one hundred rupees, or with imprisonment for a term which may extend to three months, or with both.

[a] Substituted by the Cantonments (Amendment) Act, 1925 (7 of 1925), S. 14, for "Commanding Officer of the Cantonment".

**57. Unauthorised possession of spirituous liquor.**—If within a cantonment, or within any limits defined under Section 56,—

(a) any person subject to military or air-force law otherwise than as a military officer or a soldier, or

(b) the wife or servant of any such person or of a soldier,

has in his or her possession, except on behalf of the °[Central Government] or for the private use of a military officer, more than one quart of any spirituous liquor,

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**Section 56 — Note 1**

(1) The word 'supplies' in this Section has a restricted meaning, it is inapplicable in the case of servant giving his master liquor belonging to the master himself. Thus, where the servant of a soldier buys liquor with soldier's money for use, the servant cannot be said to have supplied liquor to the soldier. ('07) 31 Bom 523 (526) : 6 Cri L Jour 67.

(2) The words spirituous liquor' and 'intoxicating drugs' should be taken in their popular and ordinary meaning. Thus, 'tari' or 'toddy' is spirituous liquor. ('88) 15 Cal 452 (454). (Case under Cantonments Act, 1880, Section 14.)

(3) Country or home-made beer is not included in the term "spirituous liquor:" ('73) 7 Mad HCR (App) 15 (16). (Decision under Madras Act I of 1866, Section 30.)

(4) As to the meaning of 'soldier', see ('80) 3 All 214 (215).

other than fermented malt-liquor, without the written permission of the [a][Officer Commanding the station] or of some person authorised by the [a][Officer Commanding the station] to grant such permission, he or she shall be punishable, in the case of a first offence, with fine which may extend to fifty rupees, and, in the case of a subsequent offence, with imprisonment for a term which may extend to three months, or with fine which may extend to one hundred rupees.

[a] Substituted by the Cantonments (Amendment) Act, 1925 (7 of 1925), S. 14, for "Commanding Officer of the Cantonment".

**58. Arrest of persons and seizure and confiscation of things for offences against the two last foregoing sections.**—(1) Any police officer or excise officer may, without an order from a Magistrate and without a warrant, arrest any person whom he finds committing an offence under Section 56 or Section 57, and may seize and detain any spirituous liquor or intoxicating drug in respect of which such an offence has been committed and any vessels or coverings in which the liquor or drug is contained.

(2) Where a person accused of an offence under Section 56 has been previously convicted of an offence under that section, an officer in charge of a police station may, with the written permission of a Magistrate, seize and detain any spirituous liquor or intoxicating drug within the cantonment or within any limits defined under that section which, at the time of the alleged commission of the subsequent offence, belonged to, or was in the possession, of such person.

(3) The Court convicting a person of an offence under Section 56 or Sec. 57 may order the confiscation of the whole or any part of anything seized under sub-section (1) or sub-section (2).

(4) Subject to the provisions of Chapter XLIII of the Code of Criminal Procedure, 1898, anything seized under sub-section (1) or sub-section (2) and not confiscated under sub-section (3) shall be restored to the person from whom it was taken.

**59. Saving of articles sold or supplied for medicinal purposes.**—The foregoing provisions of this Chapter shall not apply to the sale or supply of any article in good faith for medicinal purposes by a medical practitioner, chemist or druggist authorised in this behalf by a general or special order of the [a][Officer Commanding the station.]

[a] Substituted by the Cantonments (Amendment) Act, 1925 (7 of 1925), S. 14, for "Commanding Officer of the Cantonment".

## CHAPTER V

## TAXATION

### Imposition of Taxation.

[a][**60. General power of taxation.**—(1)] The Board may, with the previous sanction of the [c][Central Government], impose in any cantonment any tax which

**Section 60 — Note 1**

(1) Section does not envisage any conflict with the State Laws. The Board is bound to have due regard for the State laws while imposing taxes. AIR 1963 Raj 190 (191): 1963 Raj LW 258 (DB). (Terminal Tax by Cantonments Board in contravention of Section 21 of Rajasthan Motor Vehicles Taxation Act (11 of 1951) is invalid).

(2) Provincial Legislature can, by virtue of Sch. 7, List 2 item 50 of the Constitution validly authorise a municipality to levy tax on shows exhibited at the cinemas, within Municipal limits. A Cantonment Board can, therefore, follow suit under Section 60. ('54) AIR 1954 Bom 261 (264, 265): ILR (1954) Bom 647 (DB) * AIR 1959 SC 582 (584, 585): (1959) Supp (2) SCR 63.

(3) Reading Sections 60 to 63 it is plain that the previous sanction of the Central Government has to be accorded to the Board in accordance with the provisions of Sections 61 to 63, and, when the previous sanction of the Central Government has been so accorded under Section 63 of the Act, then only the Board can impose the tax. ('58) AIR 1958 Pat 38 (39): 36 Pat 1220 (DB). * AIR 1967 All 15 (18). (The limitation on powers of Municipal Board

under any enactment for the time being in force, may be imposed in any municipality in the °[State] wherein such cantonment is situated;

b[° ° ° ° °]

(2) Any tax imposed under this section shall take effect from the date of its notification in the °[Official Gazette].]

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 23, for the original section.

[b] The proviso to sub-section (1) was repealed by A. O., 1937.

a[61. **Framing of preliminary proposals.**—When a resolution has been passed by the Board proposing to impose a tax under Section 60, the Board shall in the manner prescribed in Section 255 publish a notice specifying—

(a) the tax which it is proposed to impose;

(b) the persons or classes of persons to be made liable and the description of the property or other taxable thing or circumstance in respect of which they are to be made liable; and

(c) the rate at which the tax is to be levied.]

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 24, for the original section.

a[62. **Objections and disposal thereof.**—(1) Any inhabitant of the cantonment may, within thirty days from the publication of the notice under Section 61, submit to the Board an objection in writing to all or any of the proposals contained therein and the Board shall take any objection into consideration and pass orders thereon by special resolution.

(2) If the Board decides to modify its proposals or any of them, it shall republish the modified proposals in the manner provided by Section 61 indicating that the proposals are in modification of the proposals previously published; and the provisions of sub-section (1) of this section shall apply to such modified proposals.

(3) When the Board has finally settled the proposals, it shall submit them along with the objections, if any, made in connection therewith to the °[Central Government] through the Officer Commanding-in-Chief, the Command.]

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 24, for the original section.

a[63. **Imposition of tax.**—The °[Central Government] may authorise the Board to impose the tax either in the original form or, if any objection has been submitted, in that form or any such modified form as it thinks fit.]

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 24, for the original section.

64. **Definition of "annual value".**—For the purposes of this Chapter, "annual value" means—

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**Section 60 — Note 1 (contd.)**

to levy taxes do not apply to Cantonment Board).

(4) Section 60 (1) envisages the obtaining of the previous sanction of the Central Government by the Board only before the Board actually imposes the tax in any Cantonment. There need not be a notification of the Central Government prior to the proposal by the Board to impose the tax is not borne out by Sections 60 to 63 of the Act. ('58) AIR 1958 Pat 38 (39): 36 Pat 1220 (DB).

(5) Board empowered to levy tax on water cannot vary it without the sanction of the Government. ('26) AIR 1926 Sind 130 (130, 131, 132): 20 Sind LR 325.

(6) Section was "a law in force" at the time of commencement of Constitution and is saved by Art. 372 of Constitution — Mere fact that Central Legislature cannot now impose tolls cannot have the effect of depriving Cantonment Boards of the power to impose tolls which had been conferred by valid enactment. AIR 1967 All 15 (19).

(7) Art. 305 of Constitution of India saves provisions of Section 60 of the Act which was valid existing law and hence procedure under Art. 304 need not be followed for imposing any toll on vehicles passing through Cantonment area. AIR 1967 All 15 (19).

(a) in the case of railway stations, hotels, colleges, schools, hospitals, factories and any other buildings which a [a][Board] decides to assess under this clause, one-twentieth of the sum obtained by adding the estimated present cost of erecting the building to the estimated value of the land appertaining thereto, and

(b) in the case of a building or land not assessed under clause (a), the gross annual rent for which such building (exclusive of furniture or machinery therein) or such land is actually let or, where the building or land is not let or in the opinion of the [a][Board] is let for a sum less than its fair letting value, might reasonably be expected to let from year to year:

Provided that, where the annual value of any building is by reason of exceptional circumstances, in the opinion of the [a][Board], excessive if calculated in the aforesaid manner, the [a][Board] may fix the annual value at any less amount which appears to it to be just.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 68, for "Cantonment Authority".

65 Incidence of taxation.—(1) Save as otherwise expressly provided in the notification imposing the tax, every tax [a][assessed] on the annual value of buildings or lands or of both shall be leviable primarily upon the actual occupier of the property upon which the said tax is assessed, if he is the owner of the buildings or lands or holds them on a building or other lease [b][granted by or on behalf of the [c][Government] or] the [c][Board] or on a building lease from any person.

(2) In any other case, the tax shall be primarily leviable as follows namely:—

(a) if the property is let, upon the lessor;

(b) if the property is sub-let, upon the superior lessor;

(c) if the property is unlet, upon the person in whom the right to let the same vests.

(3) On failure to recover any sum due on account of such tax from the person primarily liable, there may be recovered from the occupier of any part of the buildings or lands in respect of which the tax is due such portion of the sum due as bears to the whole amount due the same ratio which the rent annually payable by such occupier bears to the aggregate amount of rent so payable in respect of the whole of the said buildings or lands, or to the aggregate amount of the letting value thereof, if any, stated in the authenticated assessment list.

(4) An occupier who makes any payment for which he is not primarily liable under this section shall, in the absence of any contract to the contrary, be entitled to be reimbursed by the person primarily liable for the payment, and, if so entitled, may deduct the amount so paid from the amount of any rent from time to time becoming due from him to such person.

[a] Inserted by the Cantonments (Amendment) Act, 1927 (26 of 1927), S. 7.

[b] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 25, for the words "from the Secretary of State in Council or from".

[c] Substituted by Act 24 of 1936, S. 69, for "Cantonment Authority".

## ASSESSMENT LIST

60. Assessment list.—When a tax [a][assessed] on the annual value of buildings or lands or both is imposed, the [b][Board] shall cause an assessment list of all

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**Section 65 — Note 1**

(1) "We have provided in sub-clause (4) of this clause that it should be lawful for a person who is compelled to make a payment of tax on account of another person to deduct the amount paid from any rent due by him to such person." — Select Committee Report.

buildings or lands in the cantonment, or of both, as the case may be, to be prepared in such form as the °[Central Government] may by rule prescribe.

[a] Inserted by the Cantonments (Amendment) Act, 1927 (26 of 1927), S. 8.

[b] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**67. Publication of assessment list.**—When the assessment list has been prepared, the *[Board] shall give public notice thereof, and of the place where the list or a copy thereof may be inspected, and every person claiming to be the owner, lessee or occupier of any property included in the list, and any authorised agent of such person, shall be at liberty to inspect the list and to make extracts therefrom free of charge.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**68. Revision of assessment list.**—(1) The *[Board] shall, at the same time, give public notice of a date, not less than one month thereafter, when it will proceed to consider the valuations and assessments entered in the assessment list, and, in all cases in which any property is for the first time assessed or the assessment is increased, it shall also give written notice thereof to the owner and to any lessee or occupier of the property.

(2) Any objection to a valuation or assessment shall be made in writing to the *[Board] before the date fixed in the notice, and shall state in what respect the valuation or assessment is disputed, and all objections so made shall be recorded in a register to be kept for the purpose by the *[Board].

(3) The objections shall be inquired into and investigated, and the persons making them shall be allowed an opportunity of being heard either in person or by authorised agent, by an Assessment Committee appointed by the *[Board].

(4) The Assessment Committee shall consist of not less than three persons and, b[* * *] it shall not be necessary to appoint to the Assessment Committee any member °[of the Board].

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] The words "where there is a Board" were repealed by Act 24 of 1936, S. 26.

[c] Substituted by S. 26, ibid, for "thereof".

**69. Authentication of assessment list.**—(1) When all objections made under Section 68 have been disposed of and the revision of the valuation and assessment has been completed, the assessment list shall be authenticated by the signature of the members of the Assessment Committee who shall, at the same time, certify that they have considered all objections duly made and have amended the list so far as is required by their decisions on such objections.

(2) The assessment list so authenticated shall be deposited in the office of the *[Board], and shall there be open, free of charge, during office hours to all owners, lessees and occupiers of property comprised therein or the authorised agents of such persons, and a public notice that it is so open shall forthwith be published.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**70. Evidential value of assessment list.**—Subject to such alterations as may thereafter be made in the assessment list under the provisions of this Chapter and to the result of any appeal made thereunder, the entries in the assessment list

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**Section 69 — Note 1**

**(1) As to the conditions of right to appeal, See Section 87 [a].**

authenticated and deposited as provided in Section 69 shall be accepted as conclusive evidence—

(i) for the purpose of assessing any tax imposed under this Act, of the annual value or other valuation of all buildings and lands to which such entries respectively refer, and

(ii) for the purposes of any tax imposed on buildings or lands, of the amount of each such tax leviable thereon during the year to which such list relates.

**71. Amendment of assessment list.**—[a][(1) The Board may amend the assessment list at any time—

(a) by inserting or omitting the name of any person whose name ought to have been or ought to be inserted or omitted, or

(b) by inserting or omitting any property which ought to have been or ought to be inserted or omitted, or

(c) by altering the assessment on any property which has been erroneously valued or assessed through fraud, accident or mistake, whether on the part of the Board or of the Assessment Committee or of the assessee, or

(d) by revaluing or re-assessing any property the value of which has been increased, or

(e) in the case of a tax payable by an occupier, by changing the name of the occupier :

Provided that no person shall by reason of any such amendment become liable to pay any tax or increase of tax in respect of any period prior to the commencement of the year in which the assessment is made.]

[b][(1a) Before making any amendment under sub-section (1) the Board shall give to any person affected by the amendment notice of not less than one month that it proposes to make the amendment.]

(2) Any person interested in any such amendment may tender an objection to the [c][Board] in writing before the time fixed in the notice, and shall be allowed an opportunity of being heard in support of the same in person or by authorised agent.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for the original sub-section.

[b] Inserted by S. 27, ibid.

[c] Substituted by S. 69, ibid, for "Cantonment Authority".

**72. Preparation of new assessment list.**—The [a][Board] shall prepare a new assessment list at least once in every three years, and for this purpose the provisions of Sections 66 to 71 shall apply in like manner as they apply for the purpose of the preparation of an assessment list for the first time.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**73. Notice of transfers.**—(1) Whenever the title of any person primarily liable for the payment of a tax on the annual value of any building or land to or over such building or land is transferred, the person whose title is transferred and the person to whom the same is transferred shall, within three months after the execution of the instrument of transfer or after its registration, if it is registered, or

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**Section 71 — Note 1**

(1) As to the conditions of right to appeal, See Section 87 (a).

**Section 72 — Note 1**

(1) "We think it unnecessary to require the preparation of a fresh assessment list every year, and have accordingly made it obligatory only once in three years." — Select Committee Report.

after the transfer is effected, if no instrument is executed, give notice of such transfer to the Executive Officer.

(2) In the event of the death of any person primarily liable as aforesaid, the person on whom the title of the deceased devolves shall give notice of such devolution to the Executive Officer within six months from the death of the deceased.

(3) The notice to be given under this section shall be in such form [a][as may be determined by rules made under Section 280,] and the transferee or other person on whom the title devolves shall, if so required, be bound to produce before the Executive Officer any documents evidencing the transfer or devolution.

(4) Every person who makes a transfer as aforesaid without giving such notice to the Executive Officer shall continue liable for the payment of all taxes assessed on the property transferred until he gives notice or until the transfer has been recorded in the registers of the [b][Board], but nothing in this section shall be held to affect the liability of the transferee for the payment of the said tax.

[c][(5) The Executive Officer shall record every transfer [d][or] devolution of title notified to him under sub-section (1) or sub-section (2) in the assessment list and other tax registers of the Board.]

[a] Substituted for "as the Executive Officer may direct" by the Cantonments (Amendment) Act, 1953 (2 of 1954), S. 12 [2-1-1954].
[b] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".
[c] Inserted by S. 28, ibid.
[d] Substituted by the Repealing and Amending Act, 1940 (32 of 1940), S. 3 and Sch. II, for "on".

**74. Notice of erection of buildings.**—(1) If any building is erected or re-erected within the meaning of Section 179, the owner shall give notice thereof to the Executive Officer within thirty days from the date of its completion or occupation, whichever is earlier.

(2) Any person failing to give the notice required by sub-section (1) shall be punishable with fine which may extend to fifty rupees or ten times the amount of the tax payable on the said buildings, as erected or re-erected, as the case may be, in respect of a period of three months, whichever is greater.

## REMISSION AND REFUND

**75. Demolition, etc., of buildings.**—If any building is wholly or partly demolished or destroyed or otherwise deprived of value, the [a][Board] may, on the application [b][in writing] of the owner [c][or occupier], remit or refund such portion of [d][any tax assessed on the annual value thereof] as it thinks fit.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".
[b] Inserted by the Cantonments (Amendment) Act, 1931 (7 of 1931), S. 4.
[c] Inserted by Act 24 of 1936, S. 29.
[d] Substituted by the Cantonments (Amendment) Act, 1927 (26 of 1927), S. 9, for "the tax payable thereon".

**76. Remission of tax.**—In a cantonment [a][* * *] when any building or land has remained vacant and unproductive of rent for [b][sixty] or more consecutive days [c][* * *] the [d][Board] shall remit or refund, as the case may be, such portion of [e][any tax assessed on the annual value thereof] [f][* * *] as may be proportionate to the number of days during which the said building or land has remained vacant and unproductive of rent:

[g][Provided that in any cantonment which the Central Government, by notification in the Official Gazette, has declared to be a hill cantonment and in respect of which the Central Government by the same or a like notification has declared

a portion of the year to be the season for the cantonment, when any building or land is leased for occupation through the season only, but the rent charged is the full annual rent, no remission or refund shall be admissible under this section in respect of any time outside the season during which the building or land remains vacant, but in respect of any time, not being less than sixty consecutive days during which within the season such building or land has remained vacant and unproductive of rent, the Board shall remit or refund such portion of any tax assessed on the annual value thereof as bears to the whole of the tax so assessed the same proportion as the number of days during which the building or land has remained vacant and unproductive of rent bears to the total length of the season.]

[a] The words "other than a hill cantonment" were repealed by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 30.
[b] Substituted by S. 30, ibid, for "ninety".
[c] The words "during any year" were repealed by S. 30, ibid.
[d] Substituted by S. 69, ibid, for "Cantonment Authority".
[e] Substituted by Cantonments (Amendment) Act, 1927 (26 of 1927), S. 10, for "the tax payable thereon."
[f] The words "and payable in respect of that year" were repealed by Act 24 of 1936, S. 30.
[g] Proviso was added by the Cantonments (Amendment) Act, 1942 (15 of 1942), S.7 [30-3-1942].

**77. Power to require entry in assessment list of details of buildings.**—For the purpose of obtaining a partial remission or refund of tax, the owner of a building composed of separate tenements may request the [a][Board], at the time of the assessment of the building, to enter in the assessment list, in addition to the annual value of the whole building, a note recording in detail the annual value of each separate tenement. When any tenement, the annual value of which has been thus separately recorded, has remained vacant and unproductive of rent for [b][sixty] or more consecutive days [c][* * *] such portion of [d][any tax assessed on the annual value of the whole building [e][* * *]] shall be remitted or refunded as would have been remitted or refunded if the tenement had been separately assessed.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".
[b] Substituted by S. 30, ibid, for "ninety".
[c] The words "during any year" were repealed by S. 30, ibid.
[d] Substituted by the Cantonments (Amendment) Act, 1927 (26 of 1927), S. 11, for "the tax payable in respect of that year on the whole building".
[e] The words "and payable in respect of that year" were repealed by Act 24 of 1936, S. 30.

[a][77A.] **Notice to be given of the circumstances in which remission or refund is claimed.**—[b][No remission or refund under [c][* * *] Section 76 or Section 77] shall be made unless notice in writing of the [d][fact that the building, land or tenement has become vacant and unproductive of rent] has been given to the [e][Board], and no remission or refund shall take effect in respect of any period commencing more than fifteen days before the delivery of such notice.

[a] The proviso to S. 77 was numbered as S. 77A by the Cantonments (Amendment) Act, 1927 (26 of 1927), S. 11.
[b] Substituted by S. 11, ibid, for "Provided that no such remission".
[c] The words "Section 75" were repealed by the Cantonments (Amendment) Act, 1931 (7 of 1931), S. 5.
[d] Substituted by S. 5, ibid, for "circumstances in which it is claimed".
[e] Substituted by the Cantonments (Amendment Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**78. What buildings, etc., are to be deemed vacant.**—[1] For the purposes of Sections 76 and 77 no building, tenement or land shall be deemed vacant if main-

tained as a pleasure resort or town or country house, or be deemed unproductive of rent if let to a tenant who has a continuing right of occupation thereof, whether he is in actual occupation or not.

(2) The burden of proving all facts entitling any person to claim relief under Section 75, or Section 76, or Section 77, shall be upon him.

**79. Notice to be given of every occupation of vacant building or house.**—(1) The owner of any building, tenement or land in respect of which a remission or refund of tax has been given under Section 76 or Section 77 shall give notice of the reoccupation of such building [a][tenement] or land within fifteen days of such reoccupation.

(2) Any owner failing to give notice required by sub-section (1) shall be punishable with fine which shall not be less than twice the amount of the tax payable on such building, tenement or land in respect of the period during which it has been reoccupied and which may extend to fifty rupees, or to ten times the amount of the said tax, whichever sum is greater.

[a] Inserted by the Repealing and Amending Act, 1934 (24 of 1934), S. 2 and Schedule I.

## CHARGE ON IMMOVABLE PROPERTY

**80. Tax on buildings and land to be a charge thereon.**—A tax assessed on the annual value of any building or land shall, subject to the prior payment of land revenue, if any, due to the Government thereon, be a first charge upon the building or land.

## OCTROI, TERMINAL TAX AND TOLL

**81. Inspection of imported goods, etc.**—Every person bringing or receiving any goods, vehicles or animals within the limits of any cantonment in which octroi or terminal tax or toll is leviable, shall, when so required by an officer duly authorised by the [a][Board] in this behalf, so far as may be necessary for ascertaining the amount of tax chargeable—

(a) permit that officer to inspect, examine or weigh such goods, vehicles or animals; and

(b) communicate to that officer any information, and exhibit to him any bill, invoice or document of a like nature, which such person may possess relating to such goods, vehicles or animals.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**82. Evasion of octroi or terminal tax.**—(1) Any person who takes or attempts to take past any octroi station or any other place appointed within a cantonment for the collection of octroi, terminal tax or toll any goods, vehicles or animals, on account of which octroi, terminal tax or toll is leviable and thereby evades, or attempts to evade, the payment of such octroi, terminal tax or toll, and any person who abets any such evasion or attempt at evasion, shall be punishable with fine which may extend either to ten times the value of such octroi, terminal tax

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**Section 81 — Note 1**

(1) Sections 81 to 83 of the Act are a special provision dealing with octroi duties. Cases coming under any of these Sections are excluded from the operation of Section 103 which deals only with general taxes. ('53) AIR 1953 Madh B 18 (19): ILR (1952) Madh B 334: 1953 Cri L Jour 236.

(2) As to the meaning of the word 'imported' See ('97) 22 Bom 843 (844).

**Section 82 — Note 1**

(1) "We have redrafted the first part of Sub-clause (1) of the clause in order to meet an objection made to the original clause that, as octroi limits are frequently situated some distance inside the boundary of a Cantonment, a person would be unable either to pay or tender octroi before introducing into the Cantonment the goods on which the tax is payable." — Select Committee Report.

(2) Sections 81 to 83 of the Act are a special provision dealing with octroi duties. Cases coming under any of these Sections are excluded from the operation of Section 103 which deals only with general taxes. ('53) AIR 1953 Madh B 18 (19): ILR (1952) Madh B 334: 1953 Cri L Jour 236.

or toll, or to fifty rupees, whichever is greater and which shall not be less than twice the value of such octroi terminal tax or toll, as the case may be.

(2) In case of non-payment of any octroi or terminal tax or toll on demand, the officer empowered to collect the same may seize any goods, vehicles or animals on which the octroi, terminal tax or toll is chargeable or any part or number thereof which is of sufficient value to satisfy the demand [a][and shall give a receipt specifying the items seized].

(3) The [b][Board], after the lapse of five days from the seizure, and after the issue of a notice in writing to the person in whose possession the goods, vehicles or animals were at the time of seizure, fixing the time and place of sale, may cause the property so seized, or so much thereof as may be necessary, to be sold by auction to satisfy the demand and any expenses occasioned by the seizure, custody and sale thereof, unless the demand and expenses are in the meantime paid:

Provided that the Executive Officer may, in any case, order that any article of a perishable nature which cannot be kept for five days without serious risk of damage, or which cannot be kept save at a cost which, together with the amount of octroi, terminal tax or toll, is likely to exceed its value, shall be sold after the lapse of such shorter time as he may, having regard to the nature of the article, think proper.

(4) If, at any time before the sale has begun, the person whose property has been seized tenders to the Executive Officer the amount of all expenses incurred and of the octroi terminal tax or toll, the Executive Officer shall release the property seized.

(5) The surplus, if any, of the sale-proceeds shall be credited to the cantonment fund, and shall, on application made to the [b][Board] within one year after the sale, be paid to the person in whose possession the property was at the time of seizure, and, if no such application is made, shall be the property of the [b][Board].

[a] Inserted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 31.
[b] Substituted by S. 69, ibid, for "Cantonment Authority".

**83. Lease of octroi, terminal tax or toll.**—It shall be lawful for the [a][Board], with the previous sanction of the [b][Officer Commanding-in-Chief, the Command,] to lease the collection of any octroi, terminal tax or toll for any period not exceeding one year; and the lessee and all persons employed by him in the management and collection of the octroi, terminal tax or toll shall, in respect thereof,—

(a) be bound by any orders made by the [a][Board] for their guidance;
(b) have such powers exercisable by officers or servants of the [a][Board] under this Act as the [a][Board] may confer upon them; and
(c) be entitled to the same remedies and be subject to the same responsibilities as if they were employed by the [a][Board] for the management and collection of the octroi, terminal tax or toll, as the case may be:

Provided that no article distrained may be sold except under the orders of the [a][Board].

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".
[b] Substituted by the Cantonments (Amendment) Act, 1926 (35 of 1926), S. 2, for "Officer Commanding the District".

## APPEALS

**84. Appeals against assessment.**—(1) An appeal against the assessment or levy of, or against the refusal to refund, any tax under this Act shall lie to the

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**Section 84 — Note 1**

(1) Where a plaintiff brings a suit for the refund of tax assessed under this Act, if the Court is of opinion that the tax levied is ultra vires of the Act, the Civil Court will have jurisdiction to entertain the suit; but not if the tax levied is intra vires ('39) AIR 1939 Lah 147 (148). * AIR 1967 All 301 (302). (Imposing of tax on Government building by Cantonment Board in

District Magistrate or to such other officer as may be empowered by the °[Central Government] in this behalf:

Provided that, where [a][° ° °] the person to whom the appeal would ordinarily lie is, or was when the tax was imposed, a member of the Board, the appeal shall lie to the Commissioner of the Division, or, in a °[State] where there are no Commissioners, to the District Judge.

(2) If, on the hearing of an appeal under this section, any question as to the liability to, or the principle of assessment of, a tax arises on which the officer hearing the appeal entertains reasonable doubt, he may, either of his own motion or on the application of the appellant, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer the statement with his own opinion on the point for the decision of the High Court.

(3) On a reference being made under sub-section (2), the subsequent proceedings in the case shall be, as nearly as may be, in conformity with the rules relating to references to the High Court contained in Order XLVI of the First Schedule to the Code of Civil Procedure, 1908.

[a] The words "there is a Board and" were repealed by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 32.

**85. Costs of appeal.**—In every appeal the costs shall be in the discretion of the officer hearing the appeal.

**86. Recovery of costs from Board.**—If the [a][Board] fails to pay any costs awarded to an appellant within ten days after the date of the order for payment thereof, the Officer awarding the costs may order the person having the custody of the balance of the cantonment fund to pay the amount.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**87. Conditions of right to appeal.**—No appeal shall be heard or determined under this Chapter unless—

(a) the appeal is, in the case of a tax assessed on the annual value of buildings or lands or both, brought within thirty days next after the date of the authentication of the assessment list under Section 69 (exclusive of the time requisite for obtaining a copy of the relevant entries therein), or, as the case may be, within thirty days of the date on which an amendment is finally made under Section 71, and, in the case of any other tax, within thirty days next after the date of the receipt of the notice of assessment or of alteration of assessment or, if no notice has been given, within thirty days next after the date of the presentation of the first bill in respect thereof:

Provided that an appeal may be admitted after the expiration of the period prescribed therefor by this section if the appellant satisfies the Court before whom

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**Section 84 — Note 1 (contd.)**

contravention of Section 99 (2).)

(2) The jurisdiction of the Civil Court is excluded in all matters relating to any valuation, assessment, liability to assessment or taxation by the Board. ('33) AIR 1933 All 163 (165).

(3) Section 84 gives a remedy to an aggrieved person against the levy of tax. Section 88 provides that an order passed by an appellate authority shall be final. Hence, the remedy of the person to resort to a Civil Court for refund of excess tax or for an injunction restraining the Cantonment Autrorities to levy alleged excess tax in future is clearly barred. ('37) AIR 1937 Sind 305 (306).

[But see AIR 1960 Punj 561 (564, 565): ILR (1960) 2 Punj 589 (DB). (Assessment of octroi duty not in accordance with provisions of Act and Jallundur Cantonment Octroi Bye Laws — Recovery also not in accordance with Sections 90, 91 and 92 of the Act — Civil suit for injuction restraining Board from recovering duty is maintainable.)]

(4) The notification issued under Section 10 (2) of the Criminal P. C. investing an Additional District Magistrate with all the powers of a District Magistrate under the Code as well as under any other law for the time being in force, sufficiently invests the said Magistrate with powers to deal with appeals against assessment under Section 84 of the Cantonments Act. AIR 1962 Punj 490 (492): 64 Pun LR 456.

the appeal is preferred that he had sufficient cause for not preferring it within that period;

(b) the amount, if any, in dispute in the appeal has been deposited by the appellant in the office of the [a][Board].

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

88. **Finality of appellate orders.**—The order of an appellate authority confirming, setting aside or modifying an order in respect of any valuation or assessment or liability to assessment or taxation shall be final:

Provided that it shall be lawful for the appellate authority, upon application or on its own motion, to review any order passed by it in appeal if application in this behalf is made within three months from the date of the original order.

## PAYMENT AND RECOVERY OF TAXES

89. **Time and manner of payment of taxes.**—Save as otherwise expressly provided under this Act, any tax imposed under the provisions of this Act shall be payable on such dates and in such instalments, if any, as the [a][Board] may by public notice direct.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

90. **Presentation of bill.**—(1) When any tax has become due, the Executive Officer shall cause to be presented to the person liable for the payment thereof a bill for the amount due.

(2) Every such bill shall specify the particulars of the tax and the period for which the charge is made.

91. **Notice of demand.**—(1) If the amount of the tax for which any bill has been presented is not paid to the [a][Board] within thirty days from the presentation thereof, the Executive Officer may cause to be served upon the person liable for the payment of the same a notice of demand in the form set forth in Schedule I.

(2) For every notice of demand which the Executive Officer causes to be served on any person under this section, a fee of such amount, not exceeding one rupee, as shall in each case be fixed by the Executive Officer, shall be payable by the said person and shall be included in the cost of recovery.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

92. **Recovery of tax.**—(1) If the person liable for the payment of any tax does not, within thirty days from the service of the notice of demand, pay the amount due, or show sufficient cause for non-payment of the same to the satisfaction of the Executive Officer, such sum, with all costs of recovery, may be recovered

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**Section 90 — Note 1**

(1) Assessment of octroi duty not in accordance with provisions of Act and Bye law No. 15 of Octroi bye laws of Jallundur Cantonment — Recovery also without complying with provisions of Sections 90, 91 and 92 — Civil suit for permanent injunction restraining Cantonment Board from recovering the duty is maintainable. AIR 1960 Punj 561 (564, 565): ILR (1960) 2 Punj 589 (DB).

**Section 91 — Note 1**

(1) Assessment of octroi duty not in accordance with provisions of Act and Bye Law No. 15 of Octroi Bye Laws of Jallundur Cantonment — Recovery also without complying with the provisions of Sections 90, 91 and 92 — Civil suit for permanent injunction restraining Cantonment Board from recovering the duty is maintainable. AIR 1960 Punj 561 (564, 565): ILR (1960) 2 Punj 589 (DB).

**Section 92 — Note 1**

(1) Assessment of octroi duty not in accordance with provisions of Act and Bye Law No. 15 of Octroi Bye Laws of Jallundur Cantonment — Recovery also without complying with the provisions of Sections 90, 91 and 92 — Civil suit for permanent injunction restraining Cantonment Board from recovering the duty is maintainable. AIR 1960 Punj 561 (564, 565): ILR (1960) 2 Punj 589 (DB).

under a warrant, issued in the form set forth in Schedule II, by distress and sale of the moveable property of the defaulter:

Provided that the Executive Officer shall not recover any sum the liability for which has been remitted on appeal under this Chapter.

(2) Every warrant issued under this section shall be signed by the Executive Officer.

**93. Distress.**—(1) It shall be lawful for any servant of the [a][Board] to whom a warrant issued under Section 92 is addressed to distrain wherever it may be found [b][in the cantonment], any moveable property of [b][or standing timber, growing crops or grass belonging to] the person therein named as defaulter, subject to the following conditions, exceptions and exemptions, namely:—

(a) the following property shall not be distrained:—

(i) the necessary wearing apparel and bedding of the defaulter, his wife and children,

(ii) tools of artisans,

(iii) books of account, or

(iv) when the defaulter is an agriculturist, his implements of husbandry, seed-grain, and such cattle as may be necessary to enable the defaulter to earn his livelihood;

(b) the distress shall not be excessive, that is to say, the property distrained shall be as nearly as possible equal in value to the amount recoverable under the warrant, and if any property has been distrained which in the opinion of the Executive Officer, should not have been distrained, it shall forthwith be returned.

(2) The person charged with the execution of a warrant of distress shall forthwith make an inventory of the property which he seizes under such warrant, and, shall, at the same time, give a written notice in the form set forth in Schedule III to the person in possession thereof at the time of seizure that the said property will be sold as therein mentioned.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] Inserted by S. 33, ibid.

**94. Disposal of distrained property.**—(1) When the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is, when added to the amount to be recovered, likely to exceed its value, the Executive Officer shall give notice to the person in whose possession the property was at the time of seizure that it will be sold at once, and shall sell it accordingly by public auction unless the amount mentioned in the warrant is forthwith paid.

(2) If the warrant is not in the meantime suspended by the Executive Officer, or discharged, the property seized shall, after the expiry of the period named in the notice served under sub-section (2) of Section 93, be sold by public auction by order of the Executive Officer.

(3) The surplus of the sale-proceeds, if any, shall forthwith be credited to the cantonment fund, and notice of such credit shall be given at the same time to the person from whose possession the property was taken, and, if the same is claimed by written application to the [a][Board] within one year from the date of the notice, a refund thereof shall be made to such person. Any surplus not claimed within one year as aforesaid shall be the property of the [a][Board].

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**Section 93 — Note 1**

(1) As to whether a distraint becomes invalid by reason of immaterial defect, See Section 105.

**Section 94 — Note 1**

(1) "We have made a slight amendment in Sub-clauses (1) and (2) which will require distrained property, if sold, to be sold by public auction." — Select Committee Report.

(4) For every distraint made under this Chapter a fee of such amount, not exceeding one rupee, as shall in each case be fixed by the Executive Officer shall be charged, and the said fee be included in the costs of recovery.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

95. **Recovery from a person about to leave cantonment.**—(1) If the Executive Officer has reason to believe that any person from whom any sum is due [a][or is about to become due] on account of any tax is about to remove from the cantonment, he may direct the immediate payment by such person of the sum so due or about to become due, and cause a bill for the same to be served on such person.

(2) If, on the service of such bill, such person does not forthwith pay the sum so due or about to become due, the amount shall be leviable by distress and sale in the manner hereinbefore provided in this Chapter, except that it shall not be necessary to serve upon the defaulter any notice of demand and the warrant of distress and sale may be issued and executed without any delay.

[a] Inserted by the Repealing and Amending Act, 1930 (8 of 1930), S. 2 and Schedule I.

96. **Power to institute suit for recovery.**—Instead of proceeding against a defaulter by distress and sale as hereinbefore provided in this Chapter, or after a defaulter has been so proceeded against unsuccessfully or with only partial success, any sum due or the balance of any sum due, as the case may be, from such defaulter on account of a tax may be recovered from him by a suit in any Court of competent jurisdiction.

## SPECIAL PROVISIONS RELATING TO TAXATION

97. **Power to prohibit or exempt from taxation.**—Every [a][Board] shall be deemed to be a Municipal Committee for the purposes of the Municipal Taxation Act, 1881.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

98. **Power to make special provision for conservancy in certain cases.**—A [a][Board] may make special provision for the cleansing of any factory, hotel, club or group of buildings or land used for any one purpose and under one management, and may fix a special rate and the dates and other conditions for periodical payment thereof, which shall be determined by a written agreement with the person liable for the payment of the conservancy or scavenging tax in respect of such factory, hotel, club or group of buildings or lands:

Provided that, in fixing the amount, proper regard shall be had to the probable cost to the [a][Board] of the services to be rendered.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

99. **Exemption in the case of buildings.**—(1) When, in pursuance of Section 98, a [a][Board] has fixed a special rate for the cleansing of any factory, hotel,

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**Section 99 — Note 1**

(1) We have added a Sub-clause (2) to this clause in order to exempt from property taxes certain classes of buildings which are commonly so exempt under Municipal enactments." — Select Committee Report.

(2) The word "occupation" should ordinarily be interpreted as actual occupation. In the case where the Government after taking the lease merely gives a licence to some person to come and live in it, it is entitled to take away the permission at any time and thus to come into possession itself. Thus, the fact that the person to whom possession has been given is residing in the building, does not make it any the less the actual occupation of the Government. AIR 1963 SC 963 (965, 966): (1963) 1 SCR 196.

(3) Imposition of tax on Government building by Cantonment Board in contravention of Section 99 (2) — Civil suit to challenge such illegal imposition of tax not barred. AIR 1967 All 301 (302).

club or group of buildings, or lands, such premises shall be exempted from the payment of any conservancy or scavenging tax imposed in the cantonment.

(2) The following buildings and lands shall be exempt from any tax on property [b][other than a tax imposed to cover the cost of specific services rendered by the Board], namely:—

(a) places set apart for public worship and either actually so used or used for no other purpose;

(b) buildings used for educational purposes and public libraries, playgrounds and dharmsalas which are open to the public and from which no income is derived;

(c) hospitals and dispensaries maintained wholly by charitable contributions;

(d) burning and burial-grounds not being the property of [c][the Government] or a [a][Board], which are controlled under the provisions of this Act;

(e) buildings or lands vested in a [a][Board]; and

(f) any buildings or lands, used or acquired for the public service or for any public purpose, which are the property of [c][the Government] or in the occupation of [c][the Central or any State Government].

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] Inserted by the Cantonments (Amendment) Act, 1942 (15 of 1942), S. 8 (30-3-1942).

[a][99A. **General power of exemption.**—The [c][Central Government] may, by notification in the [c][Official Gazette], exempt, either wholly or in part from the payment of any tax imposed under this Act, any person or class of persons or any property or goods or class of property or goods [b][* * *].]

[a] Inserted by the Cantonments (Amendment) Act, 1926 (35 of 1926), S. 7.

[b] The words "belonging to the Secretary of State for India in Council" were repealed by the Cantonments (Amendment) Act, 1931 (7 of 1931), S. 6.

**100. Exemption of poor persons.**—A [a][Board] may exempt, for a period not exceeding one year at a time from the payment of any tax or any portion of a tax imposed under this Act, any person who is in its opinion, by reason of poverty, unable to pay the same.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**101. Composition.**—(1) A [a][Board] may, with the previous sanction of the [b][Officer Commanding-in-Chief, the Command,] allow any person to compound for any tax.

(2) Every sum due by reason of the composition of a tax under sub-sec. (1) shall be recoverable as if it were a tax.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] Substituted by Act 35 of 1926, S. 2, for "Officer Commanding the District".

**102. Irrecoverable debts.**—A [a][Board] may write off any sum due on account of any tax [b][or rate] or of the costs of recovering any tax [b][or rate] if such sum is, in its opinion, irrecoverable:

[b][Provided that, where the sum written off in favour of any one person exceeds fifty rupees, the sanction of the Officer Commanding-in-Chief, the Command, shall be first obtained.]

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] Inserted by S. 34, ibid.

**103. Obligation to disclose liability.**—(1) The Executive Officer may, by written notice, call upon any inhabitant of the cantonment to furnish such information as may be necessary for the purpose of ascertaining—

(a) whether such inhabitant is liable to pay any tax imposed under this Act;

(b) at what amount he should be assessed; or

(c) the annual value of the building or land which he occupies and the name and address of the owner or lessee thereof.

[a][(2) If any person, when called upon under sub-section (1) to furnish information, neglects to furnish it within the period specified in this behalf by the Executive Officer or furnishes information which is not true to the best of his knowledge or belief, he shall be punishable with fine which may extend to one hundred rupees and shall also be liable to be assessed at such amount on account of tax as the Board may deem proper, and the assessment so made shall, subject to the provisions of this Act, be final.]

[a] Substituted for the former sub-section (2) by the Cantonments [Amendment] Act, 1953 (2 of 1954), S. 13 (2-1-1954).

**104. Immaterial error not to affect liability.**—No assessment and no charge or demand on account of any tax or fee shall be impeached or affected by reason only of any mistake in the name of any person liable to pay such tax or fee, or in the description of any property or thing, or any mistake in the amount of the assessment, charge or demand, if the directions contained in this Act and the rules and bye-laws made thereunder have in substance and effect been complied with; but any person who sustains any special damage by reason of any such mistake shall be entitled to recover compensation for the same by suit in a Court of competent jurisdiction.

**105. Distraint not to be invalid by reason of immaterial defect.**—No distress levied under this Chapter shall be deemed unlawful, nor shall any person making the same be deemed a trespasser, on account only of any defect of form in the notice of demand, warrant of distress or other proceeding relating thereto; nor shall any such person be deemed a trespasser ab initio on account of any irregularity afterwards committed by him; but any person who sustains any special damage by reason of any such irregularity shall be entitled to recover compensation for the same by suit in a Court of competent jurisdiction.

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**Section 103 — Note 1**

(1) Since Sections 81 to 83 of the Act are a special provision dealing with octroi duties, Section 103 which is a general provision dealing with general taxes must be read as excluding from its operation the cases which have been provided for in Sections 81 to 83. An executive Officer of the Cantonment Board cannot under Sec. 103, require an inhabitant of the Cantonment to give information regarding goods imported into the Cantonment to ascertain liability to pay octroi. Failure to give such information cannot entail conviction under Section 103 (2). Section 103 also cannot be regarded as one meant for demanding information which may enable the Executive Officer to detect an evasion of tax. The only object of the section is to enable the Executive Officer to ascertain the liability or any particular inhabitant of the Cantonment Board to pay any tax. ('53) AIR 1953 Madh B 18 (19): ILR (1952) Madh B 334: 1953 Cri L Jour 236.

(2) It is open to the authorities to use Section 103 (1) for the purpose of ascertaining whether there has been any evasion or attempt to evade the payment of octroi duty by calling on shopkeepers to furnish details of goods imported by them. ('58) AIR 1958 Punj 396 (397): 1958 Cri L Jour 1343.

(3) The word "neglects" in Section 103 (2) cannot mean that a person on whom a notice has been served can only be prosecuted if he fails to send any reply at all and that any sort of reply to the notice, however inadequate or evasive, is sufficient to avert prosecution for failure to comply with the terms of the notice. ('58) AIR 1958 Punj 396 (397): 1958 Cri L Jour 1343.

## CHAPTER VI

## CANTONMENT FUND AND PROPERTY

### CANTONMENT FUND

**106. Cantonment Fund.**—There shall be formed for every cantonment, a cantonment fund, and there shall be placed to the credit thereof the following sums, namely:—

(a) the balance, if any, of the cantonment fund formed for the cantonment under the Cantonments Act, 1910.

(b) all sums received by or on behalf of the [a][Board].

[a][° ° ° ° °]

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] The word "and" and cl. (c) were repealed by A.O., 1937. See, however, para. 4 of the India and Burma (Transitory Provisions) Order, 1937.

**107. Custody of Cantonment Fund.**—(1) Where in or near a cantonment there is a Government treasury or sub-treasury, or a branch of the Imperial Bank of India,[d] the cantonment fund shall be kept in such treasury, sub-treasury or bank, as the case may be.

(2) Where there is no such treasury, sub-treasury or bank, the cantonment fund may be deposited with any bank to which the Government treasury business has been entrusted, and, in the absence of such a bank, with any banker or person acting as a banker who has given such security for the safe custody of the fund and the payment on demand of the funds so deposited as the [a][Central Government] may in each case direct.

[a][(3) A [b][Board] may, from time to time, with the previous sanction of the [a][Officer Commandinding-in-Chief, the Command], invest any portion of its cantonment fund in securities of the [a][Central Government] or in such other securities, including fixed deposits in banks, as the [a][Central Government] may approve in this behalf, and may dispose of such investments or vary them for others of a like nature.]

(4) The income resulting from any fixed deposit or from any such security as

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**Chapter VI — Note 1**

(1) Chapter VI does not purport to provide for contracts in respect of immovable property. The manner of executing contracts is specially provided for by Chapter VII which applies equally to movable and immovable properties. ('57) AIR 1957 Andh Pra 859 (861).

**Section 106 — Note 1**

(1) The Indian Legislature had power under the Devolution Rules, 1920, to legislate with respect to cantonments and with respect to criminal law. The latter power included a power to legislate with respect to the destination of fines imposed for breaches of the criminal law. If therefore the Indian Legislature chose to legislate as regards any Courts of criminal jurisdiction in a Province, including the Courts in cantonment areas, such legislation would prevail over any provincial legislation with respect to the administration of justice within the Province. A suit was instituted by the United Provinces against the Central Government for a declaration that S. 106 (c) was ultra vires the then Legislature and all fines imposed and realised by criminal Courts for offences committed within the cantonment areas should be credited to the provincial revenues and that the Untied Provinces were entitled to recover and adjust all sums wrongly credited to the cantonment funds since 1924. It was held (i) that the Untied Provinces were not entitled to a declaration that Provisions of Section 106 (c) were ultra vires; (ii) that Section 106 (c) was a law in force immediately before the commencement of Part III of the Government of India Act, 1935, and under the India and Burma (Transitory Provisions) Order 1937, such fines credited to the cantonment funds must be deemed not to form part of the revenues of the United Provisions till 31st March 1939; and (iii) that as Section 106 (c) has been deleted under the Government of India (Adaptation of Indian Laws) Order, 1937, all such fines should be credited to the provincial revenues from 1st April 1939. ('39) AIR 1939 FC 58 (62, 64, 71); ILR (1939) Kar (FC) 96; 1939 FCR 124.

is referred to in sub-section (3) or from the proceeds of the sale of any such security shall be credited to the cantonment fund.

[a] Substituted by the Cantonments (Amendment) Act, 1927 (26 of 1927), S. 12, for the original sub-section.

[b] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[c] Substituted by S. 35, ibid, for "Local Government".

[d] Now the State Bank of India.

## PROPERTY

**108. Property.**—Subject to any special reservation made by the [a][Central Government] [b][° ° °], all property of the nature hereinafter in this section specified which has been acquired or provided or is maintained by a [c][Board] shall vest in and belong to that [c][Board] and shall be under its direction, management and control, that is to say,—

(a) all markets, slaughter-houses, manure and night-soil depots, and buildings of every description;

(b) all waterworks for the supply, storage or distribution of water for public purposes and all bridges, buildings, engines, materials and things connected therewith or appertaining thereto;

(c) all sewers, drains, culverts and water-courses, and all works, materials and things appertaining thereto;

(d) all dust, dirt, dung, ashes, refuse, animal matter, filth and rubbish of every kind, and dead bodies of animals collected by the [c][Board] from the streets, houses, privies, sewers, cesspools, or elsewhere, or deposited in places appointed by the [c][Board] for such purpose;

(e) all lamps and lamp-posts and apparatus connected therewith or appertaining thereto;

(f) all land or other property transferred to the [c][Board] [d][by the Central or a State Government], or by gift, purchase or otherwise for local public purposes; and

(g) all streets and the pavements, stones and other materials thereof, and also al ltrees, erections, materials, implements, and things existing on or appertaining to streets.

[a] Substituted by A.O., 1937, for "Governor-General in Council".

[b] The words "or the Local Government" were repealed by A.O., 1937.

[c] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[d] Substituted by A.O., 1937 and A.L.O., 1950, for "by His Majesty".

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**Section 108 — Note 1**

(1) Rule 4 of the Cantonment Administration Rules shows that land is classified as land which vests in the Crown and land which vests in the Board, and in the latter class is land which is vested in the Board under Section 108 and it is called class "C" land. By Rule 9, the management of this land is also vested in the Board so that the Board has both the ownership as well as the management and therefore, a suit for injunction restraining the Board from demolishing the structure built by the plaintiff on the alleged public street can only be filed against the Board and not against the Central Government. ('47) AIR 1947 All 243 (244).

(2) A combined reading of Sections 108 and 111 indicates that markets vest in and belong to the Board and the Board can lease the said markets in accordance with the statutory rules prescribed under Section 111. In discharging the statutory functions (regarding markets) the Board does not function as agent of Government. ('57) AIR 1957 Andh Pra 859 (860).

(3) If a person constructs a platform on a drain belonging to Board so as to provide ingress and egress to his house, he does not become owner thereof but he at least enjoys a right of its user unobstructed by any person except within certain limits prescribed by the Board and if any third person interferes in the exercise thereof, he has good possessory title to eject such a trespasser. (1954) 56 Punj LR 985 (988) (DB).

(4) As to ownership of land situated in a Cantonment, See Notes on Section 8.

**109. Application of cantonment fund and property.**—The cantonment fund and all property vested in a [a][Board] shall be applied for the purposes, whether express or implied, for which, by or under this Act or any other law for the time being in force, powers are conferred or duties or obligations are imposed upon the [a][Board]:

Provided that the [a][Board] shall not incur any expenditure for acquiring or renting land beyond the limits of the cantonment or for constructing any work beyond such limits except—

(a) with the sanction of the [c][Central Government], and

(b) on such terms and conditions as the [c][Central Government] may impose:

Provided, further, that priority shall be given in the order hereinafter set forth to the following liabilities and obligations of a [a][Board], that is to say,—

(a) to the liabilities and obligations arising from a trust legally imposed upon or accepted by the [a][Board];

(b) to the repayment of, and the payment of interest on, any loan incurred under the provisions of the Local Authorities Loans Act, 1914;

(c) to the payment of establishment charges;

(d) to the payment of such expenses on account of pauper lunatics sent from the cantonment to public lunatic asylums and mental hospitals as the [c][Central Government] directs the [a][Board] to pay; and

(e) to the payment of any sum the payment of which is expressly required by the provisions of this Act or any rule or bye-law made thereunder.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**110. Acquisition of immovable property.**—When there is any hindrance to the permanent or temporary acquisition upon payment of any land required by a [a][Board] for the purposes of this Act, the [c][Central Government] may, at the request of the [a][Board], [b][procure the acquisition thereof] under the provisions of the Land Acsuisition Act, 1894, and on payment by the [a][Board] of the compensation awarded under that Act and of the charges incurred by the Government in connection with the proceedings, the land shall vest in the [a][Board].

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] Substituted by A. O., 1937, for "proceed to acquire it".

**111. Power to make rules regarding cantonment fund and property.**—The [a][Central Government] may make rules[b] consistent with this Act to provide for all or any of the following matters, namely :—

(a) the conditions on which property may be acquired by [c][Boards] or on which property vested in a [d][Board] may be transferred by sale, mortgage, lease, exchange or otherwise; and

(b) any other matter relating to the cantonment fund or cantonment property in respect of which no provisions or insufficient provision is made by or under this Act, and provision is, in the opinion of the [a][Central Government], necessary.

[a] Substituted by A. O., 1937, for "Governor-General in Council".

[b] For the "Cantonment Property Rules, 1925, made under this section, see General Rules and Orders, Vol. V, page 467.

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**Section 109 — Note 1**

**(1) This Section includes among the payments to which priority must be given by a Board the payment of expenses on account of pauper lunaties sent from Cantonments to public asylums to such extent as the Central Government may direct — See the Report of the Select Committee.**

**Section 111 — Note 1**

**(1) A combined reading of Sections 108(a) and 111 indicates that markets vest in and belong to the Board and the Board can lease the said markets in accordance with the statutory rules prescribed under Section 111. In discharging the statutory functions (regarding markets) the Board does not function as agent of Government. ('57) AIR 1957 Andh Pra 859 (860).**

[c] Substituted by Act 24 of 1936, S. 69, for "Cantonment Authorities".
[d] Substituted by S. 69, ibid, for "Cantonment Authority".

## CHAPTER VII

## CONTRACTS

**112. Contracts by whom to be executed.**—Subject to the provisions of this Chapter, every [a][Board] shall be competent to enter into and perform any contract necessary for the purposes of this Act.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**113. Sanction.**—(1) Every contract—

(a) for which budget provision does not exist, or

(b) which involves a value or amount exceeding [a][two hundred rupees],

shall require sanction of the [b][Board].

(2) Every contract other than a contract such as is referred to in sub-section (1) shall be sanctioned by the [b][Board] or by the Executive Officer on behalf of the [b][Board].

[a] Substituted for "one hundred rupees" by the Cantonments (Amendments) Act, 1953 (2 of 1954), S. 14 [2-1-1954].

[b] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**114. Execution of contracts.**—(1) Every contract made by or on behalf of a [1][Board] the value or amount of which exceeds [2][one hundred rupees], shall be in writing and every such contract shall, [3][* * *] be signed by two members, of whom the President or the Vice-President shall be one, and be countersigned by the Executive Officer and be sealed with the common seal of the Board, [4][* * *]:

Provided that [5][* * *] the Executive Officer may in a case of urgency, with the previous sanction of the President of the Board, execute on behalf of the Board any contract the value or amount of which does not exceed [6][five hundred rupees].

(2) Where an Executive Officer executes a contract on behalf of a Board under sub-section (1), he shall submit a report of his action and of the reasons therefor to the Board at its next meeting.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] Substituted for "fifty rupees" by the Cantonments (Amendment) Act, 1953 (2 of 1954), S. 15 (2-1-1954).

[c] The words "where there is a Board" were repealed by S. 36 of Act 24 of 1936.

[d] The words "or, where there is no Board, be signed by the Officer Commanding the station, and be sealed with the official seal of the Cantonment Authority" were repealed by S. 36, ibid.

[e] Substituted for "two hundred rupees" by Act 2 of 1954, S. 15 (2-1-1954).

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**Chapter VII — Note 1**

(1) Chapter 7 provides specifically for the manner of executing contracts. The provisions of this chapter apply equally to movable or immovable properties. ('57) AIR 1957 Andh Pra 859 (861).

**Section 114 — Note 1**

(1) In the case of a contract infringing the provisions of Section 114 (1) read with Section 115 a plea of part performance under Section 53-A of Transfer of property Act cannot be sustained. ('57) AIR 1957 Andh Pra 859 (861).

(2) Contract between Board and plaintiff to carry all works of construction during time specified — Contractor also bound to construct original work not exceeding Rs. 5000. Limit does not apply to repair work and no sanction necessary. 1968 MPLJ 425: 1969 Jab LJ 304.

**115. Contracts improperly executed not to be binding on a Board.**—If any contract is executed by or on behalf of a [a][Board] otherwise than in conformity with the provisions of this Chapter, it shall not be binding on the [a][Board].

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority."

## CHAPTER VIII

## DUTIES AND DISCRETIONARY FUNCTIONS OF [a][BOARDS]

**116. Duties of Board.**—It shall be the duty of every [b][Board], so far as the funds at its disposal permit, to make reasonable provision within the cantonment for—

(a) lighting streets and other public places;

(b) watering streets and other public places;

(c) cleansing streets, public places and drains, abating nuisances and removing noxious vegetation;

(d) regulating offensive, dangerous or obnoxious trades, calling and practices;

(e) removing, on the ground of public safety, health or convenience, undesirable obstructions and projections in streets and other public places;

(f) securing or removing dangerous buildings and places;

(g) acquiring, maintaining, changing and regulating places for the disposal of the dead;

(h) constructing, altering and maintaining streets, culverts, markets, slaughter-houses, latrines, privies, urinals, drains, drainage works and sewerage works;

(i) planting and maintaining trees on roadsides and other public places;

(j) providing or arranging for a sufficient supply of pure and wholesome water, where such supply does not exist, guarding from pollution water used for human consumption, and preventing polluted water from being so used;

(k) registering births and deaths;

(l) establishing and maintaining a system of public vaccination;

(m) establishing and maintaining or supporting public hospitals and dispensaries, and providing public medical relief;

(n) establishing and maintaining [c][or assisting] primary schools;

(o) rendering assistance in extinguishing fires, and protecting life and property when fires occur;

(p) maintaining and developing the value of property vested in, or entrusted to the management of, the [b][Board]; and

(q) fulfilling any other obligation imposed upon it by or under this Act or any other law for the time being in force.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69 for "Cantonment Authorities."

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**Section 115 — Note 1**

(1) In the case of a contract which infringes the provisions of Section 114 (1) read with Section 115 a plea of part performance under Section 53-A of Transfer of Property Act cannot be sustained. ('57) AIR 1957 Andh Pra 859 (861).

**Chapter IX — Note 1**

(1) As to the power of the Central Government to extend any of the provisions of Chapter IX to any area beyond a cantonment and in the vicinity thereof, See Section 286.

**Section 116 — Note 1**

(1) Statute cast duty upon Cantonment Boards to render certain services in relation to road and therefore the tax collected by Cantonment Board on the trucks going to railway Station through the Cantonment area is "toll". AIR 1967 All 15 (17).

[b] Substituted by S. 69, ibid, for "Cantonment Authority".
[c] Inserted by S. 37, ibid.

[a][116A. Power to manage property.—A [b][Board] may, subject to any conditions imposed by the [c][Central Government], manage any property entrusted to its management by the [c][Central Government] on such terms as to the sharing of rents and profits accruing from such property as may be determined by rule made under section 280.]

[a] Inserted by the Cantonments (Amendment) Act, 1925 (7 of 1925), S. 6.
[b] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority."

117. Discretionary functions of Board.—[a][(1) A [b][Board] may, within the cantonment, make provision for

(a) laying out in areas, whether previously built upon or not, new streets, and acquiring land for that purpose and for the construction of buildings, and compounds of buildings, to abut on such streets;
(b) constructing, establishing or maintaining public parks, gardens, offices, dairies, bathing or washing places, drinking fountains, tanks, wells and other works of public utility;
(c) reclaiming unhealthy localities;
(d) furthering educational objects by measures other than the establishment and maintenance of primary schools;
(e) taking a census and granting rewards for information which may tend to secure the correct registration of vital statistics;
(f) making a survey;
(g) giving relief on the occurrence of local epidemics by the establishment or maintenance of relief works or otherwise;
(h) securing or assisting to secure suitable places for the carrying on of any offensive, dangerous or obnoxious trade, calling or occupation;
(i) establishing and maintaining a farm or other place for the disposal of sewage;
(j) constructing, subsidising or guaranteeing tramways or other means of locomotion, and electric lighting or electric power works; [c][or]
(k) adopting any measure, other than a measure specified in section 116 or in the foregoing provisions of this section, likely to promote the safety, health or convenience of the inhabitants of the cantonment; [d][ * ]
[e][ * * * * * * ]

[f][(2) A Board may, either within or outside the cantonment, make provision for the doing of anything on which expenditure is declared by the Central Government, or by the Board with the sanction of the Central Government, to be an appropriate charge on the cantonment fund.]

[a] Section 117 was re-numbered as sub-section (1) of that section by the Cantonments (Amendment) Act, 1942 (15 of 1942) S. 9, (30-3-1952).
[b] Substitunted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".
[c] The word "or" was added by the Cantonments (Amendment) Act, 1942 (15 of 1942), S. 9.
[d] The word "or" was omitted by S. 9, ibid.
[e] The Clause (l) was omitted by S. 9, ibid.
[f] Sub-section (2) was added by S. 9, ibid.

[a][117A. Power of expenditure for educational purposes outside the cantonment.—A [b][Board] may make provision for educationa objects outside the can-

tonment if it is satisfied that the interests of the residents of the cantonment will be served thereby.]

[a] Inserted by the Cantonments (Amendment) Act, 1926 (35 of 1926), S. 8.
[b] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority"

## CHAPTER IX

## PUBLIC SAFETY AND SUPPRESSION OF NUISANCES

### General Nuisances

**118. Penalty for causing nuisances.**—(1) Whoever—

(a) in any street or other public place within a cantonment,—

(i) is drunk and disorderly or drunk and incapable of taking care of himself; or

(ii) uses any threatening, abusive or insulting words, or behaves in a threatening or insulting manner with intent to provoke a breach of the peace, or whereby a breach of the peace is likely to be occasioned; or

(iii) eases himself, or wilfully or indecently exposes his person; or

(iv) loiters, or begs importunately, for alms; or

(v) exposes or exhibits, with the object of exciting charity, and deformity or disease or any offensive sore or wound; or

(vi) carries meat exposed to public view; or

(vii) is found gaming; or

(viii) pickets animals, or collects carts; or

(ix) being engaged in the removal of night-soil or other offensive matter or rubbish, wilfully or negligently permits any portion thereof to spill or fall, or neglects to sweep away or otherwise effectually to remove any portion thereof which may spill or fall in such street or place; or

(x) without proper authority affixes upon any building, monument, post, wall, fence, tree or other thing, any bill, notice or other document; or

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**Section 118 — Note 1**

Section 118 (1) (a) (iii) — (1) The offence is complete if the exposure is "wilful or indecent" and in a public place. ('26) AIR 1926 All 263 (264): 27 Cri L Jour 107.

Section 118 (1) (c) — (2) The compound of a private house is not a public place. ('87) 1887 All WN 19 (19).

(3) Verandah of a private house accessible to a public street is not a public place within the meaning of Section 118 (1) (c). ('31) AIR 1931 Lah 576 (576): 33 Cri L Jour 345.

[See ('90) 1890 Pun Re (Cr) No. 11 (Case under Gambling Act, 1867 — Tharras attached to shops and situated on the verge of bazar — Not a public place.) * ('87) 1887 All WN 75 (75). (Gambling Act 1867 — Chabutra of a private house — Not a public place.) * ('81) 1881 All WN 8 (8). (Gambling Act, 1867 — Chabutra of a shop — Not a public place.)]

(4) A takhtposh or moveable wooden platform cannot be held to be "earth or material of any description, or any offensive matter, or rubbish" within the meaning of Section 118 (1) (c). ('27) AIR 1927 Lah 647 (648): 28 Cri L Jour 683.

(5) A master cannot be convicted for an act of his servant in carrying meat exposed to public view. ('08) 9 Cri L Jour 182 (183) (DB) (Bom).

Section 118 (1) (f) — (6) Persons found gambling in a common gaming house cannot be convicted for "using" the house. ('06) 3 Cri L Jour 78 (79) (Lah).

(7) A house rented by some members in the name of one, who kept the house. The use was restricted to members only, some of whom played for money with cards, the member keeping the house not making any profit. It was held that the house was not a "common gaming house." (1862-68) 1862-68 Rat Un Cr C 706 (706).

(xi) without proper authority defaces or writes upon or otherwise marks any building, monuments, post, wall, fence, tree or other thing; or

(xii) without proper authority removes, destroys, defaces or otherwise obliterates any notice or other document put up or exhibited under this Act; or

(xiii) without proper authority displaces, damages, or makes any alteration in, or otherwise interferes with, the pavement, gutter, storm-water drain, flags or other materials of any such street, or any lamp bracket, direction-post, hydrant or waterpipe maintained by the [a][Board] in any such street or public place, or extinguishes a public light or

(xiv) carries any corpse not decently covered or without taking due precautions to prevent risk of infection or injury to the public health or annoyance to passers-by or to persons dwelling in the neighbourhood; or

(xv) carries night-soil or other offensive matter or rubbish at any hour prohibited by the [a][Board] by public notice, or in any pattern of cart or receptacle which has not been approved for the purpose by the [a][Board], or fails to close such cart or receptacle when in use; or

(b) carries night-soil or other offensive matter or rubbish along any route in contravention of any prohibition made in this behalf by the [b][Board] by public notice; or

(c) deposits, or causes or permits to be deposited, earth or materials of any description, or any offensive matter or rubbish, in any place not intended for the purpose in any street or other public place or waste or unoccupied land under the management of the [a][Board]; or

(d) having charge of a corpse fails to bury, burn or otherwise lawfully dispose of the same within twenty-four hours after death; or

(e) makes any grave or buries or burns any corpse in any place not set apart for such purpose; or

(f) keeps or uses, or knowingly permits to be kept or used, any place as a common gaming house, or assists in conducting the business of any common gaming house; or

(g) at any time or place at which the same has been prohibited by the [a][Board] by public or special notice, beats a drum or tom-tom, or blows a horn or trumpet, or beats any utensil, or sounds any brass or other instrument or plays any music; or

(h) disturbs the public peace or order by singing, screaming or shouting; or

(i) lets loose any animal so as to cause, or negligently allows any animal to cause, injury, danger, alarm or annoyance to any person; or

(j) being the occupier of any building or land in or upon which an animal dies, neglects within three hours of the death of the animal, or, if the death occurs at night, within three hours after sunrise, either—

(i) to report the occurrence to the Executive Officer or to an officer, if any, appointed by him in this behalf with a view to securing the removal and disposal of the carcase by the public conservancy establishment; or

(ii) to remove and dispose of the carcase in accordance with any general directions given by the [a][Board] by public notice or any special directions given by the Executive Officer on receipt of such report as aforesaid; or

(k) save with the written permission of the [a][Board] and in such manner as it may authorise, stores or uses night-soil, manure, rubbish or any other substance emitting an offensive smell; or

(l) uses or permits to be used as a latrine any place not intended for that purpose;

shall be punishable with fine which may extend to fifty rupees.

(2) Whoever does not take reasonable means to prevent any child under the age of twelve years being in his charge from easing himself in any street or other public place within the cantonment shall be punishable with fine which may extend to twenty-five rupees.

(3) The owner or keeper of any animal found picketed or straying without a keeper in a street or other public place in a cantonment shall be punishable with fine which may extend to twenty rupees.

(4) Any animal found picketed [b][or straying] as aforesaid may be removed by any officer or servant of the [a][Board] or by any police officer to a pound [c][* * *].

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] Inserted by the Cantonments (Amendment) Act, 1953 (2 of 1954), S. 13 (2-1-1954).

[c] The words "as if the animal had been found straying," were omitted, ibid.

## Dogs

**119. Registration and control of dogs.**—(1) A [a][Board] may make bye-laws to provide for the registration of all dogs kept within the cantonment.

(2) Such bye-laws shall—

(a) require the registration, by the Officer Commanding each military unit, of all dogs kept in the lines occupied by that unit;

(b) require that every registered dog shall wear a collar to which shall be attached a metal token to be issued by the registration authority, and fix the fee payable for the issue thereof;

(c) require that any dog which has not been registered or which is not wearing such token shall, if found in any public place, be detained at a place set apart for the purpose; and

(d) fix the fee which shall be charged for such detention and provide that any such dog shall be liable to be destroyed or otherwise disposed of unless it is claimed and the fee in respect thereof is paid within one week;

and may provide for such other matters as the [a][Board] thinks fit.

(3) A [a][Board] may—

(a) cause to be destroyed, or to be confined for such period as [b][it] may direct, any dog or other animal which is, or is reasonably suspected to be, suffering from rabies; or which has been bitten by any dog or other animal suffering or suspected to be suffering from rabies;

(b) by public notice direct that, after such date as may be specified in the notice, dogs which are without collars or without marks distinguishing them as private property and are found straying on the streets or beyond the enclosures of the houses of their owners, if any, may be destroyed, and cause them to be destroyed accordingly.

(4) No damages shall be payable in respect of any dog or other animal destroyed or otherwise disposed of under this section.

(5) Whoever, being the owner or person in charge of any dog, neglects to restrain it so that it shall not be at large in any street without being muzzled and without being secured by a chain lead in any case in which—

(a) he knows that the dog is likely to annoy or intimidate any person, or

(b) the [a][Board] has, by public notice during the prevalence of rabies, directed that dogs shall not be at large without muzzles and chain leads.

shall be punishable with fine which may extend to one hundred rupees.

(6) Whoever in a cantonment —

(a) allows any ferocious dog which belongs to him or is in his charge to be at large without being muzzled, or

(b) sets on or urges any dog or other animal to attack, worry or intimidate any person, or

(c) knowing or having reason to believe that any dog or animal belonging to him or in his charge has been bitten by an animal suffering or reasonably suspected to be suffering from rabies, neglects to give immediate information of the fact to the Executive Officer or gives information which is false.

shall be punishable with fine which may extend to two hundred rupees.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] Substituted for "that Authority" by the Repealing and Amending Act, 1939 (34 of 1939), S. 2 and Schedule I. (28-9-1939).

### Traffic.

120. **Rule of the road.**—Whoever in driving, leading or propelling a vehicle along a street fails except in a case of actual necessity,—

(a) to keep to the left when passing a vehicle coming from the opposite direction, or

(b) to keep to the right when passing a vehicle going in the same direction as himself,

shall be punishable with fine which may extend to fifty rupees.

### Prevention of Fire, etc.

121. **Use of inflammable materials for building purposes.**—(1) A [a][Board] may by public notice, direct that within such limits in the cantonment as may be specified in the notice, the roofs and external walls of huts or other buildings shall not, without the permission in writing of the [a][Board], be made or renewed of grass, mats, leaves or other inflammable materials, and may, by notice in writing require any person who has disobeyed any such direction as aforesaid to remove or alter the roofs or walls so made or renewed.

(2) A [a][Board] may, by notice in writing, require the owner of any building in the cantonment which has an external roof or wall made of any such material as aforesaid to remove such roof or wall within such time as may be specified in the notice, notwithstanding that a public notice under sub-section (1) has not been issued or that such roof or wall was made with the consent of the [a][Board] or before the issue of such public notice:

Provided that, in the case of any such proof or wall in existence before the issue of such a public notice or made with the consent of the [a][Board], that Authority[b] shall make compensation, not exceeding the original cost of constructing the roof or wall, for any damage caused by the removal.

[a] Substituted by S. 69 of the Cantonments (Amendment) Act, 1936 (24 of 1936) for "Cantonment Authority."

[b] Sic. The reference is obviously to the Board.

122. **Stacking or collecting inflammable materials.**—A [a][Board] may, by public notice, prohibit in any case where such prohibition appears to it to be necessary for the prevention of danger to life or property, the stacking or collecting of wood, dry grass, straw or other inflammable materials, or the placing of mats or thatched huts or the lighting of fires in any place in the cantonment, within any limits therein, which may be specified in the notice.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority."

**123. Care of naked lights.**—No person shall set a naked light on or near any building in any street or other public place in a cantonment in such manner as to cause danger of fire:

Provided that nothing in this section shall be deemed to prohibit the use, subject to the permission in writing of the [a][Board], of lights for purposes of illumination on the occasion of a festival or public or private entertainment.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**124. Regulation of cinematographic and dramatic performances.**—(1) Notwithstanding anything contained in the Cinematograph Act, 1918, no exhibition of pictures or other optical effects by means of a cinematograph or other like apparatus for the purpose of which inflammable films are used, and no public dramatic performance or pantomime, shall be given in any cantonment elsewhere than in premises for which a licence has been granted by the [a][Board] under this section.

(2) If the owner of a cinematograph or other apparatus uses the apparatus or allows it to be used, or if any person takes any part in any public dramatic performance or pantomime, in contravention of the provisions of this section, or if the occupier of any premises allows them to be used in contravention of the provisions of this section or of any condition of any licence granted under this section, he shall be punishable with fine which may extend to two hundred rupees, and, in the case of a continuing offence, with an additional fine which may extend to fifty rupees for each day after the first during which the offence continues.

(3) Nothing in this section shall be deemed to prohibit the giving of any exhibition or any dramatic performance or pantomime in any theatre or institute which is the property of [a][the Government] where the exhibition, performance or pantomime is held with the permission and under the control of the military authorities.

[a] Substituted by S. 69 of the Cantonments (Amendment) Act, 1936 (24 of 1936), for "Cantonment Authority".

**125. Discharging fireworks, fire-arms, etc.**—Whoever in a cantonment discharges any fire-arm or lets off fire-works or fire-balloons, or engages in any game in such manner as to cause or to be likely to cause danger to persons passing by or dwelling or working in the neighbourhood or risk of injury to property shall be liable to fine which may extend to fifty rupees.

**126. Power to require buildings, wells etc., to be rendered safe.**—Where in a cantonment any building or wall, or anything affixed thereto, or any well, tank, reservoir, pool, depression, or excavation, or any bank or tree, is in the opinion of the [a][Board], [b][in a ruinous state or], for want of sufficient repairs, protection or enclosure, [b][a nuisance or] dangerous to persons passing by or dwelling or working in the neighbourhood, the [a][Board] [c][by notice in writing may], require the owner [d][or part-owner or person claiming to be the owner or part-owner thereof, or, fail-

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**Section 126 — Note 1**

(1) Section 126 clearly lays down two conditions, on the fulfilment of either of which a building may be ordered to be removed: (1) it must be in ruinous state, or (2) for want of sufficient repairs, protection or enclosure it is nuisance or dangerous to persons passing by or dwelling or working in the neighbourhood; in the cases falling under the first category, it is not necessary to show affirmatively that it portended danger to human beings. In the cases falling under the second category, it must further be shown that it was a nuisance or dangerous to persons. ('58) AIR 1958 Pat 71 (73) (DB).

(2) There was a conflict of opinion as to whether Section 126 requires the Board to give, to the owner of property in regard to which action is taken under the section, an option whether to remove the same or to repair it or whether the Board can require the removal without such option. The amendment made to section in 1944 now sets the conflict at rest by establishing the latter view.

(3) Option to determine question whether the building is in a dangerous condition and whether the owner shall be required to remove or repair the same is an option given to the Board and not to the owner. ('19) AIR 1919 Bom 172 (173): 20 Cri L Jour 697.

(4) It is for the Board to consider whether in its opinion the building was in a ruinous state, and if the Board has formed the opinion that the building is in ruinous state, then in the absence of suffi-

ing any of them, the occupier] thereof [e][to remove the same or may require him to repair], [f][or to protect or to enclose] the same in such manner as it thinks necessary, and, if the danger is, in the opinion of the [a][Board], imminent, it shall forthwith take such steps as it thinks necessary to avert the same.

[a] Substituted by Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69 for "Cantonment Authority".
[b] Inserted by the Cantonments (Amendment) Act, 1925 (7 of 1925), S. 7.
[c] Substituted for the words "may", by notice in writing" by the Cantonments (Amendment) Act, 1944 (8 of 1944), S. 6 (17-3-1944).
[d] Inserted by S. 38 of Act 24 of 1936.
[e] Substituted by S. 6 of Act 8 of 1944, for "either to remove the same or to repair".
[f] Substituted by Act 24 of 1936, S. 38, for "protect or enclose".

**127. Enclosure of waste land used for improper purposes.**—A [a][Board] may, by notice in writing, require the owner or part-owner, or person claiming to be the owner or part-owner, of any building or land in the cantonment, or the lessee or the person claiming to be the lessee of any such land, which, by reason of disuse or disputed ownership or other cause, has remained unoccupied and has become the resort of idle and disorderly persons or of persons who have no ostensible means of subsistence or cannot give a satisfactory account of themselves, or is used for gaming or immoral purposes, or otherwise occasions or is likely to occasion a nuisance, to secure and enclose the same within such time as may be specified in the notice.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

## CHAPTER X

## SANITATION AND THE PREVENTION AND TREATMENT OF DISEASE

### Sanitary Authorities

**128. Responsibility for sanitation.**—The following officers shall, for the purposes of sanitation, have control over and be responsible for maintaining in a sani-

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**Section 126 — Note 1 (contd.)**

cient material on the record it is difficult to say that that opinion is based upon no evidence so as to deprive the Board of its jurisdiction to order removal. ('58) AIR 1958 Pat 71 (73): 36 Pat 1264 (DB).

(5) A notice, which does not specify at all what kind of repairs the cantonment authority requires the owner to make to the houses specified in the notice, is illegal. ('12) 13 Cri L Jour 17 (17, 18): 1912 Pun Re (Cr) No. 3.

(6) The cantonment authorities have discretion to issue orders to repair buildings for public safety and Courts have no jurisdiction to interfere. ('04) 1 Cri L Jour 1093 (1094): 1904 Pun Re No. 19, p. 56.

(7) Cantonment committee must give the owner of a building destroyed by fire the option of removing its remains or repairing it and a conviction for failure to comply with a notice without the option is illegal. ('05) 3 Cri L Jour 301 (302): 1905 Pun Re (Cr) No. 23.

(8) The section does not contemplate the issue of a notice for effecting repairs to houses that may be dangerous to the tenants or uninhabitable. Where the repairs are not necessary for "public safety" the issue of notice is illegal and conviction based thereon is illegal. ('06) 3 Cri L Jour 346 (348): 1906 Pun Re No. 4 (DB).

[See also ('07) 5 Cri L Jour 493 (495): 1907 Pun Re (Cr) No. 3. (Case under 1899 Code — Notice issued without resolution of cantonment committee — Conviction for non-compliance of notice is illegal.)]

(9) Section 126 does nothing beyond imposing reasonable restrictions upon the fundamental right to hold his property under Article 19 (1) (f) of the Constitution. The provision is sufficiently protected by Clause (5) of Article 19. ('58) AIR 1958 Pat 71 (74): 36 Pat 1264 (DB).

(10) The Cantonments Act is an existing law and falls under sub-clause (a) of Clause (5) of Article 31 and is therefore, not open to attack on the ground either that there was no public purpose or that no compensation was provided, and is ipso facto saved from being questioned on the ground of their contravention of Clause (2) of this article. ('58) AIR 1958 Pat 71 (74): 36 Pat 1264 (DB).

**Chapter X — Note 1**

(1) As to the power of the Central Government to extend any of the provisions

tary condition, those parts of a cantonment, respectively, which are specified in the case of each, that is to say:—

(a) the [a][Officer Commanding the station]—all buildings and lands which are occupied or used for military purposes;

(b) the Officer Commanding the air forces in the cantonment—all buildings and lands which are occupied or used for air force purposes ;

(c) the head of any civil department or railway administration occupying as such any part of the cantonment—all buildings and lands in his charge as head of that department or administration.

[a] Substituted by the Cantonments (Amendment) Act, 1925 (7 of 1925), S. 14, for "Commanding Officer of the Cantonment".

**129. General duties of Health Officer.**—(1) The Health Officer shall exercise a general sanitary supervision over the whole cantonment, and shall submit monthly to the [a][Board] a report as to the sanitary condition of the cantonment, together with such recommendations in connection therewith as he thinks fit.

(2) The Assistant Health Officer shall perform such duties in connection with the sanitation of the cantonment as are, subject to the control of the [a][Board], allotted to him by the Health Officer.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

### Conservancy and Sanitation

**130. Public latrines, urinals and conservancy establishments.**—All public latrines and urinals provided or maintained by a [a][Board] shall be so constructed as to provide separate compartments for each sex and not to be a nuisance, and shall be provided with all necessary conservancy establishments, and shall regularly be cleansed and kept in proper order.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**131. Power of Board to undertake private conservancy arrangements.**—(1) On the application or with the consent of the occupier of any building or land, or, where the occupier of any building or land fails to make arrangements to the satisfaction of the [a][Board] for the matters referred to in this section, without such consent, and after giving notice in writing to the occupier, a [a][Board] may undertake the house scavenging of any building or land in the cantonment for such period as it thinks fit on such terms as it may prescribe in this behalf.

(2) The [a][Board] may, by public notice, issue directions as to the time at which, all matter removed in the performance of such duties shall be the property of the [b][Board].

(3) For the purposes of this section, "house scavenging" means the removal of filth or rubbish or other offensive matter from a privy, latrine, urinal, drain, cesspool, or other common receptacle for such matter.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] Substituted for the word "Authority" by the Repealing and Amending Act, 1939 (34 of 1939), S. 2 and Sch. I (28-9-1939).

**132. Deposit and disposal or rubbish, etc.**—(1) Every [a][Board] shall provide or appoint, in proper and convenient situations, public receptacles, depots or places for the temporary deposit or disposal of household rubbish, offensive matter, carcases of dead animals and sewage.

(2) The [a][Board] may, by public notice, issue directions as to the time at which, the manner in which, and the conditions subject to which, any matter referred

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**Chapter X — Note 1 (contd.)**

**(d) Chapter X to any area beyond a cantonment and in the vicinity thereof, see Section 286.**

to in sub-section (1) may be removed along a street or may be deposited or otherwise disposed of.

(3) All matter deposited in receptacles, depots or places provided or appointed under this section shall be the property of the [a][Board].

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**133. Cesspools, receptacles for filth, etc.**—The Executive Officer of any cantonment may, by notice in writing,—

(a) require any person having the control whether as owner, lessee or occupier of any land or building in the cantonment—

(i) to close any cesspool appertaining to the land or building which is in the opinion of the Executive Officer, a nuisance, or

(ii) to keep in a clean condition, in such manner as may be prescribed by the notice, any receptacle for filth or sewage accumulating on the land or in the building, or

(iii) to prevent the water of any private latrine, urinal, sink or bath-room or any other offensive matter, from soaking, draining or flowing, or being put, from the land or building upon any street or other public place, or into any water-course or into any drain not intended for the purpose, or

(iv) to collect and deposit for removal by the conservancy establishment of the [a][Board], within such time and in such receptacle or place, situate at not more than one hundred feet from the nearest boundary of the premises, as may be specified in the notice, any offensive matter or rubbish which such person has allowed to accumulate or remain under, in or on such building or land; or

(b) require any person to desist from making or altering any drain leading into a public drain; or

(c) require any person having the control of a drain in the cantonment to cleanse, purify, repair or alter the same, or otherwise put it in good order, within such time as may be specified in the notice.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**134. Filling up of tank, etc.**—(1) Where any well, tank, cistern, reservoir, receptable, or other place in the cantonment where water is stored or accumulates, whether within any private enclosure or not, is in such a condition as to create a nuisance or, in the opinion of the Health Officer, or the Assistant Health Officer, is or is likely to be a breeding place for mosquitoes, the [a][Board] may, by notice in writing, require the owner, lessee or occupier thereof, within such period as may be specified in the notice, to fill up or cover the well, cistern, reservoir or receptacle, or to fill up the tank, or to drain off or remove the water, as the case may be.

(2) The [a][Board] may, if it thinks fit, with the previous sanction of the [b][Officer Commanding-in-Chief, the Command], meet the whole or any portion of the expenses incurred in complying with a requisition under sub-section (1).

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] Substituted by the Cantonments (Amendment) Act, 1926 (35 of 1926), S. 2, for "Officer Commanding the District".

**135. Provision of latrines, etc.**—A [a][Board] may, by notice in writing, require the owner or lessee of any building or land in the cantonment to provide, in such manner as may be specified in the notice, any latrine, urinal, cesspool, dust-bin or other receptacle for filth, sewage, or rubbish, or any additional latrine,

urinal, cesspool or other receptacle as aforesaid, which should, in his opinion, be provided for the building or land.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority."

**136. Sanitation in factories, etc.**—Every person employing, whether on behalf of the Government or otherwise, more than ten workmen or labourers, and every person managing or having control of a market, school, theatre or other place of public resort, in a cantonment shall give notice of the fact to the [a][Board], and shall provide such latrine, and urinals, and shall employ such number of sweepers, as the [a][Board] thinks fit, and shall cause the latrines and urinals to be kept clean and in proper order.

Provided that nothing in this section shall apply in the case of a factory to which the Indian Factories Act, 1911,[b] applies.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] See now the Factories Act, 1948 (63 of 1948), Ch. III.

**137. Private latrines.**—A [a][Board] may, by notice in writing,—

(a) require the owner or other person having the control of any private latrine or urinal in the cantonment not to put the same to public use; or

(b) where any plan for the construction of private latrines or urinals has been approved by the [a][Board], and copies thereof may be obtained free of charge on application,—

(i) require any person repairing or constructing any private latrine or urinal not to allow the same to be used until it has been inspected by or under the direction of the Health Officer and approved by him as conforming with such plan; or

(ii) require any person having control of any private latrine or urinal to re-build or alter the same in accordance with such plan; or

(c) require the owner or other person having the control of any such private latrine or urinal which, in the opinion of the [a][Board], constitutes a nuisance, to remove the latrine or urinal; or

(d) require any person having the control whether as owner, lessee or occupier of any land or building in the cantonment—

(i) to have any latrines provided for the same shut out by a sufficient roof and wall or fence from the view of persons passing by or dwelling in the neighbourhood, or

(ii) to cleanse in such manner as the [a][Board] may specify in the notice any latrine or urinal belonging to the land or building;

(e) require any person being the owner and having the control of any drain in the cantonment to provide, within ten days from the service of the notice, such covering as may be specified in the notice.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority."

**138. Removal of congested buildings.**—(1) Where it appears to a [a][Board] that any block of buildings in the cantonment is in an unhealthy condition by reason of the manner in which the buildings are crowded together, or of the narrowness or closeness of the street or of the want of proper drainage or ventilation, or of the impracticability of cleansing the buildings or other similar cause, it may cause the block to be inspected by a committee consisting of—

(a) the Health Officer,

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**Section 137 — Note 1**

(1) As to whether all proceedings to enforce the order and all prosecutions for any contravention thereof shall be held in abeyance pending the decision of the appeal from an order under Section 137 (a), see Section 276.

(b) the Civil Surgeon of the district, or, if his services are not available some other Medical Officer [b][in the service of the [c][Government]],

(c) the Executive Engineer or a person deputed by the Executive Engineer in this behalf, and

[c][(d) where the cantonment is a Class I or Class II cantonment, two non-official members of the Board, or where the cantonment is a Class III cantonment, one non-official member of the Board.]

(2) The committee shall make a report in writing to the [a][Board] regarding the sanitary condition of the block, and if it considers that the condition thereof is likely to cause risk of disease to the inhabitants of the building or of the neighbourhood or otherwise to endanger the public health, it shall clearly indicate on a plan verified by the Executive Engineer or the person deputed by him to serve on the committee, the buildings which should in its opinion wholly or in part be removed in order to abate the unhealthy condition of the block.

(3) If, upon receipt of such report, the [a][Board] is of opinion that all or any buildings indicated should be removed, it may, by notice in writing, require the owners thereof to remove them:

Provided that the [a][Board] shall make compensation to the owners for any building so removed which have been erected under proper authority:

Provided, further, that the [a][Board] may, if it considers it equitable in the circumstances so to do, pay to the owners such sum as it thinks fit as compensation for any buildings so removed which have not been erected under proper authority.

(4) For the purposes of this section "buildings" includes enclosure walls and fences appertaining to buildings.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority."
[b] Substituted by A. O., 1937, for "of the Government."
[c] Subsituted by S. 39 of Act 24 of 1936 for the original clause.

**139. Overcrowding of dwelling houses.**—(1) Where it appears to a [a][Board] that any building or part of a building in the cantonment which is used as a dwelling house is so overcrowded as to endanger the health of the inmates thereof, it may, after such inquiry as it thinks fit, by notice in writing require the owner or occupier of the building or part thereof, as the case may be, within such time not being less than one month as may be specified in the notice, to abate the overcrowding of the same by reducing the number of lodgers, tenants, or other inmates to such number as may be specified in the notice.

(2) Any person who fails, without reasonable cause, to comply with a requisition made upon him under sub-section (1) shall be punishable with fine which may extend to fifty rupees, and, in the case of a continuing offence, to an additional fine which may extend to five rupees for every day after the first during which the failure has continued.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority."

**140. Power to require repair or alteration of building.**—(1) Where any building in a cantonment is so ill-constructed or dilapidated as to be, in the opinion of the [a][Board], in an insanitary state, the [a][Board] may, by notice in writing, require the owner within such time as may be specified in the notice, to execute such repairs or to make such alterations as it thinks necessary for the purpose of removing such defects.

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**Section 140 — Note 1**

**(1) As to whether all proceedings to enforce the order and all prosecutions for any contravention thereof shall be held in abeyance pending the decision of the appeal from an order under this section, see Section 276.**

(2) A copy of every notice issued under sub-section (1) shall be conspicuously posted on the building to which it relates.

(3) A notice issued under sub-section (1) shall be deemed to have been complied with if the owner of the building to which it relates has, instead of executing the repairs or making the alterations directed by the notice, removed the building.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**141. Power to require land or building to be cleansed.**—(1) The Executive Officer may, by notice in writing, require the owner, lessee or occupier of any building or land in the cantonment, which appears to him to be in a filthy or insanitary state, within twenty-four hours to cleanse the same or otherwise put it in a proper state, in such manner as may be specified in the notice.

(2) If, within three months from the date of the service of a notice under sub-section (1), any building or land in respect of which the notice was issued is again in a filthy or insanitary state, the owner, lessee or occupier, as the case may be, shall be punishable with fine which may extend to two hundred rupees.

**142. Power to order disuse of house.**—If a [a][Board] is satisfied that any building or part of a building in the cantonment which is intended for or used as a dwelling place is unfit for human habitation, it may cause a notice to be posted on some conspicuous part of the building prohibiting the owner or occupier thereof from using the building or room for human habitation, or allowing it to be so used, until it has been rendered fit for such use to the satisfaction of the [a][Board].

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**143. Removal of noxious vegetation.**—A [a][Board] may, by notice in writing, require the owner, lessee, or occupier of any land in the cantonment to clear away and remove any thick or noxious vegetation or undergrowth, which appears to it to be injurious to health or offensive to persons residing in the neighbourhood.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**144. Agriculture and irrigation.**—Where, in the opinion of a [a][Board], the cultivation in the cantonment of any description of crop or the use therein of any kind of manure or the irrigation of any land therein in any specified manner is likely to be injurious to the health of persons dwelling in the neighbourhood, the [a][Board] may, by public notice, prohibit such cultivation, use or irrigation after such date as may be specified in the notice, or may, by a like notice, direct that it shall be carried out subject to such conditions as the [a][Board] thinks fit:

Provided that if, when a notice is issued under this section, any land to which it relates has been lawfully prepared for cultivation or any crop is sown therein or is standing thereon, the [a][Board] shall, if it directs that the notice is to take effect on a date earlier than that by which the crop would ordinarily be sown or reaped as the case may be, make compensation to all persons interest-

**Section 141 — Note 1**

(1) The use of the word "again" suggests that the offence contemplated in sub-section (2) is a recurring and not a continuing offence. Hence, where a person fails to comply with notice under Section 141 (1) he cannot be prosecuted under Sec. 141 (2). He can be dealt with under Section 141 (1) read with Section 268 and in case of a continuing failure to comply with it he is liable to an additional fine. ('35) AIR 1935 All 905 (906, 907): 36 Cri L Jour 1493.

ed in the land or crop for the loss, if any, incurred by them respectively by reason of compliance with the notice.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

## Burial and Burning Grounds

**145. Power to call for information regarding burial and burning grounds.**— A [a][Board] may, by notice in writing, require the owner or person in charge of any burial or burning ground in the cantonment to supply such information as may be specified in the notice concerning the condition, management or position of such ground.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**146. Permission for use of new burial or burning ground.**—(1) No place in a cantonment which has not been used as a burial or burning ground before the commencement of this Act shall be so used without the permission in writing of the [a][Board].

(2) Such permission may be granted subject to any conditions which the [a][Board] thinks fit to impose for the purpose of preventing annoyance to, or danger to the health of, persons residing in the neighbourhood.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**147. Power to require closing of burial or burning ground.**—(1) Where a [a][Board], after making or causing to be made local inquiry, is of opinion that any burial or burning ground in the cantonment has become offensive to, or dangerous to the health of, persons living in the neighbourhood, it may, with the previous sanction of the [c][Central Government], by virtue in writing, require the owner or person in charge of such ground to close the same from such date as may be specified in the notice.

(2) Where the [c][Central Government] sanctions the issue of any notice under sub-section (1), it shall declare the conditions on which the burial or burning ground may be re-opened, and a copy of such declaration shall be annexed to the notice.

(3) Where the [c][Central Government] sanctions the issue of any such notice, it shall require a new burial or burning ground to be provided at the expense of the cantonment fund, or, if the community concerned is willing to provide a new burial or burning ground, the [c][Central Government] shall require a grant to be made from the cantonment fund towards the cost of the same.

(4) No corpse shall be buried or burnt in any burial or burning ground in respect of which a notice issued under this section is for the time being in force.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**148. Exemption from operation of sections 145 to 147.**—The provisions of sections 145, 146 and 147 shall not apply in the case of any burial ground which is for the time being managed by or on behalf of the Government.

**149. Removal of corpses.**—A [a][Board] may, by public notice, prescribe routes in the cantonment by which alone corpses may be removed to burial or burning grounds.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

## PREVENTION OF INFECTIOUS OR CONTAGIOUS DISEASES

**150. Obligation to give information of infectious or contagious diseases.**—[a][Any person], being in charge of, or in attendance, whether as a medical practitioner or otherwise, upon any person in a cantonment whom he knows or has reason to believe to be suffering from a contagious or infectious disease, or being the owner, lessee or occupier of any building in a cantonment in which he knows that any such person is so suffering, shall, if he fails to give information, or if he gives false information, to the [b][Board] respecting the existence of such disease, be punishable with fine which may extend to one hundred rupees:

Provided that no person shall be punishable under this section for failure to give information if he had reasonable cause to believe that the information had already been duly given:

Provided, further, that this section shall not apply in the case of venereal disease where the person suffering therefrom is under specific and adequate medical treatment and is, by reason of his habits and conditions of life and residence, unlikely to spread the disease.

[a] Substituted by the Repealing and Amending Act, 1930 (8 of 1930), S. 2 and Sch. I, for "Whoever".

[b] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**151. Special measures in case of outbreak of infectious or epidemic diseases.**—(1) In the event of a cantonment being visited or threatened by an outbreak of any infectious or contagious disease among the inhabitants thereof or of any epidemic disease among any animals therein, the [a][Officer Commanding in-Chief, the Command], if he thinks that the provisions of this Act or of any law for the time being in force in the cantonment are insufficient for the purpose, may, with the previous santion of the [b][Central Government],—

(a) take such special measures, and

(b) by public notice, make such temporary regulations to be observed by the public or by any class or section of the public,

as he thinks necessary to prevent the outbreak or the spread of the disease:

Provided that, where in the opinion of the [a][Offier Commanding-in-Chief, the Command], immediate measures are necessary, he may take action without such sanction as aforesaid and, if he does so, shall forthwith report such action to the [b][Central Government].

(2) Whoever commits a braech of any temporary regulation made under sub-section (1) shall be deemed to have committed an offence under section 188 of the Indian Penal Code.

[a] Substituted by the Cantonments (Amendment) Act, 1926 (35 of 1926), S. 2, for "Officer Commanding the district".

**152. Power to require names of dairyman's customers.**—Where it is certified to the Eexcutive Officer by a medical practitioner that the outbreak or spread of any infectious or contagious disease in the cantonment is, in the opinion of such medical practitioner, attributable to the milk supplied by any dairyman, the Executive Officer may, by notice in writing, require the dairyman, within such time as may be specified in the notice, to furnish him with a full and complete list of the names and addresses of all his customers within the cantonment, or to give him such information as will enable him to trace the persons to whom the dairyman has sold milk.

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**Section 151 — Note 1**

(1) Power is given under this section to the Officer Commanding-in-Chief, the Command, to take emergent measures for the prevention of the spread of disease in cases of extreme urgency without having to wait for the previous sanction of the Central Government. — See the Report of the Select Committee.

153. **Power to require names of a washerman's customers.**—Where it is certified to the Executive Officer by the Health Officer that it is desirable, with a view to prevent the spread of any infectious or contagious disease in the cantonment, that the Health Officer should be furnished with a list of the customers of any washerman, the Executive Officer may, by notice in writing, require the washerman, within a time to be specified in the notice, to furnish the Health Officer with a full and complete list of the names and addresses of all owners within the cantonment of clothes and other articles which the washerman washes or has washed during the six weeks immediately preceding the date of the notice.

154. **Report after inspection of dairy or washerman's place of business.**—Where, after inspection, the Health Officer is of opinion that any infectious or contagious disease is caused or is likely to arise in the cantonment from the consumption of the milk supplied from a dairy or from the washing of clothes or other articles in any place, or from any process employed by a washerman, he shall report the matter to the Executive Officer.

155. **Action on report submitted by Health Officer.**—Upon receipt of a report submitted by the Health Officer under Section 154, the Executive Officer may, by notice in writing,—

(a) prohibit the supply of milk from the dairy until the notice has been withdrawn; or

(b) prohibit the washerman from washing clothes or other articles in any such place or by any such process as aforesaid until the notice has been withdrawn or unless he uses such place in such manner, or washes by such process, as the Executive Officer may direct in the notice.

156. **Examination of milk or washed clothes.**—The Health Officer may take possession of any milk, clothes or other articles which are or have recently been in the possession of any dairyman on whom a notice has been served under section 152, or of any clothes or other articles which are or have recently been in the possession of any washerman, on whom a notice has been served under section 153, and may subject the same or cause the same to be subjected to such chemical or other process as he may think necessary; and the [a][Board] shall pay from the cantonment fund all the costs of the process and shall also pay to the owner of the milk, clothes or [b][other] articles such sum as compensation for any loss occasioned by such process as may appear to it to be reasonable.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] Substituted by the Repealing and Amendment Act, 1930 (8 of 1930), S. 2 and Sch. I for "their".

157. **Contamination of public conveyance.**—Whoever in a cantonment—

(a) uses a public conveyance while suffering from an infectious or contagious disease, or

(b) uses a public conveyance for the carriage of a person who is suffering from any such disease, or

(c) uses a public conveyance for the carriage of the corpse of a person who has died from any such disease,

shall be bound to take proper precautions against the communication of the disease to other persons using or who may thereafter use the conveyance and to notify such use to the owner, driver or person in charge of the conveyance, and further to report without delay to the Executive Officer the number of the conveyance and the name of the person so notified.

158. **Disinfection of public conveyance.**—(1) Where any person suffering from, or the corpse of any person who has died from, an infectious or contagious disease has been carried in a public conveyance which ordinarily plies in a can-

tonment, the driver thereof shall forthwith report the fact to the Executive Officer who shall forthwith cause the conveyance to be disinfected if that has not already been done.

(2) No such conveyance shall be brought again into use until the Executive Officer has granted a certificate stating that it can be used without causing risk of infection.

**159. Penalty for failure to report.**—Whoever fails to make to the Executive Officer any report which he is required to make by section 157 or section 158, shall be punishable with fine which may extend to one hundred rupees.

**160. Driver of conveyance not bound to carry person suffering from infectious or contagious disease.**—Notwithstanding anything contained in any law for the time being in force, no owner, driver or person in charge of a public conveyance shall be bound to convey or to allow to be conveyed in such conveyance in or in the vicinity of a cantonment any person suffering from an infectious or contagious disease or the corpse of any person who has died from such disease unless and until such person pays or tenders a sum sufficient to cover any loss and expense which would ordinarily be incurred in disinfecting the conveyance.

**161. Disinfection of building or articles therein.**—Where a [a][Board] is upon the advice of the Health Officer, of opinion that the cleansing and disinfection of any building or part of a building in the cantonment or of any articles in any such building or part which are likely to retain infection, or the renewal of the flooring of any such building or part of such building would tend to prevent or check the spread of any infectious or contagious disease, [b][the Board may], by notice in writing, require the owner or occupier to cleanse and disinfect the said building, part or articles, as the case may be, or to renew the said flooring, within such time as may be specified in the notice:

Provided that where, in the opinion of the [a][Board], the owner or occupier is from poverty or any other cause unable effectually to carry out any such requisition, the [a][Board] may, at the expense of the cantonment fund, cleanse and disinfect the building, part or articles, or, as the case may be, renew the flooring.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] Substituted for the words 'he may', by the Repealing and Amending Act, 1960 (58 of 1960), S. 3 and IInd Sch. (26-12-1960.)

**162. Destruction of infectious hut or shed.**—(1) Where the destruction of any hut or shed in a cantonment is, in the opinion of the [a][Board], necessary to prevent the spread of any infectious or contagious disease, the [a][Board] may, by notice in writing, require the owner to destroy the hut, or shed and the materials thereof within such time as may be specified in the notice

(2) Where the President of a Board [b][* * *] is satisfied that the destruction of any hut or shed in the cantonment is immediately necessary for the purpose of preventing the spread of any infectious or contagious disease, he may order the owner or occupier of the hut or shed to destroy the same forthwith, or may himself cause it to be destroyed after giving not less than two hours' notice to the owner or occupier thereof.

(3) The [a][Board] shall pay compensation to the owner of any hut or shed destroyed under this section.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] The words "or, where there is no Board, the Officer Commanding the station" were repealed by S. 40, ibid.

**163. Temporary shelter for inmates of disinfected or destroyed building or shed.**—The [a][Board] shall provide free of charge temporary shelter or house

accommodation for the members of any family in which an infectious or contagious disease has appeared who have been compelled to leave their dwelling by reason of any proceedings taken under section 161 or section 162, and who desire such shelter or accommodation as aforesaid to be provided for them.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

164. Disinfection of building before letting the same.—(1) Where in a cantonment any building or part of a building is intended to be let in which any person has, within the six weeks immediately preceding, been suffering from an infectious or contagious disease, the person letting the building or part shall before doing so disinfect the same in such manner as the [a][Board] may, by public or special notice, direct, together with all articles therein liable to retain infection.

(2) For the purposes of this section, the keeper of an hotel, lodging house or sarai shall be deemed to let to any person who is admitted as a guest therein that part of the building in which such person is permitted to reside.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**165. Disposal of infected article without disinfection.**—No person shall, without disinfection of the same, give, lend, sell, transmit or otherwise dispose of to another person any article or thing which he knows or has reason to believe has been exposed to contamination by any infectious or contagious disease and is likely to be used in, or taken into, a cantonment.

**166. Means of disinfection.**—(1) Every [a][Board] shall—

(a) provide proper places with necessary attendants and apparatus for the disinfection of conveyances, clothing, bedding or other articles which have been exposed to infection;

(b) cause conveyances, clothing or other articles brought for disinfection to be disinfected either free of charge or on payment of such charges as it may fix.

(2) A [a][Board] may notify places at which articles of clothing, bedding, conveyances or other articles which have been exposed to infection shall be washed, and, if it does so, no person shall wash any such thing at any place not so notified without having previously disinfected such thing.

(3) The President of a Board [b][* * *] may direct the destruction of any clothing, bedding or other article in the cantonment likely to retain infection, and may give such compensation as he thinks fit for any article so destroyed.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] The words "or, where there is no Board, the Officer Commanding the station" were repealed by S. 41, ibid.

**167. Making or selling of food etc., or washing clothes by infected person.**—Whoever, while suffering from, or in circumstances in which he is likely to spread, any infectious or contagious disease,—

(a) makes, carries or offers for sale in a cantonment or takes any part in the business of making, carrying or offering for sale therein any article of food or drink or any medicine or drug for human consumption, or any article of clothing or bedding for personal use or wear, or

(b) takes any part in the business of the washing or carrying of clothes,

shall be punishable with fine which may extend to one hundred rupees.

**168. Power to restrict or prohibit sale of food or drink.**—When a cantonment is visited or threatened by an outbreak of any infectious or contagious disease, the [a][Board] may, by public notice, restrict in such manner or prohibit

for such period, as may be specified in the notice, the sale or preparation of any article of food or drink for human consumption specified in the notice or the sale of any flesh of any description of animals so specified.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**169. Control over wells, tanks, etc.**—(1) If a [a][Board] is of opinion that the water in any well, tank or other place is likely, if used for drinking, to engender, or cause the spread of, any disease, it may,—

(a) by public notice, prohibit the removal or use of such water for drinking;

(b) by notice in writing, require the owner or person having control of such well, tank or place to take such steps as may be directed by the notice to prevent the public from having access to or using such water; or

(c) take such other steps as it may consider expedient to prevent the outbreak or spread of any such disease.

(2) In the event of a cantonment or any part of a cantonment being visited or threatened by an outbreak of any infectious or contagious disease, the Health Officer or any person authorised by him in this behalf may, without notice and at any time, inspect and disinfect any well, tank or other place from which water is, or is likely to be, taken for the purposes of drinking, and may further take such steps as he thinks fit to ensure the purity of the water or to prevent the use of the same for drinking purposes.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**170. Disposal of infectious corpse.**—Where any person has died in a cantonment from any infectious or contagious disease, the Executive Officer may, by notice in writing,—

(a) require any person having charge of the corpse to convey the same to a mortuary, thereafter to be disposed of in accordance with law; or

(b) prohibit the removal of the corpse from the place where death occurred except for the purpose of being buried or burned or of being conveyed to a mortuary.

## HOSPITALS AND DISPENSARIES

**171. Maintenance or aiding of hospitals or dispensaries.**—(1) A [a][Board] may—

(a) provide and maintain either within or without the cantonment as many hospitals and dispensaries as it thinks fit; or

(b) make, upon such terms as it thinks fit to impose, a grant-in-aid to any hospital or dispensary [b][or veterinary hospital], whether within or without the cantonment, not maintained by it.

(2) Every hospital or dispensary maintained or aided under sub-section (1) shall have attached to it a ward or wards for the treatment of persons suffering from infectious or contagious disease.

(3) A medical officer, appointed in such manner as the [a][Central Government] may direct, shall be in charge of every hospital or dispensary maintained or aided under this section.

[a] Substituted by S. 69 of the Cantonments (Amendment) Act, 1936 (24 of 1936) for "Cantonment Authority".

[b] Inserted by S. 42, ibid.

**172. Medical supplies, appliances, etc.**—(1) Every hospital or dispensary maintained or aided under Section 171 shall be maintained in accordance with

any general or special orders of the [a][Central Government] [b][* * *] for the conduct of hospitals and dispensaries or in accordance with the said orders modified in such manner as the [a][Central Government] [b][* * *] [c][* * *], thinks fit.

(2) The [d][Board] shall cause every such hospital or dispensary to be provided with all requisite drugs, instruments, apparatus, furniture and appliances and with sufficient cots, bedding and clothing for in-patients.

[a] Substituted by A. O., for "Governor-General in Council".
[b] The words "or the local Government" were repealed by A. O.
[c] The words "as the case may be" were repealed by A. O.
[d] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

173. **Free patients.**—At every hospital or dispensary maintained or aided under section 171, the sick poor of the cantonment and other inhabitants of the cantonment suffering from infectious or contagious diseases, and, with the sanction of the [a][Board], any other sick persons, may receive medical [b][or surgical] treatment free of costs, and, if treated as in-patients, shall be either dieted gratuitously or, if the medical officer in charge so directs, shall be granted subsistence allowance on such scale as the [a][Board] may fix:

Provided that the subsistence allowance shall not be less than the lowest allowance for the time being fixed for the subsistence of judgment-debtors by the [c][State Government] under section 57 of the Code of Civil Procedure, 1908.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".
[b] Inserted by S. 43, ibid.

174. **Paying patients.**—Any sick person who is ineligible to receive medical [a][or surgical] treatment free of costs in any hospital or dispensary under section 173 may be admitted to treatment therein upon such terms as the [b][Board] thinks fit.

[a] Inserted by S. 44 of the Cantonments (Amendment) Act, 1936 (24 of 1936).
[b] Substituted by S. 39, ibid, for "Cantonment Authority".

175. **Power to order person to attend hospital or dispensary.**—(1) If the Health Officer or the medical officer in charge of a hospital or dispensary maintained or aided under section 171 has reason to believe that any person living in the cantonment is suffering from an infectious or contagious disease, he may, by notice in writing, call upon such person to attend for examination at any such hospital or dispensary at such time as may be specified in the notice and not to quit it without the permission of the medical officer in charge; and, on the arrival of such person at the hospital or dispensary, the medical officer in charge thereof may examine him for the purpose of satisfying himself whether or not such person is suffering from an infectious or contagious disease:

Provided that, if, having regard to the nature of the disease or the condition of the person suffering therefrom, or the general environment and circumstances of such person, the Health Officer or medical officer, as the case may be, considers that the attendance of such person at a hospital or dispensary is likely to prove unnecessary or inexpedient, he shall examine such person at such person's own residence.

(2) If any person, on examination under sub-section (1), is found to be suffering from an infectious or contagious disease, the Health Officer or medical officer

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**Section 175 — Note 1**

(1) We have, to a large extent, remodelled this clause in order to provide that, in the case of persons whose circumstances are such as to allow of their satisfactory segregation in their own houses, the Medical Officer concerned shall make the medical examination at their private residences and shall not subsequently require their detention in hospital. We further think that the Health Officer of a cantonment, as well as the Medical Officer-in-Charge of Cantonment hospitals, should be able to exercise the power conferred by this clause". — Select Committee Report.

as the case may be, may cause him to be detained in hospital until he is free from the infection or contagion:

Provided that if, having regard to the nature of the disease or the condition of the person suffering therefrom, or the general environment and circumstances of such person, he considers that the detention of such person at a hospital or dispensary is unnecessary or inexpedient, he shall discharge such person and take such measures or give such directions in the matter as he thinks necessary.

176. Power to exclude from cantonment persons refusing to attend hospital or dispensary.—(1) If the Health Officer or the medical officer in charge of a hospital or dispensary maintained or aided under Section 171 reports in writing to the [a][Officer Commanding the station] that any person having received a notice under Sec. 175 has refused or omitted to attend at the hospital or dispensary, specified in the notice, or that such person, having attended the hospital or dispensary, has quitted it without the permission of such medical officer, or that any person has failed to comply with any direction given to him under section 175, the [a][Officer Commanding the station] may, by order in writing, direct such person to remove from the cantonment within twenty-four hours and not to re-enter it without his permission in writing.

(2) No person who has under sub-section (1) been ordered to remove from and not to re-enter a cantonment shall enter any other cantonment [b][* *] without the written permission of the [c][Officer Commanding the station].

[a] Substituted by the Cantonments (Amendment) Act, 1925 (7 of 1925), S. 14, for "Commanding Officer of the Cantonment".

[b] The words "in the Provinces" were omitted by A.L.O., 1950.

[c] Substituted for S. 8, ibid, for "Commanding Officer of that Cantonment".

## CONTROL OF TRAFFIC FOR HYGIENIC PURPOSES

177. Routes for pilgrims and others.—(1) A [a][Board] may provide or prescribe suitable routes for the use of persons passing through the cantonment—

(a) on their way to or from fairs or places of pilgrimage or other places of public resort; or

(b) during times when an infectious or contagious disease is prevalent;

and may, by public notice, require such persons as aforesaid to use such routes and no others.

(2) All routes provided or prescribed under sub-section (1) shall be clearly and sufficiently indicated by the [a][Board].

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

## SPECIAL CONDITIONS REGARDING ESSENTIAL SERVICES

178. Conditions of service of sweepers.—(1) Whoever, being a sweeper employed by a [a][Board] in the absence of a written contract authorising him so to do and without reasonable cause, resigns his employment or absents hismelf from his duty without having given one month's notice to the [a][Board], or neglects or refuses to perform his duties, or any of them, shall be punishable with imprisonment which may extend to one month.

(2) The [b][Central Government] may, by notification in the [b][Official Gazette] direct that on and from such date as may be specified in the notification, the provisions of this section shall apply in the case of any specified class of servants employed by a [a][Board] whose functions intimately concern the public health or safety.

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**Section 176 — Note 1**

(1) As to whether all proceedings to enforce the order and all prosecutions for any contravention thereof shall be held in abeyance pending the decision of the appeal from an order under this section, see Section 276.

(3) For the purpose of this section, "sweeper" includes any menial servant employed by a [a][Board] in the removal or disposal of filth or rubbish.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69 for "Cantonment Authority".

## CHAPTER XI

## CONTROL OVER BUILDINGS, STREETS, BOUNDARIES, TREES, ETC.

### Buildings

[a][178A. **Sanction for building.**—No person shall erect or re-erect a building on any land in a cantonment, except with the previous sanction of the Board, nor otherwise than in accordance with the provisions of this Chapter and of the rules and bye-laws made under this Act relating to the erection and re-erection of buildings.]

[a] Inserted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 45.

**179. Notice of new buildings.**—(1) Whoever intends to erect or re-erect any building in a cantonment shall [a][apply for sanction by giving notice] in writing of his intention to the [b][Board].

(2) For the purposes of this Act, a person shall be deemed to erect or re-erect a building who—

(a) makes any material alteration or enlargement of any building, or

(b) converts into a place for human habitation any building not originally constructed for that purpose, or

(c) converts into more than one place for human habitation a building originally constructed as one such place, or

(d) converts two or more places of human habitation into a greater number of such places, or

(e) converts into a stable, cattle-shed or cowhouse any building originally constructed for human habitation, or

(f) makes any alteration which there is reason to believe is likely to affect prejudicially the stability or safety of any building or the condition of any building in respect of drainage, sanitation or hygiene, or

(g) makes any alteration to any building which increases or diminishes the height of, or area covered by, or the cubic capacity of, the building,

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**Chapter XI — Note 1**

(1) As to the power of the Central Government to extend any of the provisions of Chapter XI to any area beyond a cantonment and in the vicinity thereof, see Section 286.

**Section 179 — Note 1**

(1) Sub-sections (1) and (2) deal with matters of general nature which have to be borne in mind by the Board while granting or refusing sanction. There is no force in the contention that if sanction may not be refused under sub-sections (1) and (2) it cannot be refused under sub-section (4). Nor can it be urged that the dispute contemplated by Clause (b) of sub-section (4) must exist at the time the notice under Section 179 is given. ('55) AIR 1955 Nag 81 (88): ILR (1954) Nag 973 (DB)

(2) A constructed a building on land situated within cantonment which he held as a licensee from Government. The land was resumable by Government after one month's notice. A mortgaged the building along with the land to B. A's widow who had a share in the mortgaged property sold it to B. Thereafter on various occasions B applied to the Government describing himself as owner of the building for making additions and alterations to the building. On each occasion sanction was granted and before granting sanction notices and proclamations required by the Act were issued. In 1934, B obtained a lease of the vacant site forming part of mortgaged land from the Government and built a cinema there. Held that the lease of 1934 was valid. ('47) AIR 1947 PC 99 (105): ILR (1947) Lah 399: ILR (1947) Kar (PC) 203.

(3) Though it is true that in replacing a roof with R. C. C. slab and replacing the tin sheets constituting a wall of the kitchen with a brick wall, alterations are effected which would normally add to the comforts and safety of the residents and that the new construction is more lasting and substantial, they do not amount to any material alteration under Section 179 (2) (a). AIR 1961 All 263 (265); 1960 All LJ 956.

or which reduces the cubic capacity of any room in the building below the minimum prescribed by any bye-law made under this Act.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 46, for "give notice".

[b] Substituted by S. 69, ibid for "Cantonment Authority".

**180. Conditions of valid notice.**—(1) A person giving the notice required by section 179 shall specify the purpose for which it is intended to use the building to which such notice relates.

(2) No notice shall be valid until the information required under sub-section (1) and any further information and plans which may be required under bye-laws made under this Act have been furnished to the satisfaction of the [a][Board] along with the notice.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**181. Power of Board to sanction or refuse.**—The [a][Board] may either refuse to sanction the erection or re-erection, as the case may be, of the building, or may sanction it either absolutely or subject to such directions as it thinks fit to make in writing in respect of all or any of the following matters, namely:—

(a) the free passage or way to be left in front of the building;

(b) the space to be left about the building to secure free circulation of air and facilitate scavenging and the prevention of fire;

(c) the ventilation of the building, the minimum cubic area of the rooms and the number and height of the storeys of which the building may consist.

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**Section 181 — Note 1**

(1) Permission once granted without any reservation cannot be subsequently modified or cancelled in part. ('30) AIR 1930 Lah 822 (822).

[See ('27) AIR 1927 Lah 891 (893). (Where once a Municipal Committee has given sanction to roof a drain it cannot revoke it.) * (1900) 1900 Pun Re No. 52 p. 189 (193). (Municipal Committee's power to revoke sanction once given.)]

[But see ('22) AIR 1922 Bom 247 (249): 46 Bom 663 (FB). (New building — Permission granted by P. W. Committee — General Body can revoke permission.)]

(2) Where any part of the building is sought to be re-erected the matter is covered by sub-section (4), Clause (b) of Section 181, and a dispute as to re-erection of a part of the building in question is covered by Clause (b) of sub-section (4) of ection 181. ('55) AIR 1955 Nag 81 (83): ILR (1954) Nag 973 (DB).

(3) Where the Board has decided the matter of sanction itself and has not simply communicated Government's objection, it is not necessary to consider whether it had properly applied its mind to the merits of the objections. ('55) AIR 1955 Nag 81 (83): ILR (1954) Nag 973 (DB).

(4) A liability not existing under the general law, viz., to obtain the requisite sanction to erect or re-erect a building has been created by the statute and a special remedy has also been provided therein for enforcing it. It is, that remedy alone which the aggrieved party must adopt to seek redress. ('55) AIR 1955 Nag 81 (82): ILR (1954) Nag 973 (DB).

(5) Sub-sections (1) and (2) of Sec. 181 deal with matters of a general nature which have to be borne in mind by the Board while granting or refusing sanction. The Board is not obviously concerned with the existence of any dispute unless it brought to its notice under sub-section (3). Such objection may relate to a pre-existing dispute or to a dispute which may arise in consequence of the proposed construction. In either case, it has to be considered by the Board under Clause (b) of sub-section (4). ('55) AIR 1955 Nag 81 (83): ILR (1955) Nag 973 (DB).

(6) The question whether, on the objection of the Government, a person should be given or refused sanction is within the power of the Board and of the appellate authority, and cannot be raised in the Civil Courts, even if their decision may work hardship. That the person is prepared to forego a claim to compensation for the construction in case the Government decide to resume the land is beside the point. ('55) AIR 1955 Nag 81 (84): ILR (1954) Nag 973 (DB).

(7) A person could not challenge the jurisdiction of the Cantonment Board over certain village, when he himself applied under Section 179 of the Act for permission to build the houses, submitted to its jurisdiction with a free awareness and when various notifications also established that full control over the village passed to the Board. AIR 1961 Andh Pra 113 (116) (DB).

(d) the provision and position of drains, latrines, urinals, cesspools or other respectacles for filth:

(e) the level and width of the foundation, the level of the lowest floor and the stability of the structure;

(f) the line of frontage neighbouring buildings if the building abuts on a street;

(g) the means to be provided for egress from the building in case of fire;

(h) the materials and method of construction to be used for external and party walls for rooms, floors, fire-places and chimneys;

(i) the height and slope of the roof above the uppermost floor upon which human beings are to live or cooking operations are to be carried on; and

(j) any other matter affecting the ventilation and sanitation of the buildings; and the person erecting or re-erecting the building shall obey all such written directions in every particular.

[b][(2) The Board may refuse to sanction the erection or re-erection of any building, either on grounds sufficient in the opinion of the Board affecting the particular building, or in pursuance of a general scheme sanctioned by the Officer Commanding-in-Chief, the Command, restricting the erection or re-erection of buildings within specified limits for the prevention of over-crowding or in the interests of persons residing within such limits or for any other public purpose.

(3) The Board, before sanctioning the erection or re-erection of a building on land which is under the management of the Military Estates Officer shall refer the application to the Military Estates Officer for ascertaining whether there is any objection on the part of Government to such erection or re-erection; and the Military Estates Officer shall return the application together with his report thereon to the Board within thirty days after it has been received by him.

(4) The Board may refuse to sanction the erection or re-erection of any building—

(a) when the land on which it is proposed to erect or re-erect the building is held on a lease [c][from the Government] if the erection or re-erection constitutes a breach of the terms of the lease, or

(b) when the land on which it is proposed to erect or re-erect the building is not held on a lease [c][from the Government], if the right to build on such land is in dispute between the person applying for sanction and the Government.

(5) If the Board decides to refuse to sanction the erection or re-erection of the building, it shall communicate in writing the reasons for such refusal to the person by whom notice was given.

(6) Where the Board neglects or omits, for one month after the receipt of a valid notice, to make and to deliver to the person who has given the notice any order of any nature specified in this section, and such person thereafter by a written communication sent by registered post to the Board calls the attention of the Board to the neglect or omission, then, if such neglect or omission continues for a further period of fifteen days from the date of such communication the Board shall be deemed to have given sanction to the erection or re-erection, as the case may be, unconditionally:

Provided that, in any case to which the provisions of sub-section (3) apply, the period of one month herein specified shall be reckoned from the date on which the Board has received report referred to in that sub-section.]

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] Sub-sections (2) to (6) were substituted by S. 47, ibid, for the original sub-sections (2), (3) and (4).

**182. Compensation.**—(1) No compensation shall be claimable by any person for any damage or loss which he may sustain in consequence of the refusal of the [a][Board] of sanction to the erection of any building or in respect of any direction issued by it under sub-section (1) of Section 181.

(2) The [a][Board] shall make compensation to the owner of any building for any actual damage or loss sustained by him in consequence of the prohibition of the re-erection of any building or of its requiring any land belonging to him to be added to the street:

Provided that the [a][Board] shall not be liable to make any compensation in respect of the prohibition of the re-erection of any building which for a period of three years or more immediately preceding such refusal has not been in existence or has been unfit for human habitation.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**183. Lapse of sanction.**—Every sanction for the erection or re-erection of a building given or deemed to have been given by the [a][Board] as herein before provided shall be available for one year from the date on which it is given, and if the building so sanctioned is not begun by the person who has obtained the sanction or some one lawfully claiming under him within that period, it shall not thereafter be begun [b][unless the Board on application made therefor has allowed an extension of that period.]

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] Substituted by S. 48, ibid, for "without fresh sanction obtained in the manner hereinbefore provided."

[183A. **Period for completion of building.**—A Board, when sanctioning the erection or re-erection of a building as hereinbefore provided, shall specify a reasonable period after the work has commenced within which the erection or re-erection is to be completed, and, if the erection or re-erection is not completed within the period so fixed, it shall not be continued thereafter without fresh sanction obtained in the manner hereinbefore provided, unless the Board on application made therefor has allowed an extension of that period:

Provided that not more than two such extensions shall be allowed by the Board in any case.]

[a] Inserted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 49.

**184. Illegal erection and re-erection.**—Whoever begins, continues or completes the erection or re-erection of a building—

(a) without having given a valid notice as required by sections 179 and 180, or before the building has been sanctioned or is deemed to have been sanctioned, or

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**Section 182 — Note 1**

(1) "We think that compensation should only be payable in cases where actual loss is caused by the refusal of a Cantonment Authority to allow a building to be re-erected and have provided accordingly. To enact, as was proposed in the Bill as introduced, that compensation should be payable in any case where the refusal is on the ground that the building is unsuitable in plan or design to the locality or is intended for a purpose unsuited to the locality would in our opinion be to invite a systematic blackmail of the Cantonment Authority." — Select Committee Report.

**Section 184 — Note 1**

(1) Erecting or re-erecting a building without the permission and failure to comply with a notice to alter or demolish a building are separate offences. Non-compliance with a notice given after the enactment of 1924, is punishable under the Act of 1924, even though the building was erected before 1924. Prosecution for such disobedience may be launched within 6 months of such disobedience. ('32) AIR 1932 Lah 370 (372): 33 Cri L Jour 336.

(2) Section 184 provides no penalty for a continuing failure or contravention, although such a penalty is provided in Section 268. ('34) AIR 1934 Oudh 29 (31): 35 Cri L Jour 666.

(3) An order directing a person, who has erected a structure without sanction,

(b) without complying with any direction made under sub-section (1) of section 181, or

(c) when sanction has been refused, or has ceased to be available, [a][or has been suspended by the Officer Commanding-in-Chief, the Command under clause (b) of sub-section (1) of Section 52,]

shall be punishable with fine which may extend to five hundred rupees.

[a] Inserted by the Cantonments (Amendment) At, 1936 (24 of 1936), S. 50.

185. Power to stop erection or re-erection or to demolish.—[a][(1)] A [b][Board] may, at any time, by notice in writing direct the owner, lessee or occupier of any land in the cantonment to stop the erection or re-erection of a building in any case in which the [b][Board] considers that such erection or re-erection is an offence under section 184, and may in any such case [c][or in any other case in which the Board considers that the erection or re-erection of a building is an offence under Section 184, within [d][twelve months] of the completion of such erection or re-erection] in like manner direct the alteration or demolition as it thinks necessary of the building or any part thereof, so erected or re-erected:

Provided that the [b][Board] may, instead of requiring the alteration or demolition of any such building or part thereof, accept by way of composition such sum as it thinks reasonable:

[c][Provided further that the Board shall not, without the previous concurrence of the Officer Commanding-in-Chief, the Command, accept any sum by way of compensation under the foregoing proviso in respect of any building on land which is not under the management of the Board.

(2) A Board shall by notice in writing direct the owner, lessee or occupier of any land in the cantonment to stop the erection or re-erection of a building in any case in which the order under Section 181 sanctioning the erection or re-erection has been suspended by the Officer Commanding-in-Chief, the Command, under clause (b) of sub-sec. (1) of Sec. 52, and shall in any such case in like manner direct the demolition or alteration, as the case may be, of the building or any part thereof so erected or re-erected where the Officer Commanding-in-Chief, the Command, thereafter directs that the order of the Board sanctioning the erection or re-erection of the building shall not be carried into effect or shall be carried into effect with modifications specified by him:

Provided that the Board shall pay to the owner of the building compensation for any loss actually incurred by him in consequence of the demolition or alteration of any building which has been erected or re-erected prior to the date on which

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**Section 184 — Note 1 (contd.)**

to remove the structure within a certain time or in default to pay thereafter a daily fine is improper. If the Magistrate's directions are not carried out, then the proper course is to institute a further prosecution and allow the accused an opportunity of defending himself before the further fine is imposed. ('11) 12 Cri L Jour 371 (372) (Lah). (Case under Section 104 of the Act of 1889).

(4) It is not proper to substitute a conviction under Section 268 for one under Section 184 (b). ('34) AIR 1934 Oudh 29 (31): 35 Cri L Jour 666.

Section 184 (b) — (5) S. 184 (b) does not provide a punishment for mere non-compliance with direction made under subs. (1) of S. 181. What it makes punishable is the beginning, continuation or completion of the erection of building without complying with such direction. ('34) AIR 1934 Oudh 29 (31): 35 Cri L Jour 666.

**Section 185 — Note 1**

(1) The owner should know the precise nature and extent of the repairs which he is expected to make. A notice which does not state what kind of repairs the Board requires the owner to make to the houses specified in the notice is illegal. (1912) 13 Cri L Jour 17 (17): 1912 Pun Re (Cr) No. 3. (Case under Section 94 of old Act.)

(2) It was held in the following case that it was not necessary for the Cantonment Authority to issue a notice for the demolition within a reasonable time and that such a notice could be given at any time. ('32) AIR 1932 Lah 370 (371): 33 Cri L Jour 336. (But now the amendment made in the section by the Cantonments (Amendment) Act, 1936.)

(3) Order levying compensation fee under Section 185 — Not appealable — Person is not entitled to a reasonable opportunity of being heard in person under Section 279. AIR 1961 Andh Pra 113 (116) (DB).

the order of the Officer Commanding-in-Chief, the Command has been communicated to him.]

[a] The original S. 185 was re-numbered as sub-section (1) of that section by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 51.
[b] Substituted by S. 69, ibid, for "Cantonment Authority"
[c] Inserted by S. 51, ibid.
[d] Substituted for "six months" by the Cantonments (Amendment) Act, 1953 (2 of 1954), S. 17 (2-1-1954).

**186. Power to make bye-laws.**—A [a][Board] may make bye-laws prescribing—

(a) the manner in which notice of the intention to erect or re-erect a building in the cantonment shall be given to the [a][Board] and the information and plans to be furnished with the notice;

(b) the type or description of buildings which may or may not, and the purpose for which a building may or may not, be erected or re-erected [b][in the cantonment or any part thereof];

(c) the minimum cubic capacity of any room or rooms in a building which is to be erected or re-erected; [c][*]

(d) the fees payable on provision by the [a][Board] of plans or specifications of the type of buildings which may be erected in the cantonment or any part thereof.

[d][(e) the circumstances in which a mosque, temple or church or other sacred building may be erected or re-erected; and

(f) with reference to the erection or re-erection of buildings, or of any class of building, all or any of the following matters, namely:—

(i) the line of frontage where the building abuts on a street;

(ii) the space to be left about the building to secure free circulation of air and facilities for scavenging and for the prevention of fire;

(iii) the materials and method of construction to be used for external and party-walls, roofs and floors:

(iv) the position, the material and the method of construction of fire places, chimneys, drains, latrines, privies, urinals and cesspools;

(v) height and slope of the roof above the uppermost floor upon which human beings are to live or cooking operations are to be carried on;

(vi) the level and width of the foundation, the level of the lowest floor and the stability of the structure;

(vii) the number and height of the storeys of which the building may consist.

(viii) the means to be provided for egress from the building in case of fire;

(ix) the safeguarding of wells from pollution; or

(x) the materials and method of construction to be used for godowns intended for the storage of foodgrains in excess of fifty maunds in order to render them rat proof.]

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".
[b] Substituted for the words "in any specified area or areas", by the Cantonments (Amendment) Act, 1940 (31 of 1940), S. 6 (27-11-1940).
[c] The word "and" was repealed by Act 24 of 1936, S. 52.
[d] Clauses (e) and (f) were inserted by S. 52, ibid.

**187. Projections and obstructions.**—(1) No owner or occupier of any building in a cantonment shall, without the permission in writing of the [a][Board] add to or place against or in front of the building any projection or structure overhanging, projecting into or encroaching on, any street or any drain, sewer or aqueduct therein.

(2) The [a][Board] may, by notice in writing, require the owner or occupier of any such building to alter or remove any such projection or encroachment as aforesaid:

Provided that, in the case of any projection or encroachment lawfully in existence at the commencement of this Act, the [a][Board] shall make compensation for any damage caused by the removal or alteration.

(3) The [a][Board] may, by order in writing, give permission to the owners or occupiers of buildings in any particular street to put up open verandahs, balconies or rooms projecting from any upper storey thereof to an extent beyond the line of the plinth or basement wall at such height from the level ground or street as may be specified in the order.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**188. Unauthorised buildings over drains, etc.**—A [a][Board] may, by notice in writing, require any person who has without its permission in writing, newly erected or re-erected any [b][structure] over any public sewer, drain, culvert, water-course or water-pipe in the cantonment to pull down or otherwise deal with the same as it thinks fit.

[a] Substituted by the Cantonment (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] Substituted for "building" by the Cantonments (Amendment) Act, 1940 (31 of 1940), S. 7 (27-11-1940).

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**Section 187 — Note 1**

(1) Notice under this section must be issued by the Cantonment Board. Conviction cannot be sustained for disobedience of notice issued by Executive Officer of Cantonment when notice was not issued by or with the approval of Cantonment Authority. Subsequent confirmation by the Board is of no avail. ('33) AIR 1933 Lah 545 (545): 35 Cri L Jour 612.

(2) Where a person ordinarily authorised to communicate the sanction does so on an official form of the Board, the applicant making an application for the same is entitled to act on such communication, it being not his business to enquire whether the sanction conveyed to him was actually granted by the Board. ('34) AIR 1934 Lah 510 (511): 36 Cri L Jour 700.

(3) A person is not bound to comply with the notice of the Board which is illegal and if he fails to comply with an illegal notice he cannot be liable to a fine under the Act. ('33) AIR 1933 All 486 (488): 34 Cri LJ 1191.

(4) A Cantonment Board gave permission to build warning the applicant that the question of title to the land was doubtful and hence he would build it at his own risk. Immediately the construction was started the board served a notice "to demolish the unauthorised construction" and thereafter prosecuted him under Section 268. It was held that prosecution could not stand as there was no construction for which sanction was not obtained. ('33) AIR 1933 All 486 (488): 34 Cri L Jour 1191.

(5) In the following case it was held that the open space in question in that case was not a 'street' within the meaning of Section 2 (37) and therefore paving it with burnt bricks did not amount to 'placing a structure encroaching on the street' within the meaning of this section. ('35) AIR 1935 Lah 588 (589): 36 Cri L Jour 1475.

(6) A municipal committee passed a resolution: "the committee authorized the President . . . . . to take notice of any breach of the by-laws, and to take action on the same reporting the said action for the approval of the committee at the ensuing meeting." It was held that the resolution did not validate a notice for removal of a terrace given by a Deputy Commissioner as the President of the municipality and breach of such notice was not, therefore, punishable. ('81) 1881 Pun Re No. 32, p. 84 (87). (AIR 1926 Cal 1073 (1075), a case under Bengal Municipal Act, 1884 may be consulted.)

(7) Only projections or structures overhanging, projecting into, or encroaching on, any street or drain, sewer or aqueduct therein can be demolished under the section. ('47) AIR 1947 All 243 (244).

**189. Drainage and sewer connections.**—(1) A [a][Board] may, by notice in writing, require the owner or lessee of any building or land in any street, at his own expense and in such manner as the [a][Board] thinks fit, to put up and keep in good condition proper troughs and pipes for receiving and carrying rain water from the building or land and for discharging the same or to establish and maintain any other connection or communication between such building or land and any drain or sewer.

(2) For the purpose of efficiently draining any building or land in the cantonment, the [a][Board] may, by notice in writing, require the owner or lessee of the building or land—

(a) to pave, with such materials and in such manner as it thinks fit, any courtyard, alley or passage between two or more buildings, or

(b) to keep any such paving in proper repair.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69 for "Cantonment Authority".

**190. Power to attach brackets for lamps.**—A [a][Board] may attach to the outside of any building, or to any tree in the cantonment, brackets for lamps in such manner as not to occasion injury thereto or inconvenience.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

## STREETS

**191. Temporary occupation of street, land, etc.**—A [a][Board] may, by order in writing, permit the temporary occupation of any street, or of any land vested in the [a][Board], for the purpose of depositing any building materials or making any temporary excavation therein or erection thereon, subject to such conditions as it may prescribe for the safety or convenience of the public, and may charge a fee for such permission and may in its discretion withdraw such permission.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**192. Closing and opening of streets.**—(1) A [a][Board] shall not permanently close any street or open any new street without the previous sanction of the [b][Officer Commanding-in-Chief, the Command.]

(2) A [a][Board] may, by public notice, temporarily close any street or any part of a street for repair or for the purpose of carrying out any work connected with drainage, water-supply or lighting or any other work which it is by or under this Act required or permitted to carry out:

Provided that where, owing to any works or repairs or from any other cause, the condition of any street or of any water-works, drain, culvert or premises vested in the [a][Board], is such as to be likely to cause danger to the public, the [a][Board] shall—

(a) take all reasonable means for the protection of the adjacent buildings and land and provide reasonable means of access thereto;

(b) cause sufficient barriers or fences to be erected for the security of life and property, and cause such barriers or fences to be sufficiently lighted from sunset to sunrise.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] Substituted by the Cantonments (Amendment) Act, 1926 (35 of 1926), S. 2, for "Officer Commanding the District."

**193. Names of streets and numbers of buildings.**—(1) A [a][Board] may cause a name to be given to any street and to be affixed on any building in the cantonment in such place as it thinks fit, and may also cause a number to be affixed to any such building.

(2) Whoever destroys, pulls down, defaces or alters any such name or number or puts up any name or number differing from that put up by the order of the [a][Board] shall be punishable with fine which may extend to twenty rupees.

[b][(3) When a number has been affixed to any building under sub-section (1), the owner of the building shall maintain the number in order, and shall replace it if removed or defaced, and if he fails to do so the Board may by notice in writing require him to replace it.]

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] Inserted by S. 53, ibid.

## BOUNDARIES AND TREES

**194. Boundary walls, hedges and fences.**—(1) No boundary wall, hedge or fence of any material or description shall be erected in a cantonment without the permission in writing of the [a][Board].

(2) A [a][Board] may, by notice in writing, require the owner or lessee of any land in the cantonment—

(a) to remove from the land any boundary wall, hedge or fence which is in its opinion unsuitable, unsightly or otherwise objectionable; or

(b) to construct on the land sufficient boundary walls, hedges or fences of such material, description or dimensions as may be specified in the notice; or

(c) to maintain the boundary walls, hedges or fences of such lands in good order:

Provided that, in the case of any such boundary wall, hedge or fence which was erected with the consent or under the orders of the [a][Board], or which was in existence at the commencement of this Act, the [a][Board] shall make compensation for any damage caused by the removal thereof.

(3) The [a][Board] may, by notice in writing, require the owner, lessee or occupier of any such land to cut or trim any hedge on the land in such manner and within such time as may be specified in the notice.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**195. Felling, lopping and trimming of trees.**—(1) Where, in the opinion of a [a][Board], the felling of any tree of mature growth standing in a private enclosure in the cantonment is necessary for any reason, the [a][Board] may, by notice in writing, require the owner, lessee or occupier of the land to fell the tree within such time as may be specified in the notice.

(2) A [a][Board] may—

(a) cause to be lopped or trimmed any tree standing on land in the cantonment which belongs to [c][the Government]; or

(b) by public notice require all owners, lessees or occupiers of land in the cantonment or by notice in writing require the owner, lessee or occupier of any such land, to lop or trim, in such manner as may be

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**Section 194 — Note 1**

(1) Before an order can legally be issued by the Board, it must form the opinion that the boundary wall is unsuitable, unsightly or otherwise objectionable. The Executive Officer has no authority of his own initiative to issue an order under this section. ('09) 9 Cri L Jour 447 (448): 3 Sind LR 11.

**Section 195 — Note 1**

(1) A notice under this section must be in writing; a disobedience of a notice not in writing is not punishable under Section 268. ('19) AIR 1919 All 158 (158): 20 Cri L Jour 384.

(2) The expression 'For any reason' — means good reason which man of ordinary commonsense would approve of as sound reason. 1967 Cri LJ 1235 (Mys).

specified in the notice, all or any trees standing on such land or to remove any dead trees from such land.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**196. Digging of public land.**—Whoever, without the permission in writing of the [a][Board], digs up the surface of any open space in the cantonment which is not private property, shall be punishable with fine which may extend to twenty rupees and, in the case of a continuing offence, [b][with an additional fine] which may extend to five rupees for every day after the first during which the offence continues.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] Substituted by the Repealing and Amending Act, 1930 (8 of 1930), S. 2 and Sch. I, for "to an additional fine."

**197. Improper use of land.**—(1) If, in the opinion of a [a][Board], the working of a quarry in the cantonment, or the removal of stone, earth or other material from the soil in any place in the cantonment, is dangerous to persons residing in or frequenting the neighbourhood of such quarry or place, or creates, or is likely to create, a nuisance, the [a][Board] may, by notice in writing, prohibit the owner, lessee or occupier of such quarry or place or the person responsible for such [b][working] or removal, from continuing or permitting the working of such quarry or the moving of such material, or require him to take such steps in the matter as the [a][Board] may direct for the purpose of preventing danger or abating the nuisance arising or likely to arise therefrom.

(2) If, in any case referred to in sub-section (1), the [a][Board] is of opinion that such a course is necessary in order to prevent imminent danger, it may, by order in writing, require a proper hoarding or fence to be put up for the protection of passers-by.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority."

[b] Substituted by the Repealing and Amending Act, 1930 (8 of 1930), S. 2, and Sch. I, for "making."

## CHAPTER XII

## MARKETS, SLAUGHTER-HOUSES, TRADES AND OCCUPATIONS

**198. Public markets and slaughter-houses.**—(1) A [a][Board] may provide and maintain, either within or without the cantonment, public markets and public slaughter-houses, to such number as it thinks fit, together with stalls, shops, sheds, pens and other buildings or conveniences for the use of persons carrying on trade or business in or frequenting such markets or slaughter-houses, and may provide and maintain in any such market buildings, places, machines, weights, scales and measures for the weighment or measurement of goods sold therein.

(2) When such market or slaughter-house is situated beyond cantonment limits, the [a][Board] shall have the same power for the inspection and proper regulation of the same as if it were situated within those limits.

(3) The [a][Board] may at any time, by public notice, close any public market or public slaughter-house or any part thereof.

(4) Nothing in this section shall be deemed to authorise the establishment of a public market or public slaughter-house within the limits of any area administered by any local authority other than the [a][Board], without the permis-

**Chapter XII — Note 1**

(1) As to the power of the Central Government to extend any of the provisions of Chapter XII to any area beyond a cantonment and in the vicinity thereof, see Section 286.

sion of such local authority or otherwise than on such conditions as such local authority may approve.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

199. Use of public market.—(1) No person shall, without the general or special permission in writing of the [a][Board], sell or expose for sale any animal or article in any public market.

(2) Any person contravening the provisions of this section, and any animal or article exposed for sale by such person, may be summarily removed from the market by or under the orders of the Executive Officer or any officer or servant of the [a][Board] authorised by it in this behalf.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[a][200 Power to transfer by public auction, etc.—The Board may transfer by public auction, for any period not exceeding three years at a time, the right to occupy or use any stall, shop, standing, shed or pen in a public market, or public slaughter-house or the right to expose goods for sale in a public market or the right to weigh or measure goods sold therein, or the right to slaughter animals in any public slaughter house:

Provided that where the Board is of opinion that such transfer of the aforesaid rights by public auction is not considered desirable or expedient, it may with the previous sanction of the General Officer Commanding-in-Chief of the Command,—

(a) either levy such stallages, rents or fees as it thinks fit; or

(b) farm the stallages, rents and fees leviable under clause (a) for any period not exceeding one year at a time.]

[a] Substituted for former section 200 by the Cantonments (Amendment) Act, 1953 (2 of 1954), S. 18 (2-1-1954).

201. Stallages, rents, etc., to be published.—A copy of the table of stallages, rents and fees, if any, leviable in any public market or public slaughter-house, and of the bye-laws made under this Act for the purpose of regulating the use of such market or slaughter-house, printed in the English language and in such other language or languages as the [a][Board] may direct, shall be affixed in some conspicuous place in the market or slaughter-house.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority."

202. Private markets and slaughter-houses.—(1) No place in a cantonment other than a public market shall be used as a market, and no place in a cantonment other than a public slaughter-house shall be used as a slaughter-house, unless such place has been licensed as a market or slaughter-house, as the case may be, by the [a][Board]:

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**Section 200 — Note 1**

(1) The cantonment authorities rented a shed to X for Rs. 300, for use as vegetable shop. The period of tenure was three years. Before the expiry of the period the shed was blown off. Some instalments were paid by X but he refused to pay instalments after the shed blew off. The agreement included a clause that any amount due would be recovered from the movable and immovable property of X. The cantonment authorities recovered the dues by issue of a warrant of attachment. Thereupon X filed a suit for illegal restraint and damages.

Held, that Section 200 applies to the case and not Section 210. The relationship between the authorities and X was that of ordinary landlord and tenant and it was optional for X to avoid the lease under Section 108 of the T. P. Act. ('33) AIR 1933 Lah 517 (519).

(2) Failure to pay rent for a stall rented from cantonment authority is not punishable. ('07) 5 Cri L Jour 87 (87, 88): 1906 Pun Re (Cr) No. 15, p. 70. (Case with reference to Section 131 of 1899 Act.)

Provided that nothing in this sub-section shall apply in the case of a slaughter-house established and maintained by the Government.

(2) Nothing in sub-section (1) shall be deemed—

(a) to restrict the slaughter of any animal in any place on the occasion of any festival or ceremony, subject to such conditions as to prior or subsequent notice as the Executive Officer with the previous sanction of the District Magistrate may, by public or special notice, impose in this behalf, or

(b) to prevent the Executive Officer, with the sanction of the [a][Board], from setting apart places for the slaughter of animals in accordance with religious custom, when such animals are slaughtered for consumption by the troops or for the purpose of the sale of the flesh thereof to the troops.

(3) Whoever omits to comply with any condition imposed by the Executive Officer under clause (a) of sub-section (2) shall be punishable with fine which may extend to fifty rupees and, in the case of a continuing offence, with an additional fine which may extend to ten rupees for every day after the first during which the offence is continued.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**203. Conditions of grant of licence for private market or slaughter-house.**—(1) A [a][Board] may charge such fees as it thinks fit to impose for the grant of a licence to any person to open a private market or private slaughter-house in the cantonment, and may grant such licence subject to such conditions, consistent with this Act, and any bye-laws made thereunder, as it thinks fit to impose.

(2) The [a][Board] may refuse to grant any such licence without giving reasons for such refusal.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**204. Penalty for keeping market or slaughter-house open without licence, etc.**—(1) Any person who keeps open for public use any market or slaughter-house in respect of which a licence is required by or under this Act, without obtaining licence therefor, or while the licence therefor is suspended, or after the same has been cancelled, shall be punishable with fine which may extend to fifty rupees and, in the case of a continuing offence, with an additional fine which may extend to five rupees for every day after the first during which the offence is continued.

(2) When a licence to open a private market or private slaughter-house, is granted or refused or is suspended or cancelled, the [a][Board] shall cause a

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**Section 203 — Note 1**

(1) The section covers only licenses to open a market. The word "open" must be read as applying only to the first opening of a market. It is only at that stage that the Cantonment Board has been given power to charge a fee. Once a license is given and a market is opened the section ceases to apply. The Board cannot charge any fee for renewal of the license. ('58) AIR 1958 Mad 513 (513, 514): ILR (1955) Mad 729 (DB).

(2) There can be no doubt that under Section 203 the Cantonment Board can say when issuing a licence that it will be tenable only for a particular period. But under the guise of that power the board cannot say that on the expiration of the period the market is being opened and therefore it is entitled to charge fees for issuing licence for a further period. Nor do Sections 208 and 280 which empower the Board and the Central Government to make bye-laws and rules confer power on the Cantonment Board to charge fees for the renewal of a licence issued under Section 203. ('58) AIR 1958 Mad 513 (514): ILR (1958) Mad 729 (DB).

**Section 204 — Note 1**

(1) Section 204 does not apply to the question of the levy of fees for the renewal of license granted under Section 203. ('58) AIR 1958 Mad 513 (514): ILR (1958) Mad 729 (DB).

notice of the grant, refusal, suspension or cancellation to be posted in English and in such other language or languages as it thinks necessary, in some conspicuous place by or near the entrance to the place to which the notice relates.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**205. Penalty for using unlicensed market or slaughter-house.**—Whoever, knowing that any market or slaughter-house has been opened to the public without a licence having been obtained therefor when such licence is required by or under this Act, or that the licence granted therefor is for the time being suspended or that it has been cancelled, sells or exposes for sale any article in such market, or slaughters any animal in such slaughter-house, shall be punishable with fine which may extend to fifty rupees and, in the case of a continuing offence, with an additional fine which may extend to five rupees for every day after the first during which the offence is continued.

**206. Prohibition and restriction of use of slaughter-houses.**—(1) Where, in the opinion of the [a][Board], it is necessary on sanitary grounds so to do, it may, by public notice, prohibit for such period, not exceeding one month, as may be specified in the notice, or for such further period, not exceeding one month, as it may specify by a like notice, the use of any private slaughter-house specified in the notice, or the slaughter therein of any animal of any description so specified.

(2) A copy of every notice issued under sub-section (1) shall be conspicuously posted in the slaughter-house to which it relates.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**207. Power to inspect slaughter-houses.**—(1) Any servant of a [a][Board], authorised by order in writing in this behalf by the President of the Board [b][* * * *] or the Health Officer, may, if he has reason to believe that any animal has been, is being, or is about to be slaughtered in any place in contravention of the provisions of this Chapter, enter into and inspect any such place at any time, whether by day or by night.

(2) Every such order shall specify the place to be entered and the locality in which the same is situated and the period, which shall not exceed seven days, for which the order is to remain in force.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] The words "if any" were repealed by S. 54, ibid.

**208. Power to make bye-laws.**—A [a][Board] may, with the approval of the [b][Central Government], make bye-laws consistent with this Act to provide for all or any of the following matters, namely:—

(a) the days on, and the hours during, which any private market or private slaughter house may be kept open for use;

(b) the regulation of the design, ventilation and drainage of such markets and slaughter-houses, and the material to be used in the construction thereof;

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**Section 205 — Note 1**

(1) The section does not apply to the question of levy of fees for the renewal of license granted under Sec. 203. ('58) AIR 1958 Mad 513 (514): ILR (1958) Mad 729 (DB).

**Section 207 — Note 1**

(1) Nothing in Section 241 shall be deemed to confer upon any person any power such as is referred to in this section; see proviso to Section 241.

**Section 208 — Note 1**

(1) Section 208 which empowers the Board and the Central Government to make bye-laws and rules does not confer power on the Board to charge fees for the renewal of the license granted under S. 203. ('58) AIR 1958 Mad 513 (514): ILR (1958) Mad 729 (DB).

(c) the keeping of such markets and slaughter-houses and lands and buildings appertaining thereto in a clean and a sanitary condition, the removal of filth and refuse therefrom, and the supply therein of pure water and of a sufficient number of latrines and urinals for the use of persons using or frequenting the same;

(d) the manner in which animal shall be stalled at a slaughter-house;

(e) the manner in which animals may be slaughtered;

(f) the disposal or destruction of animals offered for slaughter which are, from disease or any other cause, unfit for human consumption; and

(g) the destruction of carcases which from disease or any other cause are found after slaughter to be unfit for human consumption.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

## Trades and Occupations

**209. Provision of washing places.**—(1) A [a][Board] may provide suitable places for the exercise by washermen of their calling, and may require payment of such fees for the use thereof as it thinks fit.

(2) Where the [a][Board] has provided such places as aforesaid it may, by public notice, prohibit the washing of clothes by washermen at any other place in the cantonment:

Provided that such prohibition shall not be deemed to apply to the washing by a washerman of his own clothes or of the clothes of any other person who is an occupier of the place at which they are washed.

(3) Whoever contravenes any prohibition contained in a notice issued under sub-section (2) shall be punishable with fine which may extend to twenty rupees.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**210. Licences required for carrying on of certain occupations.**—(1) No person of any of the following classes, namely:—

(a) butchers and vendors of poultry, game or fish;

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**Section 210 — Note 1**

(1) The provisions of Section 210 of the Act does not impose an unreasonable restriction on the exercise of the right guaranteed by Article 19 (1) (g) of the Constitution of India. AIR 1961 Madh Pra 361 (362, 363): 1961 Jab LJ 531 (DB).

(2) Sub-section (1) (i) — Betel leaves are not articles of food within the meaning of Clause (i) of sub-section (1) of Section 210. 1962 (1) Cri LJ 161 (162): 1961 Jab LJ 1143.

(3) The term "vegetables" in Section 210 (1) (i) denotes those classes of vegetable matter which are used for the table. 1962 (1) Cri LJ 161 (162): 1961 Jab LJ 1143.

(4) The words 'no person' used in Section 210 (1) cannot be abridged as to exclude persons who have obtained a lease under Section 200 from the Cantonment Authority. ('55) ILR (1955) Patiala 1 (5).

Sub-section (1) (l) — (5) The word "wood" is unqualified and not restricted to "inflammable wood" only. Hence a person selling bamboos, ballies, takhats and karies within cantonment without licence is guilty under Section 268. ('34) AIR 1934 All 987 (987): 36 Cri L Jour 261.

Sub-section (3) — (6) The word 'locality" is not an unfair interpretation of the word "part" in Clause (a) of Section 210 (3). It covers all that part of the cantonment where the bazar was situated and where the particular trader could carry on his occupation without offence or danger to other parts of the cantonment not used for the purpose of a bazar, but where residences of officers or the barracks for troops are situated. ('42) AIR 1942 Sind 95 (95): 43 Cri L Jour 733.

(7) Where a person has been carrying on a trade in the same part of the cantonment from the commencement of the Cantonments Act, there is no obligation upon him to apply for licence to carry on the trade. Cantonment Authority must give him three month's notice of his obligation to apply for licence. Without such notice he cannot be convicted for carrying on trade without a licence. ('42) AIR 1942 Sind 95 (95): 43 Cri L Jour 733.

(8) A notice was served on a person prohibiting him from selling fruit in the cantonment area. He made a representation under sub-section (3) (a) whereupon he was allowed to continue the business but

(b) persons keeping pigs for profit, and dealers in the flesh of pigs which have been slaughtered in India;
(c) persons keeping milch cattle or milch goats for profits;
(d) persons keeping for profit any animals other than pigs, milch cattle or milch goats;
(e) dairymen, buttermen and makers and vendors of ghee;
(f) makers of bread, biscuits or cake, and vendors of bread, biscuits or cake made in India;
(g) vendors of fruit or vegetables;
(h) manufacturers of aerated or other potable waters or of ice or ice-cream and vendors of the same;
[a][(i)] vendors of any medicines, drugs or articles of food or drink for human consumption (other than the flesh of pigs, milk, butter, bread, biscuits, cake, fruit, vegetables, aerated or other potable waters or ice or ice-cream) which are of a perishable nature;
(j) vendors of water to be used for drinking purposes;
(k) washermen;
(l) dealers in hay, straw, wood, charcoal or other inflammable material;
(m) dealers in fire-works, kerosene oil, petroleum or any other inflammable oil or spirit;
(n) tanners and dyers;
(o) persons carrying on any trade or occupation from which offensive or unwholesome smells arise;
(p) vendors of wheat, rice and other grain or of flour; [b][*]
(q) makers and vendors of sugar or sweetmeats [c][and
(r) barbers and keepers of shaving saloons;]

shall carry on his trade, calling or occupation in any part of a cantonment unless he has applied for and obtained a licence in this behalf from the [d][Board].

(2) A licence granted under sub-section (1) shall be valid [e][until the end of the year in which it is issued] and the grant of such licence shall not be withheld by the [d][Board] unless it has reason to believe that the business which it is intended to establish or maintain would be offensive or dangerous to the public [f][or that the premises in which the business is intended to be established or maintained are unsuitable for the purpose].

(3) Notwithstanding anything contained in sub-section (1),—

(a) no person who was, at the commencement of this Act, carrying on his trade, calling or occupation in any part of a cantonment shall be bound to apply for a lience for carrying on such trade or occupation in that part until he has received from the [d][Board] not less than three months' notice in writing of his obligation to do so, and if the [d][Board] refuses to grant him a licence, it shall pay compensation for any loss, incurred by reason of such refusal;

(b) no person shall be required to take out a licence for the sale or storage of petroleum or for the sale or possession for sale of poisons or white arsenic in any case in which he is required to take out a licence for such sale, storage or possession for sale by or under the Indian Petroleum Act, 1899,[g] or the Poisons Act, 1919.

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**Section 210 — Note 1 (contd.)**

it was not clear whether the cantonment authorities required him to take a licence. However, he applied for a licence without paying the fee prescribed for it. No licence was issued and he was tried summarily for offence under Sections 210 (g) and 213, and convicted. It was held that he could not by reason of his conduct in applying for a licence, avail of sub-section (3) (a). It was also remarked that the accused should not have been tried summarily. ('38) AIR 1938 Lah 427 (427): 39 Cri L Jour 653.

(4) The [a][Board] may charge for the grant of licences under this section such fee [b][not exceeding the cost of granting the licences,] as it may fix with the previous sanction of the [c][Central Government].

[a] Original clauses (j) to (r) were re-lettered (i) to (q) by the Repealing and Amending Act, 1934 (24 of 1934), S. 2 and Sch. I.
[b] The word "and" was repealed by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 55.
[c] Inserted by S. 55, ibid.
[d] Substituted by S. 69, ibid, for "Cantonment Authority".
[e] Substituted by S. 55, ibid, for "for one year".
[f] Added by the Cantonments (Amendment) Act, 1953 (2 of 1954), S. 19 (2-1-1954).
[g] See now the Indian Petroleum Act, 1934 (30 of 1934).

**211. Conditions which may be attached to licences.**—A licence granted to any person under section 210 shall specify the part of the cantonment in which the licensee may carry on his trade, calling or occupation, and may regulate the hours and manner of transport within the cantonment of any specified articles intended for human consumption, and may contain any other conditions which the [a][Board] thinks fit to impose in accordance with bye-laws made under this Act.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

## General Provisions

**212. Power to vary licence.**—If a [a][Board] is satisfied that any place used under a licence granted under this Chapter is a nuisance or is likely to be dangerous to life, health or property, the [a][Board] may, by notice in writing, require the owner, lessee or occupier thereof to discontinue the use of such place or to effect such alterations, additions, or improvements as well, in the opinion of the [a][Board] render it no longer a nuisance or dangerous.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**213. Carrying on trade, etc., without licence or in contravention of section 212.**—Whoever carries on any trade, calling or occupation for which a licence is required without obtaining a licence therefor or while the licence therefor is suspended or after the same has been cancelled, and whoever, after receiving a notice under Section 212, uses or allows to be used any building or place in contravention thereof, shall be punishable with fine which may extend to two hundred rupees and, in the case of a continuing offence, with an additional fine which may extend to forty rupees for every day after the first during which the offence is continued.

**214. Feeding animals on dirt, etc.**—Whoever feeds or allows to be fed on filthy or deleterious substances any animal, which is kept for the purpose of supplying milk to, or which is intended to be used as food for, the inhabitants of a cantonment or allows it to graze in any place in which grazing has, for sanitary reasons, been prohibited by public notice by the [a][Board] shall be punishable with fine which may extend to fifty rupees.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

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**Section 213 — Note 1**

(1) A butcher who had no licence imported meat in large quantities and distributed it. There was no evidence of his receiving any money. He alleged that he was a salaried person employed for fetching meat by several persons. It was held that the presumption was that he imported meat for sale and sold it, and in the absence of any other evidence conviction was proper. ('29) AIR 1929 Sind 150 (151): 30 Cri L Jour 906.

## ENTRY, INSPECTION AND SEIZURE

**215. Powers of entry and seizure.**—(1) The President or the Vice-President [a][* * *] the Executive Officer, the Health Officer, the Assistant Health Officer, or any other officer or servant of a [b][Board] authorised by it in writing in this behalf,—

(a) may at any time enter into any market, building, shop, stall or other place in the cantonment for the purpose of inspecting, and may inspect, any animals, articles or things intended for human food or drink or for medicine, whether exposed or hawked about for sale or deposited in or brought to any place for the purpose of sale, or of preparation for sale, or any utensil or vessel for preparing, manufacturing or containing any such article or thing, and may enter into and inspect any place used as a slaughter-house and may examine any animal or article therein;

(b) may seize any such animal, article or thing which appears to him to be diseased, or unwholesome or unfit for human food or drink or medicine, as the case may be, or to be adulterated or to be not what it is represented to be, or any such utensil or vessel which is of such a kind or in such a state as to render any article prepared, manufactured or contained therein unwholesome or unfit for human food or for medicine, as the case may be.

(2) Any article seized under sub-section (1) which is of a perishable nature may, under the orders of the Health Officer or the Assistant Health Officer, forthwith be destroyed if, in his opinion, it is diseased, unwholesome or unfit for human food, drink or medicine, as the case may be.

(3) Every animal, article, utensil, vessel or other thing seized under sub-section (1) shall, if it is not destroyed under sub-section (2), be taken before a Magistrate [c][who shall give orders as to its disposal].

(4) The owner or person in possession, at the time of seizure under sub-section (1) of any animal or carcase which is diseased or of any article or thing which is unwholesome or unfit for human food, drink or medicine as the case may be, or is adulterated or is not what it is represented to be, or of any utensil or vessel which is of such kind or in such state as is described in clause (b) of sub-section (1), shall be punishable with fine which may extend to one hundred rupees, and the animal, article, utensil, vessel or other thing shall be liable to be forfeited to the [b][Board] or to be destroyed or to be so disposed of as to prevent its being exposed for sale or used for the preparation of food, drink or medicine, as the case may be.

Explanation I.—If any such article, having been exposed or stored in, or brought to, any place mentioned in sub-section (1) for sale as ghee, contains any substance not exclusively derived from milk, it shall be deemed, for the purposes of this section, to be an article which is not what it is represented to be.

Explanation II.—Meat subjected to the process of blowing shall be deemed to be unfit for human food.

Explanation III.—The article of food or drink shall not be deemed to be other than what it is represented to be merely by reason of the fact that there has been added to it some substance not injurious to health:

Provided that—

(a) such substance has been added to the article because the same is required for the preparation or production thereof as an article of commerce in a state fit for carriage or consumption and not fraudulently

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**Section 215 — Note 1**

(1) Nothing in Section 241 shall be deemed to confer upon any person any power such as is referred to in this section; see proviso to Section 241.

to increase the bulk, weight or measure of the food or drink or conceal the inferior quality thereof, or

(b) in the process of production, preparation or conveyance of such article of food or drink, the extraneous substance has unavoidably become intermixed therewith, or

(c) the owner or person in possession of the article has given sufficient notice by means of a label distinctly and legibly written or printed thereon or therewith, or by other means of a public description, that such substance has been added, or

(d) such owner or person has purchased the article with a written warranty that it was of a certain nature, substance and quality and had no reason to believe that it was not of such nature, substance and quality, and has exposed it or hawked it about or brought it for sale in the same state and by the same description as that in and by which he purchased it.

[a] The words "of a Board" were repealed by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 56.
[b] Substituted by S. 69, ibid, for "Cantonment Authority"
[c] Added by the Cantonments (Amendment) Act, 1944 (8 of 1944), S. 7, (17-3-1944).

### Import of Cattle and Flesh

**216. Import of cattle and flesh.**—(1) No person shall, without the permission in writing of the [a][Board], bring into a cantonment any animal intended for human consumption, or the flesh of any animal slaughtered outside the cantonment otherwise than in a slaughter-house maintained by the Government or the [a][Board].

(2) Any animal or flesh brought into a cantonment in contravention of sub-section (1) may be seized by the Executive Officer or by any servant of the [a][Board] and sold or otherwise disposed of as the [b][President of the Board] may direct, and, if it is sold the sale-proceeds may be credited to the cantonment fund.

(3) Whoever contravenes the provisions of sub-section (1) shall be punishable with fine which may extend to fifty rupees.

(4) Nothing in this section shall be deemed to apply to cured or preserved meat or to animals driven or meat carried throughout a cantonment for consumption outside thereof, or to meat brought into a cantonment by any person for his immediate domestic consumption:

Provided that the [a][Board] may, by public notice, direct that the provisions of this section shall apply to cured or preserved meat of any specified description or brought from any specified place.

[a] Substituted by the Cantonment (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".
[b] Substituted for "Board" by the Cantonments (Amendment) Act, 1944 (8 of 1944), (17-3-1944).

## CHAPTER XIII

## WATER-SUPPLY, DRAINAGE AND LIGHTING

### Water-supply

**217. Maintenane of water-supply.**—(1) In every cantonment where a sufficient supply of pure water for domestic use does not already exist, the [a][Board] shall provide or arrange for the provision of such a supply.

**Chapter XIII — Note 1**

(1) As to the power of the Central Government to extend any of the provisions of Chapter XIII to any area beyond a cantonment and in the vicinity thereof, see Section 286.

(2) The [a][Board] shall, as far as possible, make adequate provision that such supply shall be continuous throughout the year, and that the water shall be at all times pure and fit for human consumption.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority."

218. Control over sources of public water-supply.—(1) The [a][Board] may, with the previous sanction of the [c][Central Government], by public notice, declare any lake, stream, spring, well, tank, reservoir or other source, whether within or without the limits of the cantonment (other than a source of water-supply under the control of the [b][Military Engineer] Services or the Public Works Department) from which water is or may be made available for the use of the public in the cantonment to be a source of public water-supply.

(2) Every such source shall be under the control of the [a][Board].

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] Substituted by the Cantonments (Amendment) Act, 1925 (7 of 1925), S. 9, for "Military Works".

219. Power to require maintenance or closing of private source of public drinking water-supply.—The [a][Board] may, by notice in writing, require the owner or any person having the control of any source of public water-supply which is used for drinking purposes—

(a) to keep the same in good order and to clear it from time to time of silt, refuse and decaying vegetation, or

(b) to protect the same from contamination in such manner as the [a][Board] may direct, or

(c) if the water therein is proved to the satisfaction of the [a][Board] to be unfit for drinking purposes, to take such measures as may be specified in the notice to prevent the public from having access to or using such water:

Provided that, in the case of a well, such person as aforesaid may, instead of complying with the notice signify in writing his desire to be relieved of all responsibility for the proper maintenance of the well and his readiness to place it under the control and supervision of the [a][Board] for the use of the public, and, if he does so, he shall not be bound to carry out the requisition, and the [a][Board] shall undertake the control and supervision of the well.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

220. Supply of water.—(1) The [a][Board] may permit the owner, lessee or occupier of any building or land to connect the building or land with a source of public water-supply by means of communication pipes of such size and description as it may prescribe for the purpose of obtaining water for domestic use.

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**Section 218 — Note 1**

(1) "It has been pointed out that this clause as originally drafted would enable the cantonment authority to take under its own control sources of water-supply belonging to a municipality supplying water in the cantonment besides giving somewhat wide powers of confiscation of wells, etc. We have accordingly made the exercise of the powers conferred by this section subject to the sanction of the Local Government." — Select Committee Report.

**Section 219 — Note 1**

(1) The Officer of the Military Engineer Services or the Public Works Department when in charge of water supply may require the Board to exercise any of the powers conferred by this section; see Section 233 (1).

**Section 220 — Note 1**

(1) As to the penalty for using for other than domestic purposes any water supplied for domestic use, see Section 226.

(2) As to whether the Board empowered to levy tax on water can increase or vary the tax without sanction from Government, see ('26) AIR 1926 Sind 130 (131, 132): 20 Sind LR 325.

(2) The occupier of every building so connected with the water-supply shall be entitled to have for domestic use, in return for the water tax, if any, such quantity of water as the [a][Board] may determine.

(3) All water supplied in excess of the quantity to which such supply is limited under sub-section (2) and, in a cantonment in which a water tax is not imposed, all water supplied under this section, shall be paid for at such rate as the [a][Board] may fix.

(4) The supply of water for domestic use shall not be deemed to include any supply—

(a) for animals or for washing vehicles where such animals or vehicles are kept for sale or hire;

(b) for any trade, manufacture or business;

(c) for fountains, swimming baths or any ornamental or mechanical purpose;

(d) for gardens or for purposes of irrigation;

(e) for making or watering roads or paths; or

(f) for building purposes.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority."

**221. Power to require water supply to be taken.**—If it appears to the [a][Board] that any building or land in the cantonment is without a proper supply of pure water, the [a][Board] may, by notice in writing require the owner, lessee or occupier of the building or land to obtain from a source of public water-supply such quantity of water as is adequate to the requirements of the persons usually occupying or employed upon the building or land, and to provide communication pipes of the prescribed size and description, and to take all necessary steps for the above purposes.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**222. Supply of water under agreement.**—(1) The [a][Board] may, by agreement, supply, from any source of public water-supply, the owner, lessee or occupier of any building or land in the cantonment with any water for any purpose, other than a domestic purpose, on such terms and conditions, consistent with this Act and rules and bye-laws made thereunder, as may be agreed upon between the [a][Board] and such owner, lessee or occupier.

(2) The [a][Board] may withdraw such supply or curtail the quantity thereof at any time if it should appear necessary to do so for the purpose of maintaining sufficient supply of water for domestic use by inhabitants of the cantonment.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**223. Board not liable for failure of supply.**—Notwithstanding any obligation imposed on [a][Board] under this Act a [b][Board] shall not be liable to any forfeiture, penalty or damages for failure to supply water or for curtailing the quantity thereof if the failure or curtailment, as the case may be, arises from accident or from drought or other unavoidable cause unless in the case of an agreement for the supply of water under section 222, the [b][Board] has made express provision for forfeiture, penalty or damages in the event of such failure or curtailment.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authorities".

[b] Substituted by S. 69, ibid, for "Cantonment Authority".

**224. Conditions of universal application.**—Notwithstanding anything hereinbefore contained or contained in any agreement under section 222, the supply of

water by a [a][Board] to any building or land shall be, and shall be deemed to have been, granted subject to the following conditions, namely:—

(a) the owner, lessee or occupier of any building or land in or on which water supplied by the [a][Board] is wasted by reason of the pipes, drains or other works being out of repair shall, if he has knowledge thereof, give notice of the same to such officer as the [a][Board] may appoint in this behalf;

(b) the Executive Officer or any other officer or servant of the [a][Board] authorised by it in writing in this behalf may enter into or on any premises supplied with water by the [a][Board], for the purpose of examining all pipes, taps, works and fittings connected with the supply of water and of ascertaining whether there is any waste or misuse of such water;

(c) the [a][Board] may, after giving notice in writing, cut off the connection between any source of public water-supply and any building or land to which water is supplied for any purpose therefrom, or turn off such supply if—

(i) the owner or occupier of the building or land neglects to pay the water-tax or other charges connected with the water-supply within one month from the date on which such tax or charge falls due for payment;

(ii) the occupier refuses to admit the Executive Officer or other authorised officer or servant of the [a][Board] into the building or land for the purpose of making any examination or inquiry authorised by clause (b) or prevents the making of such examination or inquiry;

(iii) the occupier wilfully or negligently misuses or causes waste of water;

(iv) the occupier wilfully or negligently injures or damages his meter or any pipe or tap conveying water from the water-works;

(v) any pipes, taps, works or fittings connected with the supply of water to the building or land are found, on examination by the Executive Officer, to be out of repair to such an extent as to cause a waste of water;

(d) the expense of cutting off the connection or of turning off the water in any case referred to in clause (c) shall be paid by the owner or occupier of the building or land;

(e) no action taken under or in pursuance of clause (c) shall relieve any person from any penalty or liability which he may otherwise have incurred.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**225. Supply to persons outside cantonment.**—A [a][Board] may allow any person not residing within the limits of the cantonment to take or be supplied with water for any purpose from any source of public water supply on such terms as it may prescribe, and may at any time withdraw or curtail such supply.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**226. Penalty.**—Whoever—

(a) uses for other than domestic purposes any water supplied by a [a][Board] for domestic use, or

(b) where water is supplied by agreement with a [a][Board] for a specified purpose, uses that water for any other purpose.

shall be punishable with fine which may extend to fifty rupees, and the [a][Board] shall be entitled to recover from him the price of the water misused.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

### Water, Drainage and other Connections

**337. Power of Board to lay wires, connections, etc.**—A [a][Board]] may carry any cable, wire, pipe, drain, sewer or channel of any kind,—

(a) for the purpose of carrying out, establishing or maintaining any system of water-supply, lighting, drainage, or sewerage, through, across, under or over any road or street, or any place laid out or intended as a road or street or, after giving reasonable notice in writing to the owner or occupier, into, through, across, under or over any land or building, or up the side of any building, situated within the cantonment, or

(b) for the purpose of supplying water or of the introduction or distribution of outfall of water or for the removal or outfall of sewage, after giving reasonable notice in writing to the owner or occupier, into, through, across, under or over any land or building, or up the side of any building, situated outside the cantonment;

and may at all times do all acts and things which may be necessary or expedient for repairing or maintaining any such cable, wire, pipe, drain, sewer or channel in an effective state for the purpose for which the same may be used or is intended to be used:

Provided that no nuisance shall be caused in excess of what is reasonably necessary for the proper execution of the work:

Provided, further, that compensation shall be payable to the owner or occupier for any damage sustained by him which is directly occasioned by the carrying out of any such operation.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69 for "Cantonment Authority".

**228. Wires, etc, laid above surface of ground.**—In the event of any cable, wire, pipe, drain, sewer or channel being laid or carried above the surface of any land or through, over or up the side of any building, such cable, wire, pipe, drain, sewer or channel shall be so laid or carried as to interfere as little as possible with the rights of the owner or occupier to the due enjoyment of such land or building, and compensation shall be payable by the [a][Board] in respect of any substantial interference with the right to any such enjoyment.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**229. Connection with main not to be made without permission.**—No person shall, for any purpose whatsoever, without the permission of the [a][Board] at any time make or cause to be made any connection or communication with any cable, wire, pipe, drain, sewer or channel constructed or maintained by, or vested in, a [a][Board].

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69 for "Cantonment Authority".

**230. Power to prescribe ferrules and to establish meters, etc.**—A [a][Board] may prescribe the size of the ferrules to be used for the supply of gas, if any, and may establish meters or other appliances for the purpose of testing the quantity of any water, or the quantity or quality of any gas supplied to any premises by the [a][Board].

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**231. Power of inspection.**—The ferrules, communication pipes, connections, meters, stand-pipes and all fittings thereon or connected therewith leading from water mains or from pipes, drains, sewers or channels into any house or land, to which water or gas is supplied by a [a][Board] and the pipes, fittings, and works inside any such house or within the limits of any such land, shall in all cases be [b][installed or] executed subject to the inspection and to the satisfaction of the [a][Board].

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] Inserted by the Repealing and Amending Act, 1930 (8 of 1930), S. 2 and Sch. I.

**232. Power to fix rates and charges.**—A [a][Board] may fix the charges to be made for the establishment by them or through their agency of communications from, and connections with, mains, or pipes for the supply of water, or gas, or for meters or other appliances for testing the quantity or quality thereof supplied, and may levy such charges accordingly.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority."

### Application of this Chapter to Government Water-supplies

**233. Government water-supply.**—(1) Where in any cantonment there is a water-supply under the control of the [a][Military Engineer] Services or the Public Works Department, the Officer of the [a][Military Engineer] Services or of the Public Works Department, as the case may be, in charge of such water-supply (hereinafter in [b][this Chapter] referred to as the Officer) may publish in the cantonment in such manner as he thinks fit a notice declaring that any lake, stream, spring, well, tank, reservoir or other source, whether within or without the limits of the cantonment (other than a source of public water-supply) under the control of the [c][Board] is a source of public water supply and may, for the purpose of keeping any such source in good order or of protecting it from contamination or from use, require the [c][Board] to exercise any power conferred upon [d][it] by section 219.

(2) In the case of any water-supply such as is referred to in sub-section (1), the following provisions of this Chapter, namely, the provisions of Sections 220, 222, 223, 224, 226, 227, 228, 229, 230, 231, and 232 shall, as far as may be, be applicable in respect of the supply of water to the cantonment, and for the purpose of such application references to the [c][Board] shall be construed as references to the Officer and references to the Executive Officer or other officer, or servant of the [c][Board] shall be construed as references to such person as may be authorised in this behalf by the Officer.

[e][(3) The provisions of Section 222 shall be applicable in respect of the supply of water by agreement to the Board by the Officer for use for any purpose other than a domestic purpose in like manner as they are applicable to such supply to the owner, lessee or occupier of any building or land in the cantonment.]

[a] Substituted by the Cantonments (Amendment) Act, 1925 (7 of 1925), S. 9, for "Military Works".

[b] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 57, for "this section and in section 234."

[c] Substituted by S. 69, ibid, for "Cantonment Authority."

[d] Substituted for "that Authority" by the Repealing and Amending Act, 1939 (34 of 1939), S. 2 and Sch. I. (28-9-1939).

[e] Sub-section (3) was added by the Cantonments (Amendment) Act, 1942 (15 of 1942), S. 10 (30-3-1942).

**234. Recovery of charges.**—In any case in which the provisions of Section 233 apply [a][and in which the Board is not receiving a bulk supply of water

under section 234A,] the water-tax, if any, imposed in the cantonment and all other charges arising out of the supply of water which may be imposed under the provisions of this Chapter as applied by Section 233 shall be recovered by the [b][Board], and all monies so recovered, or such proportion thereof as the [c][Central Government] may in each case determine, shall be paid by the [b][Board] to the Officer.

[a] Inserted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 58.
[b] Substituted by S. 69, ibid., for "Cantonment Authority."

[a][234A. Supply of water from Government water supply to the Board.—(1) Where in any cantonment there is a water-supply such as is referred to in sub-section (1) of Section 233, the Board may [b][and so long as the Board is unable to provide a water supply of its own, it shall] receive from the Military Engineer Services or the Public Works Department, as the case may be, at such point or points as may be agreed upon betwen the Board and the Officer, a supply of water adequate to the requirements for domestic use of all persons in the cantonment other than entitled consumers.

(2) Any supply of water received under sub-section (1) shall be a bulk supply and the Board shall make such payments to the Officer for all water so received as may be agreed upon between the Board and the Officer, or, in default of such agreement, as may be determined by the [c][Central Government] to be reasonable having regard to the actual cost of supplying the water in the cantonment and the rate charged for water in any adjacent municipality:

Provided that, notwithstanding anything contained in this Act, the Board shall not charge for the supply to persons in the cantonment of water received by the Board under this section a rate calculated to produce more than the sum of the payments made to the Officer for water received and the actual cost of the supply thereof by the Board to consumers.

(3) If any dispute arises between the Board and the Officer regarding the amount of water adequate to the requirements of persons in the cantonment other than entitled consumers, the dispute shall be referred to the [c][Central Government] whose decision shall be final.]

[a] Section 234A was inserted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 59.
[b] Inserted by the Cantonments (Amendment) Act, 1942 (15 of 1942), S. 11, (30-3-42).

[a][234B. Functions of the Board in relation to distribution of bulk supply.—Where under the provisions of sub-section (1) of section 234A a bulk supply of water is received by the Board, the Board shall be solely responsible for the supply of water to all persons in the cantonment other than entitled consumers; and the provisions of this Act shall apply as if such bulk supply were a source of public water-supply under the control of the Board and as if the communications from and connections with such bulk supply for the purpose of supplying water to such persons were a system of water-supply established and maintained by the Board.]

[a] Section 234B was inserted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 59.

## CHAPTER XIV

## REMOVAL AND EXCLUSION FROM CANTONMENTS AND SUPPRESSION OF SEXUAL IMMORALITY

235. Power to remove brothels and prostitutes.[1]—The [a][Officer Commanding the station] [b][or the Board] may, on receiving information that any building in

Chapter XIV — Note 1

(1) As to the power of the Central Government to extend any of the provisions of Chapter XIV to any area beyond a cantonment and in the vicinity thereof, see Section 286.

the cantonment is used as a brothel or for purposes of prostitution, by order in writing setting forth the substance of the information received summon the owner, lessee, tenant or occupier of the building to appear before him [c][or the Board, as the case may be] either in person or by an authorised agent, and, if the [d][Officer Commanding the station] [b][or the Board] is then satisfied as to the truth of the information, [e][the Officer Commanding the station or, as the case may be, the Board may], by order in writing, direct the owner, lessee, tenant or occupier, as the case may be, to discontinue such use of the building within such period as may be specified in the order.

[a] Substituted by the Cantonments (Amendment) Act, 1925 (7 of 1925), S. 10, for "Commanding Officer of a Cantonment."
[b] Inserted by the Cantonments (Amendment) Act, 1953 (2 of 1954), S. 20 (2-1-1954).
[c] Inserted, ibid.
[d] Substituted for "Commanding Officer of the Cantonment" by Act 7 of 1925, S. 14.
[e] Substituted for "he may" by Act 2 of 1954, S. 20.
[f] See the Suppression of Immoral Traffic in Women and Girls Act, 1956 (104 of 1956) which applies to the whole of India.

**236. Penalty for loitering and importuning for purposes of prostitution.**[c]— (1) Whoever in a cantonment loiters for the purpose of prostitution or importunes any person to the commission of sexual immorality, shall be punishable with imprisonment which may extend to one month, or with fine which may extend to two hundred rupees.

(2) No prosecution for an offence under this section shall be instituted except on the complaint of the person importuned, or of a military officer in whose presence the offence was committed, or of a member of the Military or Air Force Police, being employed in the cantonment and authorised in this behalf by the [a][Officer Commanding the station], in whose presence the offence was committed, or of a police officer not below the rank of a sub-inspector [b][or a sergeant] who is employed in the cantonment and authorised in this behalf by the [a][Officer Commanding the station] [b][with the concurrence of the District Magistrate].

[a] Substituted by the Cantonments (Amendment) Act, 1925 (7 of 1925), S. 14, for "Commanding Officer of the Cantonment".
[b] Inserted by the Cantonments (Amendment) Act, 1931 (7 of 1931), S. 7.
[c] Cf. S. 8 of the Suppression of Immoral Traffic in Women and Girls Act, 104 of 1956; offence under S. 8 of that Act is cognisable as one under this section.

**237. Removal of lewd persons from cantonment.**—If the [a][Officer Commanding the station] [b][or the Board] is, after such inquiry [c][as he or it thinks necessary], satisfied that any person residing in or frequenting the cantonment is a prostitute

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**Section 236 — Note 1**

(1) As to when a police officer may arrest a person for an offence under this section, see S. 250 (b).

(2) Person importuning need not importune to commission of sexual immorality with himself or herself. ('36) AIR 1936 All 129 (130): 37 Cri L Jour 372.

(3) A male can be convicted of the offence of loitering because prostitution may be female or male prostitution. ('26) AIR 1926 Bom 227 (227): 27 Cri L Jour 555.

(4) In order that a conviction may be legal under sub-section (1) prosecution should be started strictly in accordance with sub-section (2). Thus, where an Executive Officer of a cantonment launched a prosecution under sub-section (1) and it was found that none of the conditions mentioned in sub-section (2) was fulfilled, the conviction of the accused was set aside by the High Court as the prosecution was not legally instituted. ('33) AIR 1933 Lah 590 (591): 35 Cri L Jour 509.

(5) Regimental Provost Sergeant sending complaint under Section 236 to Sub-Inspecter — Latter forwarding original to Magistrate — Sergeant, member of Military Police, and authorised to make complaint under Section 236 — Part of the offence committed in his presence — Complaint held was properly made. ('36) AIR 1936 All 129 (130, 131): 37 Cri L Jour 372.

or has been convicted of an offence under section 236, or of the abetment of such an offence, [d][he or, as the case may be, the Board may] cause to be served on such person an order in writing requiring such person to remove[f] from the cantonment within such time as may be specified in the order, and prohibiting such person from re-entering it without the permission in writing of the [e][Officer Commanding the station] [b][or the Board].

[a] Substituted by the Cantonments (Amendment) Act, 1925 (7 of 1925), S. 10, for "Commanding Officer of a Cantonment".
[b] Inserted by the Cantonments (Amendment) Act, 1953 (2 of 1954), S. 21 (2-1-1954).
[c] Substituted for "as he thinks necessary" ibid.
[d] Substituted for "he may", ibid.
[e] Substituted for "Commanding Officer of the Cantonment" by Act 7 of 1925, S. 14.
[f] Cf. S. 20 of the Suppression of Immoral Traffic in Women and Girls Act, 1956 (104 of 1956).

**238. Removal and exclusion from cantonment of disorderly persons.**—(1) A Magistrate of the first class, having jurisdiction in a cantonment, on receiving information that any person residing in or frequenting the cantonment—

(a) is a disorderly person who has been convicted more than once of gaming or who keeps or frequents a common gaming house, a disorderly drinking shop or a disorderly house of any other description, or

(b) has been convicted more than once, either within the cantonment or elsewhere, of an offence punishable under Chapter XVII of the Indian Penal Code, or

(c) has been convicted, either within the cantonment or elsewhere, of any offence punishable under section 156 of the Army Act,[a] or

(d) has been ordered under Chapter VIII of the Code of Criminal Procedure, 1898, either within the cantonment or elsewhere, to execute a bond for his good behaviour,

may record in writing the substance of the information received, and may issue a summons to such person requiring such person to appear and show cause why he should not be required to remove from the cantonment and be prohibited from re-entering it.

(2) Every summons issued under sub-section (1) shall be accompanied by a copy of the record aforesaid, and the copy shall be served along with the summons on the person against whom the summons is issued.

(3) The Magistrate shall, when the person so summoned appears before him, proceed to inquire into the truth of the information received and take such further evidence as he thinks fit, and if upon such inquiry, it appears to him that such person is a person of any kind described in sub-section (1) and that it is

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**Section 238 — Note 1**

(1) The provisions of Section 238 are not violative of the constitutional liberties declared by Article 19 (1) (d) and (e) and the procedural and substantive provisions of the Act do not overstep the limits of reasonableness. The section is intra vires the Constitution. AIR 1957 Punj 244 (254): ILR (1957) Punj 1388: 1957 Cri L Jour 1173 (DB).

(2) The provisions of the section are in the interest of general public within the meaning of Article 19 (5) of the Constitution. ('57) AIR 1957 Punj 244 (248): ILR (1957) Punj 1388: 1957 Cri L Jour 1173 (DB).

(3) The provisions of Section 238 relating to externment of disorderly and other persons did not make any distinction between Indian or British soldiers. If it was desirable in 1924 when the Act was passed, to protect British and Indian soldiers against bad influences it is equally desirable that Indian soldiers now should also receive the benefit of the legislation. AIR 1957 Punj 244 (248): ILR (1957) Punj 1388: 1957 Cri L Jour 1173 (DB).

(4) As to whether all proceedings to enforce the order and all prosecutions for any contravention thereof shall be held in abeyance pending the decision of the appeal from an order under this section, see Section 276.

necessary for the maintenance of good order in the cantonment that such person should be required to remove therefrom and be prohibited from re-entering the cantonment, the Magistrate shall report the matter to the [b][Officer Commanding the station], and, if the [b][Officer Commanding the station] so directs, shall cause to be served on such person an order in writing requiring him to remove from the cantonment within such time as may be specified in the order and prohibiting him from re-entering it without the permission in writing of the [b][Officer Commanding the station]

[a] (1881) 44 and 45 Vict., c. 58.

[b] Substituted by the Cantonments (Amendment) Act, 1925 (7 of 1925), S. 14, for "Commanding Officer of the Cantonment".

239. **Removal and exclusion from cantonment of seditious persons.**—(1) If any person in a cantonment causes or attempts to cause or does any act which he knows is likely to cause disloyalty, disaffection or breaches of discipline amongst any portion of [as][the Armed forces of the Union] or is a person who, the [a][Officer Commanding the station] has reason to believe, is likely to do any such act the [a][Officer Commanding the station] may make an order in writing setting forth the reasons for the making of the same and requiring such person to remove from the cantonment within such time as may be specified in the order and prohibiting him from re-entering it without the permission in writing of the [a][Officer Commanding the station]:

Provided that no order shall be made under this section against any person unless he has had a reasonable opportunity of being informed of the grounds on which it is proposed to make the order and of showing cause why the order should not be made.

(2) Every order made under sub-section (1) shall be sent to the Superintendent of Police of the district, who shall cause a copy thereof to be served on the person concerned.

(3) Upon the making of any order under sub-section (1), the [a][Officer Commanding the station] shall forthwith send a copy of the same to the [c][Central Government].

(4) The [c][Central Government] may, of its own motion, and shall, on application, made to it in this behalf within one month of the date of the order by the person against whom the order has been made, call upon the District Magistrate to make, after such inquiry as the [c][Central Government] may prescribe, a report regarding the justice of the order and the necessity therefor. At every such inquiry the person against whom the order has been made shall be given an opportunity of being heard in his own defence.

(5) The [c][Central Government] may, at any time after the receipt of a copy of an order sent under sub-section (3), or where a report has been called for under sub-section (4), on receipt of that report if it is of opinion that the order should be varied or rescinded, [b][make such order thereon as it thinks fit].

(6) Any person who has been excluded from a cantonment by an order made under this section may, at any time after the expiry of one month from the date thereof, apply to the Officer Commanding-in-Chief, the Command, for the rescission of the same and, on such application being made, the said Officer may,

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**Section 239 — Note 1**

(1) "We recognise that preventive powers of the nature given in this section are necessary, and we are satisfied that sufficient safeguards against the possibility of abuses are provided, subject to the incorporation of two amendments which we have made. The first of these makes it clear that the person whom it is proposed to expel shall be given an opportunity of hearing the grounds on which his expulsion is considered necessary before being required to show cause under sub-clause (1). The second makes it clear that at any inquiry by the District Magistrate under sub-clause (4) the person expelled shall be given an opportunity of being heard in his own defence." — Select Committee Report.

after making such inquiry, if any, as he thinks necessary, either reject the application or rescind the order.

[aa] Substituted for "His Majesty's forces" by A. L. O. 1950.
[a] Substituted by the Cantonments (Amendment) Act, 1925 (7 of 1925), S. 14, for "Commanding Officer of the Cantonment".
[b] Substituted by A. O. for "refer the case to the Governor-General in Council, who shall pass such orders thereon as he thinks fit".

**240. Penalty.**—Whoever—

(a) fails to comply with an order issued under this Chapter within the period specified therein, or, whilst an order prohibiting him from re-entering a cantonment without permission is in force, re-enters the cantonment without such permission, or

(b) knowing that any person has, under this Chapter, been required to remove from the cantonment and has not obtained the requisite permission to re-enter it, harbours or conceals such person in the cantonment,

shall be punishable with fine which may extend to two hundred rupees and, in the case of a continuing offence, with an additional fine which may extend to twenty rupees for every day after the first during which he has persisted in the offence.

## CHAPTER XV

## POWERS, PROCEDURE, PENALTIES AND APPEALS

### Entry and Inspection

**241. Powers of entry.**—It shall be lawful for the President or the Vice-President of a Board, or the Executive Officer, or the Health Officer or Assistant Health Officer, or any person specially authorised by the Health Officer or the Assistant Health Officer, or for any other person authorised by general or special order of a [a][Board] in this behalf, to enter into or upon any building or land with or without assistants or workmen in order to make any inquiry, inspection, measurement, valuation or survey, or to execute any work, which is authorised by or under this Act or which it is necessary to make or execute for any of the purposes or in pursuance of any of the provisions of this Act or of any rule, bye-law or order made thereunder:

Provided that nothing in this section shall be deemed to confer upon any person any power such as is referred to in Section 207 or Section 215 or to authorise the conferment upon any person of any such power.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority."

**242. Powers of inspection by member of a Board.**—With the previous sanction of the President, any member of a Board may inspect any work or institution constructed or maintained, in whole or part, at the expense of the Board, and any register, book, accounts or other document belonging to, or in the possession of, the Board.

**243. Power of inspection, etc.**—(1) A [a][Board] may, by general or special order, authorise any person—

(a) to inspect any drain, privy, latrine, urinal, cesspool, pipe, sewer or channel in or on any building or land in the cantonment, and, in his discretion, to cause the ground to be opened for the purpose of pre-

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**Chapter XV — Note 1**

(1) As to the power of the Central Government to extend any of the provisions of Chapter XV to any area beyond a cantonment and in the vicinity thereof, see S. 286.

venting or removing any nuisance arising from the drain, privy, latrine, urinal, cesspool, pipe, sewer or channel, as the case may be;

(b) to examine works under construction in the cantonment, to take levels or to remove, test, examine, replace or read any meter.

(2) If on such inspection, the opening of the ground is found to be necessary for the prevention or removal of a nuisance, the expenses thereby incurred shall be paid by the owner or occupier of the land or building, but if it is found that no nuisance exists or but for such opening would have arisen the ground or portion of any building, drain, or other work opened, injured or removed for the purpose of such inspection shall be filled in, reinstated, or made good, as the case may be, by the [a][Board].

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**244. Power to enter land adjoining land where work is in progress.**—(1) The Executive Officer of a cantonment may, with or without assistants or workmen, enter on any land within fifty yards of any work authorised by or under this Act for the purpose of depositing thereon any soil, gravel, stone or other materials, or of obtaining access to such work, or for any other purpose connected with the carrying on of the same.

(2) The Executive Officer shall, before entering on any land under sub-section (1), give the occupier, or, if there is no occupier, the owner not less than three days' previous notice in writing of his intention to make such entry, and shall state the purpose thereof, and shall, if so required by the occupier or owner, fence off so much of the land as may be required for such purpose.

(3) The Executive Officer shall, in exercising any power conferred by this section, do as little damage as may be, and compensation shall be payable by the [a][Board] to the owner or occupier of such land, or to both, for any such damage whether permanent or temporary.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**245. Breaking into premises.**—It shall be lawful for any person, authorised by or under this Act to make any entry into any place, to open or cause to be opened any door, gate or other barrier—

(a) if he considers the opening thereof necessary for the purpose of such entry; and

(b) if the owner or occupier is absent, or being present refuses to open such door, gate or barrier.

**246. Entry to be made in the day time.**—Save as otherwise expressly provided in this Act, no entry authorised by or under this Act shall be made except between the hours of sunrise and sunset.

**247. Owner's consent ordinarily to be obtained.**—Save as otherwise expressly provided in this Act, no building or land shall be entered without the consent of the occupier, or if there is no occupier, of the owner thereof, and no such entry shall be made without giving the said occupier or owner, as the case may be, not less than four hours' written notice of the intention to make such entry:

Provided that no such notice shall be necessary if the place to be inspected is a stable for horses or a shed for cattle, or a latrine, privy or urinal, or a work under construction.

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**Section 247 — Note 1**

(1) The entry which is contemplated in Section 247 which requires four hours' written notice is an entry without the consent of the occupier or the owner. But if the entry is with the implied consent of the occupier or the owner no question of four hours' written notice arises. ('35) AIR 1935 All 160 (161): 36 Cri L Jour 356.

**248. Regard to be had to social and religious usages.**—When any place used as a human dwelling is entered under this Act, due regard shall be paid to the social and religious customs and usages of the occupants of the place entered, and no apartment in the actual occupancy of a female shall be entered or broken open until she has been informed that she is at liberty to withdraw and every reasonable facility has been afforded to her for withdrawing.

**249. Penalty for obstruction.**—Whoever obstructs or molests any person employed by a [a][Board], who is not a public servant within the meaning of section 21 of the Indian Penal Code or any person with whom the [a][Board] has lawfully contracted, in the execution of his duty or of anything which he is empowered or required to do by virtue or in consequence of any of the provisions of this Act or of any rule, bye-law or order made thereunder, or in fulfilment of his contract, as the case may be, shall be punishable with fine which may extend to one hundred rupees.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

## POWERS AND DUTIES OF POLICE OFFICERS

**250. Arrest without warrant.**—Any member of the police force employed in a cantonment may, without a warrant, arrest any person committing in his view a breach of any of the provisions of this Act which are specified in Schedule IV.

Provided that—

(a) in the case of the breach of any such provision as is specified in Part B of Schedule IV, no person shall be so arrested who consents to give his name and address, unless there is reasonable ground for doubting the accuracy of the name or address so given, the burden of proof of which shall lie on the arresting officer, and no person so arrested shall be detained after his name and address have been ascertained; and

(b) no person shall be so arrested for an offence under section 236 except—

(i) at the request of the person importuned or of a military officer in whose presence the offence was committed; or

(ii) by or at the request of a member of the Military or Air Force Police, who is employed in the cantonment and authorised in this behalf by the [a][Officer Commanding the station], and in whose presence the offence was committed or by or at the request of any police officer not below the rank of a sub-inspector who is employed in the cantonment and authorised in this behalf by the [a][Officer Commanding the station].

[a] Substituted by the Cantonments (Amendment) Act, 1925 (7 of 1925), S. 14, for "Commanding Officer of the Cantonment".

**251. Duties of police officers.**—It shall be the duty of all police officers to give immediate information to the [a][Board] of the commission of any offence against the provisions of this Act or of any rule or bye-law made thereunder, and to assist all cantonment officers and servants in the exercise of their lawful authority.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

## NOTICES

**252. Notices to fix reasonable time.**—Where any notice, order or requisition made under this Act or any rule or bye-law made thereunder requires anything to be done for the doing of which no time is fixed in this Act or in the rule or bye-

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**Section 249 — Note 1**

(1) Mere refusal to pay rent is not an obstruction within the meaning of this section. ('32) AIR 1932 All 386 (389).

law, the notice, order or requisition shall specify a reasonable time for doing the same.

253. Authentication and validity of notices issued by Board.—Every notice, order or requisition issued by a [a][Board] under this Act or any rule or bye-law made thereunder shall be signed—

(a) [b][* * *] either by the President of the Board or by the Executive Officer or, [c][* * *]

(b) by the members of any committee especially authorised by the [a][Board] in this behalf.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for 'Cantonment Authority".
[b] The words "where there is a Board" were repealed by S. 60, ibid.
[c] The words "where there is no Board, by the Executive Officer; or" were repealed by S. 60, ibid.

254. Service of notice, etc.—(1) Every notice, order or requisition issued under this Act or any rule or bye-law made thereunder shall, save as otherwise expressly provided, be served or presented—

(a) by giving or tendering the notice, order or requisition, or sending it by post, to the person for whom it is intended; or

(b) if such person cannot be found, by affixing the notice, order or requisition on some conspicuous part of his last known place of abode or business, if within the cantonment, or by giving or tendering the notice, order or requisition to some adult male member or servant of his family, or by causing it to be affixed on some conspicuous part of the building or land, if any, to which it relates.

(2) When any such notice, order or requisition is required or permitted to be served upon an owner, lessee or occupier of any building or land, it shall not be necessary to name the owner, lessee or occupier therein, and the service thereof shall, save as otherwise expressly provided, be effected either—

(a) by giving or tendering the notice, order or requisition, or sending it by post, to the owner, lessee or occupier, or, if there are more owners, lessees or occupiers than one, [a][to] any one of them; or

(b) if no such owner, lessee or occupier can be found, by giving or tendering the notice, order or requisition to the authorised agent, if any, of any such owner, lessee or occupier, or to an adult male member or servant of the family of any such owner, lessee or occupier, or by causing it to be affixed on some conspicuous part of the building or land to which it relates.

(3) When the person on whom a notice, order or requisition is to be served is a minor, service upon his guardian or upon an adult male member or servant of his family shall be deemed to be service upon the minor.

[a] Substituted for "on" by the Repealing and Amending Act, 1940 (32 of 1940), S. 3 and Sch. II, (27-11-1940).

255. Method of giving notice.—Every notice which, by or under this Act, is to be given or served as a public notice or as a notice which is not required to be given to any individual therein specified shall, save as otherwise expressly provided, be deemed to have been sufficiently given or served if a copy thereof is affixed in such conspicuous part of the office of the [a][Board] or in such other public place, during such period, or is published in such local newspaper or in such other manner, as the [a][Board] may direct.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**256. Powers of Board in case of non-compliance with notice, etc.**—In the event of non-compliance with the terms of any notice, order or requisition issued to any person under this Act, or any rule or bye-law made thereunder, requiring such person to execute any work or to do any act, it shall be lawful for the [a][Board], whether or not the person in default is liable to punishment for such default or has been prosecuted or sentenced to any punishment therefor, after giving notice in writing to such person, to take such action or such steps as may be necessary for the completion of the act or work required to be done or executed by him, and all the expenses incurred on such account shall be recoverable by the [a][Board].

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

## RECOVERY OF MONEY

**257. Liability of occupier to pay in default of owner.**—(1) If any such notice as is referred to in Section 256 has been given to any person in respect of property of which he is the owner, the [a][Board] may require any occupier of such property or of any part thereof to pay to it, instead of to the owner, any rent payable by him in respect of such property, as it falls due, up to the amount recoverable from the owner under section 256:

Provided that, if the occupier, on application made to him by the [a][Board], refuses truly to disclose the amount of his rent or the name or address of the person to whom it is payable, the [a][Board] may recover from the occupier the whole amount recoverable under section 256.

(2) Any amount recovered from an occupier instead of from an owner under sub-section (1) shall, in the absence of any contract between the owner and the occupier to the contrary, be deemed to have been paid to the owner.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**258. Relief to agents and trustees.**—(1) Where any person, by reason of his receiving the rent of immovable property as an agent or trustee, or of his being as an agent to trustee the person who would receive the rent if the property were let to a tenant, would under this Act be bound to discharge any obligation imposed on the owner of the property for the discharge of which money is required, he shall not be bound to discharge the obligation unless he has, or but for his own improper act or default might have had, funds in his hands belonging to the owner sufficient for the purpose.

(2) The burden of proving any fact entitling an agent or trustee to relief under sub-section (1) shall lie upon him.

(3) Where any agent or trustee has claimed and established his right to relief under this section, the [a][Board] may, by notice in writing, require him, to apply to the discharge of such obligation as aforesaid the first monies which may come to his hands on behalf, or for the use, of the owner, and, on failure to comply with the notice, he shall be deemed to be personally liable to discharge the obligation.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[a][259. Method of recovery.—(1) Notwithstanding anything elsewhere contained in this Act, [b][arrears of any tax, rent on land and buildings and any other

**Section 259 — Note 1**

(1) This section was substituted for the old section by the Cantonments (Amendment) Act, 1936. Under the old section only moveable property was mentioned; but under the new section in addition to moveable property, standing timber, growing crops or grass are also included. Fur-

money recoverable by a Board or a Military Estates Officer under this Act or the rules made thereunder] may be recovered together with the cost of recovery either by suit or. on application to a Magistrate having jurisdiction in the cantonment or in any place where the person from whom such [c][tax, rent or money] is recoverable may for the time being be residing, by the distress and sale of any moveable property of or standing timber, [d][or growing crops] belonging to, such person which is within the limits of such Magistrate's jurisdiction, and shall, if payable by the owner of any property as such, be a charge on the property until paid:

Provided that the tools of artisans, [e][growing crops up to the value of five hundred rupees and implements and cattle used for the purposes of agriculture] shall be exempt from such distress or sale.

(2) An application to a Magistrate under sub-section (1) shall be in writing and shall be signed by the President or Vice-President of the Board or by the Executive Officer [f][or the Military Estates Officer], but shall not require to be personally presented.]

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 61, for the original section.

[b] Substituted for "arrears of any tax and any other money recoverable by a Board under this Act" by the Cantonments (Amendment) Act, 1953 (2 of 1954), S. 22 (2-1-1954).

[c] Substituted for "tax or money", ibid.

[d] Substituted for "growing crops or grass", ibid.

[e] Inserted, ibid.

[f] Inserted, ibid.

## COMMITTEES OF ARBITRATION

**260. Application for a Committee of Arbitration.**—In the event of any disagreement as to the liability of a [a][Board] to pay any compensation under this Act, or as to the amount of any compensation so payable, the person claiming such compensation may apply to the [a][Board] for the reference of the matter to a committee of Arbitration, and the [a][Board] shall forthwith proceed to convene a Committee of Arbitration to determine the matter in dispute.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**261. Procedure for convening Committee of Arbitration.**—When a Committee of Arbitration is to be convened, the [a][Board] shall cause a public notice to be published stating the matter to be determined, and shall forthwith send copies of the order to the District Magistrate, and to the other party concerned, and shall, as soon as may be, nominate such members of the Committee, as it is entitled to nominate under section 262, and, by notice in writing, call upon the other persons who are entitled to nominate a member or members of the Committee to nominate such member or members in accordance with the provisions of that section.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

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**Section 259 — Note 1 (contd.)**

ther, under the new section the proviso to sub-section (1) exempts tools of artisans from such distress or sale.

(2) An action for recovery can be taken under Section 259 with respect to rent on land and buildings if such rent is "claimable" by a Board under the Act or the rules framed thereunder. The section cannot be applied to a simple case of money due to the Board on a contract of lease. AIR 1966 SC 108 (111): (1965) 3 SCR 341.

(3) Magistrate while purporting to act under Section 259 of the Cantonments Act does not exercise any judicial function. His order is, therefore, not revisable. ILR (1959) 9 Raj 1041.

**262 Constitution of Committee of Arbitration.**—(1) Every Committee of Arbitration shall consist of five members, namely:—

(a) a Chairman who shall be a person not in the service of the [a][Government] or the [a][Board], and who shall be nominated by the [b][Officer Commanding the station];

(b) two persons nominated by the [a][Board]; and

(c) two persons nominated by the other party concerned,

[c][* * * *]

(2) If the [a][Board] or the other party concerned or the [b][Officer Commanding the station] fails within seven days of the date of issue of the notice referred to in section 261 to make any nomination which it or he is entitled to make or, if any member who has been so nominated neglects or refuses to act and the [a][Board] or other person by whom such member was nominated fails to nominate another member in his place within seven days from the date on which it or he may be called upon to do so by the District Magistrate, the District Magistrate shall fortwith appoint a member or members, as the case may be, to fill the vacancy or vacancies.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] Substituted by the Cantonments (Amendment) Act, 1925 (7 of 1925), S. 14, for "Commanding Officer of the Cantonment."

[c] The words "who shall be persons liable to pay taxes in the cantonment and ordinarily resident therein or in the immediate vicinity thereof" were repealed by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 62.

**263. No person to be nominated who has direct interest or whose services are not immediately available.**—(1) No person who has a direct interest in the matter under reference, or whose services are not immediately available for the purposes of the Committee, shall be nominated a member of a Committee of Arbitration.

(2) If, in the opinion of the District Magistrate, any person who has been nominated has a direct interest in the matter under reference, or is otherwise disqualified for nomination, or if the services of any such person are not immediately available as aforesaid, and if the [a][Board] or other person by whom any such person was nominated fails to nominate another member within seven days from the date on which it or he may be called upon to do so by the District Magistrate, such failure shall be deemed to constitute a failure to make a nomination within the meaning of Section 262.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority."

**264. Meetings and powers of Committees of Arbitration.**—(1) When a Committee of Arbitration has been duly constituted, the [a][Board] shall, by notice in writing, inform each of the members of the fact, and the Committee shall meet as soon as may be thereafter.

(2) The Chairman of the Committee shall fix the time and place of meetings, and shall have power to adjourn any meeting from time to time as may be necessary.

(3) The Committee shall receive and record evidence, and shall have power to administer oaths to witnesses, and, on requisition in writing signed by the Chairman of the Committee, the District Magistrate shall issue the necessary processes for the attendance of witnesses and the production of documents required by the Committee, and may enforce the said processes as if they were processes for attendance or production before himself.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**265 Decisions of Committees of Arbitration.**—(1) The decision of every Committee of Arbitration shall be in accordance with the majority of votes taken at a meeting at which the Chairman and at least three of the other members are present.

(2) If there is not a majority of votes in favour of any proposed decision, the opinion of the Chairman shall prevail.

(3) The decision of a Committee of Arbitration shall be final and shall not be questioned in any Court.

## PROSECUTIONS

**266 Prosecutions.**—[a][(1)] Save as otherwise expressly provided in this Act, no Court shall proceed to the trial of any offence made punishable by or under this Act, other than an offence specified in Schedule IV, except on the complaint of, or upon information received from, the [b][Board] concerned or a person authorised by the [b][Board] by a general or special order in this behalf.

[c][(2) No offence made punishable under this Act shall be tried by any Magistrate or by any Bench, if such Magistrate or any of the Magistrates composing the Bench is a member of the Board.]

[a] Section 266 was re-numbered as sub-section (1) of that section by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 63.

[b] Substituted by S. 69, ibid, for "Cantonment Authority".

[c] Inserted by S. 63, ibid.

**Section 266 — Note 1**

(1) "We have excepted from the general rule that cognizance is not to be taken of offences otherwise than on complaint by or under the authority of the Cantonment Authority, those offences under the Act for which the Police can arrest without warrant." — Select Committee Report.

(2) This section merely lays down that no Court shall proceed to the trial of any offence under this Act unless moved by the persons mentioned in the section. After such persons initiate the proceedings, the Court must follow the procedure laid down in the Criminal P. C. This section does not lay down that on the information or complaint of certain persons the Court should proceed with the trial of the case irrespective of the provisions of the Criminal P. C. ('28) 29 Cri L Jour 591 (592) (Nag).

(3) Offences under Section 141 (1) and offences under Section 141 (2) are not specified in Schedule IV. Therefore, no Court can proceed with the trial of any of these offences except on the complaint filed in accordance with Section 266. ('35) AIR 1935 All 905 (906): 36 Cri L Jour 1493.

(4) The letter on record, which was written to the Sub-Divisional Magistrate, purported to be signed by the Executive Officer of the Cantonment Authority. No evidence was called to prove this letter. Neither was it proved to have been signed by the Cantonment Authority nor was the officer proved to have been authorised by the Authorities. Held, that Section 266 was not complied with and the proceedings commenced on that letter and the orders passed were invalid. ('35) AIR 1935 All 905 (906): 36 Cri L Jour 1493.

(5) Cantonment Board lodging a complaint signed by its Executive Officer — Executive Officer filing no authority but having power to file such complaint — Affidavit filed in revision Court showing that he had an authority to do so — Omission to file authority held was curable under Section 537, Criminal P. C. ('28) AIR 1928 Lah 946 (947): 29 Cri L Jour 822.

(6) On the report of a Cantonment Official, the Cantonment Magistrate wrote: "A is to blame; prosecute A." — The Magistrate then proceeded to try A himself without informing him that he was entitled to have the case tried by another Magistrate. It was held that the Magistrate should not have tried the case without informing the accused of his right to trial by another Magistrate. ('20) AIR 1920 Lah 203 (204): 21 Cri L Jour 394.

(7) Sub-section (2), as inserted by the amending Act in 1936, now specifically provides that no offence made punishable under this Act shall be tried by a Magistrate if such Magistrate is a member of the Board. The following case decided in 1928 holding that a cantonment Magistrate can try a complaint even though he is a member of the Board is no longer good law. ('28) AIR 1928 Lah 946 (947): 29 Cri L Jour 822.

**267. Composition of offence.**—(1) A [a][Board], or any person authorised by it, by general or special order in this behalf, may, either before or after the institution of the proceedings, compound any offence made punishable by or under this Act other than an offence under Chapter XIV:

Provided that no offence shall be compoundable which is committed by failure to comply with a notice, order or requisition issued by or on behalf of the [a][Board], unless and until the same has been complied with in so far as compliance is possible.

(2) Where an offence has been compounded, the offender, if in custody, shall be discharged and no further proceedings, shall be taken against him in respect of the offence so compounded.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

## GENERAL PENALTY PROVISIONS

**268. General penalty.**—Whoever, in any case in which a penalty is not expressly provided by this Act, fails to comply with any notice, order or requisition issued under any provision thereof, or otherwise contravenes any of the provisions of this Act, shall be punishable with fine which may extend to two hundred rupees and, in the case of a continuing failure or contravention, with an additional fine which may extend to twenty rupees for every day after the first during which he has persisted in the failure or contravention.

**269. Cancellation and suspension of licences.**—Where any person to whom a licence has been granted under this Act or any agent or servant of such person

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**Section 267 — Note 1**

(1) Notwithstanding the fact that an offence under the Cantonments Act, e.g., disobedience to a notice under Section 135 of that Act, may be triable under the Criminal P. C., as a summons case and the accused could only be acquitted and not discharged the accused can be discharged or further proceedings against him can be dropped under Section 267 (2), if the ofence with which he is charged has been properly compounded. ('47) AIR 1947 Sind 128 (128): ILR (1947) Kar 299: 48 Cri L Jour 300 (DB).

(2) Where an offence under the Act has been properly compounded, the fact that the offender is not in custody and therefore it is not necessary to discharge him under Section 267 (2) does not preclude the Court from dropping further proceedings against the offender under Section 267 (2). ('47) AIR 1947 Sind 128 (128): ILR (1947) Kar 299: 48 Cri L Jour 300 (DB).

**Section 268 — Note 1**

(1) Where no notice is issued to the accused, this section cannot be invoked. ('10) 11 Cri L Jour 17 (18): 1909 Pun Re (Cr) No. 9.

(2) A fine cannot be inflicted under this section for breach of conditions of a licence, where the licence only provides for suspension or cancellation in case of such breach. ('10) 11 Cri L Jour 17 (17): 1909 Pun Re (Cr) No. 9.

(3) Section 184 provides no penalty for a continuing failure or contravention; such a penalty is provided in Section 268. ('34) AIR 1934 Oudh 29 (31): 35 Cri L Jour 666.

(4) The punishment of whipping is not one of the sentences mentioned by the Cantonments Act. ('93) 1893 Rat 682 (682). (Case under old Act, 1889.)

(5) The imposition of a prospective daily fine under this section is illegal. The proper course is to institute a further prosecution if need be before further fine is imposed. ('11) 12 Cri L Jour 371 (371) (Lah).

(6) The penal sections of the Act are of so rigorous a nature that they must be construed strictly in favour of an accused as well as against him. ('11) 12 Cri L Jour 371 (372) (Lah).

(7) Prosecution for failure to comply with resolution — It is always open to accused to show that resolution was not legal or that it was in excess of powers possessed by body passing such resolution — No independent proceedings are necessary for this purpose — Accused cannot be held guilty unless prosecution establishes that Board was within its powers in passing Resolution and calling upon accused to comply with it. 1937 Cr LJ 1235 (Mys).

(8) See also Notes on Sections 187 and 210.

**Section 269 — Note 1**

(1) A Magistrate in his judicial capacity has no authority to cancel a licence. That power is now vested in the Board. ('88) 15 Cal 452 (455).

commits a breach of any of the conditions thereof, or of any bye-law made under this Act for the purpose of regulating the manner or circumstances in, or the conditions subject to, which anything permitted by such licence is to be or may be done, the [a][Board] may, without prejudice to any other penalty which may have been incurred under this Act, by order in writing, cancel the licence or suspend it for such period as it thinks fit:

Provided that no such order shall be made until an opportunity has been given to the holder of the licence to show cause why it should not be made.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

270. Recovery of amount payable in respect of damage to cantonment property.—Where any person has incurred a penalty by reason of having caused any damage to the property of a [a][Board], he shall be liable to make good such damage, and the amount payable in respect of the damage shall in case of dispute, be determined by the Magistrate by whom the person incurring such penalty is convicted, and, on non-payment of such amount on demand, the same shall be recovered by distress and sale of the moveable property of such person, and the Magistrate shall issue a warrant for its recovery accordingly.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

## LIMITATION

271. Limitation for prosecution.—No Court shall try any person for an offence made punishable by or under this Act, after the expiry of six months from the date of the commission of the offence, unless complaint in respect of the offence has been made to a Magistrate within the six months aforesaid.

## SUITS

272. Protection of Board, Executive Officer, etc.—No suit or prosecution shall be entertained in any Court against any [a][Board] [b][* * *] or against any [c][Officer Commanding a station] or against any member of a Board, or against any officer or servant of a [a][Board], for anything in good faith done, or intended to be done, under this Act or any rule or bye-law made thereunder.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] The words "or authority appointed under sub-section (2) of section 10" were repealed by section 64, ibid.

[c] Substituted by the Cantonments (Amendment) Act, 1925 (7 of 1925), S. 11, for "Commanding Officer of a Cantonment".

273. Notice[b] to be given of suits.—(1) No suit shall be instituted against any [a][Board] or against any member of a Board, or against any officer or servant of a

### Section 271 — Note 1

(1) Where there is nothing to show that any new building was built by the accused within limitation and what was built had been completed more than six months before the date of complaint, trial for an offence under Section 271 is not proper. ('34) AIR 1934 Oudh 29 (31): 35 Cri L Jour 666.

(2) In the case of a continuing offence the limitation for making a complaint begins to run from the time when the offence was last committed. ('55) ILR (1955) Patiala 1 (8).

### Section 272 — Note 1

(1) Section applies only to cases where notice under Section 187 appears to have been given according to terms of Act. Where it is found that the notice itself was bad because the alleged encroachments were not on a public street but were on the land belonging to the plaintiff and therefore, a notice under Section 187 was not justified, Section 272 would have no application. ('47) AIR 1947 All 243 (244).

### Section 273 — Note 1

(1) The object of the provisions of Section 273 is to give these public authorities an opportunity to settle such claims without suit and to afford them protection against suits filed after considerable delay with the result that the burden falls upon a different set of tax-payers and not upon the body of tax-payers as it existed at the

[a][Board], in respect of any act done, or purporting to have been done, in pursuance of this Act or of any rule or bye-law made thereunder, until the expiration of two months after notice in writing has been left at the office of the [a][Board], and in the case of such member, officer or servant, unless notice in writing has also been delivered to him or left at his office or place of abode, and unless such notice states explicitly the cause of action, the nature of the relief sought, the amount of compensation claimed, and the name and place of abode of the intending plaintiff, and unless the plaint contains a statement that such notice has been so delivered or left.

(2) If the [a][Board], member, officer or servant has, before the suit is instituted, tendered sufficient amends to the plaintiff, the plaintiff shall not recover any sum in excess of the amount so tendered, and shall also pay all costs incurred by the defendant after such tender.

(3) No suit, such as is described in sub-section (1), shall, unless it is an action for the recovery of immoveable property or for a declaration of title thereto, be instituted after the expiry of six months from the date on which the cause of action arises.

(4) Nothing in sub-section (1) shall be deemed to apply to a suit in which the only relief claimed is an injunction of which the object would be defeated by the giving of the notice or the postponment of the institution of the suit or proceeding.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] This section is similar in contents to S. 80 of the Code of Civil Procedure. This latter section is sought to be repealed by a Bill presented to the Parliament.

## APPEALS AND REVISION

**274. Appeals from executive orders.**—(1) Any person aggrieved by any order described in the second column of Schedule V may appeal to the authority specified in that behalf in the third column thereof.

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**Section 273 — Note 1 (contd.)**

date of the cause of action . ('47) AIR 1947 All 42 (45) (DB).

(2) Sub-section (1) of this section does not apply to suits on private contracts. A suit for the recovery of the price of the goods supplied to the Cantonment Board is not a suit within the ambit of this section. Hence, such a suit is governed by Article 52, Limitation Act, and not by this section. ('34) AIR 1934 All 436 (437): 56 All 885 * 1969 MPLJ 425: 1969 Jab LJ 304.

(3) The effect of the provisions of sub-sections (1) and (3) of Section 273 is that a plaintiff is entitled to institute his suit within eight months of the date of the accruing of the cause of action after having delivered notice to the Board not less than two months prior to the institution of the suit. ('47) AIR 1947 All 42 (44) (DB).

(4) All that sub-section (1) of Sec. 273 contemplates is that the act must have been done in pursuance of the Act or of any rule or bye-law made thereunder and this section cannot be interpreted to mean that the acts done by the Board in exercise of its powers under the Act will stand on a different footing from those done in discharge of the duties imposed on the Board by the Act. Sub-section (3) will be applicable to all suits which fall within the ambit of sub-section (1) of the said section. AIR 1961 Punj 460 (463, 464): 63 Punj LR 407.

(5) It is to acts which the Board has not merely the authority but also duty to perform, that is acts which are enjoined upon the Board that the protection afforded by Section 273 extends. An "act done by the Board in pursuance of this Act" means an act enjoined upon the Board by the Act. ('47) AIR 1947 All 42 (46, 48) (DB). (Post of Office Superintendent carrying certain fixed pay — Person appointed as Office Superintendent but paid less pay according to new scale introduced by Board but not sanctioned by Eastern Command — Suit by person for payment of arrears of pay — Section 273 (1) does not apply.)

**Section 274 — Note 1**

(1) A self-contained code of appeal is provided by Sections 274 and 278 and it is, therefore, difficult to conceive that the challenge to the appellate order does not apply to the Civil Courts but only to the authorities functioning under the Act. ('55) AIR 1955 Nag 81 (82): ILR (1954) Nag 973 (DB).

(2) No such appeal be admitted if it is made after the expiry of the period specified in that behalf in the fourth column of the said Schedule.

(3) The period specified as aforesaid shall be computed in accordance with the provisions of the Indian Limitation Act, 1908, with respect to the computation of periods of limitation thereunder.

275. Petition of appeal.—(1) Every appeal under section 274 shall be made by petition in writing accompanied by a copy of the order appealed against.

(2) Any such petition may be presented to the authority which made the order against which the appeal is made, and that authority shall be bound to forward it to the appellate authority, and may attach thereto any report which it may desire to make by way of explanation.

276. Suspension of action pending appeal.—On the admission of an appeal from an order, other than an order contained in a notice issued under [a][* * *], section 140, section 176, or section 238, all proceedings to enforce the order and all prosecutions for any contravention thereof shall be held in abeyance pending the decision of the appeal, and, if the order is set aside on appeal, disobedience thereto, shall not be deemed to be an offence.

[a] The words, letter, brackets and figures "clause (a) of section 137" were omitted by the Cantonments (Amendment) Act, 1948 (50 of 1948), S. 3, (8-9-1948).

277. Revision.—[a][ ■ ■ ■ ■ ■ ]

[a][(1)] Where an appeal from an order made by the [b][Board] has been disposed of by the District Magistrate, [c][either party to the proceedings] may, within thirty days from the date thereof, apply, through the [d][Officer Commanding-in-Chief, the Command], to the [e][Central Government], or to such authority as the [e][Central Government] may appoint in this behalf, for a revision of the decision.

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**Section 274 — Note 1 (contd.)**

(2) The question whether on the objection of the Government, a person should be given or refused sanction is within the power of the Board and of the appellate authority and cannot be raised in Civil Court even though their decision may work hardship. ('55) AIR 1955 Nag 81 (84): ILR (1954) Nag 973 (DB).

(3) A liability not existing under the general law viz to obtain the requisite sanction to erect or to re-erect a building has been created by Section 181 of the statute and a special remedy has also been provided therein (Section 274) for enforcing it. It is that remedy alone which the aggrieved party must adopt to seek redress. ('55) AIR 1955 Nag 81 (82): ILR (1954) Nag 973 (DB).

(4) Conviction by Cantonment Magistrate of offences punishable under Cantonment Rules are appealable to the same extent as convictions by other Magistrates of the same class. ('97) 1897 Pun Re (Cr) No. 1, p. 1 (2) (DB).

(5) A Cantonment Magistrate was expressly made subordinate to the District Magistrate by the Cantonments Act, 1889, Section 7. ('96) Rat Un. Cr. C. 849 (849).

(6) The Cantonment Magistrate of Secunderabad in his character of a District Magistrate is subordinate to the High Court of Bombay in criminal matters relating to Christian European British subjects in Hyderabad within the contemplation of Section 526, Criminal P. C. ('85) 9 Bom 333 (341, 342).

(7) Order levying compensation fee under Section 185 — Not appealable — Person is not entitled to a reasonable opportunity of being heard in person under Section 279. AIR 1961 Andh Pra 113 (116) (DB).

**Section 277 — Note 1**

(1) An order inflicting a fine under Section 268 is a judicial order and, therefore, is open to revision ('10) 11 Cri L Jour 17 (18): 1909 Pun Re (Cr) No. 9.

(2) It is no part of the duty of the superior Court to search through a voluminous enactment like the Cantonments Act in order to ascertain whether convictions are maintainable otherwise than under the precise section quoted by the Magistrate as his authority. Where, therefore, a Magistrate convicts under a wrong section, the accused is entitled to the benefit of the mistake and the Magistrate's orders are liable to be set aside in revision as being illegal. ('11) 12 Cri L Jour 371 (372) (Lah).

*[(2)] The provisions of this Chapter with respect to appeals shall apply, as far as may be, to applications for revision made under this section.

[a] The original sub-section (1) was omitted and sub-sections (2) and (3) were re-numbered as (1) and (2) by the Cantonments (Amendment) Act, 1926 (35 of 1926), S. 9.

[b] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[c] Substituted by S. 65, ibid, for "the Cantonment Authority".

[d] Substituted by the Cantonments (Amendment) Act, 1926 (35 of 1926), S. 9, for "Officer Commanding the District".

**278. Finality of appellate orders.**—Save as otherwise provided in Section 277, every order of an appellate authority shall be final.

**279. Right of appellant to be heard.**—No appeal shall be decided under this Chapter unless the appellant has been heard, or has had a reasonable opportunity of being heard in person or through a legal practitioner.

## CHAPTER XVI

## RULES AND BYE-LAWS

**280. Power to make Rules.**—(1) The *[Central Government] may, after previous publication, make rules[a] to carry out the purposes and objects of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:

(a) the manner in which, and the authority to which, application for permission to occupy land belonging to *[the Government] in a cantonment is to be made;

(b) the authority by which such permission may be granted and the conditions to be annexed to the grant of any such permission;

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**Section 278 — Note 1**

(1) A self-contained code of appeal is provided by Sections 274 and 278. ('55) AIR 1955 Nag 81 (82): ILR (1954) Nag 973 (DB).

(2) The question whether on the objection of the Government a person should be given or refused sanction is within the power of the Board and of the appellate authority and cannot be raised in Civil Courts even though their decision may work hardship. ('55) AIR 1955 Nag 81 (84): ILR (1954) Nag 973 (DB).

**Section 279 — Note 1**

(1) Order levying compensation fee under Section 185 — Not appealable — Person is not entitled to a reasonable opportunity of being heard in person under Section 279. AIR 1961 Andh Pra 113 (116) (DB).

**Section 280 — Note 1**

(1) Section 280 which empowers the Board and the Central Government to make bye laws and rules does not confer power on the Cantonment Board to charge fees for the renewal of the licence issued under Section 203. ('58) AIR 1958 Mad 513 (514): ILR (1958) Mad 729 (DB).

(2) As to the power of the Central Government to extend any rules framed under this section to any area beyond a cantonment and in the vicinity thereof, see Section 286.

(3) For cases decided with reference to the rules framed under this section, see (1862-68) Rat Un Cr C 505 (505, 506). (Erection of building on a public road.) * ('95) 1895 Pun Re (Cr) No. 9, p. 34 (35). (Disregard of Magistrate's proclamation against disease.) * ('85) 1885 Pun Re (Cr) No. 2, p. 5 (6) * ('70) 1870 Pun Re (Cr) No. 12, p. 21 (22, 23). (Breach of rules extended outside cantonment limits.) * AIR 1961 Punj 460 (464): 63 Punj LR 407 * AIR 1961 Andh Pra 37 (38, 42, 43). (Case under Rules 11 and 12 of Cantonment Fund Servants Rules (1937).)

(4) A suit based on agreement with Cantonment Board is not by Rule 43 (iii) of Cantonment Land Administration Rules (1937). AIR 1960 J and K 83 (84).

[b][(bb) the allotment to a [c][Board] of a share of the rents and profits accruing from property entrusted to its management under the provisions of section 116A;]

(c) the appointment, control, supervision, suspension, removal, dismissal and punishment of servants of [d][Boards];

[b][(cc) the constitution of a [1][Military Lands and Cantonment Service] and the appointment, control, supervision, conditions of service, pay and allowances, suspension, removal, dismissal and punishment of the members thereof;]

(d) the circumstances in which security shall be demanded from servants of [d][Boards] and the amount and nature of such security;

(e) the grant of leave, absentee or acting allowance to servants of [d][Boards];

(f) the creation and management of Provident Funds, and the circumstances in which, and the conditions subject to which, contributions thereto shall be made from cantonment funds and by servants of [d][Boards];

(g) the keeping of accounts by [d][Boards] and the manner in which such accounts shall be audited and published;

(h) the definition of the persons by whom and the manner in which money may be paid out of a cantonment fund;

[g][ ° ° ° ° ° ° ° ]

(i) the preparation of estimates of income and expenditure by [f][Boards] and the definition of the persons by whom, and the conditions subject to which, such estimates may be sanctioned;

(j) the regulation of the procedure of Committees of Arbitration; and

(k) the prescribing of registers, statements and forms to be used and maintained by any authority for the purposes of this Act;

[h][(l) the grant of leave to the members of the Board;

(m) the form of notices required to be sent under this Act and the manner of their service.]

[a] For the Cantonment Account Code, 1924, and the Cantonment Fund Servants Rules 1925, made under this section, see General Rules and Orders, Vol. V, pp. 470, 546 and pp. 591-611; and for the Cantonment Land Administration Rules, 1937, see Gazette of India, 1937, Pt. I, p. 1841. For Cantonments Electoral Rules, 1945, republished—see Gaz. Ind., 2-10-1954, Pt. II, S. 4, p. 243.

[b] Inserted by the Cantonments (Amendment) Act, 1925 (7 of 1925), S. 12.

[c] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[d] Substituted by S. 69, ibid., for "Cantonment Authorities".

[e] Inserted by S. 66, ibid.

[f] Substituted for "Service of Executive Officers" by the Cantonments (Amendment) Act, 1948 (50 of 1948), S. 2. (8-9-1948).

[g] Clause (hh) inserted by the Cantonments (Amendment) Act, 1926 (35 of 1926). S. 10 was repealed by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 66.

[h] Clauses (l) and (m) were inserted by the Cantonments (Amendment) Act, 1953 (2 of 1954), S. 23 (2-1-1954).

**281. Supplemental provisions respecting rules.**—(1) A rule under section 280 may be made either generally for all cantonments or for the whole or any part of any one or more cantonments.

(2) All rules so made shall be published in the [°][Official Gazette] and in such other manner, if any, as the [°][Central Government] may direct and, on such publication, shall have effect as if enacted in this Act.

**282. Power to make bye-laws.**—Subject to the provisions of this Act and of the rules made thereunder a [a][Board] may, in addition to any bye-laws which it is empowered to make by any other provision of this Act, make bye-laws to provide for all or any of the following matters in the cantonment, namely:—

(1) The registration of births, deaths and marriages and the taking of a census;

(2) The enforcement of compulsory vaccination;

(3) the regulation of the collection and recovery of taxes, tolls and fees under this Act and the refund of taxes;

(4) the regulation or prohibition of any description of traffic in the streets;

(5) the manner in which vehicles standing, driven, led or propelled in the streets between sunset and sunrise shall be lighted;

(6) the seizure and confiscation of ownerless animals staying within the limits of the cantonment;

(7) the prevention and extinction of fire;

(8) the construction of scaffolding for building operations to secure the safety of the general public and of persons working thereon;

(9) the regulation in any manner not specifically provided for in this Act of the construction, alteration, maintenance, preservation, cleaning, and repairs of drains, ventilation-shafts, pipes, waterclosets, privies, latrines, urinals, cesspools and other drainage works.

[10] the regulation or prohibition of the discharge into, or deposit in drains or sewage, polluted water and other offensive or obstructive matter;

(11) the regulation or prohibition of the stabling or herding of animals, or of any class of animals, so as to prevent danger to public health;

(12) The proper disposal of corpses, the regulation and management of burial and burning places and other places for the disposal of corpses and the fees-chargeable for the use of such places where the same are provided or maintained by Government or at the expense of the cantonment fund;

(13) the permission, regulation or prohibition of the use or occupation of any street or place by itinerant vendors or by any person for the sale of articles or the exercise of any calling or the setting up of any booth or stall, and the fees chargeable for such use or occupation;

[14] the regulation and control of encamping grounds, pounds, washing-places, serais, hotels, dak-bungalows, lodging-houses, boarding-houses, buildings let in tenements, residential clubs; restaurants, eating-houses, cafes, refreshment-rooms and places of public recreation, entertainment or resort;

(15) the regulation of the ventilation, lighting, cleansing, drainage and water supply of the buildings used for the manufacture or sale of aerated or

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**Section 282 — Note 1**

(1a) Section 282 only indicates the subjects on which bye-laws can be framed. It does not require that the bye-laws should contain a mention of all possible details in respect of the situations in which they are to be enforced or the circumstances in which they are to apply. Thus, bye-laws conferring general powers to be utilised on specific occasions by means of resolutions can be framed under Section 282. AIR 1960 All 719 (721): 1960 All LJ 572 (DB).

(1) As to the power of the Central Government to extend any bye-laws framed under this section to any area beyond a cantonment and the vicinity thereof, see Section 286.

(2) See also the following cases: ('07) 1907 Pun LR No. 22, p. 69 (70). (Failure to pay hackney carriage fee.) * ('87) 1887 Pun Re (Cri) No. 48, p. 122 (126, 127) (DB). (Owner of house failing to appoint an agent.) * ('87) 1887 All WN 219 (220). (Registered prostitute — Failure to go to hospital for inspection.)

other potable waters and of butter, milk, sweet-meats and other articles of food or drink for human consumption;

(16) the matters regarding which conditions may be imposed by licences granted under section 210;

(17) the control and supervision of places where dangerous or offensive trades are carried on so as to secure cleanliness therein or to minimise any injurious, offensive or dangerous effects arising or likely to arise therefrom;

(18) the regulation of the erection of any enclosure, fence, tent, awning or other temporary structure of whatsoever material or nature on any land situated within the cantonment;

(19) the laying out of streets, and the regulation and prohibition of the erection of buildings without adequate provision being made for the laying out and location of streets;

(20) the regulation of the use of public parks and gardens and other public places, and the protection of avenues, trees, grass and other appurtenances of streets and other public places;

(21) the regulation of the grazing of animals;

(22) the fixing and regulation of the use of public bathing and washing places;

(23) the regulation of the posting of bills and advertisements, and of the position, size, shape or style of name-boards, sign-boards and sign-posts;

(24) the fixation of a method for the sale of articles whether by measure, weight, piece or any other method;

[(25) the rendering necessary of licences within the cantonment—

(a) for persons working as job porters for the conveyance of goods;

(b) for animals or vehicles let out on hire;

(c) for the proprietors or drivers of vehicles, boats or other conveyances, or of animals kept or plying for hire; ²[•]

(d) for persons impelling or carrying such vehicles or other conveyances; ²[or

(e) for persons practising as nurses, midwives or dais;]]

[(26) the prescribing of the fee payable for any licence required under Cl. (25), and of the conditions subject to which such licences may be granted, revised, suspended or withdrawn;

[(27)] the regulation of the charges to be made for the services of such job porters and of the hire of such animals, vehicles or other conveyances, and for the remuneration of persons impelling or carrying such vehicles or conveyances as are referred to in clause (25);

[(28)] the regulation or prohibition, for purposes of sanitation or the prevention of disease or the promotion of public safety or convenience of any act which occasions or is likely to occasion a nuisance, and for the regulation or prohibition of which no provision is made elsewhere by or under this Act;

[(29)] the circumstances and the manner in which owners of buildings or land in the cantonment, who are temporarily absent from, or are not resident in, the cantonment, may be required to appoint as their agents, for all or any of the purposes of this Act or of any rule or bye-law made thereunder, persons residing within or near the cantonment;

[(30)] the prevention of the spread of infectious or contagious diseases within the cantonment;

(31) the segregation in, or the removal and exclusion from, the cantonment, or the destruction, of animals suffering or reasonably suspected to be suffering from any infectious or contagious disease;

(32) the supervision, regulation, conservation and protection from injury, contamination or trespass of sources and means of public water-supply and of appliances for the distribution of water whether within or without the limits of the cantonment;

(33) the manner in which connections with water-works may be constructed or maintained, and the agency which shall or may be employed for such construction and maintenance;

(34) the regulation of all matters and things relating to the supply and use of water including the collection and recovery of charges therefor and the prevention of evasion of the same;

(35) the maintenance of schools, and the furtherance of education generally;

(36) the regulation or prohibition of the cutting or destruction of trees or shrubs, or of the making of excavations, or of the removal of soil or quarrying, where such regulation or prohibition appears to the [a][Board] to be necessary for the maintenance, of a water-supply, the preservation of the soil, the prevention of landslips or of the formation of ravines or torrents, or the protection of land against erosion or against the deposit thereon of sand, gravel or stones;

(37) the rendering necessary of licences for the use of premises within the cantonment as stables or cowhouses or as accommodation for sheep, goats or fouls;

(38) the control of the use in the cantonment of mechanical whistles, syrens or trumpets; and

(39) generally for the regulation of the administration of the cantonment under this Act.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[b] the word "or" was omitted by the Cantonments (Amendment) Act, 1942 (15 of 1942), S. 12. (30-3-1942).

[c] Added by S. 12, ibid.

**283. Penalty for breach of bye-laws.**—Any bye-law made by a [a][Board] under this Act may provide that a contravention thereof shall be punishable—

(a) with fine which may extend to one hundred rupees; or

(b) with fine which may extend to one hundred rupees and, in the case of a continuing contravention, with an additional fine which may extend to twenty rupees for every day during which such contravention continues after conviction for the first such contravention; or

(c) with fine which may extend to ten rupees for every day during which the contravention continues after the receipt of a notice from the [a][Board] by the person contravening the bye-law requiring such person to discontinue such contravention.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69 for "Cantonment Authority".

**284. Supplemental provisions regarding bye-laws.**—(1) Any power to make bye-laws conferred by this Act is conferred subject to the condition of the bye-laws being made after previous publication and of their not taking effect until they have been approved and confirmed by the [b][Central Government] and published in the [b][Official Gazette].

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**Section 283 — Note 1**

(1) The additional fine is to be imposed only after first conviction and that too on proof that failure is persisted in. The continuing failure must be matter of separate inquiry and proof. ('98) 22 Bom 841 (843). (Failure to re-build latrines according to plan.)

(2) The *[Central Government] in confirming a bye-law may make any change therein which appears to it to be necessary.

(3) The *[Central Government] may, after previous publication of its intention cancel any bye-law which it has confirmed, and thereupon the bye-law shall cease to have effect.

285. **Rules and bye-laws to be available for inspection and purchase.**—(1) A copy of all rules and bye-laws made under this Act shall be kept at the office of *[Board] and shall, during office hours, be open free of charge to inspection by any inhabitant of the cantonment.

(2) Copies of all such rules and bye-laws shall be kept at the office of the [a][Board], [b][and shall be sold to the public at cost price singly, or in collections at the option of the purchaser].

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for Cantonment Authority".

[b] Substituted by S. 67, ibid for "for sale to the public".

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## CHAPTER XVII
## SUPPLEMENTAL PROVISIONS

286. **Extension of certain provisions of the Act and rules to places beyond cantonments.**—The *[Central Government] may, by notification in the *[Official Gazette], and subject to any conditions as to compensation or otherwise which it thinks fit to impose, extend to any area beyond a cantonment and in the vicinity thereof, with or without restriction or modification, any of the provisions of Chapters IX, X, XI, XII, XIII, XIV and XV or of any rule or bye-laws made under this Act for the cantonment which relates to the subject-matter of any of those Chapters, and every enactment, rule or bye-law so extended shall thereupon apply to that area as if the area were included in the cantonment.

[a][286A. **Power to delegate functions of Executive Officer.**—[b][(1)] The [c][Board] may empower any of its members or officers to exercise or perform in the absence of the Executive Officer from the cantonment all or any of such powers or duties of an executive officer under this Act as the *[Central Government] may by notification in the *[Official Gazette], specify in this behalf.]

[d][(2) The Board may, by a resolution passed in this behalf, delegate to the President, Vice-President, Executive Officer or health officer, subject to such conditions, if any, as may be specified in the resolution, all or any of its functions under sub-section (3) of section 82, sub-section (3) or clause (b) of sub-section (5) of Section 119, Section 131, sub-section (2) of Section 132, Section 143, Section 161, section 163, section 164, section 168, section 169, section 189, section 190, section 191, section 194, section 195, section 196 or section 197.]

[a] Inserted by the Cantonments (Amendment) Act, 1931 (7 of 1931), Section 8.

[b] Section 286A was re-numbered as '(1)' of that section by the Cantonments (Amendment) Act, 1953 (2 of 1954), S. 24 (2-1-1954).

[c] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

[d] Sub-section (2) was added by Act 2 of 1954, S. 24. (2-1-1954).

287. **Registration.**—(1) Paragraphs 2 and 3 of section 54 and sections 59, 107 and 123 of the Transfer of Property Act, 1882, with respect to the transfer of property by registered instrument, shall, on and from the commencement of this Act, extend to every cantonment.

*[(2) The Registrar or Sub-Registrar of the district or sub-district formed for the purposes of the Indian Registration Act, 1908, in which any cantonment is

situated, shall, [b][when any document relating to immovable property within the cantonment is registered, send information of the registration] forthwith to the [a][Board] or such other authority as the [c][Central Government] may prescribe in this behalf.]

[a] Substituted by the Cantonments (Amendment) Act, 1926 (35 of 1926), S. 11, for the original sub-section.

[b] Substituted by the Repealing and Amending Act, 1927 (10 of 1927), S. 2 and Sch. I, for the original words.

[c] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority and Cantonment Authorities", respectively.

**288. Validity of notices and other documents.**—No notice, order, requisition, licence, permission in writing or other such document issued under this Act shall be invalid merely by reason of any defect of form.

**289. Admissibility of document or entry as evidence.**—A copy of any receipt application, plan, notice, order or other document or of any entry in a register, in the possession of a [a][Board] shall, if duly certified by the legal keeper thereof or other person authorised by the [a][Board] in this behalf, be admissible in evidence of the existence of the document or entry, and shall be admitted as evidence of the matters and transactions therein recorded in every case where, and to the same extent to which, the original document or entry would, if produced, have been admissible to prove such matters.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69 for "Cantonment Authority".

**290. Evidence by officer or Servant of the Board.**—No officer or servant of a [a][Board] shall, in any legal proceeding to which the [a][Board] is not a party, be required to produce any register or document the contents of which can be proved under section 289 by a certified copy, or to appear as a witness to prove any matter or transaction recorded therein save by order of the Court made for special cause.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

**291. Application of Act IV of 1899.**—For the purposes of the Government Buildings Act, 1899, cantonments and [a][Boards] shall be deemed to be municipalities and municipal authorities respectively.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authorities".

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**Section 287 — Note 1**

(1)The effect of Section 32 of the Cantonments Act of 1889 (corresponding to Section 287 of the present Act) is that a gift of property situate in a cantonment must be made in the manner provided by Section 123 of the T. P. Act. An oral gift by a Muhammadan of such property is, therefore, not valid. ('20) AIR 1920 Lah 249 (251).

(2) Transaction purporting to create a mortgage by deposit of title deeds effected in a cantonment area is invalid. The determining factor in such a case is not the place where the property is situated but the formalities required by the law for a mortgage at a place where the title-deeds are delivered to the creditor. ('33) AIR 1933 Lah 972 (974).

(3) This section makes Section 59 of the T. P. Act applicable to cantonments. Hence a mortgage by deposit of title-deeds within the limits of the cantonment is invalid. ('33) AIR 1933 Lah 1001 (1001, 1002).

(4) Section 107 of the Transfer of Property Act has been made applicable to cantonments by this section; hence lease of land in cantonment from month to month has to be registered. ('31) AIR 1931 Lah 501 (502).

**Section 289 — Note 1**

(1) Where the General Lands Register of a Cantonment Board was found not to have been carefully prepared: Held, that the Court will not rely on it without corroborative evidence from other records of the cantonment or other testimony. ('35) AIR 1935 Lah 588 (589): 36 Cri L Jour 1475.

**292.** Repeals.

[Repealed by the Repealing Act, 1927 (XII of 1927).]

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## SCHEDULE I

### NOTICE OF DEMAND

[See Section 91.]

To

residing at

Take notice that the [a][Board] demands from the sum of due from on account of, (here describe the property, occupation, circumstance or thing in respect of which the sum is payable) leviable under for the period of commencing on the day of 19 , and ending on the day of 19 , and that if, within thirty days from the service of this notice, the said sum is not paid to the [a][Board] at or sufficient cause for non-payment is not shewn to the satisfaction of the Executive Officer, a warrant of distress will be issued for the recovery of the same with costs.

Dated this day of 19 .

(Signed)

Executive Officer,
Cantonment.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority".

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## SCHEDULE II

### FORM OF WARRANT

(See Section 92.)

(Here insert the name of the officer charged with the execution of the warrant.)

Whereas A. B. of has not paid, and has not shewn satisfactory cause for the non-payment of, the sum of due on account of * for the period of commencing on the day of 19 , and ending with the day of 19 , which sum is leviable under

And whereas thirty days have elapsed since the service on him of notice of demand for the same;

This is to command you to distrain, subject to the provisions of the Cantonments Act, 1924, the moveable property of the said A. B. to the amount of the said sum of Rs. and forthwith to certify to me, together with this warrant, all particulars of the property seized by you thereunder.

Dated this day of 19 .

(Signed)

Executive Officer,
Cantonment.

*(Here describe the liability.)

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## SCHEDULE III

### FORM OF INVENTORY OF PROPERTY DISTRAINED AND NOTICE OF SALE

(See Section 93.)

To

residing at

Take notice that I have this day seized the property specified in the inventory annexed hereto, for the value of due for the liability* mentioned in the margin for the period commencing with the day of 19 , and ending with the day of 19 , together with Rs. due for service of notice of demand, and that, unless within seven days from the date of the service of this notice you pay to the [a][Board] the said amount, together with the costs of recovery, the said property will be sold by public auction.

Dated this day of 19 .

(Signature of officer executing the warrant.)

INVENTORY.

(Here state particulars of property seized.)

*(Here describe the liability.)

[a] Substituted by the Cantonments (Amendment) Act 1936 (24 of 1936), S. 69, for "Cantonment Authority".

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## SCHEDULE IV

### CASES IN WHICH POLICE MAY ARREST WITHOUT WARRANT

(See Section 250.)

| 1<br>Section. | 2<br>Subject. |
|---|---|
| | PART A. |
| 118 (1) (a) (i) | Drunkenness, etc., |
| 167 | Making or selling of food, etc., or washing of clothes, by infected person |
| | PART B. |
| 118 (1) (a) (ii) | Using threatening or abusive words, etc. |
| 118 (1) (a) (iii) | Indecent exposure of person, etc. |
| 118 (1) (a) (iv) | Begging. |
| 118 (1) (a) (v) | Exposing deformity, etc. |
| 118 (1) (a) (vii) | Gaming. |
| 118 (1) (a) (xii) | Destroying notice, etc. |
| 118 (1) (a) (xiii) | Breaking direction-post, etc. |
| 118 (1) (f) | Keeping common gaming-house, etc. |
| 118 (1) (g) | Beating drum, etc. |
| 118 (1) (h) | Singing, etc., so as to disturb public peace or order. |
| 119 (c) | Letting loose, or setting on, ferocious dog. |
| 125 | Discharging fire-arms, etc., so as to cause danger. |
| 176 (1) | Remaining in or re-entering cantonment after notice of expulsion for failure to attend hospital or dispensary. |
| 193 (2) | Destroying, etc., name of street or number affixed to building. |
| 214 | Feeding animal on filth, etc. |
| 236 | Loitering or importuning for sexual immorality. |
| 240 (a) | Remaining in, or returning to, a cantonment after notice of expulsion. |

## SCHEDULE V

### APPEALS FROM ORDERS

(See Section 274.)

| 1<br>Section | 2<br>Executive Order. | 3<br>Appellate Authority. | 4<br>Time allowed for appeal. |
|---|---|---|---|
| 126 | [a][Board's] notice to [b][remove] repair, protect or enclose a building, wall or anything affixed thereto, or well, tank, reservoir, pool, depression or excavation. | [c][Officer Commanding-in-Chief, the Command] [d][, or other authority authorised in this behalf by the [e][Central Government].] | Thirty days from service of notice. |
| 134 | [a][Board's] notice to fill up well, tank, etc., or to drain off or remove water. | [c][Officer Commanding-in-Chief, the Command] [d][or other authority authorised in this behalf by the [e][Central Government].] | Thirty days from service of notice. |
| [f][* * * * * | * * * * * | * * * * * | * * * *][f] |
| 140 | [a][Board's] notice requiring a building to be repaired or altered so as to remove sanitary defects.] | [c][Officer Commanding-in-Chief, the Command] [d][, or other authority authorised in this behalf by the [e][Central Government].] | Thirty days from service of notice. |

| 1<br>Section | 2<br>Executive Order. | 3<br>Appellate Authority. | 4<br>Time allowed for appeal. |
|---|---|---|---|
| 176 | Order of [g][Officer Commanding the station] on report of Medical Officer, directing a person to remove from the cantonment and prohibiting him from re-entering it without permission. | [c][Officer Commanding-in-Chief, the Command] [d][, or other authority authorised in this behalf by the [e][Central Government].] | Thirty days from service of notice. |
| 181 | [a][Board's] refusal to sanction the erection or re-erection of a building. | [c][Officer Commanding-in-Chief, the Command] [d][, or other authority authorised in this behalf by the [e][Central Government].] | [h][Thirty days from the date on which the refusal shall have been communicated to the person, applying for sanction.] |
| 185 | [a][Board's] notice to alter or demolish a building. | [c][Officer Commanding-in-Chief, the Command] [d][, or other authority authorised in this behalf by the [e][Central Government].] | Thirty days from service of notice. |
| 188 | [a][Board's] notice to pull down or otherwise deal with a building newly erected or rebuilt without permission over a sewer, drain, culvert, watercourse or water-pipe. | [c][Officer Commanding-in-Chief, the Command] [d][, or other authority authorised in this behalf by the [e][Central Government].] | Thirty days from service of notice. |
| 206 | [a][Board's] notice prohibiting or restricting the use of a slaughterhouse. | [c][Officer Commanding-in-Chief, the Command] [d][, or other authority authorised in this behalf by the [e][Central Government].] | Twenty-one days from service of notice. |
| 238 | Magistrate's notice directing disorderly person to remove from cantonment and prohibiting him from re-entering it without permission. | District Magistrate. | Thirty days from service of notice. |

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 of 1936), S. 69, for "Cantonment Authority's". [b] Inserted by the Repealing and Amending Act, 1939 (34 of 1939), S. 2 and Sch. I. [c] Substituted by the Cantonments (Amendment) Act, 1926 (35 of 1926), S. 2, for "Officer Commanding the District". [d] Inserted by S. 68 of Act 24 of 1936. [e] Substituted by A. O. for "Governor-General in Council". [f] Entry relating to S. 137 was omitted by the Cantonments (Amendment) Act, 1940 (31 of 1940), S. 8. [27-11-1940]. [g] Substituted by the Cantonments (Amendment) Act, 1925 (7 of 1925), S. 13, for "Commanding officer of Cantonment". [h] Substituted by S. 68, Act 24 of 1936, for "Thirty days from date of refusal".

SCHEDULE VI — Enactments Repealed. [Repealed by the Repealing Act, 1927 (XII of 1927).]

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# [THE UTTAR PRADESH] CANTONMENTS (CONTROL OF RENT AND EVICTION) ACT, 1952

## (ACT X OF 1952)

[The text of the Act printed here is as on 1-5-1969.]

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24. [Repealed.]

## STATEMENT OF OBJECTS AND REASONS

"Under Article 246 of the Constitution read with Entry 3 of the Union Legislative List, power to make laws with respect to rent control in cantonment areas now belongs exclusively to Parliament. Before the Constitution came into force, this power belonged to the former Provincial Legislature and in most Provinces the Provincial Rent Control Act was applied to cantonment areas and these Acts have continued in force in those areas. In Uttar Pradesh, however, due to a misunderstanding of the constitutional position, the cantonment areas were unfortunately excluded from the application of the Provincial Act by an amendment made shortly before the commencement of the new Constitution, with the result that there is no rent control law in force in the cantonments in that State.

2. The residents of the cantonments in Uttar Pradesh have been representing that they are being put to very grave hardship by reason of the removal of the rent control which was in force from 1947 to 1949. As rent control had not been operating in Cantonments in Uttar Pradesh for nearly two years and as the absence of such control had resulted in considerable hardship to tenants, an Ordinance, namely the Uttar Pradesh Cantonments (Control of Rent and Eviction) Ordinance, 1952 (No. II of 1952) was promulgated on the 16th January 1952, providing for the restriction of rents and protection against eviction, generally on the lines of the rent control law in force in the State. The Ordinance is applicable only to the cantonments in Uttar Pradesh, since cantonments in the other Part 'A' States and Part 'C' States (former Provinces) are covered by existing State law, and the problem has so far not arisen in the two or three cantonments situated in Part 'B' States.

3. As the necessity for the control of rents and eviction in cantonment areas of Uttar Pradesh is likely to continue for some considerable time, it is essential to replace the said Ordinance II of 1952 by an Act."

—Gaz. of Ind., 1952, Pt. II-Sec. 2, page 31.

## ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Repealed in part by Act XXXVI of 1957.

# [THE UTTAR PRADESH] CANTONMENTS (CONTROL OF RENT AND EVICTION) ACT, 1952

## (ACT X OF 1952)[a]

[27th February, 1952.]

An Act to provide for the control of rent of house accommodation in cantonments in Uttar Pradesh and to prevent the eviction of tenants therefrom.

Be it enacted by Parliament as follows:—

[a] For Statement of Objects and Reasons, see Gaz. of Ind., 1952, Pt. II-Sec. 2, page 31.

1. Short title and extent.—(1) This Act may be called THE UTTAR PRADESH CANTONMENTS (CONTROL OF RENT AND EVICTION) ACT, 1952.

(2) It extends to all the cantonments in the State of Uttar Pradesh.

**2. Act not to apply to certain accommodation.**—Nothing contained in this Act shall apply to—

(a) any premises belonging to the Government;

(b) any tenancy or other like relationship created by a grant from the Government in respect of premises taken on lease or requisitioned by the Government; or

(c) any house which is, or may hereafter be, appropriated by the Central Government on lease under the Cantonments (House Accommodation) Act, 1923.

3. Definitions.—In this Act, unless the context otherwise requires,—

(a) "accommodation" means house accommodation, residential or non-residential, in any cantonment to which this Act applies, and includes—

(i) the gardens, grounds or outhouses, if any, appurtenant to the building or any part thereof;

(ii) any furniture supplied by the landlord for use in the house or any part thereof;

(iii) any fittings affixed to the building or any part of the building for the more beneficial enjoyment thereof;

(b) "district Magistrate" includes an officer authorised by a district Magistrate to perform any of his functions under this Act;

(c) 'landlord" means a person to whom rent is payable by a tenant in respect of any accommodation, and includes—

(i) the agent, attorney, heir or assignee of the landlord, and

(ii) a tenant in relation to a sub-tenant;

(d) 'lease" includes a sub-lease;

(e) "municipal assessment" means—

(i) in respect of accommodation which was assessed by a cantonment board on or before the 1st day of April, 1942, the annual rental value so assessed and in force on the said date, and

(ii) in respect of accommodation which was assessed by a cantonment board after the said date, the annual rental value first assessed after the said date;

(f) "officer commanding the station" means the military officer for the time being in command of the forces in a cantonment or, if that officer is the Officer Commanding the Area or Officer Commanding-in-Chief, the Command, the military officer who would be in command of those forces in the absence of the Officer Commanding the Area and Officer Commanding-in-Chief, the Command, and includes any officer authorised by the officer commanding the station to exercise the powers of an officer commanding the station under this Act;

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**Section 2 — Note 1**

(1) The language of S. 2 of the Act is wide enough to cover a factory situate in a shop. 1957 All WR (HC) 35: 1957 All LJ 183.

**Section 3 — Note 1**

(1) Factory situated in shop comes within definition of "accommodation" as defined in Section 3 (a). 1957 All LJ 183.

(2) The definition of the word 'tenant" in Section 3 (h) applies unless the context otherwise requires. The context in Section 20 clearly requires the contrary. 1954 All L Jour 622.

(3) In a suit for the ejectment of the tenant where the tenant attacks the validity of the order of permission to sue under Section 3 on the ground that it was passed by an officer with no authority from the District Magistrate, the initial burden of proving that a valid order granting permission was passed is on the plaintiff-landlord, but it is discharged when the plaintiff produces a certified copy of an order which purports on the face of it to be made by an officer with apparent authority to pass it. After this it is for the defendant to produce some evidence in support of his allegation that the officer had in fact no authority. 1963 All LJ 827: 1963 All WR (HC) 421.

(g) "reasonable annual rent" means—

(1) in the case of accommodation constructed before the 1st day of October, 1946,—

(i) if it is separately assessed to municipal assessment, its municipal assessment plus twenty-five per cent. thereon;

(ii) if it is a part only of the accommodation so assessed, the proportionate amount of the municipal assessment of such accommodation plus twenty-five per cent. thereon;

(iii) if it is not assessed to municipal assessment—

(a) if it was held by a tenant on rent between the 1st day of April, 1942 and the 30th day of September, 1946, fifteen times the rent for the one month nearest to and after the 1st day of April, 1942; and

(b) if it was not so held on rent, the amount determined under Section 7; and

(2) in the case of accommodation constructed on or after the 1st day of October, 1946, the rent determined in accordance with Section 7;

(h) "tenant" means the person by whom rent is, or, but for a contract express or implied, would be, payable for any accommodation and includes any person holding or occupying the accommodation as a sub-tenant.

**4. Control of rent.**—(1) Except as hereafter in this section provided, the rent payable for any accommodation shall be such as may be agreed upon between the landlord and the tenant.

(2) Where the rent for any accommodation has not been agreed upon, or where in the case of tenancies continuing from any date before the 1st day of October, 1946, the landlord wishes to enhance the rent agreed upon, he may, by notice in writing, fix the annual rent at, or enhance it to an amount not exceeding, the reasonable annual rent:

Provided that the enhanced rent shall not exceed the rent, if any, payable on the 1st day of October, 1946, by more than fifty per cent. thereof:

Provided further that nothing in this section shall entitle the landlord to enhance the rent in the case of leases for a fixed term during the continuance of the term unless so permitted by the contract of tenancy.

(3) If any accommodation is let after the 16th day of January, 1952, without the rent being agreed upon between the landlord and the tenant, the rent fixed under sub-section (2) shall be payable from the date of commencement of the tenancy and where the rent agreed upon is enhanced under the said sub-section, the enhanced rent shall be payable from the first day of the month next after the month in which the notice is given.

(4) If the landlord claims that the reasonable annual rent of any accommodation is inadequate, or if the tenant claims that the reasonable annual rent is excessive or that the agreed rent is higher than the reasonable annual rent, he may institute a suit for fixation of rent in the Court of the munsiff having territorial jurisdiction if the annual rent claimed or payable is five hundred rupees or less, and if it exceeds five hundred rupees, in the Court of the civil Judge having territorial jurisdiction or, if there is no such civil Judge, in the Court of the district Judge:

Provided that the Court shall not vary the agreed rent unless it is satisfied that the transaction was unfair and, in the case of a lease for a fixed term made before the 1st day of April, 1942, that the term has expired.

(5) Notwithstanding anything contained in sub-sections (1), (2) and (3), the rent fixed by the Court under sub-section (4) shall, so long as this Act remains in force, be payable by the tenant and from such date as the Court may direct.

Explanation.—For the purposes of this section, "accommodation" includes any accommodation let on a monthly basis.

5. Procedure in suits under Section 4.—In determining the amount of annual or monthly rent in any suit under sub-section (4) of Section 4, the Court shall take into account—

(a) in the case of accommodation constructed before the 1st day of October, 1946, the pre-war rent, the reasonable annual or monthly rent, the prevailing rent on the date of the suit for similar accommodation in the locality, the cost of maintenance of, and repairs to, such accommodation, and any other material circumstances provided by the plaintiff or the defendant;

(b) in the case of accommodation constructed on or after the said date, the cost of construction and maintenance of, and repairs to, the accommodation, its situation and any other circumstances which the Court may consider material.

6. Bar of appeals from decrees or orders in suits under Section 4.—No appeal shall lie from any decree or order of the munsiff, the civil Judge or the district Judge, as the case may be, in a suit brought under sub-section (4) of Section 4:

Provided that the decree or order so passed (except in so far as it relates to the amount of rent) snall not operate as res judicata between the parties or their representatives in interest in any suit or proceeding under any other law.

7. Determination of reasonable annual rent in certain cases.—(1) In the case of any accommodation constructed after the 30th day of September, 1946, or falling within Item (b) of sub-clause (1) (iii) of Clause (g) of Section 3, the district Magistrate may, on the application of the landlord or the tenant, determine the reasonable annual rent thereof.

(2) In determining the reasonable annual rent under sub-section (1), the district Magistrate shall take into account—

(a) in the case of accommodation constructed after the 30th day of September, 1946, the cost of construction and maintenance of, and repairs to the accommodation, its situation and any other matter which in the opinion of the district Magistrate is material, and

(b) in the case of accommodation falling within Item (b) of sub-clause (1) (iii) of Clause (g) of Section 3, the matters set out in Cl. (a) of Section 5.

(3) Subject to the result of any suit filed under sub-section (4) of Section 4, the amount fixed by the district Magistrate under this section shall be the reasonable annual rent of the accommodation.

8. Unlawful charges not to be claimed or received.—(1) Subject to the provisions of this Act, no person shall be entitled to claim or to receive any rent in excess of the rent payable under this Act notwithstanding any agreement to the contrary.

(2) No person shall, in consideration of the grant, continuance or renewal of any tenancy, claim or receive any premium or other like sum in addition to the rent payable under this Act.

9. Control of letting.—(1) The officer commanding the station may, by general or special order, require a landlord to give intimation that any accommodation of which he is the landlord has fallen vacant and to let or not to let such accommodation to any person.

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**Section 9 — Note 1**

(1) No sooner a tenant leaves the premises at the end of the period of his tenancy, a vacancy occurs and consequently the Station Commander has authority to make an allotment order in favour of another person, notwithstanding the fact that the premises left was a shop and the landlord has purchased the business and goodwill of the outgoing tenant. 1954 All LJ 766.

(2) Every tenant occupying accommocation shall, within seven days of his vacating such accommodation, give intimation thereof in writing to the officer commanding the station.

(3) The officer commanding the station may, on application being made to him by the landlord, require a prospective tenant of any accommodation in respect of which an order has been made under this section to pay to the landlord an advance of rent equal—

(a) to one month's rent, where the accommodation is to be let on a monthly basis, and

(b) to one-half of the yearly rent where the accommodation is to be let on a yearly basis.

(4) In respect of any accommodation constructed after the 1st day of October, 1946, in respect of which he has to pass an order under sub-section (1), the officer commanding the station shall allot it to the owner if the owner, not being in occupation of any other house owned by him in the cantonment, genuinely requires such accommodation for his own residence.

Explanation I.—Any accommodation newly constructed shall be deemed to be vacant as soon as it is fit for occupation.

Explanation II.—For the purposes of this section "letting" includes sub-letting.

**10. Eviction of persons occupying accommodation in contravention of Section 9.**—(1) Where in pursuance of an order of the officer commanding the station under sub-section (1) of Section 9 the vacancy of any accommodation is required to be reported and is not so reported, or where an order requiring any accommodation to be let or not to be let has been duly passed under that sub-section and the officer commanding the station believes, or has reason to believe, that any person has, in contravention of such order, occupied the accommodation or any part thereof, he may call upon the person in occupation to show cause, within such time as may be fixed by him, why he should not be evicted therefrom :

Provided that no order under this section shall be made if the officer commanding the station is of opinion that due to lapse of time or other causes it is inexpedient to do so.

(2) If such person fails to appear in reply to the notice served under sub-section (1) or, if he appears but fails to satisfy the officer commanding the station that the order under sub-section (1) of Section 9 was not duly passed and that he is entitled to remain in occupation of the accommodation, the officer commanding the station may, without prejudice to any other action which may be taken against

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**Section 10 — Note 1**

(1) Section 10 contemplates two notices; one is given to an occupant to show cause within a specified time as to why he should not be evicted. The second notice is given to the occupant to vacate the premises within a specified time. 1957 All WR (HC) 35: 1957 All LJ 183.

(2) Section 10 (3) comes into play only when notice given in Section 10 (2) is not complied with and unless the period in notice expires, it cannot be argued that terms of notice had not been complied with. 1957 All LJ 183: 1957 All WR (HC) 35.

(3) Petitioner threatened with forcible ejectment — Availability of remedy by way of revision under Section 10 (4) is no bar to a remedy under Art. 226 of the Constitution. 1957 All LJ 183: 1957 All WR (HC) 35.

(4) Tenant forcibly dispossessed without authority of law — It is open to the petitioners to ask for a writ of mandamus directing the opposite party not to disturb the possession of the petitioners and to deliver back the possession to them. 1957 All LJ 183: 1957 All WR (HC) 35.

(5) Where notice to vacate under Section 10 (2) is issued to the petitioners, it is not open to the allottees to say that no notice should have been given as the petitioners were not occupants. 1957 All LJ 183: 1957 All WR (HC) 35.

(6) Where the only notice given to occupant was asking him to vacate the premises within a fortnight, the notice is not legal. Attitude of occupant showing that he was not likely to vacate the premises is no ground for taking forcible possession before the expiry of period mentioned in notice. 1957 All LJ 183: 1957 All WR (HC) 35.

him under this Act or any other law for the time being in force, direct him to vacate the premises within such period as he may specify.

(3) Upon the making of an order under sub-section (2), the person against whom the order is made and any other person claiming under him shall vacate the accommodation and if the person does not vacate the accommodation within the time allowed or such extended period as the officer commanding the station may, on cause shown, allow, the officer commanding the station may evict, or cause to be evicted, the person or persons concerned and may use such force as may be necessary for carrying out the order and also put the person entitled under sub-section (1) of Section 9 in occupation of the accommodation.

(4) No appeal shall lie from any order passed by the officer commanding the station under this section, but the Central Government or any person authorised by it in this behalf may revise the said order if it is satisfied that the officer commanding the station has acted illegally or with material irregularity or has wrongly refused to act, and may make such order in relation thereto as it thinks fit.

11. Eviction of tenants occupying accommodation under Section 9.—(1) Where any tenant who is in occupation of any accommodation in pursuance of an order made under sub-section (1) of Section 9 is in arrears of rent for more than three months, the landlord may make an application to the munsiff having territorial jurisdiction for an order of eviction of the tenant from the accommodation.

(2) Every application under sub-section (1) shall contain the following particulars, namely .—

(a) the name of the landlord and, where there are more landlords than one, the names of all the landlords;

(b) a sufficient description of the accommodation from which the tenant is to be evicted or a copy of the order of allotment;

(c) the arrears claimed and the rate at which they are claimed;

(d) where the rent has already been determined in a suit under sub-section (4) of Section 4, the fact that it has been so determined;

and shall be verified in the manner prescribed for the verification of plaints in the Code of Civil Procedure, 1908.

(3) On the making of an application under sub-section (1), the munsiff shall, without unnecessary delay, cause a notice to be served on the tenant in the manner prescribed by rules under this Act requiring him to pay the amount of arrears within fifteen days of the service thereof or to show cause within the said period why an order evicting him from the accommodation be not passed against him.

(4) If within the time allowed in the notice under sub-section (3) the tenant pays into Court the amount mentioned therein, the munsiff shall dismiss the application and direct the amount to be deposited to be paid to the landlord in satisfaction of the arrears and shall make such order as to costs as may appear to him to be just and proper.

(5) Where the tenant has been duly served with a notice under sub-section (3) but fails to deposit the amount mentioned within the time allowed therein and does not file any objection thereto, the munsiff shall, notwithstanding anything to the contrary contained in the Transfer of Property Act, 1882, make an order directing that the tenant be evicted from the accommodation and that he shall pay the costs of the application.

(6) As soon as may be after an order has been passed under sub-section (5) the munsiff shall forward a copy of the same to the district Magistrate and thereupon the district Magistrate shall cause the tenant to be evicted from the accommodation, using or causing to be used such force as may be necessary for the purpose, and nothing contained in the Code of Civil Procedure, 1908, shall apply to any such proceedings :

Provided that if the tenant at any time before his eviction deposits the amount due in the treasury or pays the landlord or the officer charged with the execution of the order for the delivery of possession the amount of arrears together with all the costs of the proceedings, the tenant shall not be evicted from the accommodation and the district Magistrate shall report the proceedings to the munsiff who shall make an order quashing the proceedings :

Provided further that the district Magistrate may, for sufficient reasons, allow such time as he may think fit to the tenant to pay the amount for which an order of eviction has been passed against him.

(7) Any order made under sub-section (5) or anything done or any action taken under sub-section (6) shall not be deemed in any way to affect the question of title to the property to which it relates.

**12. Proceedings under Section 11 may be converted into suits in certain cases.**—(1) Where a tenant appears in reply to a notice under sub-section (3) of Section 11 and files an objection, other than an objection as to the costs of the proceedings merely, the munsiff shall inform the applicant that he may, subject to the payment within such time as may be specified of the court-fee in respect thereof, have the application treated as a plaint in a suit for the recovery of arrears of rent alone :

Provided that the tenant shall not be permitted to file any objection unless he deposits in Court the amount mentioned in the notice.

(2) If the applicant pays the necessary court-fee within the time allowed, the application shall be treated as a plaint and the proceedings as a suit and disposed of accordingly, but if no court-fee is so deposited the proceeding shall be quashed, without prejudice to the right of the applicant to file, subject to any other law for the time being in force, a separate suit for ejectment and recovery of arrears.

**13. Special costs for frivolous or vexatious applications or objections.**—Whenever the munsiff finds that an application by the landlord under Sec. 11 or any objection filed by the tenant under Section 12 is frivolous or vexatious, he shall award, by way of special costs, to the tenant or the landlord, as the case may be, such sum not exceeding the amount of the claim as he may think fit,

**14. Restrictions on eviction.**—No suit shall, without the permission of the district Magistrate, be filed in any civil Court against a tenant for his eviction from any accommodation except on one or more of the following grounds, namely :—

(a) that the tenant has wilfully failed to make payment to the landlord of any arrears of rent within one month of the service upon him of a notice of demand from the landlord;

(b) that the tenant has wilfully caused or permitted to be caused substantial damage to the accommodation;

(c) that the tenant has, without the permission of the landlord, made or permitted to be made any such construction as in the opinion of the Court has materially altered the accommodation or is likely substantially to diminish its value;

(d) that the tenant has created a nuisance or has done any act which is inconsistent with the purpose for which he was admitted to the tenancy of the accommodation or which is likely to affect adversely and substantially the landlord's interest therein;

(e) that the tenant has sub-let the whole or any portion of the accommodation without the permission of the landlord;

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**Section 14 — Note 1**

(1) When there was a lis between the parties which was formally adjudicated under Section 14 the order so passed was nothing but a quasi-judicial order which could not have been reviewed or modified without an express provision in the Act to that effect. 1966 All L Jour 103.

(f) that the tenant has renounced his character as such or has denied the title of the landlord and the latter has not waived his right or condoned the conduct of the tenant.

Explanation.—For the purposes of Clause (e), a person lodging another person in any accommodation which is a hotel or a lodging house shall not be deemed to have sub-let such accommodation.

Note.—As regards a suit for eviction pending on the date of the commencement of the Act, no decree for eviction shall be passed except on one or more of the grounds mentioned in this section. See S.19.

Similarly, a decree for eviction of a tenant passed before the commencement of the Act, in so far as it relates to the eviction of such tenant, shall not be executed unless the decree is based on one or more of the grounds specified in this section, provided that if the decree is based on the ground mentioned in clause (a), the decree shall not be executed if the tenant pays the arrears of rent together with the costs of the suit. See S. 20.

**15. Penalty.**—Any person who contravenes any of the provisions of this Act or any order made in pursuance thereof shall be punishable, on conviction, with simple imprisonment for a term which may extend to six months or with fine, which may extend to one thousand rupees, or with both.

**16. Attempts, etc.**—Any person who attempts to contravene or abets a contravention of any order made under this Act shall be deemed to have contravened that order.

**17. Offences by companies.**—(1) If the person contravening any order made under this Act is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence was committed with the consent or connivance of, or is attributable to any neglect on the part of, any director or manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section—

(a) "company" means any body corporate, and includes a firm or other association of individuals, and

(b) "director" in relation to a firm means a partner in the firm.

**18. Act to override other laws.**—The provisions of this Act and of any orders or rules made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any such law.

**19. Pending suits for eviction.**—In all suits for eviction of a tenant from any accommodation pending on the date of commencement of this Act, no decree for eviction shall be passed except on one or more of the grounds mentioned in Section 14.

**20. Execution of pending decrees for eviction.**—Any decree for the eviction of a tenant from any accommodation passed before the commencement of this Act, in so far as it relates to the eviction of such tenant, shall not be capable of execution unless the decree is based on one or more of the grounds specified in Section 14:

Provided that where the decree is based on the ground specified in C. (a) of Section 14, the decree shall not be capable of execution if the tenant pays to the landlord or deposits in Court the arrears of rent due from him together with all the costs of the proceedings and also agrees to pay to the landlord the reasonable annual rent or the rent payable by him before the passing of the decree, whichever is lower.

**21. Orders under Act not to be questioned in any Court.**—Save as otherwise provided in this Act, no order made thereunder by the Government or the district Magistrate or the officer commanding the station shall be called in question in any Court.

**22. Protection for action taken in good faith.**—(1) No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done in pursuance of any order made under this Act.

(2) No suit or other legal proceeding shall lie against the Government for any damage caused or likely to be caused by anything which is in good faith done or intended to be done in pursuance of any order made under this Act.

**23. Power to make rules.**—(1) The Central Government may, by notification in the Official Gazette, make rules[a] to give effect to the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) the manner in which any notice under this Act may be served;

(b) the procedure to be followed by district Magistrates in the disposal of any proceedings under this Act;

(c) the manner in which and the conditions subject to which officers commanding the station may exercise their powers under this Act.

[a] See Uttar Pradesh Cantonments (Control of Rent and Eviction) Rules, 1954, Gaz. of Ind., 1954, Pt. II, Sec. 4, page 90.

**24. Repeal of Ordinance II of 1952.**—[Repealed by the Repealing and Amending Act, 1957 (XXXVI of 1957), S. 2 and Sch. I.]

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## [THE] CANTONMENTS (EXTENSION OF RENT CONTROL LAWS) ACT, 1957
## (ACT 46 OF 1957)

[The text of the Act printed here is as on 1-5-1969.]

### STATEMENT OF OBJECTS AND REASONS

"Under Art. 246 of the Constitution read with Entry 3 of the Union List, power to make laws with respect to rent control in cantonment areas now belongs exclusively to Parliament. Before the Constitution came into force, this power belonged to the Legislatures of the former Provinces and States.

2. Accordingly in Mhow cantonment, rents of premises, their letting and eviction of tenants therefrom were controlled by the Madhya Bharat Accommodation Control Act which had been passed on the 11th January 1950, and applied to Mhow as from the 6th February, 1950. The Act was due to expire on the 30th June 1953, but by State Act VI of 1953

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**Section 20 — Note 1**

(1) Compromise decree passed before passing of Act — Execution of decree after commencement of Act — Can be made only in accordance with terms of Section 20 and not according to its own term. 1954 All LJ 622 (DB).

(2) 'Tenant' means person who was tenant before suit but whose right to continue as such has ceased and suit for eviction against him has been decreed on that ground. 1954 All LJ 622 (DB).

its duration was extended up to the 30th June 1955. The Act was however replaced before that date by an Ordinance which in its turn has been replaced by the present Madhya Bharat Accommodation Control Act of 1955. In view of the re-distribution of the legislative powers in the Constitution the State Legislature cannot exercise legislative powers after the commencement of the Constitution, over a subject which is included in the Union List. Hence, the Amendment Act of 1953 or the Ordinance promulgated in 1955 was not, nor the present Act is, applicable to the Mhow Cantonment. A large number of eviction cases has been filed by the landlords by taking advantage of the non-existence of any rent control law in the cantonment area.

3. To protect the tenants from improper evictions, Central legislation is, therefore, necessary to provide for the application of the State Act of 1955 to Mhow with necessary modifications.

4. As a situation similar to that in Mhow Cantonment, may arise in other cantonments also, it is proposed to confer powers on the Central Government to extend the relevant rent control laws of any State to the cantonments situated in that State by notification in the Gazette of India.

5. The Bill is designed to achieve the objects mentioned above."

—Gaz. Ind. Extra., 1957, Pt. II-S. 2, page 831.

## THE] CANTONMENTS (EXTENSION OF RENT CONTROL LAWS) ACT, 1957 (ACT 46 OF 1957)[a]

[18th December, 1957.]

An Act to provide for the extension to cantonments of laws relating to the control of rent and regulation of house accommodation.

Be it enacted by Parliament in the Eighth Year of the Republic of India as follows :

[a] For Statement of Objects and Reasons, see Gaz. of Ind., Extra, 1957, Pt. II-S. 2, page 831.

This Act has been extended to the Union Territory of Pondicherry by Regulation 7 of 1963 [w. e. f. 1-10-1963].

1. Short title.—This Act may be called THE CANTONMENTS (EXTENSION OF RENT CONTROL LAWS) ACT, 1957.

2. Definitions.—In this Act, "cantonment" means any place declared to be a cantonment under S. 3 of the Cantonments Act, 1924.

3. Power to extend to cantonments laws relating to control of rents and regulation of house accommodation.—The Central Government may, by notification in the Official Gazette, extend to any cantonment with such restrictions and modifications as it thinks fit, any enactment relating to the control of rent and regula-

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Section 3 — Note 1

(1) What Section 3 empowers the Central Government to do is to extend to any cantonment with restrictions and modification any enactment relating to control of rent and regulation of house accommodation that might be in force on the date of notification in the State in which the cantonment was situated. In doing that the Central Government would merely be adopting the State Act with modifications and applying it to a cantonment Board area in exercise of delegated legislative functions. In no case such a modified Act could be considered to be a central enactment for the purposes of interpretation except with reference to the special modifications provided for. AIR 1966 Madh Pra 171 (174): 1965 Jab LJ 786.

(2) Extension of M. P. Accomodation Control Act (1961) during pendency of suit — For eviction except Section 51 thereof. Held, that although Act is not retrospective and does not apply to suits pending on date of notification, validly instituted suit for eviction filed before extension of Act could be continued in view of fact of its being a vested right of plaintiff. AIR 1967 Madh Pra 265 (267, 268): 1967 Jab LJ 581 (DB). (Second Appeal No. 131 of 1966, D/- 21-9-1966 (M. P.) — Overruled.)

[But See AIR 1966 Madh Pra 171 (176, 177): 1965 Jab LJ 786. (The action of Central Government in deleting Sec. 52 of M.P. Accommodation Control Act (41 of 1961) while adopting that Act for Cantonment Board area, would have the effect of the 1961 Act becoming applicable to pending cases.)]

tion of house accommodation which is in force on the date of the notification in the State in which the cantonment is situated :

Provided that nothing contained in any enactment so extended shall apply to,—

(a) any premises within the cantonment belonging to the Government;

(b) any tenancy or other like relationship created by a grant from the Government in respect of premises within the cantonment taken on lease or requisitioned by the Government; or

[c] any house within the cantonment which is, or may be, appropriated by the Central Government on lease under the Cantonments (House Accommodation) Act, 1923.

**4. Extension of the Madhya Bharat Accommodation Control Act, 1955 to the Cantonment of Mhow.**—The Madhya Bharat Accommodation Control Act, 1955, as in force in that part of the State of Madhya Pradesh which immediately before the 1st day of November, 1956, formed the State of Madhya Bharat is hereby extended to, and brought into force in, the Cantonment of Mhow with the following modifications, namely:—

In the said Act,—

(a) for the words "commencement of this Act" wherever they occur, the words "extension of this Act to the cantonment" shall be substituted;

(b) in Section 1, for sub-sections (2), (3) and (4), the following sub-sections shall be substituted, namely .—

"(2) It extends to the Cantonment of Mhow.

(3) It shall remain in force up to the 31st day of December, 1957; but the Central Government may, by notification in the Official Gazette, direct from time to time that it shall remain in force for such further period as may be specified in the notification so, however, that the total period for which it may remain in force shall not exceed two years from the 31st day of December, 1957.";

(c) in Section 2, in Cl. (b) of sub-section (1), for the words "a Municipality", the words "the Cantonment Board" shall be substituted;

(d) in Section 3, in Cl. (e), for the word "Municipal", the words "Cantonment Board" shall be substituted;

(e) in Section 4,—

(i) in Clause (g), for the words "city or town concerned", the word "cantonment" shall be substituted;

(ii) in Clause (h), for the words "city or town for that purpose and if he was in occupation, has for sufficient reasons vacated it after the Act has been extended to that city or town", the words "cantonment for that purpose or if he was in occupation, has for sufficient reasons vacated it after the extension of this Act thereto" shall be substituted;

(f) in Section 6,—

(i) in sub-section (1), the words and brackets "situated in the city of Lashkar (including Gwalior and Morar), Indore, Ujjain or Ratlam" shall be omitted;

(ii) sub-section (2) shall be omitted;

(g) in Section 14, the words "the provisions of this Act cease to be applicable to any town, or" shall be omitted;

(h) in Section 15, after the word "instituted", the words "or if instituted, continued", shall be inserted;

(i) in Section 18, sub-section (4) shall be omitted;

(j) in Section 21, the words "or deemed to have been passed" shall be omitted;

(k) in Section 22, the words "or deemed to have been made" shall be omitted;

(l) Section 23, Section 27 and the Schedule shall be omitted;

(m) in Sections 24 and 25, the words "or deemed to have been made" shall be omitted.

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# [THE] CANTONMENTS (HOUSE-ACCOMMODATION) ACT, 1923
## (ACT VI OF 1923)

[The text of the Act printed here is as on 1-5-1969.]

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## STATEMENTS OF OBJECTS AND REASONS

"The committee which was appointed in the winter of 1920-21 to enquire into and make recommendations in regard to the administration of cantonments recommended inter alia that the Cantonments (House Accommodation) Act should be revised, so as to remove certain defects which have been brought to light and to carry out more fully the intention of the Act, namely, the better provision of house-accommodation for military officers in cantonments. These recommendations have now been examined by the Government of India whose conclusions are embodied in the draft Bill.

2. A number of the amendments are designed merely to bring the Act up-to-

date by specifying, in place of the authorities by whom the Act is at present administered, other authorities recently constituted, e.g. District Commanders in lieu of Divisional Commanders.

3. The principal changes of substance which the Bill seeks to introduce are, firstly, to substitute for the procedure under which houses are liable to be appropriated for use, on a monthly tenancy, by military officers holding direct from the house owner, a procedure under which Government will take such houses as may be required on a repairing lease for a term of at least five years and will allot the houses so leased to officers requiring accommodation. Under this procedure, officers will become the tenants of Government who alone will deal with the house-owners. Secondly, it is proposed to repeal those sections of the existing Act which provide for interference in the settlement of disputes between house-owners and individual tenants. If the Bill becomes law, individual officers will, as already explained, cease to be the direct tenants of house owners. Where the military officer prefers to take a house by private agreement with a house-owner, and not from Government, it is considered that there is no justification for interference between the two parties in cases of disputes, which will in future be settled as they would outside a cantonment, either by agreement between the parties or by recourse to the law Courts. Thirdly, the Bill alters the constitution of Committees of Arbitration and provides for an appeal to the Court against the decisions of such committees."

* * * *

—Gazette of India, 1922, Pt. V, p. 233.

## ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Amended by Acts X of 1925; IX of 1930; XXII of 1933; XXXII of 1940, LIII of 1950.

—Adapted by A.O., 1937; A.C.A.O., 1948; A.L.O., 1950; 3 A.L.O., 1956.

—Repealed in part by Act XII of 1927.

## COGNATE ACTS AND PROVISIONS

1. Cantonments Act, II of 1924.
2. Cantonments (Extension of Rent Control Laws) Act, 46 of 1957.
3. Uttar Pradesh Cantonments (Control of Rent and Eviction) Act, 10 of 1952.

# [THE] CANTONMENTS (HOUSE-ACCOMMODATION) ACT, 1923 (ACT 6 OF 1923)[a]

[5th March 1923.]

**An Act further to amend and to consolidate the law relating to the provision of house accommodation for military officers in cantonments.**

Whereas it is expedient further to amend and to consolidate the law relating to the provision of house-accommodation for military officers in cantonments; It is hereby enacted as follows:—

[a] For Report of Joint Committee, see Gazette of India, 1923, Pt. V, p. 5.

The Act has been extended to the new provinces and merged States by the Merged States (Laws) Act, 1949 (59 of 1949), S. 3 (1-1-1950), and to the Union Territories of Manipur and Tripura, by the Union Territories (Laws) Act, 1950 (30 of 1950), S. 3 (16-4-1950). Vindhya Pradesh, to which also this Act was extended along with Manipur and Tripura, now forms part of the State of Madhya Pradesh—See Act 37 of 1956, S. 9 (1) (e) (1-11-1956). It has now been extended to the Union Territory of Pondicherry by Regn. 7 of 1963 (1 10-1963).

## CHAPTER I

## PRELIMINARY

**1. Short title, extent and commencement.**—(1) This Act may be called THE CANTONMENTS (HOUSE-ACCOMMODATION) ACT, 1923.

(2) It extends to [b][the whole of India [c][* *]] [d][* * *] [e][* *].

(3) It shall come into force on the first day of April, 1923, but it shall not become operative in any cantonment or part of a cantonment until the issue, or otherwise than in pursuance, of a notification as hereinafter provided by Sec. 3:

Provided that any notification made under Section 3 of the [d]Cantonments (House-Accommodation) Act, 1902, which is in force at the commencement of this Act, shall be deemed to be a notification made under Section 3 of this Act.

[a] The words 'except Part B States" were omitted by the Cantonment Laws (Extension and Amendment) Act, 1950 (53 of 1950), S. 2 (18-8-1950). If immediately before the 19th day of June 1950, there was in force in any of the Part B States any law corresponding to the Cantonments (House-Accommodation) Act, 1923, such corresponding law is repealed by S. 10 of the said Act.

[b] The brackets and words "inclusive of British Baluchistan" were omitted by A.O., 1948.

[c] The words "except Aden" were omitted by A.O., 1937.

[d] Repealed by this Act, see S. 39 and Schedule.

2. Definitions.—(1) In this Act, unless there is anything repugnant in the subject or context,—

(a) 'Brigade area" means one of the Brigade areas, whether occupied by a brigade or not, into which India is for military purposes for the time being divided, and includes any area which the [Central Government] may, by notification in the [Official Gazette], declare to be a Brigade area for all or any of the purposes of this Act;

[(b) 'Cantonment Board" means a Cantonment Board constituted under the Cantonments Act, 1924;]

[a] This clause originally lettered (bb) was inserted by the Cantonments (House-Accommodation Amendment) Act, 1925 (10 of 1925), S. 2. It was re-lettered (b), and the original clause (b) was repealed by ibid, 1930 (9 of 1930), S. 2.

(c) 'Command' means one of the Commands into which India is for military purposes for the time being divided, and includes any area which the Central Government may, by notification in the Official Gazette, declare to be a Command for all or any of the purposes of this Act;

(d) [['Officer Commanding the station"] means the officer for the time being in command of the forces in a cantonment [or, if that officer is the Officer Commanding the District, the military officer who would be in command of these forces in the absence of the Officer Commanding the District].

[a] Substituted by the Cantonments (House-Accommodation Amendment) Act, 1925 (10 of 1925), S. 6, for "Commanding Officer of the Cantonment".

[b] Inserted, see ibid, 1930 (9 of 1930), S. 2.

(e) 'District" means one of the Districts into which India is for military purposes for the time being divided; it includes a Brigade area which does not form part of any such District and any area which the Central Government may, by notification in the Official Gazette, declare to be a District for all or any of the purposes of this Act;

(f) "house" means a house suitable for occupation by a military officer or a military mess, and includes the land and buildings appurtenant to a house;

(g) "military officer" means a commissioned or warrant officer of [the Indian] military or air forces on military or air force duty in a cantonment, [* * * *], [an officer of the Cantonments Department] and any person in Army departmental employment whom the Officer Commanding the District may at any time, by an order in writing, place on the same footing as a military officer for the purposes of this Act;

[a] Substituted for "His Majesty's" by A.L.O., 1950.

[b] The words "and includes a chaplain on duty with troops in a Cantonment" were omitted by A.L.O., 1950.

[c] Substituted by the Cantonments (House-Accommodation Amendment) Act, 1925 (10 of 1925), S. 2, for "a Cantonment Magistrate".

(h) "owner" includes the person who is receiving, or is entitled to receive, the rent of a house, whether on his own account or on behalf of himself and others or as an agent or trustee, or who would so receive the rent, or be entitled to receive it, if the house were let to a tenant; and

(i) a house is said to be in a state of reasonable repair when—

(i) all floors, walls, pillars and arches are sound and all roofs sound and watertight,

(ii) all doors and windows are intact, properly painted or oiled, and provided with proper locks or bolts or other secure fastenings, and

(iii) all rooms, out-houses and other appurtenant buildings are properly colour-washed or white-washed.

(2) If any question arises whether any land or building is appurtenant to a house, it shall be decided by the [a][Officer Commanding the station] whose decision thereon shall, subject to revision by the [b][Collector], be final.

[a] Substituted by the Cantonments (House-Accommodation Amendment) Act, 1925 (10 of 1925), S. 6, for "Commanding Officer of the Cantonment'.

[b] Substituted, see ibid, 1930 (9 of 1930), S. 2, for "District Magistrate".

[a][(3) In the application of this Act to [b][the territories which, immediately before the 1st November 1956, were comprised in any Part B State], any reference to an enactment not in force in [c][those territories] shall be construed as a reference to the corresponding law in force in [c][those territories].]

[a] Added by the Cantonment Laws (Extension and Amendment) Act, 1950 (53 of 1950), S. 3 (18-8-1950).

[b] Substituted for "any Part B State" by 3 A.L.O., 1956.

[c] Substituted for "that State", ibid.

## CHAPTER II

## APPLICATION OF ACT

**3. Cantonments or parts of cantonments in which Act to be operative.**—(1) The [a][Central Government] [b][• • •] may, by notification in the [a][Official Gazette], declare this Act to be operative in any cantonment or part of a cantonment [b][• • •], other than a cantonment situate within the limits of a presidency-town

(2) Before issuing a notification under sub-section (1) in respect of any cantonment or port of a cantonment, the [a][Central Government] shall cause local inquiry to be made with a view to determining whether it is expedient to issue such notification, and what portion (if any) of the area proposed to be included therein should be excluded therefrom.

[a] The words "with the previous sanction of the Governor-General in Council" were repealed by A.O., 1937.

[b] The words "situate in the Province" were repealed by A.O., 1937.

[c] Substituted, ibid, for "Local Government".

[a][4. **Saving of written instruments.**—Nothing in this Act shall affect the provisions of any written [b][contract with the Government] unless all the parties to that contract consent in writing to be bound by the terms of this Act.]

[a] Substituted by A.O., 1937, for the original section.

[b] Substituted for "crown contract" by A.L.O., 1950.

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**Section 4 — Note 1**

(1) Section 4 does not apply to a licence under General Order No. 179 unless the Secretary of State and the other party entitled consent to be bound by the terms of the Act. AIR 1936 Lah 582 (583) (DB).

(2) Where Government once owned land in a cantonment to which General Order No. 179 applied, the occupiers of buildings thereon are licensees and the onus is upon them to show that they own the land. AIR 1936 Peah 227 (227, 228) (DB).

## CHAPTER III

## APPROPRIATION OF HOUSES

**5. Liability of houses to appropriation.**—Every house situate in a cantonment or part of a cantonment in respect of which a notification under sub-section (1) of Section 3 is for the time being in force shall be liable to appropriation by [a][the Central Government] on a lease in the manner and subject to the conditions hereinafter provided.

[a] Substituted by A.O., 1937.

[a][6. **Conditions on which houses may be appropriated.**—(1) Where—

(a) a military officer who is stationed in or has been posted to the cantonment, or a President of a military mess in the cantonment, applies in writing to the Officer Commanding the Station stating that he is unable to secure suitable accommodation in the cantonment for himself or the mess on reasonable terms by private agreement, and that no suitable house or quarter belonging to the [b][Government] is available for his occupation or for the occupation of the mess, and the Officer Commanding the Station is satisfied on inquiry of the truth of the facts so stated; or

(b) the Officer Commanding the Station is satisfied on inquiry that there is not in the cantonment a sufficient and assured supply of houses available at reasonable rates of rent by private agreement to meet the requirements of the military officers and military messes whose accommodation in the cantonment is in his opinion necessary or expedient,

the Officer Commanding the Station may, with a view to enforcing the liability under Section 5, serve a notice on the owner of any house which appears to him to be suitable for occupation by a military officer or a military mess, as the case may be, within the cantonment, or, if this Act is in force in part only of the cantonment, within that part, requiring the owner to permit the house to be inspected, measured and surveyed by such person and on such date, not being less than three clear days from the service of the notice, and at such time between sunrise and sunset, as may be specified in the notice.

(2) On the date and at the time so specified the owner shall be bound to afford all reasonable facilities to the person specified in the notice for the purpose of the inspection, measurement and survey of the house and if he refuses or neg-

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**Section 5 — Note 1**

(1) Two pre-requisites of a valid notice under Section 6 are that there should be an application from an individual officer to the Officer Commanding the station that no Government quarters were provided to him and that despite reasonable efforts he could not find any private accommodation; and that the Officer Commanding the station has been satisfied on enquiry of the truth of these facts. The Officer Commanding the station can move suo motu only when he is satisfied by enquiry about the necessity of appropriating a private house inasmuch as there is not a sufficient and assured supply of houses available at reasonable rates by private agreement. No house will be liable to appropriation unless these two conditions are satisfied. (1954) 1954 BLJR 414 (417).

(2) It is sufficient if the authority is satisfied that the house is required for occupation of a military officer. An order not specifying the particular officer is not a mala fide exercise of jurisdiction. (1954) 1954 BLJR 414 (418).

**Section 6 — Note 1**

(1) Two pre-requisite conditions are to be fulfilled in order to give validity to a notice under Section 6: According to the first clause of the section, (1) there should be an application from an individual officer to the Officer Commanding the station that the applicant could not be provided with Government quarters and (2) in spite of all reasonable efforts he was not able to make satisfactory private arrangement. ('54) 1954 BLJR 414 (417).

(2) The only thing necessary for the authority is to satisfy itself whether a house is required for occupation of a military officer. Order not specifying the particular military officer for whom accommodation was sought for is not mala fide. ('54) 1954 BLJR 414 (418).

(3) A Civil Court has no jurisdiction to question validity of notice under Sections 6 and 7. ('54) 1954 BLJR 414 (418).

(4) As to service of notice, see Section 34.

lects to do so, such person may, subject to any rules made under this Act, enter on the premises and do all such things as may be reasonably necessary for the said purpose.]

[a] Substituted by the Cantonments (House-Accommodation Amendment) Act, 1930 (9 of 1930), S. 3, for the original section.
[b] Substituted by A.L.O., 1950, for "the Crown".

**7. Procedure for taking house on lease.**—(1) If, on the report of such person as aforesaid, the [a][Officer Commanding the station] is satisfied that the house is suitable for occupation by a military officer or a military mess, he may [b][* * *] by notice—

(a) require the owner to execute a lease of the house to [c][the Central Government] for a specified period which shall not be less than five years;

(b) require the existing occupier, if any, to vacate the house; and

(c) require the owner to execute within such time as may be specified in the notice such repairs as may, in the opinion of the [a][Officer Commanding the station], be necessary for the purpose of putting the house into a state of reasonable repair.

(2) Every notice issued under sub-section (1) shall state the amount of the annual rent proposed as reasonable for the house, calculated on the assumption that the owner will carry out the required repairs, if any. It shall also contain an estimate of the cost of such repairs.

(3) The following shall be deemed to be conditions of every lease executed under sub-section (1), namely:—

(a) that the house shall, on the expiration of the lease, be re-delivered to the owner in a state of reasonable repair, and

(b) that the grounds and the garden, if any, appertaining to the house shall be maintained in the condition in which they are at the time at which the lease is executed:

[d][Provided that nothing in this sub-section shall be deemed to affect the right of [c][the Central Government] to avoid the lease in any such event as is specified in clause (e) of Section 108 of the Transfer of Property Act, 1882.]

[a] Substituted by the Cantonments (House-Accommodation Amendment) Act, 1925 (10 of 1925), S. 6, for "Commanding Officer of the Cantonment".
[b] The words "with the previous sanction of the Officer Commanding the District" were repealed by the Cantonments (House-Accommodation Amendment) Act, 1930 (9 of 1930), S. 4.
[c] Substituted by A.O., 1937, for "the Government".
[d] Inserted by Act 9 of 1930, S. 4.

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**Section 7 — Note 1**

(1) As to appeal to Officer Commanding the District see Section 30; and as to service of notice, see Section 34.

(2) Best criterion for arriving at a reasonable figure of rent of a house is to find out the rent of the houses in the locality. ('39) AIR 1939 Pesh 22 (22, 23).

(3) When the procedure prescribed in the Act is not followed, the amount of rent payable by a military officer is a matter of contract expressed or implied between the officer and the owner. ('13) 18 Ind Cas 708 (710) (All).

(4) Order of appropriation under Section 7 is final and cannot be agitated in a civil suit. ('54) 1954 BLJR 414 (418).

(5) Where there is a mala fide exercise of jurisdiction the whole proceedings are vitiated. ('54) 1954 BLJR 414 (418).

(6) 'House' means the whole house and an order for partial appropriation of a house is without jurisdiction particularly when the other part is occupied bona fide by the owner himself. ('54) 1954 BLJR 414 (421).

(7) A Civil Court cannot declare that an order for appropriation is illegal on the ground that there was a breach regarding the execution of the lease. Proper manner is for the owner to apply to the Officer Commanding the Station to rectify the mistake. ('54) 1954 BLJR 414 (418).

**8. Procedure to be observed before taking a house on lease.** [Repealed by the Cantonments (House-Accommodation Amendment) Act, 1930 (IX of 1930), S. 5.]

**9. Sanction to be obtained before a house is occupied as a hospital, etc.**—No house in any cantonment or part of a cantonment in which this Act is operative shall, unless it was so occupied at the date of the issue of the notification declaring this Act or the [a]Cantonments (House-Accommodation) Act, 1902, as the case may be, to be operative, be occupied for the purposes of a hospital, school, school hostel, bank, hotel, or shop, or by a railway administration, a company or firm engaged in trade or business or a club, without the previous sanction of the Officer Commanding the District given with the concurrence of the Commissioner or, in a [b][State] where there are no Commissioners, of the Collector.

[a] Repealed by this Act, S. 39 and Schedule.
[b] Substituted by A.L.O., 1950, for "Province".

**10. Houses not to be appropriated in certain cases.**—No notice shall be issued under Section 7 if the house—

(a) was, at the date of the issue of the notification declaring this Act or the [a]Cantonments (House-Accommodation) Act, 1902, as the case may be, to be operative in the cantonment or part of the cantonment, or is with such sanction as is required by Section 9, occupied as a hospital, school, school hostel, bank, hotel or shop, and has been so occupied continuously during the three years immediately preceding the time when the occasion for issuing the notice arises, or

(b) was, at the date of such a notification as is referred to in clause (a), or is, with such sanction as aforesaid, occupied by a railway administration or by a company or firm engaged in trade or business or by a club, or

(c) is occupied by the owner, or

(d) has been appropriated by the [b][State Government] with the concurrence of the Officer Commanding the District, or by the [c][Central Government], for use as a public office or for any other purpose.

[a] Repealed by this Act, S. 39 and Schedule.
[b] Substituted by A.L.O., 1950, for "Province".

**11. Time to be allowed for giving possession of house.**—(1) If a house is unoccupied, a notice issued under Section 7 may require the owner to give possession of the same to the [a][Officer Commanding the station] within twenty-one days from the service of the notice.

(2) If a house is occupied, a notice issued under Section 7 shall not require its vacation in less than thirty days from the service of the notice.

(3) Where a notice has been issued under Section 7 and the house has been

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**Section 10 — Note 1**

(1) The owner of a house in cantonment may agree with authorities that if the house is required by a military officer, he would deliver possession thereof to him. Such an agreement does not defeat the provision contained in Section 10 (c). ('24) AIR 1924 Bom 258 (259). (Cantonment tenure — Sale of lands subject to sanction of cantonment authorities — Requisition by cantonment authorities that the intending purchaser should vacate house when required for military officer — Requisition is not illegal.)

(2) Officer Commanding the station has no jurisdiction to pass an order appropriating only a part of a house, while the rest of it is occupied by the owner. ('54) 1954 BLJR 414 (420, 421).

**Section 11 — Note 1**

(1) Order of the Officer Commanding the Station under Section 11 (2) is not illegal because there was any breach regarding the execution of the lease or omission to give the statutory time of 30 days. ('54) 1954 BLJR 414 (418).

(2) Officer commanding the Station has no jurisdiction to appropriate only a part of the house, while the remaining part is occupied by the owner. ('54) 1954 BLJR 414 (420, 421).

vacated in pursuance thereof, the lease shall be deemed to have commenced on the date on which the house was so vacated.

[a] Substituted by the Cantonments (House-Accommodation Amendment) Act, 1925 (10 of 1925), S. 6, for "Commanding Officer of the Cantonment".

**12. Surrender of house when to be enforced.**—If the owner fails to give possession of a house to the [a][Officer Commanding the station] in pursuance of a notice issued under Section 7, or if the existing occupier fails to vacate a house in pursuance of such a notice, the District Magistrate, by himself or by another person generally or specially authorised by him in this behalf, shall enter on the premises and enforce the surrender of the house.

[a] Substituted by the Cantonments (House-Accommodation Amendment) Act, 1925 (10 of 1925), S. 6, for "Commanding Officer of the Cantonment".

**13. Option in certain cases for owner on whom notice is issued under Sec. 7 to call upon the Government to purchase.**—(1) If a house, in respect of which a notice is issued under Section 7, is shown to the satisfaction of the [a][Central Government], or is proved by a decree or order of a Court of competent jurisdiction, to have been erected—

(a) under any conditions, rules, regulations or orders which were in force in Bengal prior to the eighth day of December, 1864, and conferred on the owner the option of offering the house for sale to the military officer applying for its appropriation for his occupation or to the East India Company or the Government, or

(b) under any conditions, rules, regulations or orders which were in force in Bombay prior to the first day of June, 1875, and conferred such an option as is described in clause (a), then the owner shall have the option of either complying with the notice or offering the house [b][for sale to the Central Government].

(2) If the owner elects to sell the house, and [c][the Central Government] is willing to purchase it, the question of the amount of the purchase-money to be paid shall, in the event of disagreement, be referred to [c][a Civil Court, in accordance with the provisions of Chapter IV].

[a] Substituted by A.O., 1937, for "Local Government".
[b] Substituted, ibid, for "for sale to the Government".
[c] Substituted by Cantonments (House-Accommodation Amendment) Act, 1930 (9 of 1930), S. 6, for "a Committee of Arbitration".

**14. Provision where house is held on long lease by a tenant.**—(1) If a house, in respect of which a notice is issued under Section 7, is occupied by a tenant holding in good faith and for valuable consideration under a registered lease for any term exceeding one year, [a][the Central Government] shall, for the term of one year from the date on which the house is vacated in pursuance of the notice, or for the unexpired term of the lease whichever is the shorter, be liable to the owner for the rent fixed by the registered lease instead of for the rent payable under this Act if the rent so fixed exceeds the rent so payable.

(2) If a house, in respect of which a notice is issued under Section 7, is occupied by a tenant holding in good faith and for valuable consideration under a registered lease from year to year, [a][The Central Government] shall be liable as aforesaid for the term of six months from the date on which the house is vacated in pursuance of the notice.

(3) Nothing in this section shall be deemed—

(a) to render [a][the Central Government] so liable unless an application in writing in this behalf is made by the owner to the [a][Officer Commanding the station] within fifteen days from the service of the notice; or

(b) to limit or otherwise affect any agreement between [b][the Government] and the owner

[a] Substituted by the Cantonments (House-Accommodation Amendment) Act, 1925 (10 of 1925), S. 6, for "Commanding Officer of the Cantonment".
[b] Substituted by A.L.O., 1950, for "the Crown"

**15. Power for owner to refer to Civil Court on question of rent.**—(1) If the owner considers that the rent stated in a notice issued under Section 7 is not reasonable, he may within a period of [a][thirty] days from the service of such notice, [b][refer the matter to a Civil Court, in accordance with the provisions of Chapter IV]:

[Provided that where an appeal has been made to the Officer Commanding the District under Section 30, the period of thirty days shall be reckoned from the date on which the owner received notice of the result of the appeal under sub-section (2) of Section 32.]

(2) If the owner does not make such a [c][reference] within the said period, he shall be deemed to have accepted the rent so offered.

[a] Substituted by the Cantonments (House-Accommodation Amendment) Act, 1930 (9 of 1930), S. 7, for "fifteen".
[b] Substituted by S. 7, ibid, for "require that the matter be referred by the Officer Commanding the station to a Committee of Arbitration".
[c] Inserted by the Cantonments (House-Accommodation Amendment) Act, 1933 (22 of 1933), S.2.
[d] Substituted by Act 9 of 1930, S. 7, for "requisition".

**16. Power for owner to refer to Civil Court on question of repairs.**—(1) If the owner fails to execute any repairs to a house as required by a notice issued to him under Section 7, the [a][Officer Commanding the station] may by notice require the owner to execute the repairs within such period, not being less than [b][thirty] days, as may be specified in the notice.

(2) If the owner objects to any requisition contained in a notice issued under sub-section (1), he may, within [b][thirty] days from the service of the notice [c][refer the matter to a Civil Court in accordance with the provisions of Chapter IV]:

[d][Provided that where an appeal has been made to the Officer Commanding the District under Section 30, the period of thirty days shall be reckoned from the date on which the owner received notice of the result of the appeal under sub-section (2) of Section 32.]

[e][(3) Every reference under sub-section (2) shall be accompanied by an esti-

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**Section 15 — Note 1**

(1) As to computation of period of limitation, see Section 34-A.

(2) Where owner does not raise question of enhancement until commencement of tenancy, and is served with notice for repairs, he is not entitled to enhanced rent from commencement of tenancy. ('26) AIR 1926 All 746 (747).

(3) It is the owner alone that can make a reference under this section to the civil Court. Therefore, in a reference the owner is not bound to make a mortgagee, who is not in possession of the lease property, a party to the reference and his non-joinder will not defeat the suit. However, the Court may join the mortgagee as a proper party under Civil P. C., Order 1, Rule 10. ('37) AIR 1937 Pesh 17 (17, 18).

(4) The Peshawar Court has observed that there is a lacuna in the Act which should be filled up by the Legislature. It has, therefore, suggested that there should be a provision to the effect that where the house has been taken over and the question of rent is contested by the landlord the amount fixed by the authorities should be paid to the landlord without prejudice to his right to fight in Court the question as to the reasonability of the rent proposed. AIR 1939 Pesh 22 (23).

**Section 16 — Note 1**

(1) As to service of notice, see Sec. 341 and as to computation of period of limitation, see Section 34-A.

(2) Tenant, a military officer, deciding repairs to be necessary and executing the repairs himself—Tenant not entitled to recover cost of repairs from landlord so as to make landlord liable for costs where procedure under the Act is not followed. ('11) 11 Ind Cas 471 (472) (All).

mate of the repairs, if any, which the owner considers necessary in order to put the house into a state of reasonable repair.]

[a] Substituted by the Cantonments (House-Accommodation Amendment) Act, 1925 (10 of 1925), S. 6, for "Commanding Officer of the Cantonment"

[b] Substituted by the Cantonments (House-Accommodation Amendment) Act, 1930 (9 of 1930), S. 8, for "fifteen

[c] Substituted by S. 8, ibid, for "require that the matter be referred by the Officer Commanding the station to a Committee of Arbitration".

[d] Inserted by the Cantonments (House-Accommodation Amendment) Act, 1933 (22 of 1933), S. 3.

[e] Inserted by Act 9 of 1930, S. 8.

[a][17. **Power to have repairs executed and recover cost**—If the owner fails to comply with a notice issued under sub-section (1) of Section 16, the Military Engineer Services or the Public Works Department may, with the previous sanction of the Officer Commanding the Station and notwithstanding any right of reference conferred by that section, cause the repairs specified in the notice to be executed at the expense of [b][the Central Government], and the cost thereof, or, where a reference has been made, the amount finally determined by the Civil Court may be deducted from the rent payable to the owner.]

[a] Substituted by the Cantonments (House-Accommodation Amendment) Act, 1930 (9 of 1930), S. 9, for the original section

[b] Substituted by A.O., 1937.

**18. Notice to be given of devolution of interest in house in cantonment.**—Every person on whom devolves, by transfer, by succession or by operation of law, the interest of an owner in any house, or in any part of any house, situate in a cantonment or part of a cantonment in respect of which a notification under sub-section (1) of Section 3 is for the time being in force, shall be bound to give notice of the fact to the [a][Officer Commanding the station] within one month from the date of such devolution, and, if he, without reasonable cause, fails to do so, he shall be punishable with fine which may extend to fifty rupees.

[a] Substituted by the Cantonments (House-Accommodation Amendment) Act, 1925 (10 of 1925), S. 6, for "Commanding Officer of the Cantonment".

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## [a][CHAPTER IV

## PROCEDURE IN REFERENCES

**19. Jurisdiction in references.**—All references under this Act shall be made by application to, and tried by, the Court of the District Judge.

[a] Substituted by the Cantonments (House-Accommodation Amendment) Act, 1930 (9 of 1930), S. 10, for the original Chapter IV entitled 'Committees of Arbitration' and consisting of Ss. 19 to 28.

**20. Procedure and powers of the Court.**—References under this Act shall be deemed to be proceedings within the meaning of Section 141 of the Code of Civil Procedure, 1908, and in the trial thereof the Court may exercise any of its powers under that Code.

**21. Restriction of scope of inquiry.**—The scope of the inquiry in a reference under this Act shall be restricted to a consideration of the matters referred to the Court in accordance with the provisions of this Act.]

**22 to 28.** [See Foot-note [a] given under Section 19.]

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**Section 18 — Note 1**

(1) As to service of notice, see Sec. 34.

**Section 19 — Note 1**

(1) Provision for references under this Act is made in Sections 13 (2), 15 (1) and 16 (2).

## CHAPTER V

## APPEALS

[1][29. **Appeal to High Court.**—(1) An appeal shall lie to the High Court against the decision of the Court of the District Judge upon a reference tried by it.

(2) No appeal under this section shall be admitted unless it is made within thirty days from the date of the decision against which it is preferred.

(3) An appeal preferred under this section shall be deemed to be an appeal from an order within the meaning of Section 108 of the Code of Civil Procedure, 1908.]

[1] Substituted by the Cantonments (House-Accommodation Amendment) Act, 1930 (9 of 1930), S. 11, for the original section.

[1][30. **Appeal to Officer Commanding the District.**—The owner or any tenant of a house in respect of which a notice has been issued under Section 7 may, within a period of [2][ten days] from the date of the service thereof, appeal to the Officer Commanding the District against the decision of the Officer Commanding the Station to appropriate the house.]

[1] Substituted by the Cantonments (House-Accommodation Amendment) Act, 1930 (9 of 1930), S. 12 for the original section.

[2] Substituted by the Cantonments (House-Accommodation Amendment) Act, 1933 (22 of 1933), S. 4, for "twenty-one days".

**31. Petition of appeal.**—(1) Every petition of appeal under Section 30 shall be in writing and accompanied by a copy of the notice appealed against.

(2) Any such petition may be presented to the [1][Officer Commanding the station], and that officer shall be bound to forward it to the authority empowered by Section 30 to hear the appeal, and may attach thereto any report which he may desire to make in explanation of the notice appealed against.

(3) If any such petition is presented direct to the Officer Commanding the District and an immediate order on the petition is not necessary, the Officer Commanding the District may refer the petition to the [1][Officer Commanding the station] for report

[1] Substituted by the Cantonments (House-Accommodation Amendment) Act, 1925 (10 of 1925), S. 6, for "Commanding Officer of the Cantonment".

**32. Order in appeal final.**—[1][(1)] The decision on any such appeal to the Officer Commanding the District [2][* * * *] shall be final, and shall not be questioned in any Court otherwise than on the ground that the house is situate in a cantonment, or part of a cantonment in which this Act is not operative:

Provided that no appeal shall be decided until the appellant has been heard or has had a reasonable opportunity of being heard in person or through a legal

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**Section 29 — Note 1**

(1) As to computation of period of limitation, see S. 34-A.

(2) As this Act is a special Act, Sec. 5 of the Limitation Act does not apply to an appeal under this section. ('41) AIR 1941 All 207 (208): ILR (1941) All 358.

**Section 30 — Note 1**

(1) As to suspension of action pending appeal, see Section 33; and as to computation of period of limitation, see Section 34-A.

(2) A person aggrieved by the notice issued under Section 7 to vacate the house in the cantonment has to adopt the only remedy of appealing under Section 30, whether the notice is legal or not. A Civil Court has no jurisdiction to entertain a suit in respect of such notice. ('25) AIR 1925 Bom 162 (164): 49 Bom 152.

**Section 32 — Note 1**

(1) As to how the time for referring a matter to a Civil Court under Section 15 or Section 16 is to be computed, see Section 15 (1) Proviso and Section 16 (2) Proviso.

(2) Officer Commanding the District is the tribunal to which a person aggrieved by a notice under Section 7 must apply for redress and the decision of the officer thereon is final under this section. ('17) AIR 1917 Sind 30 (42): 10 Sind LR 113.

practitioner [and in giving a decision of the Officer Commanding the District shall record briefly the grounds therefor.]

[(2) Notice of the result of the appeal shall be given to the appellant as soon as may be, and, where the appellant is a tenant of the house, to the owner of the house also.]

[a] The original Section 32 was renumbered as sub-section (1) of that section by the Cantonments (House-Accommodation Amendment) Act, 1933 (22 of 1933), S. 5.

[b] The words "or of the Ceneral Officer Commanding-in-Chief, the Command, as the case may be" were repealed by the Cantonments (House-Accommodation Amendment) Act, 1930 (9 of 1930), S. 13.

[c] Inserted by Act 9 of 1930, S 13

[d] Inserted by Act 22 of 1933, S 5.

**33. Suspension of action pending appeal.**—Where an appeal has been presented under Section 30 within the period prescribed [therein], all action on the notice shall, on the application of the appellant, be held in abeyance pending the decision of the appeal.

[a] Substituted by the Cantonments (House-Accommodation Amendment) Act, 1930 (9 of 1930), S. 14, for "by sub-section (2) of that section".

## CHAPTER VI

## SUPPLEMENTAL PROVISIONS

**34. Service of notice and requisitions.**—Every notice or requisition prescribed by this Act shall be in writing, signed by the person by whom it is given or made or by his duly appointed agent, and may be served by post on the person to whom it is addressed, or, in the case of an owner who does not reside in or near the cantonment, on his agent appointed [in accordance with a bye-law made under clause (29) of Section 282 of the Cantonments Act, 1924].

[a] Substituted by the Cantonments (House-Accommodation Amendment) Act, 1925 (10 of 1925), S. 4, for "under the Cantonments Act, 1910, or any rule made thereunder".

[34A. **Computation of periods of limitation.**—The period prescribed for making any reference or preferring any appeal under this Act shall be computed in accordance with the provisions of the Indian Limitation Act, 1908.]

[a] Inserted by the Cantonments (House-Accommodation Amendment) Act, 1930 (9 of 1930), S. 15.

[b] Now see Limitation Act, 1963 (36 of 1963).

**35. Power for Central Government to make rules.**—(1) The [Central Government] may make rules to carry out the purposes and objects of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

[• • • • •]

(b) define the powers of entry, inspection, measurement or survey which may be exercised in carrying out the purposes and objects of this Act or of any rule made hereunder.

[a] For such rules see Gazette of India, 1923, Pt. I, p. 1242.

[b] Clause (a) was repealed by the Cantonments (House-Accommodation Amendment) Act, 1930 (9 of 1930), S. 16.

**36. Further provisions respecting rules.**—(1) The power to make rules under Section 35 shall be subject to the condition of the rules being made after previous publication and of their not taking effect until they have been published in the [Official Gazette] and in such other manner (if any) as the [Central Government] may direct.

(2) Any rule under Section 35 may be general for all cantonments or parts of cantonments [^ *] in which this Act is for the time being operative, or may be special for any of such cantonments or parts as the *[Central Government] may direct.

(3) A copy of the rules under Section 35 for the time being in force in a cantonment shall be kept open to inspection free of charge at all reasonable times in the office of the Cantonment [b][Board].

(4) In making any rule under clause (b) of sub-section (2) of Section 35, the *[Central Government] may direct that whoever obstructs any person, not being a public servant within the meaning of Section 21 of the Indian Penal Code, in making any entry, inspection, measurement or survey, shall be punishable with fine which may extend to fifty rupees, and, in the case of a continuing offence, with fine which, in addition to such fine as aforesaid, may extend to five rupees for every day after the first during which such offence continues.

[a] The words 'in the Provinces" were omitted by A.L.O., 1950.

[b] Substituted by the Repealing and Amending Act, 1940 (32 of 1940), S. 3 and Schedule II, for "Authority".

37. **Inapplicability of Section 556 of the Code of Criminal Procedure, 1898, to trials of offences.**—No Judge or Magistrate shall be deemed, within the meaning of Section 556 of the Code of Criminal Procedure, 1898, to be a party to, or personally interested in, any prosecution for an offence constituted by or under this Act merely because he is a member of the Cantonment [a][Board] or has ordered or approved the prosecution.

[a] Substituted by the Cantonments (House-Accommodation Amendment) Act, 1925 (10 of 1925), S. 5, for "Committee".

38. **Protection to persons acting under Act.**—No suit or other legal proceeding shall lie against any person for anything in good faith done, or intended to be done, under this Act or in pursuance of any lawful notice or order issued under this Act.

39. **Repeals.** [Repealed by the Repealing Act, 1927 (XII of 1927), S. 2 and Schedule.]

## THE SCHEDULE

Enactments Repealed. [Repealed by the Repealing Act, 197 (XII of 1927), S. 2 and Schedule.]

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# [THE] CAPITAL ISSUES (CONTROL) ACT, 1947

## (ACT XXIX OF 1947)

[The text of the Act printed here is as on 1-5-1969.]

## CONTENTS

SECTIONS

1. Short title, extent and duration.
2 Definitions and interpretation.
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4. Control of advertisement of offers of securities for subscription, etc.
5. Purchase and sale of securities.
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9. Prohibition against disclosing information
10. Power to delegate function.
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12. Power to make rules
13. Penalties
14. Burden of proof in certain cases.
15. Protection of action taken under Act.
16. Continuance of existing orders and savings.

## STATEMENT OF OBJECTS AND REASONS

"The object of this measure is to keep in existence...the control over capital issues which was imposed by Rule 94-A of the Defence of India Rules in May, 1943 and continued in force after the expiry of the Defence of India Act by Ordinance No. XX of 1946. Although there has been an appreciable change in the general conditions which constituted the principal reason for the introduction of the control during war-time, it is thought in the light of experience gained that the control is still necessary to secure a balanced investment of the countrys's resources in industry, agriculture and the social servicses".

—Gazette of India, 1947, Part V, p. 264.

## ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Amended by Acts 22 of 1950; 6 of 1952; 8 of 1956; 50 of 1957.
—Adapted by A.L.O., 1950.
—Extended by Acts 59 of 1949; 30 of 1950.

## [THE] CAPITAL ISSUES (CONTROL) ACT, 1947
(ACT XXIX OF 1947)[a]

[18th April, 1947.]

**An Act to provide for [b][* *] control over issues of capital.**

Whereas it is expedient to provide for [b][* *] control over issues of capital; It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, see Cazette of India, 1947, Pt. V, p. 264.

The Act has been extended to the new Provinces and merged States by the Merged States (Laws) Act, 1949 (59 of 1949), S. 3 (1-1-1950) and to the Union Territories of Manipur and Tripura by the Union Territories (Laws) Act, 1950 (30 of 1950), S. 3 (16-4-1950). Vindhya Pradesh now forms part of the State of Madhya Pradesh—See C.A. 37 of 1956, S. 9 (1) (a) (1-11-1956). The Act now extends to the Union territories of—

(1) Goa, Daman and Diu—See Regn. 12 of 1962 (with effect from 24-1-1963).

(2) Dadra and Nagar Haveli—Act as in force in the State of Gujarat is extended to this territory with effect from 1-1-1966—See Cazette of India, 18-12-65, Pt. II, S. 3 (1), p. 2016.

(3) Pondicherry, by Regn. 7 of 1963 (with effect from 1-10-1963).

(4) Laccadiv, Minicoy and Amindivi Islands by Regn. 8 of 1965 (with effect from 1-10-1967).

[b] The words "the continuance of" were omitted by the Capital Issues (Continuance of Control) Amendment Act, 1956 (8 of 1956), S. 2 [21-3-1956].

**1. Short title, extent and duration.**—(1) This Act may be called THE CAPITAL ISSUES [a][* *] CONTROL ACT, 1947.

[b][(2) It extends to the whole of India except the State of Jammu and Kashmir, and it applies also to citizens of India outside India.]

[c][(3) * * * * * *].

[a] The words "continuance of" were omitted by the Capital Issues (Continuance of Control) Amendment Act, 1956 (8 of 1956), S. 3 [21-3-1956].

[b] Substituted for former sub-section (2) by the Capital Issues (Continuance of Control) Amendment Act, 1950 (22 of 1950), S. 2 [18-3-1950].

[c] Sub-section (3) was omitted by Act 8 of 1956, Section 3.

[a][2. Definitions and interpretation.—(1) In this Act, unless the context otherwise requires,—

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**Section 2 — Note 1**

(1) The important words in Section 2 are 'in this Act'. Therefore the definitions of 'securities' and of 'issue of capital' as contained in Section 2 would not govern the meaning of the terms 'debenture' as it

(a) "company" means a company as defined in Section 3 of the Companies Act, 1956, and includes a foreign company within the meaning of Section 591 of that Act;

(b) "issue of capital" means the issuing or creation of any securities whether for cash or otherwise, and includes the capitalisation of profits or reserves for the purpose of converting partly paid-up shares into fully paid-up shares or increasing the par value of shares already issued;

(c) "private company" means a private company as defined in Section 3 of the Companies Act, 1956;

(d) "prospectus" means any prospectus, notice, circular, advertisement or other document inviting offers from the public for the subscription or purchase of any securities of a company;

(e) "securities" means any of the following instruments issued or to be issued, or created or to be created, by or for the benefit of a company, namely :—

(i) share, stocks and bonds;

(ii) debentures;

(iii) mortgage deeds, instruments of pawn, pledge or hypothecation and any other instruments, creating or evidencing a charge or lien on the assets of the company; and

(iv) instruments acknowledging loan to or indebtedness of the company and guaranteed by a third party or entered into jointly with a third party;

(f) 'States" means the territories of India to which this Act extends.

(2) Any reference in this Act to offering securities to the public shall be construed as including a reference to offering them to any section of the public, whether selected as members, debenture holders or holders of any other securities of the company concerned or as clients of the person issuing any prospectus in relation to such securities, or selected in any other manner :

Provided that the foregoing provisions shall not be taken as requiring any offer to be treated as made to the public if it can properly be regarded, in all the circumstances, as not being calculated to result directly or indirectly in the securities becoming available for the subscription or purchase by persons other than those receiving the offer, otherwise as being a domestic concern of the persons making or receiving it.]

[a] Substituted for old S. 2, by the Capital Issues (Control) Amendment Act, 1957 (50 of 1957), S. 2 [21-12-1957].

**3 Control over issues of capital[b].**—(1) No company incorporated in °[the States] shall, except with the consent of the Central Government, make an issue of capital outside °[the States].

(2) No company, whether incorporated in °[the States] or not, shall, except with the consent of the Central Government,—

(a) make an issue of capital in °[the States];

(b) make in °[the States] any public offer of securities for sale;

(c) renew or postpone the date of maturity or repayment of any security maturing for payment in °[the States].

(3) The Central Government may on application make an order according recognition to an issue of capital made or to be made outside °[the States] by a company not incorporated in °[the States].

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**Section 2 — Note 1 (contd.)**

occurs in the Companies Act, 1956. So far the latter Act is concerned. 'debenture' is an instrument under seal evidencing a debt. It is not capital. AIR 1958 Bom 491 (498): ILR (1958) Bom 250 (DB). (Discount on debenture is not a payment out of capital.)

(4) The Central Government may qualify any consent or recognition accorded by it under sub-section (2) or sub-section (3) with such conditions, whether for immediate or future fulfilment, as it may think fit to impose; and where a company acts in pursuance of such consent or recognition, it shall comply with the terms of any condition so imposed.

(5) Where an application for the consent or recognition of the Central Government under any of the provisions of this section is refused, the Central Government shall, upon the request of the applicant, communicate to him in writing the reasons for such refusal.

*[(6) The Central Government may by order at any time—

(a) revoke the consent or recognition accorded under any of the provisions of this section; or

(b) where such consent or recognition has been qualified with any conditions, vary all or any of those conditions :

Provided that before an order under this sub-section is made the company concerned shall be given a reasonable opportunity of showing cause why such order should not be made.

(7) Where an order has been made under sub-section (6), the Central Government shall, upon the request of the company concerned, communicate to it in writing the reasons for such order.]

[a] Inserted by the Capital Issues (Control) Amendment Act, 1957 (50 of 1957), S. 3 [21-12-1957].

[b] Industrial Credit and Investment Corporation of India Ltd., exempted from the provisions of this section as well as S. 5, see Gaz. of India., 1961, Pt. II, S. 3 (ii), page 993.

*[4. Control of advertisement of offers of securities for subscription etc.—(1) No person shall circulate any offer, being a public offer, in the States for the subscription, or purchase of any securities unless consent or recognition has been accorded by the Central Government under this Act to the issue or creation of such securities and a statement has been made to that effect in the offer.

(2) No company shall circulate any offer, being an offer to existing holders of the securities of that company or to existing holders of the securities of any other company specified in the offer, in the States for the subscription or purchase of any securities of such company unless recognition has been accorded by the Central Government under this Act to the issue or creation of such securities and a statement has been made to that effect in the offer.

(3) No person shall without the consent of the Central Government circulate any offer, being a public offer, in the States for the sale of any securities issued or created with the consent or recognition of the Central Government if such issue or creation was made by a private company or if the order according consent or recognition contained a condition that the securities should be privately subscribed.]

[a] Substituted for old S. 4 by the Capital Issues (Control) Amendment Act, 1957 (50 of 1957), S. 4 [21-12-1957].

5. Purchase and sale of securities*.—(1) No person shall accept or give any consideration for any securities in respect of an issue of capital made or proposed to be made in *[the States] or elsewhere unless the consent or recognition of the Central Government has been accorded to such issue of capital.

(2) No person shall sell or purchase or otherwise transfer or accept transfer of any securities issued by a company in respect of any issue or capital made after the 17th day of May 1943 in *[the States] or elsewhere unless such issue has been made with the consent or recognition of the Central Government.

[a] See note (b) under S. 3.

[b] Substituted by A. L. O., 1950.

**6. Power to exempt and to condone contraventions.**—(1) The Central Government may, by general order[a] which shall be notified in the Official Gazette, provide for the granting of exemption from all or any of the provisions of Sections 3, 4 and 5.

(2) The Central Government may, by order condone a contravention of any of the provisions of Section 3 or Section 4 [b][or Section 5], and on the making of such order the provisions of this Act, shall have effect as if an exemption had been granted under sub-section (1) of this section in respect of the thing done or omitted to be done in contravention of Section 3 or Section 4 [b][or Section 5], as the case may be.

[a] For the Capital Issues (Exemption) Order, 1969, see Gaz. of Ind., 1-2-1969, Pt. II, S. 3 (ii), Ext., page 149. In the Union Territory of Dadra and Nagar Haveli, however. Capital Issue (Exemption) Order 1961 published in G. I. 8-6-1961, as S. O. 1234 has been extended — See G. I. 13-5-1967, Pt. II, S 3 (i), page 796.

[b] Inserted by the Capital Issues (Control) Amendment Act, 1957 (50 of 1957), S. 6 [21-12-1957].

[a][7 **Power to call for information**[b].—Any officer authorised in this behalf by the Central Government may, for the purpose of inquiring into the correctness of any statement made in an application for consent or recognition to an issue of capital or for the purpose of ascertaining whether or not the requirements of any condition attached to an order according such consent or recognition have been complied with or for the purpose of obtaining particulars as to the total capital issued or for any other purposes of this Act, require any company or any officer of a company to submit and furnish to him within such time as may be specified in the requisition, such accounts, book or other documents and such information as he may reasonably think necessary.]

[a] Substituted for former S. 7 by the Capital Issues (Control) Amendment Act, 1957 (50 of 1957), S. 6 [21-12-1957].

[b] Every Registrar of Joint Stock Companies has been authorised to exercise the powers conferred by the section, within the limits of his jurisdiction—See Gaz. of Ind., 1954, Pt. II, S. 3, page 1106.

**8 False statement.**—No person shall, when complying with any requisition under Section 7 or when making any application for consent or recognition to an issue of capital [a][or in connection with any of the other provisions of this Act], give any information or make any statement which he knows, or has reasonable cause to believe, to be false or not true in any material particular.

[a] Inserted by the Capital Issues (Control) Amendment Act, 1957 (50 of 1957), S. 8 [21-12-1957].

**9 Prohibition against disclosing information.**—No person who obtains any information by virtue of this Act shall, otherwise than in connection with the execution of the provisions of this Act or of any order made in pursuance thereof, disclose that information to any other person except with the permission of the Central Government.

**10 Power to delegate function.**—The Central Government may by order[a] direct that any power or duty which by or under any of the preceding provisions of this Act is conferred or imposed upon the Central Government shall, in such circumstances and under such conditions, if any, as may be specified in the direction, be exercised or discharged by any officer subordinate to that Government.

[a] For such an order, see Gaz. of Ind., Extra, 1947, page 335; and ibid, 1949, Pt. I, page 1771.

**11. Committee to advise Government.**—The Central Government shall, by notification in the Official Gazette, constitute an Advisory Committee consisting of not more than five members, and may from time to time refer to it for advice any

such matters arising out of the administration of this Act as the Central Government may think fit.

**12. Power to make rules.**—[a][(1)] The Central Government may by notification in the Official Gazette make rules[b] for carrying out the purposes of this Act [c][and in particular for the levy of fees on applications made to the Central Government for its consent].

[d][(2) All rules made under this section shall be laid for not less than thirty days before each House of Parliament as soon as possible after they are made and shall be subject to such modifications as Parliament may make during the session in which they are so laid or the session immediately following.]

[a] Section 12 was renumbered as sub-section (1) by the Capital Issues (Control) Amendment Act, 1957 (50 of 1957), S. 8 [21-12-1957].

[b] For the Capital Issues (Applications for Consent) Rules, 1966, [S. R. O. 600 of 29-3-1966], see Gaz. of Ind., 23-4-1966, Pt. II, S. 3 (1), p. 760.

[c] Added by the Capital Issues (Continuance of Control) Amendment Act, 1952 (6 of 1952), S. 3 [23-2-1952].

[d] Inserted by Act 50 of 1957, S. 8.

**13. Penalties.**—(1) Whoever contravenes, or attempts to contravene, any of the provisions of this Act or of any order made thereunder shall be punishable with imprisonment for a term which may extend to one year or with fine or with both.

(2) If the person committing an offence punishable under this section is a company or other body corporate, every director, manager, secretary or other officer thereof shall, unless he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent its commission, be deemed to be guilty of such offence.

**14. Burden of proof in certain cases.**—Where any person is prosecuted for contravening any provision of this Act or of any order made thereunder which prohibits him from doing an act without the consent or permission of any authority the burden of proving that he had the requsite consent or permission shall be on him.

**15. Protection of action taken under Act.**—No suit, prosecution or other legal proceedings shall lie against any person for anything in good faith done or intended to be done under this Act or any rule or order made thereunder.

**16. Continuance of existing orders and savings.**—(1) All orders made or deemed to be made under the provisions of the Capital Issues (Continuance of Control) Ordinance, 1947, and in force immediately before the commencement of this Act shall continue to be in force and be deemed to be orders made under the corresponding provisions of this Act.

(2) Section 6 of the General Clauses Act, 1897, shall apply upon the expiration of the said Ordinance as if it had then been repealed by this Act.

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**Section 13 — Note 1**

(1) All infractions of orders in the sense of breaches of conditions attached to consents accorded under Rule 94-A of the Defence of India Rules can be punished under Section 13 of the Act. Hence, a Director of company can be prosecuted for breach of conditions imposed in the consent granted for issue of capital. ILR (1957) 2 Cal 506 (516).

**Section 16 — Note 1**

(1) Consent for issue of capital under Rule 94-A of the Defence of India Rules had to be communicated by an order, and the order was continued by virtue of the provisions of S. 15 of Ordinance V of 1947 and Section 16 of the Act of 1947 and remained valid. ILR (1957) 2 Cal 506.

# [THE] CARDAMOM ACT, 1965
## (ACT 42 OF 1965)
[The text of the Act printed here is as on 1-5-1969.]

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# [THE] CARDAMOM ACT, 1965
## (ACT 42 OF 1965)[a]

[9th December, 1965.]

An Act to provide for the development under the control of the Union of the cardamom industry.

Be it enacted by Parliament in the Sixteenth Year of the Republic of India as follows :—

[a] Received the assent of the President on 9-12-1965, Act published in Gaz. of Ind., 10-12-1965, Pt. II-S. 1, Ext., page 589.

For Statement of Objects and Reasons, see Gaz. of Ind., 11-5-1965, Pt. II-S 2, Ext., page 445.

## CHAPTER I
## PRELIMINARY

**1. Short title, extent and commencement.**— (1) This Act may be called THE CARDAMOM ACT, 1965.

(2) It extends to the whole of India :

Provided that it shall not apply to the State of Jammu and Kashmir except to the extent to which the provisions of this Act relate to the control of export of cardamom from India and import thereof into India.

(3) It shall come into force on such date[a] as the Central Government may, by notification in the Official Gazette, appoint :

Provided that different dates may be appointed for different provisions of this Act.

[a] Ss. 14 and 15 enforced from 1-4-1966—see G. I., 19-3-66, Pt. II, S. 3 (i), p. 428; whole of the remaining Act, except Ch. III, came into force on 5-4-1966, see G. I. 16-4-66, Pt. II, S. 3 (i), p. 619; Ch. III enforced on 12-7-1966 see G. I., 23-7-66, Pt. II, S. 3 (ii), p. 2108.

**2. Declaration as to expediency of control by the Union.**—It is hereby declared that it is expedient in the public interest that the Union should take under its control the cardamom industry.

**3. Definitions.**—In this Act, unless the context otherwise requires,—

(a) "Board" means the Cardamom Board established under Section 4;

(b) "cardamom" means the fruit of cardamom plant and includes green cardamom, bleached cardamom, bleachable white cardamom, sun-dried cardamom, cardamom seeds, powdered cardamom and oil extracted from cardamom;

(c) "cardamom plant" means the cardamom plant ELETTARIA CARDAMOMUM MATON and any other plant which the Board may, by notification in the Gazette of India, declare to be a cardamom plant for the purposes of this Act;

(d) "Chairman" means the Chairman of the Board;

(e) "dealer" means a dealer in cardamom;

(f) "Director" means the Director of Cardamom Development appointed under Section 7;

(g) "estate" means an area administered as one unit which contains land planted with cardamom plants;

(h) "export" and "import" mean respectively taking out of or bringing into India by land, sea or air;

(i) "owner", in relation to any land planted with cardamom plants, includes—

(i) any agent of the owner; and

(ii) a mortgagee, lessee or other person in actual possession of the land;

(j) "prescribed" means prescribed by rules made under this Act;

(k) "registered estate" means an estate in respect of which an owner is registered under sub-section (1) of Section 11 and includes any estate in respect of which an owner is required to be registered under the provisions of that sub-section;

(l) "registered owner" means an owner of a registered estate, who has been, or is required, to be, registered under sub-section (1) of Section 11;

(m) "year" means the period of twelve months beginning with the 1st day of September and ending with the 31st day of August next following.

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## CHAPTER II

## THE CARDAMOM BOARD.

**4. Establishment and constitution of the Board.**—(1) With effect from such date as the Central Government may, by notification in the Official Gazette, specify in this behalf, there shall be established for the purposes of this Act a Board to be called the Cardamom Board.

(2) The Board shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall by the said name sue and be sued.

(3) The Board shall consist of the following members, namely :—

(a) a Chairman to be appointed by the Central Government;

(b) the Director of Cardamom Development, ex officio;

(c) three Members of Parliament of whom two shall be elected by the House of the People and one by the Council of States :

(d) three members to represent respectively the Ministries of the Central Government dealing with—

(i) commerce;

(ii) agriculture; and

(iii) finance;

(e) such number of other members not exceeding fifteen as the Central Government may think expedient, to be appointed by that Government by notification in the Official Gazette from among persons who are in its opinion capable of representing—

(i) the Governments of the principal cardamom-growing States;

(ii) the cardamom-growing interests;

(iii) the cardamom trade interests;

(iv) the interests of labour;

(v) the consumers; and

(vi) such other persons or class of persons who, in the opinion of the Central Government, ought to be represented on the Board.

(4) The number of persons to be appointed as members from each of the categories specified in Clause (e) of sub-section (3), the term of office of the members of the Board other than the member referred to in Clause (b) of that sub-section, and the manner of filling vacancies among, and the procedure to be followed in the discharge of their functions by, the members of the Board shall be such as may be prescribed.

(5) Any officer of the Central Government, not being a member of the Board, when deputed by that Government in this behalf shall have the right to attend meetings of the Board and take part in the proceedings thereof but shall not be entitled to vote.

(6) The Board shall elect from among its members a Vice-Chairman who shall exercise such of the powers, and perform such of the functions of the Chairman as may be prescribed or as may be delegated to him by the Chairman.

**5. Acts or proceedings of Board or its Committees not to be invalidated.**—No act or proceeding of the Board or any Committee appointed by it under Section 8, shall be invalidated merely by reason of—

(a) any vacancy in, or any defect in the constitution of, the Board or such Committee, or

(b) any defect in the appointment of a person acting as a member of the Board or such Committee, or

(c) any irregularity in the procedure of the Board or such Committee not affecting the merits of the case.

**6. Salary and allowances of Chairman.**—The Chairman shall be entitled to such salary and allowances and such conditions of service in respect of leave, pension, provident fund and other matters as may, from time to time, be fixed by the Central Government.

**7. Executive officers of the Board and other staff.**—(1) The Central Government shall appoint a Director of Cardamom Development to exercise such powers

and perform such duties under the Chairman as may be prescribed or as may be delegated to him by the Chairman.

(2) The Central Government shall appoint a Secretary to the Board to exercise such powers and perform such duties under the Chairman as may be prescribed or as may be delegated to him by the Chairman.

(3) The Director and the Secretary shall be entitled to such salaries and allowances and be governed by such conditions of service regarding leave, pension, provident fund and other matters as may be fixed by the Central Government.

(4) Subject to such control and restrictions as may be prescribed, the Board may appoint such other officers and employees as may be necessary for the efficient performance of its functions and pay them such salaries and allowances as it may determine from time to time:

Provided that all officers and other employees of the Directorate of Cardamom Development and Marketing (other than the Director) who hold office as such immediately before the date referred to in sub-section (1) of Section 4 shall be deemed to have been appointed as officers or employees of the Board with effect from that date and every such officer and employee shall hold his office by the same tenure, at the same remuneration and upon the same terms and conditions and with the same rights and privileges as to pension, leave, provident fund and other matters as he would have held the same if this Act had not been passed, and shall continue to do so unless and until his employment is terminated or until such tenure, remuneration and terms and conditions are altered by the Board with the approval of the Central Government:

Provided further that if the alteration so made is not acceptable to any such officer or employee, his employment may be terminated by the Board in accordance with the terms of the contract, if any, with such officer or employee or, if there be no such contract, on payment to him by the Board of compensation equivalent to three months' remuneration in the case of permanent employees and one month's remuneration in the case of other employees.

(5) The Chairman, the Director, the Secretary and other employees of the Board shall not undertake any work unconnected with their duties under this Act except with the permission of the Central Government.

[a] For Cardamom Board Service (Recruitment) Rules 1967—see Gaz. of Ind., 2-12-1967, Pt. II, S. 3 (1), p. 1889.

**8. Committees of the Board.**—(1) The Board may appoint such Committees as may be necessary for the efficient discharge of its duties and performance of its function under this Act.

(2) The Board shall have the power to co-opt as members of any Committee appointed under sub-section (1) such other number of persons who are not members of the Board, as it may think fit.

**9. Functions of the Board.**—(1) It shall be the duty of the Board to promote, by such measures as it thinks fit, the development under the control of the Central Government of the cardamom industry.

(2) Without prejudice to the generality of the provisions of sub-section (1), the measures referred to therein may provide for—

(a) promoting co-operative efforts among growers of cardamom;

(b) ensuring remunerative returns to growers of cardamom;

(c) financial or other assistance for improved methods of cultivation and processing of cardamom, for replanting cardamom and for extension of cardamom growing areas;

(d) regulating the sale and export of cardamom and stabilisation of prices of cardamom;

(e) training in cardamom testing and fixing grade standards of cardamom;

(f) increasing the consumption in India and elsewhere of cardamom and carrying on propaganda for that purpose;

(g) registering and licensing of brokers (including auctioneers) of cardamom and persons engaged in the business of cardamom.

(h) improving the marketing of cardamom in India and elsewhere;

(i) collecting statistics from growers, dealers and such other persons as may be prescribed on any matter relating to the cardamom industry; the publishing of statistics so collected or portions thereof or extracts therefrom;

(j) securing better working conditions and the provision and improvement of amenities and incentives for workers;

(k) undertaking, assisting or encouraging scientific, technological and economic research; and

(l) such other matters as may be prescribed.

(3) The Board shall perform its functions under this section in accordance with and subject to such rules as may be made by the Central Government.

**10. Dissolution of the Board.**—(1) The Central Government may, by notification in the Official Gazette, direct that the Board shall be dissolved from such date and for such period as may be specified in the notification.

(2) When the Board is dissolved under the provisions of sub-section (1),—

(a) all members, notwithstanding that their term of office has not expired, shall, from the date of dissolution, vacate their offices as such members;

(b) all powers and duties of the Board shall during the period of dissolution, be exercised and performed by such person or persons as the Central Government may appoint in this behalf;

(c) all funds and other property vested in the Board shall, during the period of dissolution, vest in the Central Government; and

(d) as soon as the period of dissolution expires, the Board shall be reconstituted in accordance with the provisions of this Act.

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## CHAPTER III

## REGISTRATION OF OWNERS OF CARDAMOM ESTATES.

**11. Registration of owners of cardamom estates[a].**—(1) Every owner of land planted with cardamom plants, whether such land is comprised in one estate, or more than one estate, shall, before the expiration of one month from the date on which he first became owner of such estate or estates or before the expiration of three months from the date of coming into force of this section, whichever is later, apply to the registering officer appointed in this behalf by the State Government to be registered as an owner in respect of each estate owned by him:

Provided that the State Government may, for sufficient reason extend the time-limit for registration by such period as it thinks fit.

(2) Registration once made shall continue to be in force until it is cancelled by the registering officer.

[a] For Cardamom (Licensing and Registration) Rules 1968, see Gaz. of Ind., 4-1-1969, Pt. II, S. 3 (i), p. 44.

For Cardamom Rules 1966 republished, see ibid, p. 32.

**12. Power of State Government to make rules.**—(1) The State Government may, by notification in the Official Gazette, make rules[a] to carry into effect the provisions of Section 11.

(2) Without prejudice to the generality of the foregoing power, such rules may prescribe the form of the application for registration and for cancellation of registration, the fee payable on such applications, the particulars to be included in such applications, the procedure to be followed in granting and cancelling registration, the registers to be kept by registering officers, and the supply by registering officers of information to the Board.

[a] For Kerala Cardamom Estate Owners (Registration) Rules, 1966, see Ker. Gaz., 27-7-1966, Pt. I, G. 1840 and for their enforcement, see Ker. Gaz., 16-8-1966, Pt. I, S. IV, G. 1656 (II).

For Madras Cardamom Estate Owner (Registration) Rules, 1966, see Ft. St. Geo. Gaz., 28-9-1966, Pt. V (Supp).

For Mysore Cardamom Estate Owner (Registration) Rules, 1966, see Mys. Gaz., 29-12-66, Pt. IV, 2-C (i), p. 3302, Rules enforced on 15-12-1966, Mys. Gaz., 22-12-1966, Pt. IV, 2-C (ii), p. 5703.

**13. Returns to be made by registered owners.**—(1) A registered owner shall furnish to the Board at the prescribed times and in the prescribed manner such returns as may be prescribed.

(2) The Board may authorise an officer to visit any estate at any time to verify the accuracy of any return made under this section or to ascertain the productive capacity of the estate.

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## CHAPTER IV

## FINANCE, ACCOUNTS AND AUDIT.

**14. Imposition of a cess on cardamom exported.**—(1) There shall be levied on all cardamom which is exported, a cess for the purposes of this Act at such rate not exceeding two per cent. ad valorem as the Central Government may, by notification in the Official Gazette, fix.[a]

(2) The cess levied under sub-section (1) shall be in addition to any cess or duty leviable on cardamom under any other law for the time being in force.

(3) The provisions of the Customs Act, 1962, and the rules and regulations made thereunder, including those relating to refunds and exemptions from duty, shall, as far as may be, apply in relation to the levy and collection of the cess leviable under sub-section (1) as they apply in relation to the levy and collection of a duty of customs under that Act or those rules and regulations.

[a] Two per cent. ad valorem cess levied on Cardamom exported w. e. f. 1-4-1969 — see G. I., 31-3-1969, Pt. II, S. 3 (i), p. 421.

**15. Payment of proceeds of cess to the Board.**—The proceeds of the cess levied under Section 14 shall first, be credited to the Consolidated Fund of India and the Central Government may, if Parliament by appropriation made by law in this behalf so provides, pay to the Board, from time to time, from out of such proceeds, after deducting the expenses of collection, such sums of money as it may think fit for being utilised for the purposes of this Act.

**16. Grants and loans by the Central Government.**—The Central Government may, after due appropriation made by Parliament by law in this behalf, pay to the Board by way of grants or loans such sums of money as the Central Government may consider necessary.

**17. Constitution of the Fund.**—(1) There shall be formed a Fund to be called the Cardamom Fund and there shall be credited thereto—

(a) the proceeds of the cess made over to the Board by the Central Government;

(b) all fees levied and collected in respect of licences issued under this Act;

(c) any other fee that may be levied and collected by the Board under this Act or the rules made thereunder;

(d) any grants or loans that may be made by the Central Government for the purposes of the Fund;

(e) any grants or loans that may be made by any institution for the purposes of this Act;

(f) all sums realised by the Board in carrying out the measures referred to in Section 9.

(2) The Fund shall be applied—

(a) for meeting the salaries, allowances and other remuneration of the officers and other employees of the Board;

(b) for meeting the other administrative expenses of the Board;

(c) for meeting the cost of the measures referred to in Section 9;

(d) for repayment of any loans from the Central Government or from any institution.

**18. Borrowing powers of the Board.**—Subject to such rules as may be made in this behalf, the Board shall have power to borrow on the security of the Cardamom Fund or any other asset for carrying out the purposes of this Act.

**19. Accounts and audit.**—(1) The Board shall maintain proper accounts and other relevant records and prepare an annual statement of accounts, including the profit and loss account and the balance-sheet in such form as may be prescribed by the Central Government in consultatoin with the Comptroller and Auditor-General of India.

(2) The accounts of the Board shall be audited by the Comptroller and Auditor-General of India at such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the Board to the Comptroller and Auditor-General.

(3) The Comptroller and Auditor-General of India and any person appointed by him in connection with the audit of the accounts of the Board shall have the same rights and privileges and authority in connection with such audit as the Comptroller and Auditor-General has in connection with the audit of Government accounts and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offices of the Board.

(4) The accounts of the Board as certified by the Comptroller and Auditor-General of India or any other person appointed by him in this behalf together with the audit report thereon shall be forwarded annually to the Central Government and that Government shall cause the same to be laid before each House of Parliament.

## CHAPTER V

## CONTROL BY CENTRAL GOVERNMENT

**20. Power to control price and distribution of cardamom.**—(1) The Central Government may, by order notified in the Official Gazette, fix in respect of cardamom of any description specified therein—

(a) the maximum price or the minimum price, or the maximum and minimum prices, which may be charged by a grower of cardamom or cardamom dealer, wholesale or retail, whether for the Indian market or for export;

(b) the maximum quantity which may in one transaction be sold to any person.

(2) Without prejudice to the generality of the powers conferred by sub-section (1), any order made thereunder may provide—

(a) for requiring persons engaged in the production, supply or distribution of, or trade and commerce in, cardamom to maintain and produce for inspection such books, accounts and records relating to their business and to furnish such information relating thereto as may be specified in the order;

(b) for such other matters, including in particular the entering and search of premises, vehicles, vessels and aircraft, and the seizure by a person authorised to make such search, of cardamom in respect of which such person has reason to believe that a contravention of the order has been, is being or is about to be committed.

**21. Power to prohibit or control imports and exports of cardamom.**—(1) The Central Goverument may, by order[a] published in the Official Gazette, make provision for prohibiting, restricting or otherwise controlling the import or export of cardamom, either generally or in specified classes of cases.

(2) All goods to which any order under sub-section (1) applies shall be deemed to be goods of which the import or export has been prohibited or restricted under Section 11 of the Customs Act, 1962, and all the provisions of that Act shall have effect accordingly.

(3) If any person contravenes any order made under sub-section (1), he shall, without prejudice to any confiscation or penalty to which he may be liable under the provisions of the Customs Act, 1962, as applied by sub-sec. (2), be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

[a] For directions under the section see G. I., 18-6-66, Pt. II, S. 3 (ii), p. 1767.

**22. Directions by Government.**—The Board shall carry out such directions as may be issued to it from time to time by the Central Government for the efficient administration of this Act.

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## CHAPTER VI

## MISCELLANEOUS.

**23. Penalty for making false returns.**—Any person who being required by or under this Act to furnish any return fails to furnish such return or furnishes a return containing any particular which is false and which he knows to be false or does not believe to be true shall be punishable with fine which may extend to five hundred rupees.

**24. Penalties for obstructing an officer or member of the Board in the discharge of his duties and for failure to produce books and records.**—Any person who—

(a) obstructs any member authorised by the Chairman in writing or any officer or other employee of the Board authorised by it in this behalf or any person authorised in this behalf by the Central Government or by the Board, in the exercise of any power conferred, or in the discharge of any duty imposed, on him by or under this Act; or

(b) having control over or custody of any account book or other record, fails to produce such book or record when required to do so by or under this Act,

shall be punishable with imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

**25. Penalty for contravention of order relating to control of price, etc.**—(1) If any person contravenes any order made under Section 20, he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both; and the property in respect of which the order has been contravened or such part thereof as the Court may deem fit, shall be forfeited to the Central Government.

(2) Any person who attempts to contravene, or abets the contravention of, any order under Section 20 shall be deemed to have contravened that order.

**26. Other penalties.**—Whoever contravenes or attempts to contravene or abets the contravention of the provisions of this Act or of any rules made thereunder other than the provisions, punishment for the contravention whereof has been provided for in Sections 21, 23, 24 and 25, shall be punishable with imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both, and in the case of a continuing contravention with an additional fine which may extend to fifty rupees for every day during which such contravention continues after conviction for the first such contravention.

**27. Offences by companies.**—(1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation —For the purposes of this section—

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.

**28. Jurisdiction of Court.**—No Court inferior to that of Presidency Magistrate or a Magistrate of the first class shall try any offence punishable under this Act.

**29. Previous sanction of Central Government.**—No prosecution for any offence punishable under this Act shall be instituted except with the previous sanction of the Central Government.

**30. Protection of action taken in good faith.**—No suit, prosecution or other legal proceeding shall lie against the Government or the Board or any Committee appointed by it, or any member of the Board or such Committee, or any officer or employee of the Government or the Board or any other person authorised by the Government or the Board, for anything which is in good faith done or intended to be done under this Act or the rules made thereunder.

**31. Power to delegate.**—The Central Government may, by order notified in the Official Gazette, direct that any power exercisable by it under this Act may also be exercised, in such cases and subject to such conditions, if any, as may be specified in the order by such officer or authority as may be specified therein.

**32. Suspension of operation of Act.**—(1) If the Central Government is satisfied that circumstances have arisen rendering it necessary that certain of the restrictions imposed by this Act should cease to be imposed or if it considers it necessary or expedient so to do in the public interest, the Central Government may, by notification in the Official Gazette, suspend or relax to a specified extent, either indefinitely or for such period as may be specified in the notification, the operation of all or any of the provisions of this Act.

(2) Where the operation of any provision of this Act has under sub-sec. (1) been suspended or relaxed indefinitely, such suspension or relaxation may at any time, while this Act remains in force, be removed by the Central Government by notification in the Official Gazette.

**33. Power of Central Government to make rules.**—(1) The Central Government may, by notfication in the Official Gazette, make rules to carry out the purposes of this Act.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) the number of persons to be appointed as members from each of the categories specified in clause (e) of sub-section (3) of Section 4, the term of office and other conditions of service of the members of the Board and the procedure to be followed in the discharge of their functions by, and, the manner of filling vacancies among such members;

(b) the circumstances in which, and the authority by which, a member of the Board may be removed;

(c) The procedure to be followed at meetings of the Board and Committees thereof for the conduct of business and the number of members which shall form a quorum at a meeting;

(d) the maintenance by the Board of records of business transacted by the Board and the submission of copies thereof to the Central Government;

(e) the holding of a minimum number of meetings of the Board every year;

(f) the powes of the Board, its Chairman, Director and Committees of the Board with respect to the incurring of expenditure.

(g) the conditions subject to which the Board may incur expenditure outside India;

(h) the preparation of budget estimates of receipts and expenditure of the Board and the authority by which the estimates are to be sanctioned;

(i) the form and the manner in which the accounts should be kept by the Board;

(j) the deposit of the funds of the Board in banks and the investment of such funds;

(k) the conditions subject to which the Board may borrow;

(l) the conditions subject to which and the manner in which contracts may be entered into by or on behalf of the Board;

(m) the delegation to the Chairman or Director or members or officers of the Board of any of the powers and duties of the Board under this Act;

(n) the staff which may be employed by the Board and the pay and allowances and leave and other conditions of service of officers (other than those appointed by the Central Government) and other employees of the Board;

(o) the additional matters in respect of which the Board may undertake measures in the discharge of its functions;

(p) the travelling and other allowances of members of the Board and of Committees thereof;

(q) the remuneration and other allowances payable to the person or persons referred to in clause (b) of sub-section (2) of Section 10;

(r) the maintenance of the registers and other records of the Board and its various Committees;

(s) the appointment by the Board of agents to discharge on its behalf any of its functions;

(t) the form of, and the particulars to be contained in any returns or reports to be made to the Board under this Act;

(u) the form of and the manner of making application for licences issued by the Board, the fees payable for such application and the procedure to be followed in granting, and the conditions governing, such licences;

(v) the collection of any information or statistics in respect of cardamom;

(w) any other matter (other than a matter specified in Sec. 12) which is to be or may be prescribed or provided for by rules under this Act.

(3) Every rule made by the Central Government under this section shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

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# [THE INDIAN] CARRIAGE BY AIR ACT, 1934
## (ACT XX OF 1934)

[The text of the Act printed here is as on 1-5-1969].

## CONTENTS

SECTIONS

1. Short title, extent and commencement.

2. Application of the convention to India.

3. Provisions regarding suits against High Contracting Parties who undertake carriage by air.

4. Application of the Act to carriage by air which is not international.

## STATEMENT OF OBJECTS AND REASONS

"An International Convention for the unification of certain rules relating to international carriage by air was signed at Warsaw in October, 1929, by certain Governments The convention defines liability of air carriers for injury or damage caused to passengers or goods. The convention was not signed on behalf of India, but its provisions have been examined by the Government of India and are, in their opinion suitable to Indian conditions. They, therefore, propose to adhere to the convention as soon as requisite legislation to implement its provisions has been enacted. To that end they have framed the present Bill.

The convention applies only in respect of International carriage by air, i.e., carrige between two States signatory to the convention but as there is no law on the subject in India, beyond the general law of contract and the law relating to carriages on land, the Bill seeks to provide power to the Governor-General in Council to make rules extending the provisions of the convention also to internal carriage by air".
—Gazette of India, 1934, Part V. page 78.

## ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Amended by Acts 31 of 1939; 3 of 1951.
—Adapted by A. C. A. O., 1948; A. L. O., 1950.
—Extended by Acts 59 of 1949; 30 of 1950; 1 of 1962; and Regs. 6 of 1963; 7 of 1963; 8 of 1965.

# [THE INDIAN] CARRIAGE BY AIR ACT, 1934
## (ACT XX OF 1934)[a]

[19th August, 1934.]

An Act to give effect [b][° °] to a Convention for the unification of certain rules relating to international carriage by air.

WHEREAS a Convention for the unification of certain rules relating to international carriage by air (hereinafter referred to as the Convention) was, on the 12th day of October, 1929, signed at Warsaw;[a]

AND WHEREAS it is expedient that [c][India] should accede to the Convention and should make provision for giving effect to the said Convention [b][° ° °];

AND WHEREAS it is also expedient to make provision for applying the rules contained in the Convention (subject to exceptions, adaptations and modifications) to carriage by air [b][° °] which is not international carriage within the meaning of the Convention;

It is hereby enacted as follows :—

[a] For Report of Select Committee see Gazette of India, 1934, Pt. V, p. 189.

This Act has been extended to the new Provinces and merged States by the Merged States (Laws) Act, 1949 (59 of 1949), S. 3 [1-1-1950] and to the Union Territories of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act, 1950 (30 of 1950), S. 3 [16-4-1950], Vindhya Pradesh now forms part of State of Madhya Pradesh — See Act 37 of 1956, S. 9 (1) (e).

The Act now extends to the Union Territories of—

(1) Dadra and Nagar Haveli — See Reg. 6 of 1963 [w. e. f. 1-7-1965].
(2) Pondicherry — See Reg. 7 of 1963 [w. e. f. 1-10-1963].
(3) Laccadive, Minicoy and Amindivi Islands—see Reg. 8 of 1965 [w.e.f. 1-10-1967].
(4) Goa, Daman and Diu — See G. S. R. 388, G. I., 25-3-1967, Pt. II, S. 3 (i), page 471.

[b] The words "in the Provinces of India" were omitted by A. L. O., 1950.
[c] Substituted for "the Provinces of India", ibid.
[d] See Note (a) under R. 1 in Sch. I.

**1. Short title, extent and commencement.**—(1) This Act may be called THE INDIAN CARRIAGE BY AIR ACT, 1934.

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**Preamble — Note 1**

(1) The liability of the internal carrier by Airways who is not governed by the Indian Carriage by Air Act, 1934 or by the Carriers Act, 1865 is governed by the English Common Law since adopted in India and not by the Contract Act. AIR 1960 Assam 71 (72, 76): ILR (1957) 9 Assam 443 (DB). (Contract giving carrier complete immunity from liability — Not hit by Section 23, Contract Act — View of Sankaran Nair, J., in 18 Mad LJ 497 (FB), Dissented from.) * AIR 1964 Cal 396 (398) (DB). (Carrier has absolute freedom to contract out of his liability even in cases of negligence. AIR 1962 Cal 311, Not approved.)

(2) There is no statute for internal air carriage in India. The Indian Airlines Corporation is a common carrier as opposed to a private carrier, but it is not a 'common carrier' within the meaning of the Carriers Act 1865. The liability of the Corporation as a common carrier is governed by the English Common Law as administered in India. The Contract Act, 1872, has no application. As the English Common Law is applicable, the Corporation can exempt itself of all liabilities, including its liability for negligence,

[a][(2) It extends to the whole of India [b][° °].]

(3) It shall come into force on such date[c] as the °[Central Government] may, by notification in the °[Official Gazette], appoint.

[a] Substituted for original sub-section (2) and for certain words by A.L.O., 1950.

[b] The words 'except Part B States' were omitted by the Part B States (Laws) Act, 1951 (3 of 1951), S. 3 and Sch. I.

[c] 18th February 1935, see Gazette of India, 1935, Pt. I, p. 320.

**2. Application of the Convention to India.**—(1) The rules contained in the First Schedule, being the provisions of the Convention relating to the rights and liabilities of carriers, passengers, consignors, consignees and other persons, shall, subject to the provisions of this Act, have the force of law in [a][India] in relation to any carriage by air to which those rules apply, irrespective of the nationality of the aircraft performing the carriage.

(2) The [aa][Central Government] may by notification[b] in the [aa][Official Gazette], certify who are the High Contracting Parties to the Convention, in respect of what territories they are parties, and to what extent they have availed themselves of the Additional Protocol to the Convention, and any such notification shall be conclusive evidence of the matters certified therein.

(3) Any reference in the First Schedule to the territory of any High Contracting Party to the Convention shall be construed as a reference to all the territories in respect of which he is a party.

[c][(3A) Any reference in the First Schedule to agents of the carrier shall be construed as including a reference to servants of the carrier.]

(4) Notwithstanding anything contained in the Indian Fatal Accidents Act, 1855, or any other enactment or rule of law in force in any part of [a][India], the rules contained in the First Schedule shall, in all cases to which those rules apply, determine the liability of a carrier, in respect of the death of a passenger, and the rules contained in the Second Schedule shall determine the persons by whom and for whose benefit and the manner in which such liability may be enforced.

(5) Any sum in francs mentioned in Rule 22 of the First Schedule shall, for the purpose of any action against a carrier, be converted into rupees at the rate of exchange prevailing on the date on which the amount of damages to be paid by the carrier is ascertained by the Court.

[a] Substituted for "Part A States and Part C States" by the Part B States (Laws) Act, 1951 (3 of 1951), S. 3 and Sch.

[aa] Substituted by A.L.O., 1950.

[b] For specification of High Contracting Parties to the Convention and the territories in respect of which they are respectively parties and the date on which the said Convention came into force in respect of those territories, see Notifn. No. 10A/54-51 dated 29-10-1952 published in Gaz. Ind., 1952, Pt. I, Sec. 1, page 574.

[c] Inserted by the Indian Carriage by Air (Amendment) Act, 1939 (31 of 1939), S. 2 [28-9-1939].

**3. Provisions regarding suits against High Contracting Parties who undertake carriage by air.**—(1) Every High Contracting Party to the Convention who has not availed himself of the provisions of the Additional Protocol thereto shall, for the purposes of any suit brought in a Court in [a][India] in accordance with the provisions of Rule 28 of the First Schedule to enforce a claim in respect of carriage undertaken by him, be deemed to have submitted to the jurisdiction of that Court and to be a person for the purposes of the Code of Civil Procedure, 1908.

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**Preamble — Note 1 (contd.)**

by special agreement. AIR 1961 Cal 383 (384, 385, 386) * (1959) AIR 1959 Mad 285 (287): (1959) 2 Mad LJ 373.

**Section 2 — Note 1**

**(1) Warsaw Convention for Carriage of Passenger and Goods by Air is still in force and to which India is a party. The Carriage by Air Act (20 of 1934) does not apply to internal air carriage in India.** AIR 1961 Cal 383 (384). **(There is no statute for internal air carriage in India.)**

(2) The High Court may make rules of procedure providing for all matters which may be expedient to enable suits to be instituted and carried on.

(3) Nothing in this section shall authorise any Court to attach or sell any property of a High Contracting Party to the Convention.

[a] Substituted for "Part A States and Part C States" by the Part B States (Laws) Act, 1951 (3 of 1951), S. 3 and Sch.

**4. Application of Act to carriage by air which is not international.**—The [a][Central Government] may by notification[b] in the [a][Official Gazette], apply the rules contained in the First Schedule and any provision of Section 2 to such carriage by air, not being international carriage by air as defined in the First Schedule, as may be specified in the notification, subject however to such exceptions, adaptations and modifications, if any, as may be so specified.

[a] Substituted by A.L.O., 1950.

[b] For notification applying the provisions of S. 2 and the rules contained in First and Second Schedules to all carriage by air, not being international carriage as defined in First Schedule, irrespective of the nationality of the aircraft performing the carriage, subject to exceptions, adaptations and modifications, see G. S. R. 1967, Gaz. Ind., 28-12-1967, Pt. II, S. 3 (i), p. 2221 [w. e. f. 1-3-1964].

## FIRST SCHEDULE

(See Section 2)

## RULES[a]

## CHAPTER I

## SCOPE—DEFINITIONS

**1.** (1) These rules apply to all international carriage of persons, luggage or goods performed by aircraft for reward. They apply also to such carriage when performed gratuitously by an air transport undertaking.

(2) In these rules "High Contracting Party" means a High Contracting Party to the Convention.

(3) For the purposes of these rules the expression "international carriage" means any carriage in which, according to the contract made by the parties, the

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**Section 4 — Note 1**

(1) See also Preamble.

(2) The Act does not apply of its own force to internal or non-internal carriage of persons, luggage or goods, but by Section 4 of the Act, the Central Government is given authority to issue notification applying the rules in the first Schedule to internal carriage by air. In the absence of any such notification under Section 4 of the Act applying the rules of the First Schedule of the Act to internal carriage by air by Central Government of India, the appellant cannot have the benefit of R. 22 (2) of the First Schedule. AIR 1959 Cal 755 (757, 758): ILR (1960) 1 Cal 701.

(3) The very specific provision of Section 4 excludes the application of rules of Warsaw Convention to internal carriage by air in India unless the Central Government chooses to apply it by a notification. That bars the application of those rules by Judges through the back door of the vague conception of justice, equity and good conscience. (1965) AIR 1965 Cal 252 (264) (DB). (AIR 1962 Cal 544, Reversed.)

(4) In the absence of any notification under Section 4, in India there are no statutory rights, duties and liabilities of carriers and their passengers and of consignors, carriers and cosignees of goods in respect of non-international carriage by air. The rights, duties and liabilities of carriers and consignees of goods by air in India has to be decided on the principles of ordinary law, that is those contained in the Contract Act and the principles of English law which have been held to be applicable to common carriers in India. AIR 1959 Mad 285 (287): (1959) 2 Mad LJ 373.

**Schedule I, Rule 1 — Note 1**

(1) Any carriage where the place of departure was in Pakistan and the place of destination is India, is international carriage within the meaning of Rule 1 (3) of Schedule I. ('54) 56 Bom LR 944 (952). (Carriage by air of parcel containing gold from Karachi to Bombay — Loss in Bombay office while awaiting delivery — Carrier held not liable.)

(2) Unless a notification is issued under Section 4, Rule 1 of the first Schedule will not apply to internal or non-international carriage by air. AIR 1959 Cal 755 (757): ILR (1960) 1 Cal 701.

place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to the Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party is not deemed to be international for the purposes of these rules.

(4) A carriage to be performed by several successive air carriers is deemed, for the purposes of these rules, to be one undivided carriage, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contract is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party.

[a] As stated in Sec. 2, the rules contained in this Schedule are the provisions of the Convention. These conventions were subsequently amended by the Hague Protocol in 1955. The English text of the Warsaw Convention, as amended by the Hague Protocol, has been reproduced below as Appendix I for information of all interested in it. Similarly, the British Act, the Carriage by Air (Supplementary Provisions) Act, 1962 (10 and 11 Eliz. II, c. 48) is also printed as Appendix II. These do not form part of the Act.

2. (1) These rules apply to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in R. 1.

(2) These rules do not apply to carriage performed under the terms of any International Postal Convention.

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## CHAPTER II
## DOCUMENTS OF CARRIAGE
### Part 1—Passenger ticket.

3. (1) For the carriage of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:—

(a) the place and date of issue;

(b) the place of departure, and of destination;

(c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the carriage of its international character;

(d) the name and address of the carrier or carriers;

(e) a statement that the carriage is subject to the rules relating to liability contained in this Schedule.

(2) The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to these rules. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered, he shall not be entitled to avail himself of those provisions of this Schedule which exclude or limit his liability.

### Part II—Luggage ticket.

4. (1) For the carriage of luggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a luggage ticket.

(2) The luggage ticket shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The luggage ticket shall contain the following particulars:—

(a) the place and date of issue;

(b) the place of departure and of destination;

(c) the name and address of the carrier or carriers;

(d) the number of the passenger ticket;

(e) a statement that delivery of the luggage will be made to the bearer of the luggage ticket;

(f) the number and weight of the packages;

(g) the amount of the value declared in accordance with Rule 22 (2);

(h) a statement that the carriage is subject to the rules relating to liability contained in this Schedule.

(4) The absence, irregularity or loss of the luggage ticket does not affect the existence or the validity of the contract of carriage, which shall none-the-less be subject to these rules. Nevertheless, if the carrier accepts luggage without a luggage ticket having been delivered, or if the luggage ticket does not contain the particulars set out at (d), (f) and (h) of sub-rule (3), the carrier shall not be entitled to avail himself of those provisions of this Schedule which exclude or limit his liability.

## Part III—Air consignment note

**5.** (1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "air consignment note"; every consignor has the right to require the carrier to accept this document.

(2) The absence, irregularity or loss of this document does not affect the existence or the validity of the contract of carriage which shall, subject to the provisions of Rule 9, be none-the-less governed by these rules.

**6.** (1) The air consignment note shall be made out by the consignor in three original parts and be handed over with the goods.

(2) The first part shall be marked "for the carrier", and shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier and shall accompany the goods. The third part shall be signed by the carrier and handed by him to the consignor after the goods have been accepted.

(3) The carrier shall sign an acceptance of the goods.

(4) The signature of the carrier may be stamped; that of the consignor may be printed or stamped.

(5) If, at the request of the consignor, the carrier makes out air consignment note, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

**7.** The carrier of goods has the right to require the consignor to make out separate consignment notes when there is more than one package.

**8.** The air consignment note shall contain the following particulars:—

(a) the place and date of its execution;

(b) the place of departure and destination;

(c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the carriage of its international character;

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**Schedule I, Rule 8 — Note 1**

(1) Even if the carriage of goods is an international carriage by air and even if a consignment notice in the form required by Rule 8 is not issued, no liability of the carrier arises where the goods are not lost during 'the carriage by air' but from the office of the destination where the goods were awaiting delivery. ('54)) 56 Bom LR 944 (954).

(d) the name and address of the consignor;
(e) the name and address of the first carrier;
(f) the name and address of the consignee, if the case so requires;
(g) the nature of the goods;
(h) the number of the packages, the method of packing and the particular marks or numbers upon them;
(i) the weight, the quantity and the volume or dimensions of the goods;
(j) the apparent condition of the goods and of the packing;
(k) the freight, if it has been agreed upon, the date and place of payment and the person who is to pay it;
(l) if the goods are sent for payment on delivery, the price of the goods and, if the case so requires, the amount of the expenses incurred;
(m) the amount of the value declared in accordance with Rule 22 (2);
(n) the number of parts of the air consignment note;
(o) the documents handed to the carrier to accompany the air consignment note;
(p) the time fixed for the completion of the carriage and a brief note of the route to be followed, if these matters have been agreed upon;
(q) a statement that the carriage is subject to the rules relating to liability contained in this Schedule.

**9.** If the carrier accepts goods without an air consignment note having been made out or if the air consignment note does not contain all the particulars set out in Rule 8 (a) to (i) inclusive and (q), the carrier shall not be entitled to avail himself of the provisions of this Schedule which exclude or limit his liability.

**10.** (1) The consignor is responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air consignment note.

(2) The consignor will be liable for all damage suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements.

**11.** (1) The air consignment note is prima facie evidence of the conclusion of the contract of the receipt of the goods and of the conditions of carriage.

(2) The statements in the air consignment note relating to the weight, dimensions and packing of the goods, as well as those relating to the number of packages, are prima facie evidence of the facts stated; those relating to the quantity, volume and condition of the goods do not constitute evidence against the carrier except so far as they both have been, and are stated in the air consignment note to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the goods.

**12.** (1) Subject to his liability to carry out all his obligations under the contract of carriage, the consignor has the right to dispose of the goods by withdrawing them at the aerodrome of departure or destination, or by stopping them in the course of the journey on any landing, or by calling for them to be delivered at the place of destination or in the course of the journey to a person other than the consignee named in the air consignment note, or by requiring them to be returned to the aerodrome of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and he must repay any expenses occasioned by the exercise of this right.

(2) If it is impossible to carry out the orders of the consignor, the carrier must so inform him forthwith.

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**Schedule I, Rule 9 — Note 1**

(1) Under R. 9, the carrier cannot get the special exemption unless he strictly complies with the particulars in the consignment note as given in Rule 8 (a) to (i) and (q). ('54) AIR 1954 Cal 170 (171).

(3) If the carrier obeys the orders of the consignor for the disposition of the goods without requiring the production of the part of the air consignment note delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air consignment note.

(4) The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Rule 13. Nevertheless, if the consignee declines to accept the consignment note or the goods, or if he cannot be communicated with, the consignor resumes his right of disposition.

**13.** (1) Except in the circumstances set out in Rule 12, the consignee is entitled, on arrival of the goods at the place of destination, to require the carrier to hand over to him the air consignment note and to deliver the goods to him on payment of the charges due and on complying with the conditions of carriage set out in the air consignment note.

(2) Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the goods arrive.

(3) If the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee is entitled to put into force against the carrier the rights which flow from the contract of carriage.

**14.** The consignor and the consignee can respectively enforce all the rights given them by Rules 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract.

**15.** (1) Rules 12, 13 and 14 do not affect either the relations of the consignor or the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

(2) The provisions of Rules 12, 13 and 14 can only be varied by express provisions in their air consignment note.

**16.** (1) The consignor must furnish such information and attach to the air consignment note such documents as are necessary to meet the formalities of customs, octroi or police before the goods can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier or his agents.

(2) The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

## CHAPTER III

## LIABILITY OF THE CARRIER

**17.** The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

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**Schedule I, Rule 17 — Note 1**

(1) The provisions of the Carriage by Air Act, should be made applicable to internal air transport, even though the Central Government has not yet issued any notification under Section 4, extending its operation. Therefore, under Rules 17 and 20 (1) a carrier is liable unless he proves that he was not negligent. (1962) AIR 1962 Cal 544 (548).

[But see AIR 1964 Cal 396 (DB).]

(1) Ordinarily the expression 'carriage

**18.** (1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air.

(2) The carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.

(3) The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.

**19.** The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods.

**20.** (1) The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the carriage of goods and luggage the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage,

**21.** If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the Court may exonerate the carrier wholly or partly from his liability.

**22.** (1) In the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 125,000 francs. Where damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract the carrier and the passenger may agree to a higher limit of liability.

(2) In the carriage of registered luggage and of goods, the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself, the liability of the carrier is limited to 5,000 francs per passenger.

(4) The sums mentioned in this rule shall be deemed to refer to the French franc consisting of 65½ milligrams gold of millesimal fineness 900.

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**Schedule I, Rule 18 — Note 1**

by air' cannot include mere storage of goods after they are transported by the air-craft to the destination and they are awaiting delivery to the consignee. ('54) 56 Bom LR 944 (953). (Carriage by air of parcel containing gold from Karachi to Bombay — Loss in Bombay office while awaiting delivery — Carrier not liable for loss under Rule 18 (1).)

(2) The liability of Indian Airlines Corporation is governed by the English Common Law as administered in India; the Contract Act, 1872 has no application. As the English Common Law is applicable, the Corporation can exempt itself of all liabilities including its liability for negligence, by special agreement. AIR 1961 Cal 383 (385, 386).

**Schedule I, Rule 22 — Note 1**

(1) In the absence of a Notification under Section 4 by the Central Government applying rules under Schedule I to internal carriage by air a consignor consigning goods by air within India cannot have the benefit of Rule 22 of Schedule I. AIR 1959 Cal 755 (757): ILR (1960) 1 Cal 701.

**23.** Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in these rules shall be null and void, but nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Schedule.

**24.** (1) In the cases covered by Rules 18 and 19, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Schedule.

(2) In the cases covered by Rule 17, the provisions of sub-rule (1) also apply without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

**25.** (1) The carrier shall not be entitled to avail himself of the provisions of this Schedule which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as is in the opinion of the Court equivalent to wilful misconduct.

(2) Similarly, the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment.

**26.** (1) Receipts by the person entitled to delivery of luggage or goods without complaint is prima facie evidence that the same have been delivered in good condition and in accordance with the document of carriage.

(2) In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within three days from the date of receipt in the case of luggage and seven days from the date of receipt in the case of goods. In the case of delay the complaint must be made at the latest within fourteen days from the date on which the luggage or goods have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of carriage or by separate notice in writing despatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

**27.** In the case of the death of the person liable, an action for damages lies in accordance with these rules against those legally representing his estate.

**28.** An action for damages must be brought at the option of the plaintiff, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.

**29.** The right of damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

**30.** (1) In the case of carriage to be performed by various successive carriers and falling within the definition set out in sub-rule (4) of Rule 1, each carrier who accepts passengers, luggage or goods is subjected to the rules set out in this Schedule, and is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision.

(2) In the case of carriage of this nature, the passenger or his representative can take action only against the carrier who performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards luggage or goods, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled

to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place. The carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

## CHAPTER IV

## PROVISIONS RELATING TO COMBINED CARRIAGE

**31.** (1) In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Schedule apply only to the carriage by air, provided that the carriage by air falls within the terms of R. 1.

(2) Nothing in this Schedule shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Schedule are observed as regards the carriage by air.

## CHAPTER V

## GENERAL AND FINAL PROVISIONS

**32.** Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Schedule, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless, for the carriage of goods arbitration clauses are allowed, subject to these rules, if the arbitration is to take place in the territory of one of the High Contracting Parties within one of the jurisdictions referred to in Rule 28.

**33.** Nothing contained in this Schedule shall prevent the carrier either from refusing to enter into any contract of carriage, or from making regulations which do not conflict with the provisions of this Schedule.

**34.** This Schedule does not apply to international carriage by air performed by way of experimental trial by air navigation undertakings with the view to the establishment of a regular line of air navigation, nor does it apply to carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business.

**35.** The expression "days" when used in these rules means current days, not working days.

**36.** When a High Contracting Party has declared at the time of ratification of or of accession to the Convention that the first paragraph of Article 2 of the Convention shall not apply to international carriage by air performed directly by the State, its colonies, protectorates or mandated territories or by any other territory under its sovereignty, suzerainty or authority, these rules shall not apply to international carriage by air so performed.

## SECOND SCHEDULE

(See Section 2)

## PROVISIONS AS TO LIABILITY OF CARRIERS IN THE EVENT OF THE DEATH OF A PASSENGER

**1.** The liability shall be enforceable for the benefit of such of the members of the passenger's family as sustained damage by reason of his death.

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**Schedule 1, Rule 36 — Note 1**

(1) The special exemption from liability given in Rule 36 is given to the carrier, and not where the consignment note was by the forwarding agent and not the carrier. ('54) AIR 1954 Cal 170 (171).

In this rule the expression "member of the family" means wife or husband, parent, step-parent, grand-parent, brother, sister, half-brother, half-sister, child, step-child, grandchild:

Provided that, in deducing any such relationship as aforesaid any illegitimate person and any adopted person shall be treated as being, or as having been, the legitimate child of his mother and reputed father or, as the case may be, of his adopters.

**2.** An action to enforce the liability may be brought by the personal representative of the passenger or by any person for whose benefit the liability is under the last preceding rule enforceable, but only one action shall be brought in [a][India] in respect of the death of any one passenger, and every such action by whomsoever brought shall be for the benefit of all such persons so entitled as aforesaid as either are domiciled in [a][India] or, not being domiciled there, express a desire to take the benefit of the action.

[a] Substituted for "the States" by Act 3 of 1951, S. 3 and Schedule.

**3.** Subject to the provisions of the next succeeding rule the amount recovered in any such action, after deducting any costs not recovered from the defendant, shall be divided between the persons entitled in such proportions as the Court may direct.

**4.** The Court before which any such action is brought may at any stage of the proceedings make any such order as appears to the Court to be just and equitable in view of the provisions of the First Schedule to this Act limiting the liability of a carrier and of any proceedings which have been, or are likely to be, commenced outside [a][India] in respect of the death of the passenger in question.

[a] Substituted for "the States" by Act 3 of 1951, Sec. 3 and Schedule.

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## APPENDIX I

## WARSAW CONVENTION WITH THE AMENDMENTS MADE IN IT BY THE HAGUE PROTOCOL[a]

### PART I

### (The English Text)

### CONVENTION

### FOR THE UNIFICATION OF CRETAIN RULES RELATING TO INTERNATIONAL CARRIAGE BY AIR

### CHAPTER I

### SCOPE—DEFINITIONS

### Article 1

This convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

(2) For the purposes of this Convention, the expression 'international carriage' means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another State, even if that State is not a High Contracting Party. Carriage between two points within the territory of a single High Contracting Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.

(3) Carriage to be performed by several successive air carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been re-

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[a] Signed on 28-9-1955. India does not seem to have signed the Protocol. Indian Carriage by Air Act, 1934, gives effect to the original Convention signed at Warsaw on 12-10-1929.

garded by the parties as a single operation. Whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.

**Article 2**

(1) This Convention applies to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in Article 1.

(2) This Convention shall not apply to carriage of mail and postal packages.

## CHAPTER II
## DOCUMENTS OF CARRIAGE
### SECTION 1—PASSENGER TICKET

**Article 3**

(1) In respect of the carriage of passengers a ticket shall be delivered containing—

(a) an indication of the places of departure and destination;

(b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;

(c) a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage.

(2) The passenger ticket shall constitute prima facie evidence of the conclusion and conditions of the contract of carriage. The absene, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, nonetheless, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph (1) (c) of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22.

### SECTION 2—BAGGAGE CHECK

**Article 4**

(1) In respect of the carriage of registered baggage, a baggage check shall be delivered, which, unless combined with or incorporated in a passenger ticket which complies with the provisions of Article 3, paragraph (1), shall contain—

(a) an indication of the place of departure and destination ;

(b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;

(c) a notice to the effect that, if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect of loss of, or damage to baggage.

(2) The baggage check shall constitute prima facie evidence of the registration of the baggage and of the conditions of the contract of carriage. The absence, irregularity or loss of the baggage check does not affect the existence or

the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if the carrier takes charge of the baggage without a baggage check having been delivered or if the baggage check (unless combined with or incorporated in the passenger ticket which complies with the provisions of Article 3, paragraph (1) (c)), does not include the notice required by paragraph (1) (c) of this Article, he shall not be entitled to avail himself of the provisions of Article 22, paragraph (2).

## SECTION 3—AIR WAYBILL

### Article 5

(1) Every carrier of cargo has the right to require the consignor to make out and hand over to him a document called an "air waybill"; every consignor has the right to require the carrier to accept this document.

(2) The absence, irregularity or loss of this document does not affect the existence or the validity of the contract of carriage which shall, subject to the provisions of Article 9 be none the less governed by the rules of this Convention.

### Article 6

(1) The air waybill shall be made out by the consignor in three original parts and be handed over with the cargo.

(2) The first part shall be marked "for the carrier", and shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier and shall accompany the cargo. The third part shall be signed by the carrier and handed by him to the consignor after the cargo has been accepted.

(3) The carrier shall sign prior to the loading of cargo on board the aircraft.

(4) The signature of the carrier may be stamped; that of the consignor may be printed or stamped.

(5) If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

### Article 7

The carrier of cargo has the right to require the consignor to make out separate waybills when there is more than one package.

### Article 8

The air waybill shall contain—

(a) an indication of the places of departure and destination;

(b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;

(c) a notice to the consignor to the effect that, if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect of loss of, or damage to, cargo.

### Article 9

If, with the consent of the carrier, cargo is loaded on board the aircraft without an air waybill having been made out, or if the air waybill does not include the notice required by Article 8, paragraph (c), the carrier shall not be entitled to avail himself of the provisions of Article 22, paragraph (2).

### Article 10

(1) The consignor is responsible for the correctness of the particulars and statements relating to the cargo which he inserts in the air waybill.

(2) The consignor shall indemnify the carrier against all damage suffered by him, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor.

**Article 11**

(1) The air waybill is prima facie evidence of the conclusion of the contract, of the receipt of the cargo and of the conditions of carriage.

(2) The statements in the air waybill relating to the weight, dimensions and packing of the cargo, as well as those relating to the number of packages, are prima facie evidence of the facts stated; those relating to the quantity, volume and condition of the cargo do not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the cargo.

**Article 12**

(1) Subject to his liability to carry out all his obligations under the contract of carriage, the consignor has the right to dispose of the cargo by withdrawing it at the aerodrome of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination or in the course of the journey to a person other than the consignee named in the air waybill, or by requiring it to be returned to the aerodrome of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and he must repay any expenses occasioned by the exercise of this right.

(2) If it is impossible to carry out the orders of the consignor, the carrier must so inform him forthwith.

(3) If the carrier obeys the orders of the consignor for the disposition of the cargo without requiring the production of the part of the air waybill delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill.

(4) The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 13. Nevertheless, if the consignee declines to accept the waybill or the cargo, or if he cannot be communicated with, the consignor resumes his right of disposition.

**Article 13**

(1) Except in the circumstances set out in the preceding Article, the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to hand over to him the air waybill and to deliver the cargo to him, on payment of the charges due and on complying with the conditions of carriage set out in the air waybill.

(2) Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.

(3) If the carrier admits the loss of the cargo, or if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived, the consignee is entitled to put into force against the carrier the rights which flow from the contract of carriage.

**Article 14**

The consignor and the consignee can respectively enforce all the rights given them by Articles 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract.

**Article 15**

(1) Articles 12, 13 and 14 do not affect either the relations of the consignor or the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

(2) The provisions of Articles 12, 13 and 14 can only be varied by express provisions in the air waybill.

(3) Nothing in this Convention prevents the issue of a negotiable air waybill.

### Article 10

(1) The consignor must furnish such information and attach to the air waybill such documents as are necessary to meet the formalities of the customs, octroi or police before the cargo can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier or his servants or agents.

(2) The carrer is under no obligation to enquire into the correctness or sufficiency of such information or documents.

## CHAPTER III

## LIABILITY OF THE CARRIER

### Article 17

The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

### Article 18

(1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered baggage or any cargo, if the occurrence which caused the damage so sustained took place during the carriage by air.

(2) The carriage by air within the meaning of the preceding paragraph comprises the period during which the baggage or cargo is in charge of the carrier, whether in an aerodrome or on board an aircaft, or in the case of a landing outside an aerodrome, in any place whatsoever.

(3) The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.

### Article 19

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo.

### Article 20

The carrier is not liable if he proves that he and his servants or agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

### Article 21

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person, the Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from the liability.

### Article 22

(1) In the carriage of persons the liability of the carrier for each passenger is limited to the sum of two hundred and fifty thousand francs. Where, in accordance with the law of the Court seized of the case, damages may be awarded in the form of periodical payments the equivalent capital value of the said payments shall not exceed two hundred and fifty thousand francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) (a) In the carriage of registered baggage and of cargo, the liability of the carrier is limited to a sum of two hundred and fifty francs per kilogramme, unless the passenger or consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the passenger's or consignor's actual interest in delivery at destination.

(b) In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the registered baggage or cargo, or of an object contained therein, affects the value of other packages covered by the same baggage check or the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier is limited to five thousand Francs per passenger.

(4) The limits prescribed in this Article shall not prevent the Court from awarding, in accordance with its own law, in addition, the whole or part of the Court costs and of the other expenses of the litigation incurred by the plaintiff. The foregoing provision shall not apply if the amount of the damages awarded, excluding Court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

(5) The sums mentioned in Francs in this Article shall be deemed to refer to a currency unit consisting of sixty-five and a half miligrammes of gold of millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment.

**Article 23**

(1) Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

(2) Paragraph (1) of this Article shall not apply to provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried.

**Article 24**

(1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.

(2) In the cases covered by Article 17 the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

**Article 25**

The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.

### Article 25A

(1) If an action is brought against a servant or agent of the carrier arising out of damage to which this Convention relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under Article 22.

(2) The aggregate of the amounts recoverable from the carrier, his servants and agents, in that case, shall not exceed the said limits.

(3) The provisions of paragraphs (1) and (2) of this Article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

### Article 26

(1) Receipt by the person entitled to delivery of baggage or cargo without complaint is prima facie evidence that the same has been delivered in good condition and in accordance with the document of carriage.

(2) In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of carriage or by separate notice in writing despatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

### Article 27

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this Convention against those legally representing his estate.

### Article 28

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.

(2) Questions of procedure shall be governed by the law of the Court seised of the case.

### Article 29

(1) The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived or from the date on which the carriage stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the Court seised of the case.

### Article 30

(1) In the case of carriage to be performed by various successive carriers and falling within the definition set out in the third paragraph of Article 1, each carrier who accepts passengers, baggage or cargo is subjected to the rules set out in this Convention, and is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision.

(2) In the case of carriage of this nature, the passenger or his representative can take action only against the carrier who performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards baggage or cargo, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

## CHAPTER IV

## PROVISIONS RELATING TO COMBINED CARRIAGE

### Article 31

(1) In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1.

(2) Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air.

## CHAPTER V

## GENERAL AND FINAL PROVISIONS

### Article 32

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the carriage of cargo arbitration clauses are allowed, subject to this Convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of Article 28.

### Article 33

Nothing contained in this Convention shall prevent the carrier either from refusing to enter into any contract of carriage, or from making regulations which do not conflict with the provisions of this Convention.

### Article 34

The provisions of Articles 3 to 9 inclusive relating to documents of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business.

### Article 35

The expression "days" when used in this Convention means current days not working days.

### Article 36

The Convention is drawn up in French in a single copy which shall remain deposited in the archives of the Ministry for Foreign Affairs of Poland and of which one duly certified copy shall be sent by the Polish Government to the Government of each of the High Contracting Parties.

**Article 40A**

(1) (This paragraph is not reproduced. It defines "High Contracting Party".)

(2) For the purposes of the Convention the word territory means not only the metropolitan territory of a State but also all other territories for the foreign relations of which that State is responsible.

(Articles 37, 38, 39, 40 and 41 and the concluding words of the Convention are not reproduced. They deal with the coming into force of the Convention.)

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## APPENDIX II

## CARRIAGE BY AIR (SUPPLEMENTARY PROVISIONS) ACT, 1962
(10 & 11 Eliz. 2, c. 48)

### CONTENTS

SECTIONS

1. Supplementary Convention to have force of law.
2. Interpretation of Supplementary Convention.
3. Application of provisions of Acts of 1961 and 1932.
4. Interim protection for carriers' servants and agents.
5. Application to British possessions, etc., and to carriage by air not governed by Supplementary Convention.
6. Application to Crown.
7. Short title, commencement and saving.

SCHEDULE

**An Act to give effect to the Convention, supplementary to the Warsaw Convention, for the unification of certain rules relating to international carriage by air performed by a person other than the contracting carrier; and for connected purposes.**

[19th July, 1962.]

**1. Supplementary Convention to have force of law.**—(1) The provisions of the Convention, supplementary to the Warsaw Convention, for the unification of certain rules relating to international carriage by air performed by a person other than the contracting carrier, as set out in the schedule to this Act, shall, so far as they relate to the rights and liabilities of carriers, carriers' servants and agents, passengers, consignors, consignees, and other persons, and subject to the provisions of this Act, have the force of law in the United Kingdom in relation to any carriage by air to which the Convention applies, irrespective of the nationality of the aircraft performing that carriage.

(2) If there is any inconsistency between the text in English in Part I of the Schedule to this Act and the text in French in Part II of that Schedule, the text in French shall prevail.

**2. Interpretation of Supplementary Convention.**—(1) In the Schedule to this Act, "the Warsaw Convention" means—

(a) before the day on which section one of the Carriage by Air Act, 1961, comes into force, the Convention set out in the First Schedule to the Carriage by Air Act, 1932, and

(b) on and after that day, the Convention set out in the First Schedule to the said Act of 1961,

but, in relation to rights or liabilities arising out of an occurrence before that day, "the Warsaw Convention" shall continue to have the same meaning as before that day.

(2) In Articles VII and VIII in the Schedule to this Act, "Court" includes (in an arbitration allowed by the Conventions referred to in the foregoing sub-section or by Article IX, Section 3 in the Schedule to this Act) an arbitrator.

(3) In the application to Scotland of the Schedule to this Act and of the foregoing provisions of this section, for references to an arbitrator and a plaintiff, there shall be substituted respectively references to an arbiter and a pursuer.

**3. Application of provisions of Acts of 1961 and 1932.**—(1) In paragraph (a) of sub-section (1) and in sub-sections (2) and (3) of section four of the said Act of 1961 (which explain the limitations on liability in Article 22 in the First Schedule to that Act and enable a Court to make appropriate orders and awards to give effect to those limitations) references to the said Article 22 shall include, subject to any necessary modifications, references to Article VI in the Schedule to this Act.

(2) In section five of the said Act of 1961 (which limits the time for bringing proceedings against a carrier's servant or agent and to obtain contribution from a carrier) references to a carrier include references to an actual carrier as defined in paragraph (c) of Article I in the Schedule to this Act as well as to a contracting carrier as defined in paragraph (b) of that Article.

(3) In section eight of the said Act of 1961 (which relates to actions against States brought in the United Kingdom in accordance with Article 28 in the First Schedule to that Act) and in section two of the said Act of 1932 (which contains corresponding provisions) the reference to Article 28 shall include a reference to Article VIII in the Schedule to this Act.

**4. Interim protection for carrier's servants and agents.**—Article V in the Schedule to this Act, and so much of Article VI in that Schedule as limits the aggregate amount which can be recovered from a carrier and his servants and agents, shall, in relation to rights or liabilities arising out of an occurrence before the day on which Article 25A in the First Schedule to the said Act of 1961 (to which those provisions are supplementary) comes into force, apply not only in relation to carriage performed by an actual carrier and to the persons mentioned in those provisions but also in relation to any other carriage governed by the Convention set out in the First Schedule to the said Act of 1932 and to any carrier under that convention and his servants and agents.

**5. Application to British possessions, etc., and to carriage by air not governed by Supplementary Convention.**—(1) Section nine of the said Act of 1961 (which enables Her Majesty to extend that Act to British possessions and other territories) shall (except so far as it relates to United Kingdom trust territories) apply to this Act as it applies to that Act, and an order under that section may relate to both that Act and this Act.

(2) Section ten of the said Act of 1961 (which enables Her Majesty to apply the First Schedule and other provisions of that Act to carriage by air which is not governed by the Convention set out in that Schedule) shall apply to the Schedule and other provisions of this Act as it applies to that Act, and an order under that section may relate to both that Act and this Act.

(3) Before the day on which section one of the said Act of 1961 comes into force, in sub-sections (1) and (2) of this section the references to sections nine and ten of the said Act of 1961 shall be read respectively, subject to any necessary modifications, as references to sections three and four of the said Act of 1932 (which contain corresponding provisions).

(4) This section shall come into force on the passing of this Act.

**6. Application to Crown.**—(1) This Act shall bind the Crown.

(2) This section shall not have effect before the day on which section one of the said Act of 1961 comes into force.

**7. Short title, commencement and saving.**—(1) This Act may be cited as the Carriage by Air (Supplementary Provisions) Act, 1962.

(2) Except as otherwise provided, this Act shall come into force on such day as Her Majesty may by Order in Council certify to be the day on which the Convention in the Schedule to this Act comes into force as regards the United Kingdom.

(3) This Act shall not apply so as to affect rights or liabilities arising out of an occurrence before the day mentioned in the last foregoing sub-section; and nothing in this section shall prevent any provision of this Act having effect before that day by virtue of an order under sub-section (2) of section five of this Act.

## SCHEDULE

### PART I

(The English Text)

### CONVENTION

Supplementary to the Warsaw Convention for the Unification of certain Rules relating to International Carriage by Air performed by a Person other than the contracting Carrier.

#### Article I

In this Convention—

(a) (This paragraph is not reproduced. It defines "Warsaw Convention".)

(b) "Contracting carrier" means a person who as a principal makes an agreement for carriage governed by the Warsaw Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor;

(c) "actual carrier" means a person, other than the contracting carrier, who by virtue of authority from the contracting carrier, performs whole or part of the carriage contemplated in paragraph (b) but who is not with respect to such part a successive carrier within the meaning of the Warsaw Convention. Such authority is presumed in the absence of proof to the contrary.

#### Article II

If an actual carrier performs the whole or part of carriage which, according to the agreement referred to in Art. I, paragraph (b), is governed by the Warsaw Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Convention, be subject to the rules of the Warsaw Convention, the former for the whole of the carriage contemplated in the agreement, the latter solely for the carriage which he performs.

#### Article III

1. The acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier.

2. The acts and omissions of the contracting carrier and of his servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the actual carrier. Nevertheless, no such act or omission shall subject the actual carrier to liability exceeding the limits specified in Article 22 of the Warsaw Convention. Any special agreement under which the contracting carrier assumes obligations not imposed by the Warsaw Convention or any waiver of rights conferred by that Convention or any special declaration of interest in delivery at destination contemplated in Article 22 of the said Convention, shall not affect the actual carrier unless agreed to by him.

**Article IV**

Any complaint to be made or order to be given under the Warsaw Convention to the carrier shall have the same effect, whether addressed to the contracting carrier or to the actual carrier. Nevertheless, orders referred to in Article 12 of the Warsaw Convention shall only be effective if addressed to the contracting carrier.

**Article V**

In relation to the carriage performed by the actual carrier, any servant or agent of that carrier or of the contracting carrier shall, if he proves that he acted within the scope of his employment, be entitled to avail himself of the limits of liability which are applicable under this Convention to the Carrier whose servant or agent he is unless it is proved that he acted in a manner which, under the Warsaw Convention, prevents the limits of liability from being invoked.

**Article VI**

In relation to the carriage performed by the actual carrier, the aggregate of the amounts recoverable from that carrier and the contracting carrier, and from their servants and agents acting within the scope of their employment, shall not exceed the highest amount which could be awarded against either the contracting carrier or the actual carrier under this Convention, but none of the persons mentioned shall be liable for a sum in excess of the limit applicable to him.

**Article VII**

In relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately. If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the Court seised of the case.

**Article VIII**

Any action for damages contemplated in Article VII of this Convention must be brought at the option of the plaintiff, either before a Court in which an action may be brought against the contracting carrier, as provided in Article 28 of the Warsaw Convention, or before the Court having jurisdiction at the place where the actual carrier is ordinarily resident or has his principal place of business.

**Article IX**

1. Any contractual provision tending to relieve the contracting carrier or the actual carrier of liability under this Convention or to fix a lower limit than that which is applicable according to this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole agreement, which shall remain subject to the provisions of this Convention.

2. In respect of the carriage performed by the actual carrier, the preceding paragraph shall not apply to contractual provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried.

3. Any clause contained in an agreement for carriage and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless, for the carriage of cargo arbitration clauses are allowed, subject to this Convention, if the arbitration is to take place in one of the jurisdictions referred to in Article VIII.

**Article X**

Except as provided in Article VII, nothing in this Convention shall affect the rights and obligations of the two carriers between themselves.

(Articles XI to XVIII and the concluding words of the Convention are not reproduced. They deal with the coming into force of the Convention and provide that in the case of inconsistency the text in French shall prevail.)

# [THE INDIAN] CARRIAGE OF GOODS BY SEA ACT, 1925
## (ACT XXVI OF 1925)

[The text of the Act printed here is as on 1-5-1969]

## CONTENTS


SECTIONS

1. Short title and extent.
2. Application of Rules.
3. Absolute warranty of seaworthiness not to be implied in contracts to which the Rules apply.
4. Statement as to application of Rules to be included in bills of lading.
5. Modification of Article VI of Rules in relation to goods carried in sailing ships and by prescribed routes.
6. Modifications of Rules 4 and 5 of Article III in relation to bulk cargoes.
7. Saving and operation.


## STATEMENT OF OBJECTS AND REASONS

"A bill of lading was originally a receipt for the goods placed on a ship and also a document for transferring the title of the goods to the consignee. With the development of trade, it became recognised as a negotiable instrument in which shippers, the carriers and the consignees or purchasers of the goods as well as bankers and under-writers became increasingly interested. Concurrently with this it became the custom to show on the bill of lading the terms of the contract on which the goods were delivered to and received by the ship, and from time to time new clauses were added usually in the direction of contracting the carrier out of liability for some kind of loss or damage to the goods. There thus arose great diversity between the conditions on which goods were carried by sea and considerable uncertainty about the liabilities which still attached to the carrier.

2. There has been a demand for many years among the different commercial interests which handle bills of lading for uniformity among all maritime countries in the definition of the liabilities and risks attaching to the carrier of goods by sea. Some countries, e. g. Canada, Australia, and the United States of America, enacted legislation prohibiting carriers of goods by sea from contracting themselves out of certain kinds of liability. The matter was discussed at several International Conferences between shipowners, shippers and bankers in an attempt to secure the universal adoption of an agreed set of rules.

3. A Code of rules was drawn up in 1921 by the International Law Association at the Hague. These were subjected to criticism by the various interests affected till finally agreement was reached at the International Conferences on Maritime Law held in Brussels in October, 1922, and again in October 1923. A Code of rules defining the responsibilities and liabilities to which a carrier of goods by sea should be subject and also the rights and immunities he was entitled to enjoy was drawn up, and it was unanimously recommended that every country should give legal sanction to these rules. The United Kingdom has done so by the Carriage of Goods by Sea Act (1924) (14 and 15 Geo. V, c. 22). It is proposed to do the same in India by this Bill.

4. This Bill follows closely the English Act. The agreed Code of Rules are reproduced in the Schedule. Clause 5 of the Bill exempts from these rules goods carried in the coasting trade under documents other than bills of lading whilst Clause 6 saves the carrier from claims for shortage of weight in certain cases of bulk shipments where, by the custom of the trade, the weight entered in the bill of lading is a weight ascertained or accepted by a third party other than the carrier of shipper and this fact is so stated in the bill of lading."

—Gazette of India, 1925, Part V, page 37.

## REPORT OF JOINT COMMITTEE

"The following report of the Joint Committee on the Bill to amend the law with respect to the carriage of goods by sea was presented to the Legislative Assembly on the 31st August 1925:—

"We the undersigned Members of the Joint Committee to which the Bill to amend the law with respect to the carriage of goods by sea was referred. have considered the Bill and the papers noted in the margin and have now the honour to submit this our Report, with the Bill as amended by us annexed thereto.

We have made one change in the Bill the substitution of new Cl. 5.

Original Cl. 5, following lines of the English Act, exempted the whole of the coasting trade from the requirement that in all cases a bill of lading should be issued subject to the conditions prescribed in the Rules, that is to say, such trade was excluded from the operation of the Rules.

It is clear from the opinions received that, contrary to the English practice, bills of lading are almost invariably issued by steamship companies engaged in the Indian coasting trade, and that it is the desire of the mercantile community that the provisions of the Bill

relating to bills of lading should apply to such trade.

It is not, however, the practice for sailing vessels engaged in the coasting trade or proceeding from Indian ports to issue bills of lading and these have been exempted accordingly.

The provision in Clause (b) is intended to cover the case of goods carried by the South Indian Railway ferry boat from Dhanushkodi to Talaimanar. Bills of lading are not issued for the short sea journey and cargo is carried subject to the provisions of the Railway Act."

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**MINUTE OF DISSENT**

[By Purshotamdas Thakurdas] "I think it is necessary to draw the attention of the Indian Legislature to the opinion of Mr. Justice J. R. Ellis Cunliffe of the Rangoon High Court. He says that the English statute corresponding to the Bill under report 'was the result of a so-called International Maritime Conference at Brussels, which has been subjeet to acute criticism on the part of high legal authorities at Home.' These authorities 'regarded the draft provisions of the Bill as being extremely difficult to interpret and likely to lead to much unnecessary litigation arising out of their obscurity'. The learned Judge further remarks:

"The construction of Article 6 under the Schedule will be extremely difficult to decide. How the Courts are to come to a satisfactory conclusion as to whether the stipulation mentioned in the first part of the Article is or is not contrary to public opinion, I do not know. And further, the ordinary trader is bound to be in very great doubt as to the difference between the receipt mentioned therein, which is ruled to be a non-negotiable instrument and to be so marked and, the ordinary bill of lading which is, by custom largely a formally printed document.

The only reason that I know of for recommending the Indian Legislature to adopt the Rules given in the Schedule to this Bill is to ensure uniformity in a matter which has been under discussion between experts of the various countries for a number of years. But in his long and protracted discussion, it must be noted that, Indian interests had no direct say or representation. Whilst I see no reason, so far, to oppose the Bill as amended by the "Select Committee," I deem it my duty to bring the opinion expressed by Justice Cunliffe to the notice of the Legislature by a separate Minute."

—Gazette of India, 1925, Part V, page 205.

**ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION**

—Adapted by A. L. O., 1950.
—Amended by Acts 44 of 1958 and 52 of 1964.
—Extended by Acts LIX of 1949; XXX of 1950; Regns. 12 of 1962; 7 of 1963; 8 of 1965.

**COGNATE ACTS AND PROVISIONS**

1. Indian Bills of Lading Act, 9 of 1856.
2. Merchant Shipping Act, 44 of 1958.
3. Coasting Vessels Act, 19 of 1838.

## [THE INDIAN] CARRIAGE OF GOODS BY SEA ACT, 1925 (ACT XXVI OF 1925)[a]

[21st September, 1925.]

**An Act to amend the Law with respect to the carriage of goods by sea.**

WHEREAS at the International Conference on Maritime Law held at Brussels in October, 1922, the delegates at the Conference, [b][° ° °] agreed unanimously to recommend their respective Governments to adopt as the basis of a convention a draft convention for the unification of certain rules relating to bills of lading;

AND WHEREAS at a meeting held at Brussels in October, 1923, the rules contained in the said draft convention were amended by the Committee appointed by the said Conference;

[b][AND WHEREAS it is expedient that the said rules as so amended and set out with modifications in the Schedule, subject to the provisions of this Act, have the force of law with a view to establishing the responsibilities, liabilities, rights and immunities attaching to carriers under bills of lading; It is hereby enacted as follows :—]

[a] This Indian Act follows, with slight modifications, the provisions contained in the English Carriage of Goods by Sea Act, 1924 (14 and 15, Geo. V, c. 22).

For Statement of Objects and Reasons, see Gaz. Ind., 1925, Pt. V, page 37; and for the Report of the Joint Committee, see ibid, page 205.

The Act has been extended to the new Provinces and Merged States by the Merged States (Laws) Act, 1949 (59 of 1949), S. 3 [1-1-1950] and to the Union Territories of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act, 1950 (30 of 1950), S. 3 [16-4-1950]. Vindhya Pradesh now forms part of State of Madhya Pradesh — See Act 37 of 1956, S. 9 (1) (e).

It has now been extended to the Union Territories of—

(1) Goa, Daman and Diu by Reg. 12 of 1962 [w. e. f. 1-2-1965].

(2) Pondicherry by Reg. 7 of 1963 [w. e. f. 1-10-1963].

(3) Laccadive, Minicoy and Amindivi Islands by Reg. 8 of 1965.

[b] Words 'including the delegates representing His Majesty' omitted and Para 3 substituted for original Paras 3 and 4 by the Repealing and Amending Act, 1964 (52 of 1964), S. 3 and Sch. II [29-12-64].

**1. Short title and extent.**—(1) This Act may be called THE INDIAN CARRIAGE OF GOODS BY SEA ACT, 1925.

(2) It extends to [a][the whole of India].

[a] Substituted by A.L.O., 1950.

**2. Application of Rules.**—Subject to the provisions of this Act, the rules set out in the Schedule (hereinafter referred to as "the Rules") shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in [a][India] to any other port whether in or outside [a][India].

[(1924) 14 and 15 Geo. V, c. 22—S. 1.]

[a] Substituted by A.L.O., 1950.

**3. Absolute warranty of seaworthiness not to be implied in contracts to which Rules apply.**—There shall not be implied in any contract for the carriage of goods by sea to which the Rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship.

[(1924) 14 and 15 Geo. V, c. 22—S. 2.]

**4. Statement as to application of Rules to be included in bills of lading.**—Every bill of lading, or similar document of title, issued in [a][India] which contains

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**Preamble — Note 1**

(1) Prior to the passing of the Act the common law of England was applicable to common cariers and not the provisions of the Contract Act. ('53) AIR 1953 Mad 3 (6): ILR (1953) Mad 396 (DB).

(2) The Carriage of Goods by Sea Act does not apply to cargo which by the contract of carriage is stated as being carried on deck and is so carried. The English Common Law applies and Ss. 151 and 152 of the Indian Contract Act cannot affect the liability of the common carrier. The liability of a common carrier for the loss, injury or delay in respect of the goods carried may be varied by contract.

A contract relieving the carrier of responsibility for short delivery is not opposed to public policy and Section 23 of the Indian Contract Act does not apply. The bill of lading relieves the ship-owner from any liability with regard to showing how the loss had occurred. AIR 1953 Mad 3 (7, 8): ILR (1953) Mad 396 (DB).

[See however AIR 1955 Mad 602 (603, 604).]

(3) The provisions of the Carriage of Goods by Sea Act can be validly incorporated and made a part of the contract contained in the bill of lading and when so incorporated parties would be governed by the provisions of the Act and the schedule. AIR 1952 Sau 104 (105) (DB) * ('55) 8 Sau LR 179 (182).

**Section 2 — Note 1**

(1) Unless the starting point or the port of loading is a port in British India, the Act is inapplicable. AIR 1955 Mad 519 (521): ILR (1956) Mad 85 (DB).

(2) Lighter carrying goods from port not to another port but to a ship lying at anchor in the sea does not come within the scope of this section. AIR 1939 Mad 401 (402).

**Section 4 — Note 1**

(1) Two conditions have to be satisfied before the exemption could be invoked by a carrier — (1) he must have issued a bill of lading and (2) this should contain a clause stating that it was subject to the provisions of the Act. AIR 1955 Mad 519 (521): ILR (1956) Mad 85 (DB). (It was held that satmi letters issued in this case in respect of each loading did not amount to a bill of lading and further that the reference to the rules in the form did not render the statute applicable to the carriage of goods.)

or is evidence of any contract to which the Rules apply, shall contain an express statement that it is to have effect subject to the provisions of the said Rules as applied by this Act.

[(1924) 14 and 15 Geo. V, c. 22—S. 3.]

[a] Substituted by A.L.O., 1950.

**5. Modification of Article VI of Rules in relation to goods carried in sailing ships and by prescribed routes.**—Article VI of the Rules shall, in relation to—

(a) the carriage of goods by sea in sailing ships carrying goods from any port in [a][India] to any other port whether in or outside [a][India], and

(b) the carriage of goods by sea in ships carrying goods from a port in [a][India] notified[b] in this behalf in the [c][Official Gazette] by the [c][Central Government] to a port in Ceylon specified in the said notification,

have effect as though the said Article referred to goods of any class instead of to particular goods and as though the proviso to the second paragraph of the said Article were omitted.

[(1924) 14 and 15 Geo. V, c. 22—S. 4.]

[a] Substituted by A.L.O., 1950.

[b] For such a notification, see Gazette of India, 1925, Pt. I, page 950.

[c] Substituted by A. L. O., 1937.

**6. Modification of Rules 4 and 5 of Article III in relation to bulk cargoes.**—Where under the custom of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in the Rules, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

[(1924) 14 and 15 Geo. V, c. 22—S. 5.]

**7. Saving and operation.**—(1) Nothing in this Act shall affect the operation of sections [a][331 and 352 of the Merchant Shipping Act, 1958 (44 of 1958),] or the

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**Section 4 — Note 1 (contd.)**

(2) A bill of lading which did not contain a statement as required by Section 4, viz., that it is to have the effect subject to the provisions of the said rules as applied by the Act is not invalid on that account and it is the document alone which can have the relationship between the parties as distinct from the exemptions and immunities granted by the statute. AIR 1957 Trav-Co 133 (134): ILR (1956) Trav-Co 348 (DB).

(3) When a Paramount Clause is incorporated into a contract, the purpose is to give the Hague Rules contractual force, so that although the bill of lading may contain very wide exceptions the rules are paramount and make the shipowners liable for want of due diligence to make the ship seaworthy and so forth. (1957) 1957-2 All ER 311 (316): 1957-2 WLR 509 and 968.

(4) Paramount Clause which is designed for a bill of lading cannot sensibly be applied to charterparty. (1957) 1957-2 All ER 311 (318): 1957-2 WLR 509 and 968.

(5) In order to make ship owner liable for deceit the first ingredient to be satisfied is that he knowingly issued a clean Bill of Lading when it should not have been given, with intent that on that basis payment would be made to the holder of the bill under the Letters of Credit. Where a ship owner is sued for damages on the basis of deceit on the ground that he had issued a clean Bill of Lading in collusion with the seller and thereby caused the payment to be made through Letters of Credit, in order to see whether all the ingredients of the definition of 'deceit' have been satisfied, it is necessary to know the exact scope of the term 'Letters of Credit', 'Bill of Lading' and 'clean Bill of Lading.' The said three expressions are evolved in the Law Merchant to facilitate international trade and clean as under: (The scope was explained). AIR 1966 SC 1892 (1899): 1966 (Supp) SCR 92.

(6) A Bill of Lading serves three purposes, viz. (1) it is a receipt for the goods shipped containing the terms on which they have been received; (2) It is evidence of the contract of goods for the carriage of the goods; (3) It is a document of title for the goods specified therein. The contract of the ship owners in the Bill of Lading is that they will deliver the goods at their destination 'in the like good order and condition' in which they were when shipped. AIR 1966 SC 1892 (1898): 1966 (Sup) SCR 92.

operation of any other enactment for the time being in force limiting the liability of the owners of sea-going vessels.

(2) The Rules shall not by virtue of this Act apply to any contract for the carriage of goods by sea before such day,[b] not being earlier than the first day of January, 1926, as the [c][Central Government] may, by notification in the [c][Official Gazette], appoint, nor to any bill of lading or similar document of title issued, whether before or after such day as aforesaid, in pursuance of any such contract as aforesaid.

[(1924) 14 and 15 Geo. V, c. 22—S. 6 (2), (3).]

[a] Substituted for the words describing sections of British Acts by the Repealing and Amending Act, 1964 (52 of 1964), S. 3 and Sch. II [28-12-1964].

[b] For Notification appointing such day as the 1st of January 1926, see Gazette of India, 1925, Pt. I, page 950.

[c] Substituted by A. L. O., 1937.

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## SCHEDULE

## RULES RELATING TO BILLS OF LADING[a]

### Article I

### Definitions.

In these Rules the following expressions have the meanings hereby assigned to them respectively, that is to say—

(a) "Carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper:

(b) "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such

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**Schedule — Note 1**

(1) Looking to the international character of the provisions, it is incumbent on Courts to pay more than usual attention to the normal grammatical sense of the words and to guard against being influenced by similar words used in other Indian Acts. AIR 1960 SC 1058 (1062): (1960) 3 SCR 820.

**Article I — Note 1**

(1) In all cases in which a bill of lading is given there is antecedent to the issuing of the bill of lading a contract expressed or implied between the parties for affreightment of goods. Whether this is a contract of carriage of goods by sea within the meaning of the definition will depend upon whether parties to it intended that a bill of lading should be given and that the defendants would have the right to demand such a bill. ('53) AIR 1953 Bom 396 (399, 400).

(2) The true construction of the words "covered by a bill of lading" is not that the contract actually is covered by such a bill. It is sufficient if the parties intend that the shipper should be entitled to claim at or after shipping a bill of lading. ('53) AIR 1953 Bom 396 (399).

(3) The words "from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same" qualify a contract covered by a bill of lading or any similar document issued under or pursuant to a charterparty and not a contract covered by a bill of lading or any similar document of title in so far as such document relates to the carriage of goods by sea. ('53) AIR 1953 Bom 396 (398).

(4) Before you can have a charterparty, you must have (a) the hiring of a ship or some principal part of a ship, and (b) the ship must be specified. If the identity of the ship can be established as having been agreed upon between the parties, it would not matter whether the name of the ship was given or not given in the charterparty. ('53) AIR 1953 Bom 396 (397, 398).

(5) Deck cargo at owner's risk — Such cargo not being "goods" within meaning of Article 1 (c), carriage of such goods is not governed by Carriage of Goods by Sea Act, but by English common law, i.e., by the terms of the contract embodied in the bill of lading. ('53) AIR 1953 Mad 3 (7): ILR (1953) Mad 396 (DB).

(6) A mere statement in the contract of carriage that the goods are on deck would not be sufficient to exclude such cargo from the definition of the term 'goods.' It would be necessary also to prove that the cargo in question was in fact carried on the deck of a ship. Whether the cargo was carried on the deck is a fact within the special knowledge of the steamship company and the burden would be on the company to lead evidence to prove that it was so carried. AIR 1960 Bom 416 (417, 418): 62 Bom LR 265.

document relates to the carriage of goods by sea including any bill of lading or any similar document as aforesaid issued under or pursuant to a charterparty from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same:

(c) "Goods" includes goods, wares, merchandises, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried:

(d) "Ship" means any vessel used for the carriage of goods by sea:

(e) "Carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

[(1924) 14 and 15 Geo. V, c. 22—Art. I.]

[a] For law relating to Bills of Lading, see the Indian Bills of Lading Act, 9 of 1856.

## Article II

## Risks.

Subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.

[(1924) 14 and 15 Geo. V, c. 22—Art. II.]

## Article III

## Responsibilities and Liabilities.[a]

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) make the ship seaworthy;

(b) properly man, equip, and supply the ship;

(c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

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### Article II — Note 1

(1) Two conditions have to be satisfied before the exemption could be invoked by the carrier: (1) he must have issued a bill of lading and (2) this should contain a clause stating that it was subject to the provisions of the Act. AIR 1955 Mad 519 (521): (1955) 2 Mad LJ 240 (DB).

### ARTICLE III — SYNOPSIS

1. General.
2. Rule 2.
3. Rule 3.
4. Rule 4.
5. Rule 6.
6. Rule 8.

**1. General.**— (1) It is only when a bill of lading is issued and this document contains an express provision that it is subject to the terms of the rules under the Act that the rights and obligations of the parties are governed by the stipulation set out in Articles 2 to 4 including the exemption in favour of the carrier. AIR 1955 Mad 519 (521): (1955) 2 Mad LJ 240 (DB).

(2) A bill of lading is a document of title, transferable by endorsement and its transfer has the same effect as delivery of the goods. Delivery of goods to consignee without production of bill of lading, does not discharge the carrier when the consignee is not true holder of the bill of lading. ILR (1956) 2 Cal 600 (604).

**2. Rule 2.**— (1) If more than 3,500 tobacco bags are stacked in one place going right upto the ceiling of the hold with a slight gap and if they kept stacked in 12 or 14 layers deep that should be held to be deep stowage. AIR 1959 Cal 479 (483) (DB).

**3. Rule 3.**— (1) In a suit for short delivery of goods, where the bill of lading expressly says 'weight, contents and value when shipped unknown', the burden is on the plaintiff to prove shortage. ('23) AIR 1923 Mad 523 (1) (523).

(2) Common carrier — Liability in contract — Damages to goods caused by breach of contract committed by seller — Delivery made in the containers specified in the Bill of Lading — Carriers not liable for damages suffered by the consignee. AIR 1966 SC 1892 (1896): (1966) Sup SCR 92.

(3) A clause in a bill of lading was as follows:

"At all ports in which by law or the custom of the port there shall exist a Port or Harbour Authority, delivery of the goods into the custody of such Port or

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

3. After receiving the goods into his charge, the carrier or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage:

(b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper:

(c) The apparent order and condition of the goods:

Provided that no carrier, master or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

4. Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c).

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

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**Article III — Note 3 (contd.)**

Harbour Authority shall be a good and effectual discharge and delivery of the goods and shall be treated as a removal of the goods into the custody of the person entitled to the delivery thereof."

Held, (i) that the clause does not refer to the condition of the goods but is concerned only with person or authority taking delivery of the goods. It is a clause to facilitate delivery and not to exonerate liability for damage to goods.

(ii) that the words, 'the goods' do not mean 'different goods' or 'damaged goods' or 'substituted goods' within the meaning of this clause. AIR 1959 Cal 479 (481) (DB).

(4) A clause in a bill of lading was as follows:

"If any consignee has a shortage in the marks and numbers called for by this bill of lading unclaimed goods of like kind and quality shall at the carrier's option be deemed to constitute a part of the goods and be accepted by the consignee as good delivery under this bill of lading."

Held, that the scope of the clause cannot be extended to cover where the goods themselves are a total loss or have suffered total damage. AIR 1959 Cal 479 (481) (DB).

(5) Bill of lading is generally prima facie evidence against the ship owner of shipment on board of the goods acknowledged in the Bill. If the ship owner is bound by the contents of the bill as his bailee the Port Trust would be equally bound, even though the Port Trust while making the tally has not verified the brands that were being unloaded. AIR 1968 Mad 42 (46) :(1967) 2 Mad LJ 594 (DB).

(6) Delivery of cargo — Port Trust cannot contend that delivery can only be according to tally sheets and not to bill of lading. AIR 1968 Mad 42 (45): (1967) 2 Mad LJ 594 (DB).

(7) A clean bill of lading is one that does not contain any reservation as to the apparent good order or condition of either the goods themselves or their packing. A defect in packing noted in a bill of lading would render it an unclean bill. AIR 1961 Mad 442 (447): (1961) 2 Mad LJ 97 (DB).

(8) A clause in a bill of lading was, "The company will not be accountable for gold, silver . . . . planted wares or other valuables, or beyond the amount of Rs. 500/- for any package . . . . . ", Held, words "beyond the amount of Rs. 500/- for any package" stand out separately and must be construed irrespective of the occurrence if the words "gold silver . . . . . ". (1957) 100 Cal LJ 45 (52).

**4. Rule 4.—** (1) The bill of lading is sufficient evidence to establish the fact

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage, the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

7. After the goods are loaded the bill of lading to be issued by the carrier, master or agent of the carrier, to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that, if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier, such

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**Article III — Note 4 (contd.)**

that the goods were actually put on board and were received by the master of the ship. AIR 1955 Mad 602 (603).

(2) A bill of lading is evidence and sometimes conclusive evidence of the contract of affreightment, but is not the contract of affreightment itself. AIR 1919 Mad 931 (935).

(3) A stipulation in the bill of lading that if no claim for compensation is made within thirty days from the date of arrival of the ship the shipping company will not be liable for compensation is void as it offends against Paragraph 8 of Article 3. For it seeks at least to 'lessen', otherwise than provided in the rules in the Schedule the liability of the ship or carrier for loss or damage to goods or in connection with goods caused by the failure to deliver. AIR 1960 SC 1058: (1960) 3 SCR 820 * AIR 1968 Mad 42 * AIR 1953 Sau 32 (37) (FB).

(4) Once a clean Bill of lading is issued the ship owners are estopped from denying that the goods and package were not in good order. The estoppel applies only when the bad condition is discernible on a reasonable examination on the container having regard to the contents. AIR 1966 SC 1892 (1898): 1966 (Sup) SCR 92.

(5) Liability of contract — Damages to goods caused by breach of contract committed by seller — Delivery made in the containers specified in the Bill of Lading — Carriers not liable for damages suffered by the consignee. AIR 1966 SC 1892 (1896): 1966 (Sup) SCR 92.

(6) When the consignment is correctly landed from the ship, the Port Trust cannot contend that the delivery can only be in accordance with tally sheets and not according to Bill of Lading. AIR 1968 Mad 42 (45): (1967) 2 Mad LJ 594 (DB).

(7) Article 3, Rule (4) no doubt says that there is prima facie evidence, of shipment by the production of the Bill of Lading. Yet where there in specific disclaimer as to the number, or quantity in a Bill of Lading, it is not conclusive against a ship owner, it does not offer any prima facie evidence and it has no probative value. (1966) 70 Cal WN 307 (317).

**5. Rule 6.—** (1) The word 'loss' in the third clause of the 6th rule of Article 3 in the Schedule to the Act means and includes any loss caused to a shipper or a consignee by reason of the inability of the ship or the carrier to deliver part or whole of the goods, to whatever reason such failure may be due. AIR 1960 SC 1058 (1065): (1960) 3 SCR 820 * AIR 1953 Sau 32 (34) (FB).

(2) The provisions of Rule 6 of Article III do not apply proprio vigore to all contracts of carriage by sea but only in case where a bill of lading has been issued incorporating the provisions of the Act. AIR 1957 Trav-Co 133 (134): ILR (1956) Trav-Co 348 (DB).

(3) 'Removal' means physical removal. ('37) AIR 1937 Sind 11 (13): 30 Sind LR 345.

(4) The interpretation which is placed on Column 3 of Article 31, Limitation Act would equally govern the interpretation of Paragraph 6, Article III, Schedule I of the Act. It is a question of fact in each case as to when the goods should have been delivered and as to the date from which the period of limitation should be computed. Where the Courts below took the date when the carriers repudiated their liability to pay the value of the short delivery, as the date when the goods should have been delivered and not the date when the goods were unloaded at the port, the High Court refused to interfere with the division. ('57) ILR (1957) Andh Pra 295 (298).

document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this Article be deemed to constitute a "shipped" bill of lading.

8. Any clause, covenant or agreement in a contract of carriage[a] relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.

A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability.

[(1924) 14 and 15 Geo. V, c. 22—Art. III.]

[a] See Ss. 334 and 335 of the Merchant Shipping Act, 1958 (44 of 1958).

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**Article III — Note 5 (contd.)**

(5) Paragraph 6 does not only purport to limit the time within which the holder of a bill of lading may enforce his rights against the carrier, but it goes much further. It extinguishes the right itself. AIR 1931 Sind 124 (126): 25 Sind LR 222.

(6) The period of one year under Cl. 6 of Article 3 begins from the date of the delivery to the Port Commissioner and it would be irrespective of the question whether he was the consignee's agent or not. ('52) AIR 1952 Sau 104 (106) (DB).

(7) A shipping company against whom the claim for non-delivery is made may elect to waive a clause in the contract of carriage according to which the suit should be brought within one year. AIR 1957 Trav-Co 133 (135): ILR (1956) Trav-Co 348 (DB).

(8) Rule 6 is to be construed strictly — Ship leaving port on a particular date must be deemed to have delivered cargo to consignee — Consignee cannot take advantage of survey unduly delayed to extend period of limitation. AIR 1937 Sind 11 (13): 30 Sind LR 345.

(9) Condition in a bill of lading that carrier or ship will not be liable unless claim for damages for short delivery is brought within one year after delivery of goods — Suit for damages brought after one year of delivery — Held, condition extinguished consignor's right to claim damages. AIR 1932 Bom 330 (332) • AIR 1940 Rang 294 (295, 296): 1940 Rang LR 552. (By virtue of Article II the carrier is liable under the contract and not by way of tort in addition to it.)

(10) A suit against Shipping Company for recovery of amount paid to its landing agents is a suit for damages on account of unlawful detention of goods and is governed by Article III, Rule 6 (3) and not by Article 62, Limitation Act. AIR 1965 Ker 51 (55): 1964 Ker LJ 378.

(11) Effect of omission to serve notice is that removal of goods is prima facie evidence of delivery, but this prima facie evidence can be rebutted by proving that goods were not delivered. AIR 1964 Cal 362 (366).

(12) "Date" when the goods should have been delivered means the date when the ship left the port of delivery. AIR 1960 SC (1066, 1067): (1960) 3 SCR 820.

(13) Onus of proving that the claim is barred is on defendant. If however the defendant conceals material evidence, the plaintiff's claim is not extinguished. AIR 1964 Cal 362 (366).

(14) Plaintiff to prove that loss occurred due to negligence or want of skill by the defendant (carrier) . . . . Duty of carrier to show how consignment was dealt with in transit . . . . If carrier fails to do so plaintiff can request Court to draw presumption under Section 114 (g). AIR 1964 Cal 362 (364).

(15) Carriage of goods by sea — Partial loss —Claim of consignee satisfied by Insurance Company — Rights of insurers as subrogee — Suit for damages against carriers by consignee — Held not maintainable. AIR 1964 Cal 362 (365).

(16) All that Clause (1) of Rule 6 provides is that unless notice is given as required thereby, removal of the goods shall be prima facie evidence of delivery by the carrier of the goods. The only consequence therefore, of omission to serve the notice is that the removal of the goods amounts to prima facie evidence of delivery and nothing more. But this prima facie evidence can be rebutted if it is proved that goods have not been delivered at all. AIR 1964 Cal 362 (366, 367).

(17) Clause (3) of Rule 6 of Article 3 In the Schedule to the Act provides for the extinction of the right to compensation and not merely a rule of limitation.

The ordinary grammatical sense of 'discharged from liability' does not connote 'free from the remedy as regards liability' but are more apt to mean a total extinction of the liability following upon an extinction of the right. Once the liability is extinguished under this clause, there is no scope of any acknowledgment of liability thereafter. AIR 1960 SC 1058 (1065): (1960) 3 SCR 820.

## Article IV

### Rights and Immunities.

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and

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**Article III — Note 5 (contd.)**

(18) Contractual condition stipulating period for filing suit for damages — Suit not filed within the period, Court being in recess — Suit filed immediately when Court reopened — Principles underlying Section 4 of Limitation Act (1908) and Section 10 of General Clauses Act (1897), applied — Suit held within time. AIR 1964 Ker 190 (191, 192): 1963 Ker LJ 1233 (DB).

(19) Limitation Act (1908), Article 62 — Suit against carrier for recovery of money paid to its landing agents and sub-agents — It is suit for damage — Suit is governed by Article III, Rule 6, Clause 3 and not by Article 62 of Limitation Act. AIR 1965 Ker 51 (55): 1964 Ker LJ 378.

(20) In view of the fact that a bill of lading is a document of title to goods which would pass by negotiation, the representations or misrepresentations therein should be held to have been made to every individual who comes by it as a holder thereof. There is thus a breach of duty on the part of the shipowner in not disclosing the correct facts which would affect the negotiability of the bill of lading. Person suffering loss due to such misrepresentation is entitled to damages. AIR 1961 Mad 442 (450): (1961) 2 Mad LJ 97 (DB).

**6. Rule 8.**— (1) If the conditions contained in a Bill of Lading contravene the provisions of R. 8 of Art. 3 read with R. 2 of Art. 4 of the Schedule to the Carriage of Goods by Sea Act, the liability of the carrier has to be determined on the basis that those conditions have not been imposed or agreed upon between the parties. ('51) ILR (1951) 1 Cal 650 (653).

(2) The words "otherwise than" imply entire exclusion and any lessening of the liability by whatever method except as provided by Rule 8 shall be null and void. AIR 1953 Sau 32 (35) (FB).

(3) A condition in a bill of lading which limits the duration of the carrier's liability to 14 days unless notice is given is hit by Art. III, Rule 8, provided other conditions exist which attract the operation of that rule and therefore, being otherwise than as provided in the rules is null and void and of no effect. AIR 1953 Sau 32 (37) (FB).

(4) Where a carrier fails to deliver goods, the measure of damages is the value of the goods at the place of destination. The clause in the bill of lading which restricts the damage to the invoice value of the goods is repugnant to Rule 8 of Article III of the Sea Carriage Act and is null and void. ('50) ILR (1950) 1 Cal 313 (323).

(5) Where in a suit for the cost of shortage in a consignment, the shippers claimed exempption from liability on the basis of a typed endorsement specifically stipulated in the printed form of the bill of lading to the effect that the shippers were not responsible for the breakages and shortages: Held, that the carrier was not entitled to exoneration. The endorsement did not stand on a different footing than the printed clause in the bill of lading. Article 3, Rule 8, hit the endorsement as effectively as it hit any printed clause. The responsibility of the carrier to deliver the goods 'in the like good order and condition' was always there. So in view of Article 3, Rule 8, the carrier was liable to indemnify the consignee. The liability extended to that of proportionate gallonage and freight also. AIR 1957 Trav-Co 297 (298, 299): ILR (1956) Trav-Co 477.

(6) If the loss or damages arises from the neglect, fault or failure in the duties and obligations as provided in the statutory Articles or rules then a clause in the bill of lading exempting the carrier from liability for such loss and damage would be null and void and of no effect. AIR 1959 Cal 479 (482) (DB).

(7) Plea in written statement that claim for loss by plaintiff should have been made within one month of arrival of steamship as provided in bill of lading — Answer by plaintiff that such condition was void under Article 2, Rule 8 — Held, defendant should have countered plaintiff's plea by saying that that rule would not apply because the goods were not goods as fell within the definition of the term 'goods' in Clause (c) of Article 1. AIR 1960 Bom 416 (417, 418): 62 Bom LR 265.

(8) Clause in Bill of Lading providing for cesser of liability of carrier as soon as goods are free from ship's tackle — Clause cannot relieve carrier or his agents from prime obligation of delivering goods to consignee unless there was custom to the contrary in port. AIR 1965 Ker 51 (52, 53): 1964 Ker LJ 378.

### SCHEDULE — ARTICLE IV.

### SYNOPSIS

1. General.
2. Rule 1.
3. Rule 2.
4. Rule 5.

safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

**2.** Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;
(b) fire, unless caused by the actual fault or privity of the carrier;
(c) perils, dangers and accidents of the sea or other navigable waters;
(d) act of God;
(e) act of war;
(f) act of public enemies;
(g) arrest or restraint of princes, rulers of people, or seizure under legal process;
(h) quarantine restriction;
(i) act or omission of the shipper or owner of the goods, his agent, or representative;
(j) strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general;
(k) riots and civil commotions:
(l) saving or attempting to save life or property at sea;
(m) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;
(n) insufficiency of packing;
(o) insufficiency or inadequacy of marks;
(p) latent defects not discoverable by due diligence;

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**Article IV (contd.)**

**1. General.**— (1) The expression "any other cause" appearing in Rule 2 (q) of Article 4 cannot be interpreted as being ejusdem generis to sub-rules (a) to (p). These words should be given a wider interpretation and to evade his responsibility the carrier can prove that neither he nor his servants were at fault. ('51) ILR (1951) 1 Cal 650 (652, 653).

(2) Where a lighter carries goods from the port but does not carry goods to any other port the fact that goods transported are placed in another ship, which itself carries them to another port, would not bring the lighter within the purview of S. 2 of the Act. Morever, even if this lighter is a 'ship' to which the Act applies, then Art. 4, Para 2, clause (q) would make the owners of the lighter liable for the loss of goods which is due to the fault of the agent of the carriers. ('39) AIR 1939 Mad 401 (402).

(3) Clause 12 of the bill of lading insisting, on a special declaration and special conditions in respect of goods exceeding Rs. 500 per package is repugnant to Rule 5 and is null and void. Rule 5 cannot be varied in favour of the carrier in the manner it is sought to be done by cl. (12) of the bill of lading. ('50) ILR (1950) 1 Cal 313 (320).

(4) Clauses in Bills of lading, relieving the companies from liability are usually construed "contra profrentem". The relieving effect of such clauses will extend only to the tenor and the purport of words actually used. Where a clause provided against loss, non-delivery of goods cannot amount to loss. No distinction can be drawn between partial or insufficient delivery and total non-delivery. AIR 1963 Cal 510 (512).

(5) Where a Bill of lading contains an express provision that it is subject to the rules under the Act, the right and obligation of parties are governed by Articles II to IV. AIR 1955 Mad 519 (521): (1955) 2 Mad LJ 240: ILR (1955) Mad 85 (DB).

**2. Rule 1.**—(1) If the damage to or loss of goods was caused by the negligence of the carriers in stowing and stacking the goods during voyage while the goods were in their charge or custody, then they are liable. AIR 1959 Cal 479 (481) (DB).

(2) Where a whole consignment of tobacco is reduced to a 'charged mass' by spontaneous combustion, caused by the presence of water and moisture in the tobacco, if the effective and proximate

(q) any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

**3.** The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

**4.** Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

**5.** Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100l per package or unit or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be prima facie evidence, but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods if the nature or value thereof has been knowingly mis-stated by the shipper in the bill of lading.

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**Article IV — Note 2 (contd.)**

cause of this damage be the grossly careless and negligent stowing by the carrier, then the carrier is liable for the loss. If the effective and proximate cause for the spontaneous combustion is the wetness of the tobacco then the shipper and not the carrier will have to bear the loss.

Mere presence of water will not prove the inherent vice in the tobacco or its latent defect so as to exonerate the carrier if it is found that the actual burning was due to bad and negligent stowing of the cargo. AIR 1959 Cal 479 (482) (DB).

(3) Where it was found that cowls were not unshipped nor canvass taken off them it amounts to serious act of carelessness and negligence in stowing cargo. AIR 1959 Cal 479 (DB).

(4) When one is not sure as to how much loss was due to improper stowage and how much to the inherent vice or infirmity of the affected goods, the "sporting rule" of halving the damage is a known practice. AIR 1959 Cal 479 (486) (DB).

(5) As the ultimate liability to pay the excise duty is on the owner of the goods in respect of which damages are claimed, the amount of excise duty which has not been actually paid as yet could not be deducted from the market value of the goods. AIR 1959 Cal 479 (488) (DB).

**3. Rule 2.**—(1) The correct view on the law of onus relating to carriage of goods by sea is that if the shipper proves that the goods have not been delivered or damaged after shipment during the voyage and while the goods were in charge and custody of the carrier, the onus shifts on to the carrier to bring the cause of damage within the exception provided in Article 4, Rule 2 thereof. If the shipper then wants to defeat the carrier's defence of excepted risks under Article 4 by showing and proving negligence, then the onus shifts on to the shipper to prove such negligence. AIR 1959 Cal 479 (486, 487) (DB).

**4. Rule 5.** — (1) Where, in a case of short delivery of goods, in the absence of a declaration of the value of goods by the shipper in the bill of lading, it is necessary to compute the equivalent of £100 in currency other than that of the United Kingdom, Article 9 of the Schedule under the Act requires the amount of the foreign currency which would be equal in value to 100 gold sovereigns to be computed. What Article 9 imports is certainly not an obligation to deliver gold or pay in gold; what it does is to import a special standard or measure of value. Article 4, Rule 5 and Article 9 of the Schedule read together mean that the maximum prescribed is the value in rupees of 100 gold sovereigns as a vendible commodity or their gold content. 1960 Ker LT 997: 1960 Ker LJ 939 (DB).

6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented, with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

[(1924) 14 and 15 Geo. V, c. 22—Art. IV.]

## Article V

### Surrender of Rights and Immunities, and Increase of Reponsibilities and Liabilities.

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under the Rules contained in any of these Articles, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of these Rules shall not be applicable to charterparties, but if bills of lading are issued in the case of a ship under a charterparty, they shall comply with the terms of these Rules. Nothing in these Rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

[(1924) 14 & 15 Geo. V, c. 22—Art. V.]

## Article VI

### Special Conditions.

Notwithstanding the provisions of the preceding Articles, a carrier, master or agent of the carrier, and a shipper shall, in regard to any particular goods, be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness so far as the stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect:

Provided that this Article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and

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### Article VI — Note 1

(1) Article 6 enables two contracting parties to contract out of the rules in respect of the carriage of any class of goods provided two conditions are fulfilled: (1) that no bill of lading has been or shall be issued, and (2) that the terms agreed upon between the parties shall be embodied in a receipt which shall be a non-negotiable instrument and shall be marked as such. ('53) AIR 1953 Bom 396 (400).

(2) Article VI does not apply in case of Deck Cargo at owner's risk. Carriage of such cargo is not governed by Contract Act. Such cargo not being 'Goods' within meaning of Article 1 (c) carriage of such goods is not governed by Carriage of Goods by Sea Act, 1925, but by English Common Law i.e., by the terms of the contract embodied in the bill of lading. Liability of the Common Carrier in such case is not affected by Sections 151 and 152, Contract Act. ('53) AIR 1953 Mad 3 (7): ILR (1953) Mad 396 (DB).

conditions under which the carriage is to be performed, as such are reasonably to justify a special agreement.

[(1924) 14 & 15 Geo. V, c. 22—Art. VI.]

**Article VII**

**Limitations on the Application of the Rules.**

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

[(1924) 14 & 15 Geo. V, c. 22—Art. VII.]

**Article VIII**

**Limitation of liability.**

The provisions of these Rules shall not affect the right and obligation of the carrier under any Statute for the time being in force relating to the limitation of the liability of owners of sea-going vessels.

[(1924) 14 & 15 Geo. V, c. 22—Art. VIII.]

**Article IX**

The monetary units mentioned in these Rules are to be taken to be gold value.

[(1924) 14 & 15 Geo. V, c. 22—Art. IX.]

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# [THE] CARRIERS ACT, 1865

## (ACT III OF 1865)

[The text of the Act printed here is as on 1-5-1969]

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**Article VII — Note 1**

(1) Article VII applies only to cases where there is a question of liability for loss or damage to goods occurring prior to loading on and subsequent to the discharge from the ship. ('53) AIR 1953 Sau 32 (34) (FB).

(2) In a bill of lading there was a condition to the effect that "in all cases and under all circumstances the liability of the ship-owner shall absolutely cease when the goods are free from the ship's tackle. The goods were delivered to a landing agent who disposed of them without the production of a bill of lading or a delivery order. It was held that the condition in the bill afforded complete protection to the shipowner. ('09) 4 Ind Cas 475 (477) (PC).

(3) The provisions of the Act can be validly incorporated and made a part of the contract contained in the bill of lading. In such a case the rights of the parties would be governed by the provisions of the Act and the Schedule. ('52) AIR 1952 Sau 104 (105) (DB).

**Article IX — Note 1**

(1) Where it is necessary to compute the equivalent of £100 (U. K.) in other currency, the amount of foreign currency which would be equal in value to one hundred gold sovereigns has to be computed. There is no obligation in Article 9 to deliver gold or to pay in gold. 1960 Ker LT 997: 1960 Ker LJ 939 (DB).

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SCHEDULE

## STATEMENT OF OBJECTS AND REASONS

"The defective state of the Law of India in respect of the liabilities of carriers, whether companies or individuals has for some time past attracted the attention of the Governor-General in Council, but it was thought desirable to postpone any enactment on the subject, until it should be seen whether the labours of Her Majesty's Commissioners for preparing a Body of Substantive Law would relieve the Indian Legislature from the necessity of special legislation.

Meantime, however, the question has become pressing, from the increase in the numbers of carrying companies, from the transfer of part of the Government carrying business to one of them, and from the prospect of Tramways being constructed under Act XXII of 1863 (to provide for taking land for works of public utility to be constructed by private persons or companies, and for regulating the construction and use of works on land so taken). The necessity for prompt legislation has further been urged on the Government in petitions, and by the Government of Madras in an official letter.

The Bill now published by the Viceroy's permission follows the principles, though not the form or language, of the English Statutes regulating the liability of carriers.

The earlier sections extend to India the principle embodied in the English Statute II Geo. IV and I Will. IV. Chapter 68. They relieve carriers from the extraordinary liabilities which would be imposed on them by the delivery to them, without notice, of articles of peculiar value or perishableness. Any customer, delivering to the carrier any of the articles enumerated in the Schedule, must declare them, and then the carriers may charge at a higher rate for the additional risk, in conformity with a scale to be publicly exhibited in his place of business. Under the ordinary law of contract, the carrier might relieve himself from the liability by such a notice but it would be necessary to bring the notice home to the customer by evidence. From the necessity of giving such evidence, the carrier will now be relieved by this enactment.

By Section VI it is provided that the carrier shall not rid himself of his liability for articles, neither unusually valuable nor unusually perishable, by any public notice but (unless he be the owner of a Tramway) he is permitted to modify his legal obligations by special contract.

Section VII extends to Tramways constructed under Act XXII of 1863, the same rule which is applied to Railways by Act XVIII of 1854. It seems highly expedient that the same law should, if possible, be made to govern both Railways and Tramways.

The rule applicable to Indian Railway Companies is contained in Section XI of Act XVIII of 1854, and is as follows:—

"The liability of such a Railway Company for loss or injury to any articles or goods to be carried by them other than those specially provided for by this Act, shall not be deemed or construed to be limited, or in anywise affected by any public notice given, or any private contract made by them, but such a Railway Company shall be answerable for such loss or injury when it shall have been caused by gross negligence or misconduct on the part of their agents or servants."

On this Section the Government of Madras observes: The first clause prohibiting any private contract in limitation of liability goes far beyond the Common Law of England and Statutes 17 and 18 Vic., Cap. 31, S. VII. which admits of such contracts if just and reasonable. It is difficult to see why a Railway company in India should be deprived of that power of protecting itself by special contract which a Railway Company in England possesses If the latter clause of the section, which make a company liable for gross negligence or misconduct of their agents, is meant to relieve them from liability in all other cases, it would be well to say so by distinct negative words. But it is very questionable whether so wide an exemption from responsibility is desirable or was intended.'

If, however, the word "only" be supplied after "answerable" in the last line but three of the extract from the Railways Act as printed above, the Section becomes intelligible. It limits the liability of Railway Companies to the consequences of gross negligence or misconduct on the part of their agents or servants but declares that from this liability so limited they shall not be allowed to relieve themselves by any kind of contract. There cannot indeed be much doubt that the intention of the Legis-

lature was to place all Railway Company in what was once supposed to be the exact position of a carrier who had contracted for himself as favourably as the law of England would permit:

It was, in fact, long supposed in England that, while a carrier could by contract relieve himself from most of his liabilities, his power of doing so stopped short of liability for negligence or misconduct. Such is the view of the law taken by Mr. Justice Story in his "Commentaries on the law of Bailments," Section 549, and such is understood to be still the law in America. But a series of decisions in the English Courts overturned the older doctrine, and it was settled that a carrier could by a properly framed contract, deliver himself from liability even for misconduct or negligence. The liberty thus conceded was, however, found to be a practical evil, and the English Legislature intervened by 17 and 18 Vic., Cap 31.

The nearly contemporaneous enactment of the Indian Legislature, embodied in Sec. XI of Act XVIII of 1854, is obviously aimed at the same object.

It seems very undersirable to adopt the rule contained in Section VII of 17 and 18 Vic. Cap. 31, which permits companies to contract themselves on certain conditions, out of their liability for negligence. The Section, in question has been severely condemned by the present Lord Chancellor of England on the ground both of obscurity of expression and of difficulty of application:— (Peek v. The North Staffordshire Railway Company, 32 LJ NSQB 241). On the other hand, the rule of the Indian Legislature is comparatively simple: it would probably be sustained by the general sense of the mercantile community and it is especially applicable to a country in which there exists considerable difference of opinion as to the general liabilities of carriers."

—Gazette of India, Extraordinary, dated 1-8-1864, page 2.

## ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Amended by Act X of 1899.

—Adopted by A.O., 1937.

—Extended by Acts LIX of 1949; XXX of 1950; XXVI of 1968; Bombay Act IV of 1950; Reg. 6 of 1963.

—Repealed in part by Acts IX of 1890, X of 1914.

—Repealed in part and amended by Act XIII of 1921.

## COGNATE ACTS AND PROVISIONS

1. Carriage by Air Act, XX of 1934.
2. Carriage of Goods by Sea Act, XVI of 1925.
3. Contract Act, IX of 1872, Ss. 151, 152, 161.
4. Railways Act, IX of 1890, Ss. 72 to 82.
5. Sale of Goods Act, III of 1930, Ss. 50, 51.
6. Merchant Shipping Act, XLIV of 1968.

# [THE] CARRIERS ACT, 1865

## (ACT III OF 1865)[a]

[14th February, 1865.]

**An Act relating to the rights and liabilities of Common Carriers.**

**Preamble.**—Whereas it is expedient not only to enable common carriers to limit their liability for loss of or damage to property delivered to them to be carried but also to declare their liability for loss of, or damage to, such property occasioned by the negligence or criminal acts of themselves, their servants or agents; It is enacted as follows :—

[a] For Proceedings relating to the Bill, see Gazette of India, 1864 Supplement, p. 497, and ibid, 1865, pp. 51, 64 and 65.

The Act has been declared to be in force in the whole of India, except the Scheduled Districts, by the Laws Local Extent Act, 1874 (15 of 1874), Sec. 3.

It has been extended to Berar by the Berar Laws Act, 1941 (4 of 1941) and has been applied to the Santhal Parganas, by the Santhal Parganas Settlement

Regulation, 1872 (3 of 1872), S. 31. Berar now forms part of the State of Maharashtra and Santhal Parganas are in the State of Bihar.

It has been declared, by notification under S. 3 (a) of the Scheduled Districts Act, 1874 (14 of 1874), to be in force in the following Scheduled Districts, namely:—

West Jalpaiguri, the Western Hills of Darjiling, Darjiling Tarai and the Damson Sub-dn. of the Darjiling District, see ibid, 1881, Pt. I, p. 74 (now in the State of West Bengal of Bihar State); The Districts of Hazaribagh Lohardaga (now the Ranchi District), see Cal. Gaz., 1899, Pt. I, p. 44 (now in the State of Bihar) and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singbhum, see ibid, 1881, Pt. I, p. 504 (now in the State of Bihar); The Porahat Estate in the District of Singbhum, see ibid, 1897, Pt. I, p. 1059 (now in the State of Bihar); Kumaon and Garhwal, see ibid, 1876, Pt. I, p. 605; The schedule portion of the Mirzapur District, see ibid, 1878, Pt. I, p. 383; Jaunsar Bawar, see ibid, 1878, Pt. I, p. 382 (now in the State of U.P.); The Scheduled Districts of the C.P., see ibid, 1879, Pt. I, p. 771; The Scheduled Districts in Ganjam (now in the State of Orissa) and Vizagapatam (now in the State of Andhra Pradesh), see ibid, 1898, Pt. I, p. 870; Assam (except the North Lushai Hills (now known as Mizo District) ), see Act 18 of 1954, S. 2, see ibid 1897, Pt. I, p. 299.

It has been declared, by notification under S. 3 (b) of the last-mentioned Act, not to be in force in the Scheduled District of Lahaul. This district along with Spiti District has now been transferred to the Union Territory of Himachal Pradesh—See the Punjab Reorganisation Act, 1966 (31 of 1966), S. 5 [1-11-1966]—See Gazette of India, 1886, Pt. I, p. 301.

It has been extended by notification under S. 5 of the same Act to the following Scheduled Districts, namely, the Tarai of the Province of Agra—See Gazette of India, 1876, Pt. I, p. 505; now in the State of Uttar Pradesh; Ajmer and Merwara—See ibid, 1877, Pt. I, p. 605. Ajmer forms part of Rajasthan now—See Act 37 of 1956, S. 10.

It has been extended to the new Provinces and Merged States by the Merged States (Laws) Act, 1949 (59 of 1949), S. 3 [1-1-1950] and to the Union Territories of Manipur and Tripura by the Union Territories (Laws) Act, 1950 (30 of 1950), S. 3 (16-4-1950). Vindhya Pradesh now forms part of the State of Madhya Pradesh — See Act 37 of 1956, S. 9 (1) (e). The Act has been extended to the Union Territories of Pondicherry and Dadra and Nagar Haveli by Act 26 of 1968, S. 3 (1) and Schedule [1-8-1968] and Reg. 6 of 1963 (with effect from 1-7-1965), respectively.

It has been extended to the States merged in the State of Bombay—See Bom. Act 4 of 1950. Bombay has been divided into the States of Maharashtra and Gujarat, by the Bombay Reorganisation Act, 1961 (XI of 1961).

It has been repealed as to carriers by rail by the Indian Railways Act, 1879 (4 of 1879).

For the Railways Act now in force, see the Indian Railways Act, 1890 (9 of 1890).

**1. Short title.**—This Act may be cited as THE CARRIERS ACT, 1865.

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**Preamble — Note 1**

(1) The duties and liabilities of a common carrier are governed in India by the principles of the common law in England on that subject except where they have been departed from in the case of particular class of common carriers, e.g., by the Carriers Act or the Railways Act. A common carrier's responsibility is not within the Contract Act. AIR 1915 Mad 833 (834): 38 Mad 941 * AIR 1951 Trav-Co 1 (4, 6): 1950 Trav-Co LR 339 (DB) * AIR 1919 Upp Bur 17 (18): 3 Upp Bur Rul 120 * ('11) 38 Cal 28 (41, 42).

**2. Interpretation clause.**—In this Act, unless there be something repugnant in the subject or context,—

"**Common carrier.**"

"common carrier" denotes a person, other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately;

"**Person.**"

[a]"person" includes any association or body of persons, whether incorporated or not.

[b][* * * *].

[a] Cf. definition in the General Clauses Act, 1897 (10 of 1897), S. 3 (39).

[b] The para relating to "number" was repealed by the Repealing and Amending Act, 1914 (10 of 1914).

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**Pre — Note 1 (contd.)**

(2) This Act is not applicable in the case of railways except to a very limited extent. AIR 1931 Cal 585 (586).

(3) Enactments like the Carriers Act and the Railways Act are not affected by the Contract Act. (1878-79) 3 Bom 109 (113).

(4) The Carriers' Act was the first statutory enactment in India by which common carriers are enabled to limit their liability for loss or for damage to property delivered to them to be carried. ('53) AIR 1953 Mad 3 (5): ILR (1953) Mad 396 (DB).

(5) By virtue of the provisions of Kota State Laws Act and of Section 21 of Kota State Civil Courts Act, the principles underlying Carriers Act, 1865, which was in force in former British India could be resorted to in dealing with the liability of common carriers in the ex-Kota State on grounds of justice, equity and good conscience. AIR 1965 Raj 200 (202, 203): 1965 Raj LW 247 (DB).

**Section 2 — Note 1**

(1) Carriers by sea are not "common carriers" within the meaning of Section 2 of this Act and hence this Act will not apply to them. ('15) AIR 1915 Mad 833 (833, 834): 38 Mad 941 * ('53) AIR 1953 Mad 3 (5): ILR (1953) Mad 396 (DB) * ('28) AIR 1928 Bom 5 (6): 52 Bom 37 * ('16) AIR 1916 Bom 265 (267): 40 Bom 529 * ('05) 28 Mad 400 (403).

(2) The Carriers Act cannot apply to the case of carriage of goods by air, for the term 'common carrier' as defined in Section 2 of that Act does not include a carrier by air. So the liability of a carrier by air cannot be found on the basis of Section 8 of that Act. AIR 1959 Mad 285 (287): (1959) 2 Mad LJ 373.

(3) Though carriers by sea are not contemplated by this Act they are nevertheless common carriers for other purposes, e.g., for the purpose of Limitation Act. ('81) 3 Mad 107 (110).

(4) The definition of a "common carrier" in Section 2 is framed without reference to the extent of his liability. Thus, a common carrier does not cease to be so if he enters into special contract lawfully limiting his liability. ('15) AIR 1915 Nag 6 (7): 11 Nag LR 174.

(5) "For all persons indiscriminately" means simply that carriers are not at liberty to refuse business. ('24) AIR 1924 PC 40 (42): 51 Ind App 28: 51 Cal 304.

(6) The main attribute of a common carrier is that to transport for hire property for all persons indiscriminately. The question whether a carrier is a private or a common carrier depends upon the nature of the public profession made by the carrier with regard to the carriage of goods undertaken by it elsewhere. It follows therefore, that the mere fact that a common carrier is engaged in the transport of goods from places on its transport system to places outside it would not be sufficient to justify the conclusion that whatever carriage it may undertake elsewhere is also in his capacity as a common carrier. AIR 1966 All 260 (262): ILR (1965) 2 All 150 (DB).

(7) What is required in the case of a person who answers the definition of common carrier under the Carriers Act is that, he must be ready to carry for hire as a business and not as a casual occupation. It is essential that he should hold himself out as being ready to carry goods for any person or to carry any passengers, no matter who they may be. AIR 1964 Andh Pra 71 (73, 74): (1963) 2 Andh WR 190.

(8) Where under the terms of the licence, a licensee is under the obligation to carry goods of all persons, except when due to special reasons he may refuse, he is a common carrier. ('33) AIR 1933 Cal 735 (737, 738): 60 Cal 879.

(9) A licensee of a ferry is a "common carrier". ('19) AIR 1919 Upp Bur 17 (18): 3 Upp Bur Rul 120.

(10) Where a canal company which transported goods under a contract with a railway company was sued for damages for loss of goods, it was held that canal company was a common carrier and liable as such. ('31) AIR 1931 Mad 115 (117).

(11) Where in order to facilitate the transport of cargo by its steamers, a navigation company adopts different auxiliary transport systems for the carriage of goods from the producer's estates to its regular steamer ghats, the question whether the company does or does not

**3. Carriers not to be liable for loss of certain goods above one hundred rupees in value unless delivered as such.**—No common carrier shall be liable for the loss of or damage to property delivered to him to be carried exceeding in value one hundred rupees and of the description contained in the schedule to this Act, unless the person delivering such property to be carried, or some person duly authorized in that behalf, shall have expressly declared to such carrier or his agent the value and description thereof.[a]

[a] The earlier sections extend to India the principle embodied in the Carriers Act, 1830 (II Geo. IV, and 1 Will IV, c. 68)—See Statement of Objects and Reasons.

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**Section 2 — Note 1 (contd.)**

operate these different systems as common carriers, would be entirely a question of fact depending upon the evidence in each case. ('55) AIR 1955 Assam 65 (70): ILR (1954) 6 Assam 433 (DB).

(12) The definition of "common carrier" in the Act would bring the Government after having assumed charge of the Railway administration within the meaning of the word "common carrier" but for the fact that the Government has been specially excluded under the definition. But the Government would not be excluded from the ambit of the word carrier merely because it is not a person but a sovereign body or a body politic when it does the business of carriage of goods as the owner of the railway. ('55) 1955-1 Mad L Jour 406 (408).

(13) Navigation company a common carrier on main stream, carrying goods from place on tributory to main station on main route is a common carrier in respect of the feeder service. AIR 1962 SC 1276 (1279, 1280): (1962) 2 SCR 802.

(14) In determining whether a person is a common carrier or not the provisions of Motor Vehicles Act are also relevant. The provisions of Sections 2 (23), 54 and 55 show that it is a matter of public employment that a licence is granted and not for doing the transport work for only a particular individual or individuals casually. AIR 1963 Bom 208 (210, 211): 65 Bom LR 152 (DB).

(15) The Indian Airlines Corporation is a common carrier as opposed to a private carrier, but it is not a "common carrier" within the meaning of the Carriers Act. AIR 1961 Cal 383 (384, 385, 386). (There is no statute for internal air carriage in India.)

**Section 3 — Note 1**

(1) When a package containing both scheduled and non-scheduled articles is lost, the value of the non-scheduled articles may be recovered although the value of the scheduled articles cannot be recovered. ('32) AIR 1932 Cal 344 (346): 59 Cal 472.

(2) Liability for loss or damage of property is not defeated by the fact that the goods delivered as luggage are in fact merchandise. ('14) AIR 1914 Cal 150 (151): 41 Cal 80.

(3) Misdescription of property lost in transit does not exonerate the carrier from his liability for the loss. The liability is limited to the value declared and not the value of the actual contents of the package consigned. ('79) 3 Bom 120 (129, 130).

(4) Section 3 is applicable to the goods described in the schedule attached to the Act. 'Leno' means a kind of cotton gauge for caps, veils, curtains, etc. It cannot by any stretch of imagination be brought within the ambit of the clause which is 'clothes, and issues embroidered with the precious metals or of which such metals form part'. (1968) 1 Andh LT 317 (320): (1969) 1 Andh WR 115.

(5) The liability of a common carrier is that of an insurer. It, therefore, follows that notwithstanding the fact that there is no negligence on the part of the common carrier he is liable to compensate the owner of goods for the loss of the goods that occurred during the transit thereof by the lorry belonging to the carrier. AIR 1962 Mad 44 (46): 74 Mad LW 495 (DB) * AIR 1959 Mad 285 (286): (1959) 2 Mad LJ 373 * AIR 1964 Mad 516 (518): (1964) 2 Mad LJ 181. (Under general law a common carrier is liable practically as an insurer of the goods. That liability can be regulated by a contract between the parties. It is invariably the practice for common carrier to enter into a contract, defining and limiting their liability and in the normal course of things one would expect any consignor of goods to look into conditions in consignment notes. It is not the rule that in every case the carrier should prove that he drew the attention of the consignor to the clause in the consignment note regarding limitation of his liability.)

(6) It is the elementary duty of a common carrier to enquire, whenever a person presents the consignee's note, whether he is the proper person or his authorised agent. They cannot absolve themselves of their obligation to deliver the goods consigned to the proper person by merely entering into a contract with the consignor that they will not be liable for misdelivery or wrong delivery. In India a common carrier is subject to two distinct classes of liability, one for loss as an insurer and the other for loss under his obligation to carry safely. A person who suffered loss by a common carrier's breach of his common law obligations can maintain a suit independent of contract. AIR 1964 Mad 516 (517, 518): (1964) 2 Mad LJ 181.

**4. For carrying such property payment may be required at rates fixed by carrier.**—Every such carrier may require payment for the risk undertaken in carrying property exceeding in value one hundred rupees and of the description aforesaid at such rate of charge as he may fix:

**Proviso.**

Provided that, to entitle such carrier to payment at a rate higher than his ordinary rate of charge, he shall have caused to be exhibited in the place where he carries on the business of receiving property to be carried, notice of the higher rate of charge required, printed or written in English and in the vernacular language of the country wherein he carries on such business.

**5. The person entitled to recover in respect of property lost or damaged may also recover money paid for its carriage.**—In case of the loss or damage to property exceeding in value one hundred rupees and of the description aforesaid, delivered to such carrier to be carried, when the value and description thereof shall have been declared and payment shall have been required in manner provided for by this Act, the person entitled to recover in respect of such loss or damage shall also be entitled to recover any money actually paid to such carrier in consideration of such risk as aforesaid.

**6. In respect of what property liability of carrier not limited or affected by public notice.**—The liability of any common carrier for the loss or damage to any property delivered to him to be carried, not being of the description contained in the schedule to this Act, shall not be deemed to be limited or affected by any public notice;

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**Section 4 — Note 1**

(1) Where a person makes a declaration about the nature of the articles consigned but the carrier does not demand higher payment, the carrier is liable for the loss of articles although the higher payment is not made. ('92) 19 Cal 538 (540, 541).

**Section 5 — Note 1**

(1) It is only the owner of goods and not his agent, who is entitled to benefit under Section 8. AIR 1964 Andh Pra 71 (73): (1963) 2 Andh WR 190. (Goods entrusted to common carrier re-entrusted to another carrier — Suit for recovery of damages for loss of goods — Suit not by owner, but by one carrier against other — Suit, held not maintainable.)

**Section 6 — Note 1**

(1) The rights and liabilities of a common carrier are outside the Contract Act and are governed by the principles of the English Common Law as modified by the Carriers Act. In India, a common carrier is, therefore, subject to two distinct classes of liability, the one for loss for which he is liable as an insurer, the other for loss for which he is liable under his obligation to carry safely. The effect of Sections 6, 8 and 9 is that the liability of a common carrier for the loss of goods not being the description contained in the schedule may be limited by special contract signed by the owner save when such loss shall have arisen from the negligence or criminal act of the carrier or any of his agents or servants. ('11) 38 Cal 28 (41, 42) * ('55) AIR 1955 Assam 65 (72): ILR (1954) 6 Assam 433 (DB). *AIR 1966 All 260 (264): ILR (1965) 2 All 150 (DB). (Provision of S. 8 override those of Section 6.) * AIR 1962 Mad 44 (46): 74 Mad LW 495 (DB). (Negligence of common carrier need not be proved.) * AIR 1967 Assam 74 (78): ILR (1964) 16 Assam 395 (DB).

(2) A common carrier is insurer of goods which he contracts to carry and he is liable for all loss of, or injury to those goods while they are in the course of transit unless such loss or injury is caused by the act of God or by the State enemies or is the consequence of inherent vice in the thing carried or is attributable to consignor's own fault. Exception to the general liability of a carrier or a bailee in general have to be construed strictly. The carrier cannot escape its liability by merely contending that he entered into a contract with the consignor and that he is absolved from all liability for misdelivery or wrong delivery. The term 'misdelivery' should, if used in exception clause, be held to cover no more than "accidental misdelivery by mistake or error" and not deliberate misdelivery. It is the elementary duty of a carrier to enquire whenever a person presents the consignee's note whether he is the proper person or its authorised agent. AIR 1964 Mad 516 (517, 518).

(3) Sections 6 and 9 recognize the common law doctrine, save in so far as the liability is limited by some special contract, as provided by Section 6. Therefore, even if it were found that the carriers

**Carriers, with certain exceptions may limit liability by special contract.**

but any such carrier, not being the owner of a railroad or tramroad constructed under the provisions of [a]Act XXII of 1863 (to provide for taking land for works of public utility to be constructed by private persons or companies, and for regulating the construction and use of works on land so taken) may, by special contract, signed by the owner of such property so delivered as last aforesaid or by some person duly authorized in that behalf by such owner, limit his liability in respect of the same.

[a] See now the Land Acquisition Act, 1894 (1 of 1894), Sec. 2.

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**Section 6 — Note 1 (contd.)**

took as much care of the goods as a man of ordinary prudence would, under similar circumstances, they would be liable if the loss was not occasioned by any act of God or the King's enemies, which, in case of republican State, would mean the enemies of the State. AIR 1955 Assam 65 (72): ILR (1954) 6 Assam 433 (DB) * AIR 1965 Raj 200 (203): 1965 Raj LW 247 * AIR 1963 Bom 208 (209, 212): 65 Bom LR 152.

(4) Before a common carrier can take advantage of a special contract, whereby he is exonerated from liability in case of damages due to navigational perils, he must establish that his steamer has to face the peril of navigation in the course of its voyage; and he and his agents have taken all reasonable care and exercised all necessary diligence in avoiding the peril but in spite of it all the steamer sustained damage with the consequential damage to the goods of the consignor. If these facts are not proved Section 6 of the Act will be attracted and the carrier will be held liable for the damages. AIR 1967 Assam 79 (82): ILR (1964) 16 Assam 10.

(5) A special contract being in derogation of the common law, has to be strictly construed. ('55) AIR 1955 Assam 65 (71): ILR (1954) 6 Assam 433 (DB).

(6) The position of common carriers is different from that of railway companies who are only bailees coming under Sections 151, 152 and 161 of the Contract Act. The liability of common carriers is that of an insurer subject to certain exceptions under Section 6 of this Act. ('13) 40 Cal 716 (718, 719).

(7) The liability of the 'carriers' is not that of a mere bailee, as defined by Sections 151 and 152, Contract Act. The extent of his liability is very often described as the liability of an insurer against all risks; but it is not a question of any contract to insurer; if, therefore, the boat, ship or steamer sank on account of its having struck upon some snag and the cargo was lost, that may be a mere 'peril of navigation' but not an act of God and the steamer companies would still be liable even if, under the circumstances, they were found to have acted with reasonable care and prudence. AIR 1955 Assam 65 (72): ILR (1954) 6 Assam 433 (DB).

(8) A carrier of passengers in law is neither an insurer nor precluded from making a special contract with his passengers which may either enlarge, diminish or exclude his general duty to exercise care. Hence, a specific contract between a passenger and a carrier of passengers by air exempting the carrier wholly from liability for the neglect or default of his servants, is valid and enforceable. AIR 1947 PC 151 (152, 154).

(9) Certain goods were lost in transit by the defendants who were common carriers. It was found that the loss had not been occasioned by act of God or the Queen's enemies. The defendants had taken as much care of them as a man of ordinary prudence would take of similar goods belonging to himself. It was held that Sections 151 and 152, Contract Act, did not apply, and defendants were liable for loss, in the absence of a special contract such as is provided for in Section 6 of Carriers Act. (1884) 10 Cal 166 (182) (FB).

(10) What is required to limit the liability of "carrier" is that the nature of the contract entered into must either have limitation of liability under the Act made expressly and in writing or the facts must be such, that the contractor was engaging in a different type of business from that of common carriers. AIR 1924 PC 40 (42): 51 Ind App 28: 51 Cal 304.

(11) In the case of continuous carriers, (1) when goods have to be carried with the aid of different transport agencies in order to arrive at the destination, the carrier with whom the contract is made at one end is, in the absence of any contract limiting his liability to his own transport system, liable for the loss or destruction of the goods on portions beyond his own system or in consequence of acts or default of persons other than his own servants; (2) in the absence of a contract to the contrary, the consignor cannot hold the company with whom he does not contract liable for damages when all that can be complained of is non-feasance, though such company may be liable in tort for breach of duty arising from the mere fact that he has undertaken the liability of carrying goods or property belonging to another; (3) when there is an agreement between two companies the effect of which

[a]**7. Liability of owner of railroad or tramroad constructed under Act XXII of 1863, not limited by special contract. In what case owner of railroad or tramroad answerable for loss or damage.**—The liability of the owner of any railroad or tramroad constructed under the provisions of the said [b]Act XXII of 1863, for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the Schedule to this Act, shall not be deemed to be limited or affected by any special contract; but the owner of such railroad or tramroad shall be liable for the loss of or damage to property delivered to him to be carried only when such loss or damage shall have been caused by negligence or a criminal act on his part or on that of his agents or servants.

[a] Section 7 (so far as it relates to railways) has been repealed by the Indian Railways Act, 1890 (9 of 1890), S. 72.

[b] See now the Land Acquisition Act, 1894 (1 of 1894), S. 2.

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**Section 6 — Note 1 (contd.)**

is to constitute one company the agent of the other and the traffic is carried for the joint benefit of both the companies, either company may be sued at the option of the consignor. AIR 1918 Mad 341 (343).

(12) Goods were delivered to M Railway Company. The destination was a station on the G Railway lines. M and G Companies had an agreement between themselves for conveyance of goods handed over by one another for carriage on their own lines. The goods were lost after they were handed over to G company. It was held that a suit by the consignor against G company was maintainable. (1880-81) 5 Bom 371 (378).

(13) The plaintiffs consigned goods through a steam navigation company knowing that it would be carried by another railway company in latter part of the journey. The goods were lost after being delivered to the railway company. It was held that the agreement was in substance with both companies and that the railway company was absolved from liability under Section 75 of the Railways Act. (1907) 11 Cal WN 1076 (1077).

(14) A consignor entered into a contract with a railway company for carrying certain goods to a port and thence to England. Oning to a breach on the railway line the goods had to be conveyed in steamers by a steamship company with whom the Railway Company had entered into an agreement. It was held that a suit by the consignor against the steamship company for loss of goods during transit by the latter company was maintainable. AIR 1920 Cal 758 (762): 47 Cal 6.

(15) Where goods are booked to be carried over the lines of serveral carriers the proper person who is liable is one to whom the goods are delivered by the consignor. The contract is an indivisible contract and not so many contracts with different persons. The question with whom the contract is made is a question of fact. AIR 1927 Cal 394 (398): 54 Cal 430.

(16) Consignment booked at station of I. G. Navigation and Railway Co., to be despatched at station on B. A. Railway—Consignment delivered by former company to latter but not reaching consignee — Suit for loss — B. A. Railway not made party — Suit not maintainable. AIR 1949 Assam 25 (27, 29) (DB).

(17) Where in order to facilitate the transport of cargo by its steamers, the navigation company adopts different auxiliary transport systems for the carriage of goods from the Tea estates to its regular steamer ghats, the company may take delivery either at the garden ghat or at the steamer ghat. Once it has taken delivery at a garden ghat no question of fresh delivery arises because the delivery of the self-same goods to the carriers can only be made once. The liability of the company as common carriers would be there if the goods happened to be lost after such delivery, but before reaching destination. AIR 1955 Assam 65 (70): ILR (1954) 6 Assam 433 (DB).

(18) Consignment of goods not perishable by nature — No special contract as to time for delivery — Goods deteriorating due to delay caused by abnormal time taken for transit — Plaintiff consignee entitled to damages — He need not prove negligence on part of carrier. AIR 1962 Assam 110 (114): ILR (1962) 14 Assam 107 (DB).

(19) Special contract — Person contracting not authorised by owner of goods — No exoneration from liability. AIR 1965 Raj 200 (205): 1965 Raj LW 247 (DB).

(20) Under general law a common carrier is liable practically as an insurer of the goods. That liability can be regulated by a contract entered into between the parties. It is invariably the practice for common carriers to enter into a contract defining and limiting their liability. That practice is so universal that in the normal course of things one would expect any consignor of goods to look into canditions which are found in consignment notes. To say that in every case the carrier should prove that he drew the attention of the consignor to the clause in the consignment note regarding limitation of its liability is extending the rule beyond its limits. AIR 1959 Mad 285 (286).

**8. Common carrier liable for loss or damage caused by neglect or fraud of himself or his agent.**—Notwithstanding anything hereinbefore contained, every common carrier shall be liable to the owner for loss of or damage to any property delivered to such carrier to be carried where such loss or damage shall have arisen from the [a][° °] criminal act of the carrier or any of his agents or servants [b][and shall also be liable to the owner for loss or damage to any such property other than property to which the provisions of Section 3 apply and in respect of which the declaration required by that section has not been made, where such loss or damage has arisen from the negligence of the carrier or any of his agents or servants.]

[a] The words "negligence or" were repealed by the Carriers (Amendment) Act, 1921 (13 of 1921), S. 2.

[b] Inserted by S. 2, ibid.

**Section 8 — Note 1**

(1) Sections 8 and 9 are declared by Section 72 of the Railways Act not to affect the responsibility of the Railway Company as defined in the latter section. ('94) 17 Mad 445 (446).

(2) The Indian Carriers Act, while restricting the power of a common carrier of exempting himself from his common law liability, by Section 8 affirms or creates a liability and gives the benefit of that liability to the owner only. The plaintiff who himself is a common carrier who undertakes to carry the goods of a person, and who engages the defendant common carrier to carry them, not himself being the owner is not entitled to maintain a suit under Section 8 against the defendant. ('58) AIR 1958 Cal 730 (732) (DB). (Whether the plaintiff has employed the defendant carrier on his own account is a question of fact. The ordinary inference is that the contract of carriage is between the carrier and the owner in whose favour the common law duty exists. In a proper case such is the inference even when the owner is not the consignor.) * AIR 1959 Madh Pra 351 (352): 1958 Jab LJ 45. (Carrier must exonerate himself from liability for the loss.)

[See also AIR 1964 Andh Pra 71 (73): (1963) 2 Andh WR 190. (It is only the owner of the goods, who is entitled to the benefit of Section 8. An agent of the owner to whom goods are entrusted for carriage, who entrusts them to a common carrier to carry, cannot mtintain a suit for recovering damages for loss of such goods against the common carrier employed by him.) * AIR 1967 Assam 74 (76): ILR (1964) 16 Assam 395 (DB). (By mere production of an unendorsed steamer receipt from one's custody on the basis of which he obtains an assessment delivery he cannot be said to have acquired title either to the receipt or to the goods and he has no right to bring a suit on the basis of the said invoice. Such a person can however establish his ownership in the goods by proving that he or his agent had purchased them.)]

(3) A common carrier is responsible for safety of goods except when loss is caused by act of God or King's enemies. AIR 1916 Cal 647 (648).

(4) So far as the Presidency Towns are concerned common carriers by air, who carry on their business within the territory of India, are not governed by the provisions of the Indian Contract Act of 1872 or of the Carriers Act, 1865, or the Indian Carriage by Air Act, 1934, but they are to be governed by the rules of English Common law. Since the common law relating to inland carriage by air has not been modified by any statute in India, it follows that the absolute freedom of the carrier to contract out of his liability even in cases of negligence remains. Even in a territory outside the Presidency towns, the above rule of English Common law is consonant with the principles of 'justice, equity and good conscience' and as such applies in that territory. AIR 1964 Cal 396 (398) (DB).

(5) Where the point of decision arises under the Indian Law, reference to the English Law of Carriers is not very necessary. AIR 1963 Ker 198 (199, 200): 1962 Ker LJ 1284.

(6) The carrier cannot be made liable for any loss or damage which occurred before the goods were actually delivered to him for carriage. (1947) 51 Cal WN 551 (554).

(7) A common carrier does not cease to be a common carrier simply because he agreed to a special stipulation, to carry goods safely. Special stipulations do not absolve the carrier from his liabilities under the Act. AIR 1933 Cal 735 (737, 738): 60 Cal 879.

(8) A common carrier is liable to the owner for loss or damage to any property delivered to such carrier to be carried, whether such loss or damage has arisen from the negligence of the carrier or any of his agents or servants. The term "at the owner's risk" used in the goods receipt only means that the owner would be liable for any loss or damage to the goods, which are lying with the company if such loss or damage was not caused by any negligence on the part of the carrier. AIR 1964 Punj 318 (319): 1963 Cur LJ 256.

**Section 8 — Note 1 (contd.)**

(9) The combined effect of Sections 6 and 8 is that in respect of the property not mentioned in the schedule common carriers may limit their liability by special contract but not so as to get rid of their liability for negligence. (1891) 18 Cal 620 (628, 629): 18 Ind App 12 (PC) * (1890) 17 Cal 39 (43, 44).

(10-11) Provisions of Section 8 override those of Section 6. In other words, whatever other kinds of liabilities the carrier may be able to limit by special contract with the owner of the property, he cannot limit his liability for the criminal act or negligence of himself or any of the agents and servants. AIR 1967 Assam 74 (78): ILR (1964) 16 Assam 395 (DB) * AIR 1966 All 260 (264): ILR (1965) 2 All 150 (DB) * AIR 1963 Ker 198 (199, 200): 1962 Ker LJ 1284.

(12) Agreement limiting liability of carrier does not relieve carriers of liability arising from the negligence of their servants. (1911) 38 Cal 28 (42).

(13) Where a special contract absolves the carrier from liability in the case of loss or damage by accident as well as resulting from negligence, the clause absolving from liability due to negligence is bad; but this does not make the contract wholly void. The carriers are nevertheless absolved from their liability in case of accident. (1890) 17 Cal 39 (44).

(14) A common carrier cannot escape the liability for loss or damage of the property delivered to him to be carried merely by showing that he had not received it directly from the consignor but only from another carrier. (1947) 51 Cal WN 551 (553).

(15) Where one transporting agency undertakes to transport goods which are to be transported by several agencies consecutively, the other agencies are agents of the contracting agency which is responsible for the loss of goods during the whole transport. An agreement that the contracting agency will not be liable after it has delivered goods to another agency is void as offending against Section 8. AIR 1932 Cal 344 (346): 59 Cal 472.

(16) There was nothing in Section 8 which would make the clause in a forwarding note accompanying the consignment, that the common carrier will be liable on their transport system and beyond that they will act as agent of other administration, void. The common carrier cannot, therefore, be held responsible for non-delivery of part of the consignment at the destination on another administration, their responsibility being only as of agents. AIR 1955 Assam 229 (231) (DB) * AIR 1956 Assam 122 (123) (DB) * AIR 1949 Assam 25 (27, 29) (DB).

(17) Agent contracting on behalf of known principal can restrict his personal liability for acts of principal or his servants and agents — Stipulation by Steam Company with respect to consignment of goods, to act as principal so far as their own system was concerned but so far as transport over the Railway system was concerned, as agents for known principals — Further stipulation that they would not be liable for loss to goods while in transit over Railway system due to acts of the principal or the agents or servants of the principal, as they would be for loss on their own system — Stipulation contained in Clause 11 of forwarding note — Stipulation held valid and did not offend against Section 8. AIR 1953 Cal 547 (548): ILR (1952) 1 Cal 347 (DB).

(18) In a suit for damages caused to the plaintiff's goods entrusted for carriage by the ship, ordinarily, if an agent is guilty of wrongful conversion and the carrier fails to deliver the goods to the consignee, he is liable for the market price of the entire goods. But where the damage was caused due to accident, the liability of the defendants arises only because he failed to have instructions from the plaintiff as regards the disposal of the damaged goods. The loss thus suffered by the plaintiff is the market value of the damaged goods on the date when the goods were taken out of the vessel after the accident. AIR 1958 Assam 115 (119) (DB).

(19) Consignment of goods not perishable by nature — No special contract as to time for delivery — Goods deteriorating due to delay caused by abnormal time taken for transit — Plaintiff-consignee entitled to damages. AIR 1962 Assam 110 (114): ILR (1962) 14 Assam 107 (DB).

(20) Goods arriving in a deteriorated condition — Consignee not taking delivery — Carriers selling the goods and appropriating the amount towards demurrages — Consignee cannot recover as damages the entire value of the goods — He can recover only the balance after deducting the amount realised by sale and adjusted towards demurrages. AIR 1962 Assam 110 (115): ILR (1962) 14 Assam 107 (DB).

(21) Navigation perils — Special contract to limit liability of carrier — Carrier must still prove his dililgence in avoiding peril before claiming the benefit of special contract. AIR 1967 Assam 79 (82): ILR (1964) 16 Assam 10.

(22) Bill of Lading providing in respect of liability for loss of goods by carrier — Loss held did not include non-delivery. AIR 1963 Cal 510 (512).

(23) The Carriers Act does not apply to the case of carriage of goods by air, for the term "common carrier" as defined in

**9. Plaintiffs, in suits for loss, damage, or non-delivery, not required to prove negligence or criminal act.**—In any suit brought against a common carrier for the loss, damage or non-delivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants, or agents.

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**Section 8 — Note 1 (contd.)**

Section 2 does not include a carrier by air. So the liability of a carrier by air cannot be found on the basis of Section 8 of the Act. AIR 1959 Mad 285 (287): (1959) 2 Mad LJ 373.

(24) Passenger travelling by bus paying extra charges for carriage of his baggage containing betelnuts — Loss of luggage — Owner of the bus is liable for the loss in the absence of contract to contrary. AIR 1964 Mad 476 (476, 477): 77 Mad LW 247.

(25) Liability under, in respect of loss of goods — Privity of contract between the owner of goods and carrier not necessary. AIR 1965 Raj 200 (204): 1965 Raj LW 247 (DB).

**Section 9 — Note 1**

(1) Section 9 relieves the plaintiff from burden of showing that the loss or damage or non-delivery was owing to any negligence or criminal act. AIR 1955 Assam 65 (72): ILR (1954) 6 Assam 433 (DB) * AIR 1965 Raj 200 (205): 1965 Raj LW 247 (DB) * AIR 1959 Madh Pra 351 (352): 1958 Jab LJ 45 * AIR 1967 Assam and Nagaland 74 (78): ILR (1964) 16 Assam 395 (DB) * AIR 1963 Bom 208 (212): 65 Bom LR 152 (DB).

(2) Sections 6 and 9 recognise the common law doctrine save in so far as the liability is limited by some special contract as provided by Section 6. Therefore, even if it were found that the defendants took as much care of the goods as a man of ordinary prudence, would, under similar circumstances, the defendant would be liable if the loss was not occasioned by any act of God or enemies of the State. AIR 1955 Assam 65 (72): ILR (1954) 6 Assam 433 (DB) * AIR 1963 Bom 208 (212): 65 Bom LR 152 (DB) * AIR 1962 Assam 110 (114): ILR (1962) 14 Assam 107 (DB). (Consignment of goods not perishable by nature — No special contract as to time for delivery — Goods deteriorating due to delay caused by abnormal time taken to transit — Plaintiff-consignee entitled for damages — He need not prove negligence on part of carrier.) * AIR 1967 Assam 79 (83): ILR (1964) 16 Assam 10. (Navigational perils — Special contract to limit liability of carrier — Carrier must still prove his diligence in avoiding peril before claiming the benefit of special contract.) * AIR 1967 Assam and Nagaland 74 (78): ILR (1964) 16 Assam 395 (DB).

(3) Negligence is presumed by the loss of goods. AIR 1931 Mad 115 (117).

(4) Loss from unknown cause is presumptive proof of negligence. AIR 1928 Cal 371 (376).

(5) Occurrence of fire without any explanation as to origin of it is evidence of negligence. ('99) 26 Cal 398 (403): 26 Ind App 1 * AIR 1962 Mad 44 (46): 74 Mad LW 495 (DB). (An accidental fire though it might not have resulted from any act or omission of the common carrier cannot be said to be an act of God.)

(6) Onus of proving negligence of the carrier is not upon the person who seeks to make the carrier liable. ('14) AIR 1914 Cal 150 (152): 41 Cal 80 * AIR 1963 Ker 198 (199): 1962 Ker LJ 1284.

(7) Loss or damage to the goods sent is prima facie evidence of negligence. The burden of proving absence of negligence is on the carrier. ('16) AIR 1916 Cal 647 (648) * ('21) AIR 1921 Cal 315 (317): 47 Cal 1027 * ('99) 26 Cal 398 (401, 402, 403): 26 Ind App 1 (PC) * ('57) AIR 1957 Pat 328 (331): 36 Pat 495 (DB) * (47) 51 Cal WN 551 (556) * ('97) 24 Cal 786 (818) * ('31) AIR 1931 Mad 115 (117, 118) * AIR 1966 All 260 (265): ILR (1965) 2 All 150 (DB). (Presumption under Section 9 — Defendants failing to lead evidence to rebut presumption — Suit held must be decreed in full.)

(8) But where parties have placed all evidence on which they rely before the Court, it is for the Court to say upon that evidence whether or not the loss was caused by negligence of the carriers or their servants. Where, in an action brought against common carriers for loss of goods delivered to them for carriage from one place to another, nothing appears to have been done which was inconsistent with due care and skill, the presumption of negligence is rebutted, and, the carriers are entitled to have the action dismissed. ('97) 24 Cal 787 (787, 789, 791.

(9) The burden of proving negligence is not on the plaintiff even where the consignment note provides that the defendant company is not liable for damage or loss caused by fire, etc., and the goods are actually damaged by fire. ('79) 3 Bom 120 (129, 130) * ('13) 40 Cal 716 (719).

(10) In a suit for damages caused to the plaintiff's goods entrusted for carriage by the defendant's ship, the master of the ship is entitled, in the case of accident and emergency, to enter into a contract which will bind the owner of the cargo, notwithstanding that it transcends his express authority, if it is bona fide made in the best interests of the owner concerned. A person who seeks to bind a principal on these grounds bears the onus of proving

[a][**10. Notice of loss or injury to be given within six months.**—No suit shall be instituted against a common carrier for the loss of, or injury to, goods entrusted to him for carriage, unless notice in writing of the loss or injury has been given to him before the institution of the suit and witihn six months of the time when the loss or injury first came to the knowledge of the plaintiff.]

[a] Inserted by the Indian Carriers Act, 1899 (10 of 1899), S. 2. The original section was repealed by the Indian Railways Act, 1890 (9 of 1890).

[a][**11. State Government to add to the schedule.**—The [b][State Government] may by notification in the [c][Official Gazette], add to the list of articles contained in the Schedule to this Act, and the Schedule shall, on the issue of any such notification, be deemed to have been amended accordingly.]

[a] Inserted by the Carriers (Amendment) Act, 1921 (13 of 1921), S. 3.
[b] Substituted by A.L.O., 1950.
[c] Substituted by A.L.O., 1937.

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## SCHEDULE

Gold and silver coin.
Gold and silver in a manufactured or unmanufactured state.
Precious stones and pearls.
Jewellery.
Time-pieces of any description.
Trinkets.
Bills and hundis.
Currency-notes of the [a][Central Government] or notes of any Banks, or securities for payment of money, English or foreign.

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**Section 9 — Note 1 (contd.)**

that the course adopted by the carrier was reasonably necessary in the circumstances and also that it was practically impossible to communicate with the cargo owner. AIR 1958 Assam 115 (118) (DB).

(11) Remote damage should not be allowed in a suit for damages for loss of goods caused in transit. But where what was claimed as the loss of profit was not the future profit which the consignor might have earned but it was only difference between the price which he paid for the articles at the market and the price that was then prevalent at the place of destination, it would not be taken as remote damage. AIR 1957 Pat 328 (330): 36 Pat 495 (DB).

(12) Liability of a common carrier — Carrier not enquiring of person tendering consignee's note — Duties of common carrier not discharged — Carrier is liable for damages for loss of consignment. AIR 1964 Mad 516 (517): (1964) 2 Mad LJ 181.

**Section 10 — Note 1**

(1) To maintain a suit for damages for short delivery against a common carrier, notice of claim under Section 10 must be given even though the carrier came to know of the claim aliunde within six months' time and had no difficulty in tracing the goods. AIR 1918 Cal 896 (897) * ('11) 38 Cal 50 (51).

(2) This section places Steamship Company in the same position as a Railway and makes it obligatory upon person wanting to sue Steamer Company to give notice of such suit within the time mentioned in section. ('08) 8 Cal L Jour 192 (192).

(3) In a suit against a common carrier, plaintiff need not state the fact of issue of notice under Section 10 in the plaint. It is implied under Order 6, Rule 6, Civil P. C. Defendants should raise plea of absence of notice. On their failure to do so, the onus is on them to prove absence of negligence on their part. AIR 1938 Rang 437 (438, 499) (DB). (Per Dunkley J.— Absence of plea of want of notice in the written statement amounts to waiver on the part of the defendant.)

(4) The essenial of a good notice appears to be that it should reach the person liable for the loss. Notice to local agent is sufficient. AIR 1927 Cal 394 (398): 54 Cal 430.

(5) A contract with a proviso: "No claim of any kind whatsoever in respect of this contract shall be valid unless in writing and delivered at the office of the Company . . . . . within six months from the date of any default, loss or damage in respect of which such claim arises." is not unreasonable. AIR 1928 Cal 371 (374).

(6) Claim against two companies — Notice of claim sent to Joint Claims Department of the defendants is a valid notice under section. AIR 1962 Assam 110 (115): ILR (1962) 14 Assam 107 (DB).

Stamps and stamped paper.
Maps, prints and works of art.
Writings.
Title-deeds.
Gold or silver plate or plated articles.
Glass.
China.
Silk in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials.
Shawls and lace.
Cloths and tissues embroidered with the precious metals or of which such metals form part.
Articles of ivory, ebony or sandalwood.
[b][Art pottery and all articles made of marble.
Furs.
Government securities.
Opium.
Coral.
Musk, Itr, Sandalwood oil, and other essential oils used in the preparation of itr or other perfumes.
Musical and scientific instruments.
Feathers.
Narcotic preparations of hemp.
Crude India-rubber.
Jade, Jade-stone and amber.
Gooroochand or Gooroochandan.
Cinematograph films and apparatus.
Zahir Mohra Khatai.]
[c][Platinum.
Iridium.
Palladium.
Radium and its preparations.
Tantalum.
Osmium.
Ruthenium.
Rhodium.]
[d][Agarwood.]

[a] Substituted by A.O., for "Government of India".
[b] Inserted by Notification No. 5299, dated 14th October 1922; see Gazette of India, 1922, Pt. I, p. 1235.
[c] Added by Notification No. 68-C(2), dated 3-3-1928, published in Gazette of India, 1928, Pt. I, p. 329.
[d] Added by Notification No. 68-C (4), dated 28-6-1930, published in Gazette of India, 1930, Pt. I, p. 672.

## [THE] CASTE DISABILITIES REMOVAL ACT, 1850
## (ACT XXI OF 1850)[a]

[11th April, 1850.]

An Act for extending the principle of Section 9, Regulation VII, 1832, of the Bengal Code throughout [b][India].

**Preamble.**

Whereas it is enacted by S. 9, Regulation VII, 1832[c] of the Bengal Code, that "whenever in any civil suit the parties to such suit may be of different persuasions,

**Preamble — Note 1**

(1) The Act is not retrospective in operation. 1966 Ker L Jour 73: ILR (1966) 2 Ker 205.

when one party shall be of the Hindu and the other of the Muhammadan persuasion, or where one or more of the parties to the suit shall not be either of the Muhammadan or Hindu persuasions the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled"; and whereas it will be beneficial to extend the principle of that enactment throughout [b][India]; It is enacted as follows :—

[a] The short title was given by the Indian Short Titles Act, 1897 (14 of 1897).

The Act (21 of 1850) has been declared to be in force in the whole of India, except the Scheduled Districts, by the Laws Local Extent Act, 1874 (15 of 1874), S. 3.

It has been declared to be in force in the Santhal Parganas, by the Santhal Parganas Settlement Regulation (3 of 1872), S. 3. Sonthal Parganas now form part of the State of Bihar. It has been declared by notification under S. 3 (a) of the Scheduled Districts Act, 1874 (14 of 1874), to be in force in the following Scheduled Districts, namely :— West Jalpaiguri, (now in the State of West Bengal), see ibid, 1881, Pt. I, p. 74; The Districts of Hazaribagh, Lohardaga (now the Ranchi District,) see Calcutta Gazette, 1899, Pt. I, p. 44), and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singbhum, (now parts of the State of Bihar;), see ibid, 1881, Pt. I, page 504, the Scheduled portion of the Mirapur District, see ibid, 1879, Pt. I, page 383; Jaunsar Bawar, now in the State of Uttar Pradesh, see ibid, 1879, Pt. I, page 382; The District of Lahaul, (now forming part of Union Territory of Himachal Pradesh)—see Act 31 of 1966, S. 5 [1-11-1966], see ibid, 1886, Pt. I, p. 301; the Scheduled Districts of the C. P., see ibid, 1879, Pt. I, page 771; the Scheduled Districts in Ganjam (now in the State of Orissa and Vizagapatam now in the State of Andhra Pradesh, see ibid, 1898, Pt. I, page 870; Coorg, now in Mysore State, see ibid, 1898, Pt. I, page 870; Assam (except the North Lushai Hills), now known as Mizo District—see Act 18 of 1954, S. 2, see ibid, 1897, Pt. I, page 299; the Porahat Estate in the Singbhum District, see ibid, 1897, Pt. I, page 1059 (now in Bihar State).

It has been extended, by notification under S. 5 of the same Act, to the following Scheduled Districts, namely:— Kumaon and Garhwal, see Gazette of India, 1876, Pt. I, page 606; the Tarai of the Province of Agra, see Gaz. of Ind., 1876, Pt. I, page 505. All in U. P. State now.

The Act has been extended to the new Provinces and merged States by the Merged States (Laws) Act, 1949 (59 of 1949), S. 3 [1-1-1950] and to the Union Territories of Manipur and Tripura by the Union Territories (Laws) Act, 1950 (30 of 1950), S. 3 [16-4-1950].

The Act has been extended to Union Territories of Pondicherry, see Act 28 of 1968, S. 3 and Sch. [1-8-1968] and of Dadra and Nagar Haveli by Regulation 6 of 1963 [w. e. f. 1-7-1965].

The Act has been extended to States merged in the States of—

Bombay—Bombay Act 4 of 1950. Bombay has been reorganised into two States of Maharashtra and Gujarat.

Punjab—Punj. Act 5 of 1950. Punjab divided into the States of Haryana and Punjab and Union Territories of Chandigarh and Himachal Pradesh.

[b] Substituted for "the territories subject to the Government of the East India Company" by the Part B States (Laws) Act, 1951 (3 of 1951), S. 3 and Sch. [1-4-1951].

[c] Repealed by the Bengal Civil Courts Act, 1871 (6 of 1871), which was repealed by the Bengal, Agra and Assam Civil Courts Act, 1887 (12 of 1887).

**1. Law or usage which inflicts forfeiture of, or affects, rights on change of religion or loss of caste to cease to be enforced.**—So much of any law or usage now in force within [a][India] as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of, any religion, or being deprived of caste, shall cease to be enforced as law [b][in any Court].

[a] Substituted for "the territories subject to the Government of the East India Company" by the Part B States (Laws) Act, 1951 (3 of 1951), S. 3 and Sch. [1-4-1951].

[b] Substituted for "in the Court of the East India Company and in the Courts established by Royal Charter within the said territories," ibid.

## SECTION 1 — SYNOPSIS

**1. Applicability and scope.**
**2. 'Deprived of caste.'**
**3. 'Forfeiture of rights.'**
**4. 'Right of inheritance.'**

**1. Applicability and scope.**— (1) The Act is not retrospective. ('07) 29 All 487 (492).

(2) Before the enactment of this Act, upon degradation from caste a Hindu, whether male or female, was considered as dead by Hindu law. His degradation caused an extinction of all his property, whether acquired by inheritance, succession, or in any other manner. ('80) 5 Cal 776 (792): 7 Ind App 115 (PC). (The question as to what would be the effect of this Act on the vested estate of a Hindu widow on her being degraded or deprived of caste for unchastity was left unconsidered in this case.)

(3) The Act provides for the cases of those who, (a) have renounced, or (b) have been excluded from the communion of any religion or (c) have been deprived of caste, meaning those who by their own choice, or by action of their caste fellows have been finally shut out, or temporarily deprived. ('73) 19 Suth WR 367 (406) (FB). (This case is useful for its discussion on the object and construction of this Act.) * ('40) AIR 1940 All 134 (140): ILR (1940) All 100.

(4) This Act provides not only for prevention of forfeiture of rights of those who are put out of caste on account of their renouncing, or being excluded from Hindu religion but also relieves those who are deprived of caste on grounds other than change of religion. But there is nothing in the Act which has the effect of placing outcaste, in every respect, in the position which he would occupy if he had not been put out of caste, or of restoring to him all rights which he, as casteman, could have civilly enforced. It does not contemplate the restoration of privileges the granting of which would amount to interference with autonomy of caste. (1900) 23 Mad 171 (176).

(5) This Act sets aside the provisions of Hindu law which penalises the renunciation of religion or exclusion from caste by enforcing forfeiture of property of the convert. ('11) 33 All 356 (365, 366): 38 Ind App 87 (PC) * ('15) AIR 1915 Lah 441 (441): 1915 Pun Re No. 89 * ('09) 1909 Pun Re No. 36, 102 (106) (DB). (Does not lay down any rule of succession after conversion.)

(6) The effect of the Act is not to enlarge the convert's interest in any property or to get rid of any condition of restriction to which it was originally subject. ('21) AIR 1921 Mad 224 (224): 44 Mad 891 (FB). (1912 Mad WN 386, Overruled; 40 Cal 407, Dissented.)

(7) Section 1 applies only to person actually converted or outcasted. ('30) AIR 1930 PC 251 (252): 57 Ind App 313. (11 All 100, Overruled.) * ('18) AIR 1918 Mad 430 (430): 40 Mad 1118. (Provisions apply only to the convert and not to his descendants.)

(8) Held, that Sec. 9 of Regulation VII of 1832 did not abrogate the Hindu law as to the consequence of apostasy, but merely laid down for the guidance of the Judge a rule under which he might refuse to enforce these consequences; but it did not purport to affect the substantive law. ('07) 29 All 487 (491). (Hindu joint family of father and son — Father embracing Islamism — Son immediately becomes sole owner of joint property.)

(9) Province of Oudh was annexed on 13th February, 1856. Therefore, Regulation 7 of 1832 and Act 21 of 1850 did not apply to the case of convert who renounced his religion prior to that date. ('28) AIR 1928 Oudh 138 (139): 3 Luck 154.

**2. 'Deprived of caste.'**— (1) Deprivation of caste in the Act means deprivation owing to change of religion and not merely for moral degradation. ('31) AIR 1931 Cal 741 (744): 58 Cal 1392 * ('70) 5 Beng LR 466 (496) (DB).

(2) A Hindu who declares for the purpose of the Special Marriage Act that he is not a Hindu does not cease to be a Hindu and Hindu Law remains applicable to him. The Caste Disabilities Removal Act is of no assistance in construing the provisions of the Special Marriage Act. AIR 1959 Punj 415 (417): 61 Pun LR 407 (DB).

**3. 'Forfeiture of rights.'**— (1) Since Act 21 of 1850 came into force, mere loss

[a][2. Short title and extent.—(1) This Act may be called THE CASTE DISABILITIES REMOVAL ACT, 1850.

(2) It extends to the whole of India except the State of Jammu and Kashmir.]

[a] Added by the Part B States (Laws) Act, 1951 (3 of 1951), S. 3 and Sch. [1-4-1951].

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**Section 1 — Note 3 (contd.)**

of caste does not occasion a forfeiture of rights or property. ('77) 1 Bom 559 (560).

(2) A general principle of Hindu law is that the degradation of the husband from caste does not dissolve the marriage tie, ('72) 2 NWPHCR 300 (302) * ('80) 4 Bom 330 (332). (Convert's marriage with a Muhammadan during the life-time of her former husband will amount to an offence under Section 494, Penal Code.) * ('91) 18 Cal 264 (269). (Do.) * ('86) 9 Mad 466 (470) * ('07) 1907 Pun Re No. 49, p. 198 (200).

(3) Suit for restitution of conjugal rights — Hindu husband turned out of caste at the time of institution of suit — Decree for restitution of conjugal rights conditional on plaintiff's obtaining restoration to caste may be passed. ('86) 8 All 78 (81).

(4) Where a Hindu widow after embracing Islamism marries a Muhammadan, she does not thereby lose her right as a devisee of property bequeathed to her by her Hindu sister. ('25) AIR 1925 Mad 861 (870).

(5) Excommunication from caste as of itself does not deprive a wife of the right to joint enjoyment of her husband's property. ('82) 4 Mad 243 (243).

(6) This Act does not repeal the usage of Hindu temples or of religious or quasi religious institutions. A right consisting in the participation, along with other members of a caste, in the benefits of a religious institution appropriated to the members of the caste is not within the purview of this Act. ('90) 13 Mad 293 (298, 299).

(7) The word 'rights' means not merely rights of property or inheritance but also includes the right of guardianship of infant children. ('01) 1901 Pun Re No. 60, p. 191 (199) * ('77) 1 All 549 (560). (A Hindu deprived of his caste does not incur forfeiture of his right as guardian to the custody of his minor daughter.) * ('06) 28 All 233 (235). (Do.)

(8) The right of giving his son in adoption is not lost by a Hindu father even after his conversion to Muhammadanism. ('01) 25 Bom 551 (555).

(9) Conversion does not give right to partition if there is none prior to conversion. ('21) AIR 1921 Mad 224 (224): 44 Mad 891 (FB). (1912 Mad WN 386, Overruled.)

(10) Conversion of a Hindu coparcener creates a partition by operation of Hindu law. Hence, the right of survivorship is not retained by the convert unless the partition by conversion is renounced by convert. ('27) AIR 1927 Mad 883 (884, 885).

(11) Provisions of the Act cannot be extended beyond its specific provisions. Conversion of a Hindu to Muhammadanism does not entail forfeiture of any rights to ancestral property which his descendants may otherwise possess. ('02) 1902 Pun Re No. 104, p. 460 (462) (DB).

(12) Hindu widow becoming Muhammadan and then marrying a Muhammadan forfeits first husband's estate. ('19) AIR 1919 Mad 854 (859, 860) (FB). (The forfeiture is also entailed by reason of Section 2 of Act 15 of 1856 — AIR 1918 Mad 314, Overruled.)

(13) Under the strict Hindu law converts not only become divided in status but forfeit all rights to their tarwad property. But Act 21 of 1850 preserves their right to the property in that they can still continue to possess the rights incidental to their ownership. However, the Act does not preserve their status as a member of the tarwad or the incidents appropriate to and dependent thereon. ('38) AIR 1938 Mad 242 (245).

(14) The result of reading the Caste Disabilities Removal Act with Section 23 of the Special Marriage Act is this: a person marrying under the Act does not by reason of his marriage forfeit his existing interest in the joint family property or lose his rights of inheritance to the property of the members of the family whether the right accrues before or after the marriage. As by operation of Section 22 there results severance of status of a person marrying under the Act, the right of such person to take by survivorship is completely extinguished. That right is not saved by Section 23 or by Act No. 21 of 1850. ('55) AIR 1955 Madh B 148 (153): ILR (1955) Madh B 239 (DB).

(15) A Christian becoming Muhammadan after marrying Christian woman — Held, that an Indian Christian domiciled in India and married to a Christian woman also domiciled in India can validly marry a Muhammadan woman after his conversion. There is nothing in this Act which invalidates such marriage. ('39) AIR 1939 Cal 417 (418): ILR (1939) 2 Cal 12.

(16) Custom forfeiting right of out-casted husband to society of wife is not enforceable in law under Section 1 — Restitution of conjugal rights cannot be refus-

# [THE] CATTLE TRESPASS ACT, 1871

## (ACT 1 OF 1871)

[The text of the Act printed here is as on 1-5-1969].

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**Section 1 — Note 3 (contd.)**

ed to husband on that ground. AIR 1964 All 21 (21, 22): 1962 All LJ 704.

**4. 'Right of inheritance.'**— (1) Their Lordships of the Privy Council observe: "It is perfectly true that the words 'his or her' are not so easy to apply, because there is not a person expressed in the Act who is represented by 'his or her', but it seems to their Lordships to be plain that the words 'or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing' should be read 'any right of inheritance of any person by reason of his or her renouncing.' The clause is given a simple meaning by the construction and their Lordships think that that is the correct view." ('30) AIR 1930 PC 251 (252, 253). (11 All 100, Overruled.)

(2) Exclusion from caste no longer entails forfeiture of right of inheritance. ('30) AIR 1930 Pat 564 (568) * ('40) AIR 1940 All 134 (140): ILR (1940) All 100. (The Act does not deal with succession to estate of convert.) * ('70) 2 NWPHCR 446 (447) (DB).

(3) Even after conversion right to inheritance is not lost. ('24) AIR 1924 Pat 420 (430): 3 Pat 152.

(4) A widow of a separated Hindu marrying a Muhammadan after embracing Islamism does not lose her interest in the property of her late husband. ('13) 35 All 466 (469). (Hindu Widow's Remarriage Act, 1856 does not apply to such a case — 19 Cal 289, Not followed.)

(5) The Act only relieves from forfeiture of rights to property the person who has changed his religion and not any other person who may be affected by such a change. ('27) AIR 1927 Mad 72 (72).

(6) Succession to a person converted is governed by the law applicable to convert after conversion. ('30) AIR 1930 PC 251 (252): 57 Ind App 313. (11 All 100, Overruled.) * ('36) AIR 1936 All 202 (204) * ('55) AIR 1955 Trav-Co 180 (181) (DB). (Convert to Islam from Hinduism — Right of Hindu collaterals to succeed — Effect of Proclamation of 29-6-1869.) * ('49) AIR 1949 Mad 141 (142) (DB). (Hindu convert to Islam — Hindu relations do not benefit under Act and cannot inherit his or her estate.) * ('39) AIR 1939 Cal 417 (419): ILR (1939) 2 Cal 12 * ('28) AIR 1928 Oudh 138 (141): 3 Luck 154. (11 All 100, Explained and Dissented from.) * ('27) AIR 1927 Mad 72 (72). (A Hindu daughter cannot inherit from her convert father — 11 All 100, Not followed.) * ('22) AIR 1922 Low Bur 15 (16).

(7) A Hindu who was joint in estate with his son became a convert to Muhammadanism in 1845 and died in 1851. It was held that the convert's son who remained a Hindu did not acquire any enforceable right to his father's share in the joint family property. ('11) 33 All 356 (366): 38 Ind App 87 (PC). (29 All 487, Reversed.)

(8) A Hindu married woman embracing Muhammadanism and marrying a Muhammadan during life-time of her Hindu husband without having been divorced from her former husband is disqualified from inheriting her father's property on the ground of unchastity. The provisions of this Act do not save her right of inheritance, as she has not lost her right by reason of her renouncing or being excluded from the Hindu communion. ('05) 32 Cal 871 (873, 874).

(9) This Act has no application to the case of a son born of a marriage of a Brahmin with a Sudra female. He inherits the portion of the father's estate according to Hindu law. ('31) AIR 1931 Bom 89 (93, 94): 55 Bom 1.

(10) As the Act is not retrospective a person who got converted prior to the application of the Act in Kerala State in 1951, forfeited his rights to property under the law then applicable and rights vested in other members of the family could not be defeated. 1966 Ker LT 229: 1966 Ker LJ 73.

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## STATEMENT OF OBJECTS AND REASONS

"The primary object of this Bill is to consolidate the law relating to cattle trespass, which is now scattered through three Acts, — III of 1857, V of 1860 and XXII of 1861. The opportunity has been taken to improve the arrangement and the wording of the law; to provide that damages awarded for illegal seizures may be recovered as if they were fines; and (with reference to the case of Reg. v. Lingana bin Giubana, 4 Bombay High Court Rep. C. C. 14) to declare expressly that a person who, through neglect, permits a public road to be damaged by allowing his pigs to trespass thereon, is liable to be fined. The cases of Reg. v. Mir Saheb Kassamia, 1 Bombay High Court Rep. 100; Reg. v. Mathur Purshottam, 4 ib, C. C. 13; and Reg. v. Ganga kom Mhasu, 5 ib, C. C. 13 have also been carefully considered."

—Gazette of India, 1870, Part V, page 310.

## ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Amended by Acts 1 of 1891; XVII of 1921; LXXX of 1956:

—Amended in :—

Andhra Pradesh by A. P. Act XVI of 1959; A. P. Act XXX of 1961:
Assam by Assam Act I of 1936;
Bombay, by Bombay Acts V of 1931; XXXIV of 1950; VIII of 1958; XIII of 1959; Maha. A.L.O., 1961; Guj. A.L. (8th Am.) O., 1961.
Madhya Pradesh by C. P. and Berar Acts XII of 1935; XXII of 1937; XXVII of 1949; M. P. Acts XXIII of 1958; XI of 1960.
Madras by Madras Act XX of 1957;
Orissa by Orissa Acts XV of 1948; IV of 1950; XXII of 1950; XXIII of 1950.
Punjab by Punj. Acts XXIV of 1952; V of 1957; XVIII of 1959; XXV of 1964.
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West Bengal by Beng. Acts V of 1934; IV of 1947; IV of 1956:

—Adapted by A. O., 1937; 2 A. L. O., 1956; Maha. A. L. O., 1961; Guj. A. L. O. 1961.
—Extended by Acts LIX of 1949, XXX of 1950; Reg. III of 1960; Reg. 7 of 1963; Reg. 8 of 1965.
Andhra Pradesh Act XVI of 1959.
Bom. Acts IV of 1950; XIII of 1959.
Madhya Pradesh Acts XII of 1950; XXIII of 1958.
Madras Acts XXXV of 1949; XXIII of 1960.
Orissa Act IV of 1950.
Punjab Acts V of 1950, V of 1957.
—Repealed in part by Acts X of 1914; I of 1938; Mys Act V of 1955; Bom. Act XIII of 1959.
—Rep. in Kerala by Ker. Act XXVI of 1961; in Mysore by Mys. Act XIX of 1966.

**COGNATE ACTS AND PROVISIONS**

1. Criminal Procedure Code, 1898, S. 4 (1) (o); S. 260 (1) (m).
2. Forest Act, XVI of 1927, Ss. 70 and 71.
3. Railways Act, IX of 1890, S. 125.

## [THE] CATTLE-TRESPASS ACT, 1871
## (ACT 1 OF 1871)[a]

**[13th January, 1871.]**

An Act to consolidate and amend the law relating to Trespasses by Cattle.

**Preamble.**

WHEREAS it is expedient to consolidate and amend the law relating to trespasses by cattle. It is hereby enacted as follows :—

[a] For proceedings in Council, see Gazette of India, Supplement, pp. 1150, 1200, 1290, and Supplement, 1871, p. 178.
This Act has been declared to be in force in the Khondmals District by the Khondmals Laws Regulation, 1936 (4 of 1936), S. 3 and Schedule.
This Act has been extended to the new Provinces and Merged States by the Merged States (Laws) Act, 1949 (59 of 1949), S. 3 [1-1-1950] and to the Union Territories of Manipur and Tripura by the Union Territories (Laws) Act, 1950 (30 of 1950), S. 3 [16-4-1950]. Vindhya Pradesh is in the State of Madhya Pradesh now—see Act 37 of 1956, S. 9 (1) (e).
This Act is made applicable to the Merged States by Bombay Act 4 of 1950; M. P. Act 12 of 1950; Madras Act 35 of 1949; Orissa Act 4 of 1950; and Punjab Act 5 of 1950 [15-10-1962].
The Act has been extended to transferred territories in :—
Punjab by Punj. Act 5 of 1957; Madras by Mad. Act 23 of 1960; Andhra Pradesh by A. P. Act 16 of 1959.
This Act has now been extended to the Union Territory of Pondicherry by Reg. 6 of 1963 [w. e. f. 1-10-1963]; of Laccadive, Minicoy and Amindivi Islands by Reg. 8 of 1965 [w. e. f. 1-10-67] and to the North-East Frontier Area by Reg. 3 of 1960 [w. e. f. 1-11-1960]; to the Union Territory of Dadra and Nagar Haveli by Reg. 6 of 1963 [w. e. f. 1-7-1965].

### CHAPTER I
### PRELIMINARY

[a][1. Title and extent.—(1) This Act may be called THE CATTLE-TRESPASS ACT, 1871; and

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**Section 1 — Note 1**

(1) The maintenance of private cattle pounds is incompatible with the provisions of the Cattle-Trespass Act and the establishment and maintenance of cattle pounds under the superintendence and control of Government Officials assisted by the police may be considered essential for the maintenance of law and order and the peace and good government of the country. Hence, where the Executive Government takes over the charge of the

(2) It extends to °[the whole of India except [b][the territories which immediately before the 1st November, 1956, were comprised in Part B States] ], °[except the presidency-towns and such local areas as the °[State Government], by notification in the Official Gazette, may from time to time exclude from its operation.]

[d][° ° ° °]

[a] Substituted by the Cattle-Trespass Act (1871) Amendment Act, 1891 (1 of 1891), S. 1, for original S. 1.

[b] Substituted for "Part B States" by 2 A. L. O., 1956.

Immediately before the 1st of November 1956, the following were the Part B States in India; Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Pepsu, Rajasthan, Saurashtra and Travancore-Cochin.

Hyderabad is part of Andh. Pra. State; Madhya Bharat is part of M. P. State; Saurashtra forms part of Gujarat and Travancore-Cochin with certain areas from Madras is known as Kerala State. Only Mysore and Jammu and Kashmir are full-fledged States now.

[c] This Act has been declared in force in the Santhal Parganas by the Santhal Parganas Settlement Regulation, 1872 (3 of 1872); in Panth Piploda by the Panth Piploda Laws Regulation, 1929 (1 of 1929), S. 2. It has been declared by notification under the Scheduled Districts Act, 1874 (14 of 1874), S. 3 (a) to be in force in the following Scheduled Districts, namely :—

The Districts of Hazaribagh, Lohardaga, Manbhum, Paragana Dhalbhum and the Kolhan in the District of Singbhum [Gazette of India, 1881, Pt. I, p. 504; the District of Lohardaga included at this time the present District of Palamau which was separated in 1894; the District of Lohardaga is now called the Ranchi District, see Calcutta Gazette, 1899, Pt. I, p. 44.] (all these areas now form part of the State of Bihar); and the Scheduled Districts in Ganjam (now in Orissa State) and Vizagapatam (now in Andhra Pradesh State), ibid, 1899, Pt. I, p. 720.

The Act has been repealed in the State of Kerala by the Kerala Cattle-Trespass Act, 1961 (Ker. Act 26 of 1961), S. 33 [1-11-1962] and in the State of Mysore by the Mysore Cattle-Trespass Act, 1966 (Mys. Act 19 of 1966), S. 33.

The Act ceases to apply to the municipalities in Gujarat and Maharashtra — See Gujarat Municipalities Act 1964 (Guj. Act 34 of 1964), S. 238 [1-1-1965] and the Maharashtra Municipalities Act, 1965 (Maha. Act 40 of 1965), S. 282 [15-6-1966].

[d] Sub-section (3) of S. 1 was repealed by the Repealing and Amending Act, 1914 (10 of 1914), S. 3 and Schedule II.

## STATE AMENDMENTS

### Andhra Pradesh

In its application to the State of Andhra Pradesh in S. 1, sub-section (2), after the expression "the territories, which, immediately before the 1st November 1956 were comprised in Part B States" insert the expression "(other than the territories, specified in sub-section (1) of Section 3 of the States Reorganisation Act, 1956 except the cities of Hyderabad and Secunderabad)" — Andhra Pradesh Act 16 of 1959, S. 4 [16-10-1962].

Note.—By Sec. 3 of the Cattle-Trespass (Andhra Pradesh Extension and Amendment) Act, 1959 (16 of 1959), the Cattle-Trespass Act, 1871 as in force at the commencement of the said Amendment Act in the Andhra area and as amended by the said Amendment Act is extended to and shall be in force in the transferred territories i. e., the territories specified in S. 3 (1) of the

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**Section 1 — Note 1 (contd.)**

pounds from private persons who were previously controlling them, it is not competent to the Civil Courts to interfere. ('12) 39 Cal 615 (662): 39 Ind App 31 (PC).

States Reorganisation Act, 1956 (37 of 1956). And by S. 8 of the said Amendment Act the Hyderabad Cattle-Trespass Act (5 of 1337F.) is repealed.

**Gujarat**

In its application to the State of Gujarat, amendment in S. 1 is the same as in Maharashtra. Bom. Act 13 of 1959, S. 3 read with Guj. A. L. (8th Am.) Order 1961, Pt. II.

**Maharashtra**

In its application to the State of Maharashtra in S. 1 add the following proviso, namely,—

"Provided that on the commencement of the Cattle-Trespass (Bombay Extension and Amendment) Act, 1959, it shall extend to those areas in which the Hyderabad Cattle-Trespass Act, or as the case may be, the Cattle-Trespass Act, 1871, as modified and applied to the Saurashtra area of the State of Bombay was in force immediately before such commencement" — Bombay Act 13 of 1959, S. 3 [19-3-1959] and Maha. A. L. O., 1961.

Note.—By S. 2 of the Cattle-Trespass (Bombay Extension and Amendment) Act (Bombay Act 13 of 1959) the Cattle-Trespass Act, 1871, as in force in the area of the pre-reorganisation State of Bombay (excluding the transferred territories) immediately before the commencement of the said Extension and Amendment Act is extended to the Saurashtra and Hyderabad areas of the State and shall be so in force throughout the State of Bombay. And accordingly all amendments made by any law to the provisions of the Cattle-Trespass Act, 1871, in the application of the said Act to the Vidarbha region and Kutch area of the State of Bombay shall cease to have effect and shall stand repealed. Further, all amendments made in the Cattle-Trespass Act, 1871, in their application to the area of the pre-reorganisation State of Bombay (excluding the transferred territories) and in force at the commencement of the said Extension and Amendment Act shall be in force in the Vidarbha region and amendments made by C. P. B. Acts XII of 1935, XXII of 1937 and XXVII of 1949 shall cease to apply to Vidarbha region and Kutch area of the State and the relevant provision of the Cattle-Trespass Act, 1871, as in force in the said region and area shall be deemed to be amended accordingly. By S. 12 of the said Act the Cattle-Trespass Act, 1871, as modified and applied to the Saurashtra area of the State of Bombay by the State of Saurashtra (Application of Central and Bombay Act) Ordinance, 1948 and the Hyderabad Cattle-Trespass Act are repealed.

**Madhya Pradesh**

In sub-section (2) of Section 1, after "in Part B States" add "other than the Madhya Bharat and Sironj regions of the State of Madhya Pradesh" — M. P. Act 23 of 1958.

Note.—Sub-section (1) of Section 3 of the Madhya Pradesh Extension of Laws Act (M. P. Act 23 of 1958) provides: "The Acts specified in Part A of the Schedule and as in force in the Mahakoshal region immediately before the appointed day, are hereby extended to, and shall, as from the appointed day, be in force in all the other regions of the State." The Cattle-Trespass Act, 1871, is one of the Acts mentioned in the Schedule as Item 4.

**2. Repeal of Acts.**—References to repealed Acts. [Repealed by the Repealing Act (1 of 1938), S. 2 and the Schedule.]

**3. Interpretation clause.**—In this Act,—

"officer of police" includes also village-watchman, and
"cattle" includes also elephants, camels, buffaloes, horses, mares, geldings,

ponies, colts, fillies, mules, asses, pigs, rams, ewes, sheep, lambs, goats, and kids, [a][and

[b]"local authority" means any body of persons for the time being invested by law with the control and administration of any matters within a specified local area, and

"local fund" means any fund under the control or management of a local authority.]

[a] Inserted by the Cattle-Trespass Act (1871) Amendment Act, 1891 (1 of 1891), S. 2.

[b] Cf. definition in the General Clauses Act, 1897 (10 of 1897), S. 3 (31), which applies to all Acts passed after the 14th January 1887, see S. 4 (2), ibid.

## STATE AMENDMENTS

**Andhra Pradesh**

In its application to the State of Andhra Pradesh in S. 3, for the expression "'officer of police' includes also village watchman and" substitute the expression "'officer of police' includes village watchman and the police patel or the person discharging the functions of the police patel in the local area concerned, and."— A. P. Act 16 of 1959, S. 5 [16-10-1962].

**Haryana**

Amendment in Haryana is the same as in Punjab — See Act 31 of 1966, S. 88.

**Orissa**

In its application to the State of Orissa, in S. 3, at the end of the definition of "local authority" add the words, namely, "and entrusted by the State Government under Sec. 31 with any function under this Act in that area."—Orissa Acts 15 of 1948, S. 2 and Sch. I (Part A); 22 of 1950, S. 2 and Sch. II and 23 of 1950, S. 2 and Sch. II.

**Punjab**

In its application to the State of Punjab, in S. 3, after the word "cattle" insert the words "does not include such bulls as are let loose for stud purposes and are specified by a notification in this behalf but."—Punjab Act 24 of 1952, S. 2 [3-12-1952].

**Tamil Nadu**

In its application to the territories added to the State of Tamil Nadu by Act 56 of 1959, amendment in section is same as in Andhra Pradesh—Mad. (A. T.) A. L. O., 1961 [w. e. f. 1-4-1961].

**Union Territory (Chandigarh)**

Amendment in the section is the same as in Punjab — See S. 88 of the Punjab Reorganisation Act, 1966 (31 of 1966).

**Union Territory (Himachal Pradesh)**

In its application to the territories transferred to H. P., amendment in the section is the same as in Punjab — See S. 88 of Act 31 of 1966.

## CHAPTER II
## POUNDS AND POUND-KEEPERS

**4. Establishment of pounds.**—Pounds shall be established at such places as the Magistrate of the District, subject to the general control of the [a][State Government], from time to time directs.

**Section 4 — Note 1**

(1) An order of the Collector abolishing a cattle-pound is an executive order and cannot be interfered with under Article 226 of the Constitution. Chapter V of Cattle Trespass Act does not take away the power of the District Collector to direct abolition of a cattle pound.

The State Government's power under Section 4 of the Act is to exercise a general or over-all control over cattle-pounds

The village by which every pound is to be used shall be determined by the Magistrate of the District.

[a] Substituted by A. L. O., 1950.

STATE AMENDMENTS

**Gujarat**

Amendment in the section in Gujarat is the same as in Maharashtra — Bombay Act 8 of 1958, read with S. 87 of Act 11 of 1960.

**Maharashtra**

In its application to the State of Maharashtra, in Section 4 for the words "State Government" substitute the word "Commissioner". — Bombay Act 8 of 1958, S. 3 and Sch. and Maha. A. L. O., 1961.

**Tamil Nadu**

In its application to the State of Tamil Nadu in S. 4, for the words "Magistrate of the District" substitute the words "District Collector".—Madras Act 20 of 1957, S. 2 [11-12-1957] read with Madras Act 23 of 1960, S. 3 and Sch. I.

**5. Control of pounds. Rates of charge for feeding impounded cattle.**—The pounds shall be under the control of the Magistrate of the District; and he shall fix, and may from time to time alter, the rates, of charge for feeding and watering impounded cattle.

STATE AMENDMENT

**Tamil Nadu**

In its application to the State of Tamil Nadu in S. 5, for the words "Magistrate of the District" substitute the words "District Collector" — Madras Act 20 of 1957, S. 2 [11-12-1957] read with Madras Act 23 of 1960, S. 3 and Sch. I.

**6. Appointment of pound-keepers.**[b]—[a][The State Government shall appoint a pound-keeper for every pound.

**Pound-keepers may hold other offices.**

Any pound-keeper may hold simultaneously any other office under the [aa][Government].

**Pound-keepers to be "public servants".**

Every pound-keeper shall be deemed to be a public servant within the meaning of the Indian Penal Code.]

[a] Substituted by the Supplemental A. O., 1937.

[aa] Substituted for 'Crown' by A. L. O., 1950.

[b] Functions of the State Government under this section have been transferred to the Gaon Panchayats in the districts of Goalpara, Kamrup, Darrang, Nowgong, Sibsagar, Lakhimpur and Cachar in State of Assam — See Assam Gaz., 2-11-1966, Pt. IIA, p. 2641.

STATE AMENDMENT

**Orissa**

In its application to the State of Madhya Pradesh, for S. 6 substitute the following namely,—

"6. The Magistrate of the District or any officer not being below the rank of a Sub-Divisional Magistrate specially authorised by the Magistrate of the District in this behalf shall appoint for each pound a pound-keeper. Every pound-keeper appointed by the Magistrate of the District or by the officer so authorised may be suspended and removed by

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**Section 4 — Note 1 (contd.)**

in the State, and the section does not make it incumbent that it should consider the case of each pound, either in establishing or abolishing. Where the pound was not established by the District Collector with the approval of the State Government, no express approval of the State Government is necessary for its demolition. AIR 1962 Ker 10 (11): 1962 (1) Cri LJ 39: 1960 Ker LT 1231.

(2) A private citizen is not entitled to have his own pound or to claim the right to impound the offending cattle of other citizen in a private pound. (1967) 69 Bom LR 801 (807, 808): ILR (1968) Bom 203.

such Magistrate or officer. Any pound-keeper may hold simultaneously any office under the Government. Every pound-keeper shall be deemed to be a public servant within the meaning of the Indian P. C." — Orissa Acts 15 of 1948, S. 2 and Sch. I (Part A); 22 of 1950, S. 2 and Sch. II and 23 of 1950, S. 2 and Sch. II.

## DUTIES OF POUND-KEEPERS

**7. To keep registers and furnish returns.**—Every pound-keeper shall keep such registers and furnish such returns as the [a][State Government] from time to time directs.

[a] Substituted by A. L. O., 1950.

**8. To register seizures.**—When cattle are brought to a pound, the pound-keeper shall enter in his register,—

(a) the number and description of the animals,

(b) the day and hour on and at which they were so brought,

(c) the name and residence of the seizure, and

(d) the name and residence of the owner, if known,

and shall give the seizer or his agent a copy of the entry.

**9. To take charge of and feed cattle.**—The pound-keeper shall take charge of, feed and water the cattle until they are disposed of as hereinafter directed.

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## CHAPTER III

## IMPOUNDING CATTLE

**10. Cattle damaging land.**—The cultivator or occupier of any land, or any person who has advanced cash for the cultivation of the crop or produce on any land,

or the vendee or mortgagee of such crop or produce or any part thereof,

may seize or cause to be seized any cattle trespassing on such land, and doing damage thereto or to any crop or produce thereon, and [a][send them or cause them to be sent within twenty-four hours] to the pound established for the village in which the land is situate.

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**Section 8 — Note 1**

(1) When the cattle are brought to the pound it is not necessary to inform the pound-keeper whether the cattle were seized rightly or wrongly: ('43) AIR 1943 Oudh 280 (282): 44 Cri L Jour 640.

**SECTION 10 — SYNOPSIS**

**1. Damage, whether essential.**
**2. "Produce" on the land.**
**3. Seizure, when to be made.**
**4. "Within twenty-four hours".**
**5. Who can seize.**
**6. Seizure must be under the provisions of the section.**

**1. Damage, whether essential.**— (1) A person is not entitled to seize cattle which has not done any damage. A clear finding of damage done by the trespassing cattle is essential to a conviction under Section 24. ('40) AIR 1940 Pat 299 (300): 41 Cri L Jour 257 * ('45) AIR 1945 Oudh 116 (117). (A finding that cattle were grazing crops implies that they were doing damage.) * ('18) AIR 1918 Pat 649 (650): 19 Cri L Jour 157 * ('20) AIR 1920 Pat 832 (833): 21 Cri L Jour 640. (Lower Court relied on the evidence of a witness who deposed that he saw the cattle grazing on the complainant's bhoga paddy — Held, that the evidence was insufficient to show that damage was caused.) * ('18) AIR 1918 Pat 628 (628): 19 Cri L Jour 202 * ('05) 1 Weir 709 * ('18) AIR 1918 All 267 (268): 19 Cri L Jour 368.

(2) Damage required under Section 10 may be nominal and not substantial. ('49) AIR 1949 All 180 (183): ILR (1949) All 211: 50 Cri L Jour 232 * AIR 1966 Orissa 191 (192): 1966 Cri L Jour 1044: 31 Cut LT 1127.

(3) Where the damage done by the cattle is only little, their seizure may be unreasonable but is not illegal. ('39) 1939 Oudh WN 150 (152). (Hence compensation under Section 22 cannot be granted.)

(4) Where cattle trespass on a field full of standing sugar-cane, damage may be presumed. AIR 1949 All 180 (183): ILR (1940) All 211: 50 Cri L Jour 232.

(5) Where there is acceptable evidence on record in support of the prosecution case of grazing resulting in damage to the crop, conviction under Section 24 of the Act cannot be set aside merely for omission to record a finding of damage.

**Police to aid seizures.**

All officers of police shall, when required, aid in preventing (a) resistance to such seizures, and (b) rescues from persons making such seizures.

[a] Substituted by the Cattle-Trespass Act (1871) Amendment Act, 1891 (1 of 1891), S. 3, for "take them or cause them to be taken without unnecessary delay".

## STATE AMENDMENTS

**Gujarat**

In its application to the State of Gujarat, amendment in S. 10 is the same as in Maharashtra, except that for the words "State of Bombay (i. e. Maharashtra), words "State of Gujarat" shall be substituted. — Gujarat A. L. (8 Amendt.) Order 1961.

**Maharashtra**

In its application to the State of Maharashtra, in S. 10, after the words "or any part thereof" insert the following, namely,—

"or a watch and ward appointed by a panchayat established under Bombay Village Panchayats Act, 1933 or any corresponding law in force in

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**Section 10 — Note 1 (contd.)**
AIR 1963 Pat 199 (200): 1963 (1) Cri L Jour 607: ILR 43 Pat 709 (DB).

**2. 'Produce" on the land.** — (1) Grass is "produce" on the land within the meaning of Section 10. ('43) AIR 1943 Sind 152 (154): ILR (1943) Kar 112: 44 Cri L Jour 761.

**3. Seizure, when to be made.** — (1) Under the English law the cattle can be seized only while they were actually trespassing and not afterwards. But the codified law in India gives the right of seizure even though the cattle have in the meantime left the field of the complainant and reached the field or grove of the accused (the owner of the cattle), provided notice of trespass was taken immediately and the complainant was pursuing the cattle in order to take them to the pound. In such a case the accused would have no right to forcibly rescue the cattle and cause injuries to the complainant who were taking the cattle to the pound and who resisted the rescue. ('54) AIR 1954 All 381 (382): 1954 Cri L Jour 790 * ('28) AIR 1928 Lah 692 (693): 30 Cri L Jour 627 * AIR 1966 Guj 221 (227): 1966 Cri LJ 994: (1966) 7 Guj LR 357 (DB) * 1966 Cri LJ 217 (220): (1966) 1 Mad LJ 95 (DB) * AIR 1960 Pat 385 (387): 1960 Cri LJ 1132: 1960 BLJR 240.

[But see ('05) 1 Weir 709 (709). (It is only when cattle are actually trespassing that they can be seized and impounded under Section 10.) * ('25) AIR 1925 Nag 50 (50): 25 Cri L Jour 1004. (Right to seize subsists only until the cattle leave the land.) * AIR 1959 Raj 124 (125, 126): 1959 Cri LJ 770: 1959 Raj LW 120. (AIR 1954 All 581, Dissented from.)]

(2) The words "cattle trespassing on such land" in Section 10 have to be given an extended meaning but confined within reasonable limits. The act of seizure may be within section if it is effected at a spot within easy reach of the field damaged, but where the distance is very great, and the cattle have already come, not merely constructively, but actually within their owner's possession, the act of the pursuers in seizing and attempting to remove the animals is not only not covered by Section 10, but it also amounts technically to an offence of theft within the meaning of Section 378, Penal Code. ('47) AIR 1947 Lah 380 (382) (DB). (Consequently, the owners of the animals are entitled under Section 104, Penal Code, to use force to any extent short of causing death in order to prevent the pursuers from carrying out their purpose.)

(3) Although the right of capture would not extend to following them to their sheds and seizing them there, yet the person who attempts to seize the cattle while actually trespassing on the land had a right to capture them before they have definitely made their escape from the spot though they may not be actually inside the field trespassed when captured. ('34) AIR 1934 Nag 258 (259): 31 Nag LR 139: 36 Cri L Jour 361.

(4) When a person seizes cattle on the ground that they were trespassing on his land and causing damage to his crop or produce and gives out that he was taking them to the pound, he commits no offence of theft however mistaken he may be about his right to that land or crop. The remedy of the owner of the cattle so seized is to take action under Section 20 of the Act. He has no right to use force to rescue the cattle so seized. AIR 1965 SC 926 (931, 932): 1965 (2) Cri LJ 18: (1965) 1 SCR 293. (Order in Government Appeal No. 24 of 1960, Dated 13-12-1962 (Pat), Reversed.) * AIR 1968 Pat 442: 1968 Cri LJ 1440: 1968 BLJR 380.

(5) Where there is no evidence to show that cattle had trespassed into A's land, and that the cattle were running away

any part of the State of Maharashtra, or any person authorised by State Government in this behalf, either by name or by virtue of office."—Bom. Acts 34 of 1950, Ss. 2 (1) and 13 of 1959, S. 4 read with Maha. A. L. O., 1961.

**Madhya Pradesh**

In its application to the State of Madhya Pradesh for Section 10, the following section shall be substituted, namely :—

**10. Seizure of cattle trespassing on land and doing damage and causing hurt, etc.**

"The owner or occupier of any land or the person having interest in any land may seize or cause to be seized any cattle-trespassing on such land and doing damage thereto or to any crop, produce or property thereon belonging to such owner, occupier or interested person, or causing hurt or injury or obstruction to any of them or to any person by leave or licence present on, or having charge of, such land or of any such crop, produce or property, and send them or cause to be

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**Section 10 — Note 3 (contd.)**

when being pursued to seize them 'A' gets no right to ask the cattle owner to surrender the cattle from his grove or to abuse or injure him. A may file a complaint under Sections 447 and 426, Penal Code. AIR 1966 Guj 221 (227): 1966 Cri LJ 994: (1966) 7 Guj LR 357 (DB).

**4. 'Within twenty-four hours".—** (1) Where the person seizing a cow kept it overnight in his custody and released it next morning (before 24 hours of the seizure) on receipt of some money from the owner: Held, that no offence under Section 379 of the Penal Code or under any other provision was committed. ('23) AIR 1923 Nag 64 (65): 23 Cri L Jour 511.

**5. Who can selze.—** (1) For the purposes of Cattle Trespass Act, it is sufficient to prove occupation within the meaning of Section 10. There is no question of title involved in such a case. Hence, an unregistered kabuliat evidencing the settlement of land, is admissible to prove the occupation at the relevant time. ('47) AIR 1947 Pat 172 (174): 47 Cri L Jour 986 (DB).

(2) What is or is not "occupation" must depend on the nature of the land. ('43) AIR 1943 Sind 152 (154): ILR (1943) Kar 112: 44 Cri L Jour 761.

(3) A person in exclusive possession of land is an occupier thereof under Section 10. ('16) AIR 1916 Lah 281 (281): 1916 Pun Re (Cr) No. 3: 17 Cri L Jour 63. (The question of title of the owner of the cattle to the land trespassed does not affect the right to seize.)

(4) A person with whom a land has been settled for the purpose of pasture is to be regarded as the occupier of the land within the meaning of Section 10 and the grass standing thereon is to be regarded as the produce of the land within the meaning of the section. AIR 1947 Pat 172 (174): 47 Cri L Jour 986 (DB).

(5) Seizure of cattle grazing in the forest under orders of an officer in charge of forest under the Zamindar who is an occupier of the forest which is treated for some purposes as reserve forest, under Sections 26 and 32, Madras Forest Act, is legal under Section 10. ('48) AIR 1948 Mad 467 (468): 49 Cri L Jour 689.

(6) A private protected forest and embankment are included within the meaning of the term "land". Proprietor of such forest or embankment is an "occupier" of land. ('39) 20 Pat LT 340 (341).

(7) Unless the burgadar is shown to be a mere servant of the lessor, burgadar can seize the cattle of the lessor if they trespass on his land under burga lease. ('19) AIR 1919 Cal 93 (93): 20 Cri L Jour 398.

(8) The impounding of the cattle by a watchman who has got general instructions from the occupier to seize them while trespassing, is authorised under Section 10. ('16) AIR 1916 Mad 786 (786): 16 Cri L Jour 772 * ('22) AIR 1922 Pat 317 (317). * AIR 1960 Mad 331 (332): 1960 Cri LJ 932: (1960) 2 Mad LJ 455. (If the watchman or servant seizes cattle under such instructions, it must be held that the cultivator or occupier causes the them to be seized within the meaning of the section.)

(9) Where an indigo factory supplies the seeds, pays for the labour of sowing, and gives compensation to raiyats growing indigo on their own land, but no advance in cash has been made, held that, although the indigo is grown for the factory, a servant of the factory is not a person authorised under Section 10 of the Act, to seize cattle doing damage to the indigo. ('05) 2 Cri L Jour 345 (346, 347) (Cal).

(10) Seizure by a claimant to the disputed possession of land is illegal under this section, when the intention is to take by force the cattle of his opponent and not to protect his crop or produce. ('43) AIR 1943 Sind 152 (154): ILR (1943) Kar 112: 44 Cri L Jour 761.

(11) The fact that the lessee seizing the cattle intends that in order to prevent impounding the owner of the cattle may pay the grazing charges, will not make the seizure illegal if it is otherwise legal. ('18) AIR 1918 Cal 701 (702): 18 Cri L Jour 849.

sent within twenty-four hours to the pound established for the local area in which the land is situate.

All officers of police shall, when required, aid in preventing (a) resistance to such seizures and (b) rescues from persons making such seizures".—C. P. and Berar Act 12 of 1935, S. 2 [30-3-1935] read with S. 119 of the States Reorganisation Act, 1956 (37 of 1956) [1-11-1956] and M. P. Act 23 of 1958, S. 3 (1) and Sch., Pt. A, Item 4.

[a]**11. Cattle damaging public roads, canals and embankments.**—Persons in charge of public roads, pleasure-grounds, plantations, canals, drainage-works, embankments and the like and officers of police, may seize or cause to be seized any cattle doing damage to such roads, grounds, plantations, canals, drainage-works, embankments and the like or the sides or slopes of such roads, canals, drainage-works or embankments or found straying thereon.

and shall [b][send them or cause them to be sent within twenty-four hours] to the nearest pound.

[a] As to the application of S. 11 to forest, see the Indian Forest Act, 1927 (16 of 1927), S. 70; to railways, see the Indian Railways Act, 1890 (9 of 1890), S. 125 (4); to reserved or village forest in Mysore, see Mysore Forest Act, 1964 (5 of 1964), S. 60 [1-6-1969].

[b] Substituted by the Cattle-Trespass Act (1871) Amendment Act, 1891 (1 of 1891), S. 4, for "take them without unnecessary delay".

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**Section 10 — Note 5 (contd.)**

(12) It will be an illegal seizure amounting to theft for persons other than those empowered by Section 10 to attempt to seize and impound cattle. In that case owner of the cattle will conceivably have a right of private defence of property. The seizure of cattle by a watchman or servant under general instructions of the owner or occupier would be lawful, but such authority must be specifically proved. 1966 Cri LJ 217 (220): (1966) 1 Mad LJ 96 (DB).

(13) The term 'cultivator" includes not only the person who actually toils on the land on his own account but also the owner of the land who gets it cultivated through his farm-servant or daily labourer.

The occupier of any land is not necessarily a cultivator. Land other than cultivable land seems, therefore, to have been contemplated by the section. AIR 1960 Mad 331 (332): 1960 Cri LJ 932: (1960) 2 Mad LJ 455. (AIR Manual 2nd (1960) Edn. cited with approval.)

**6. Seizure must be under the provisions of the section.**— (1) No person has a right to seize and remove cattle except under the provisions of Section 10. Thus, where the system in vogue was that whenever the person seized any cattle which he caught trespassing and causing damage, he rounded them up and drove them to the village and the cattle could be redeemed on the way by their owners on payment of four annas per head of cattle, or, if the fine was not paid there, the cattle were detained in some irregular manner until the fine was paid, possibly by being handed over to the owners of the land on which the trespass and damage had been committed:

Held, that the villagers might find a rough and ready system of this kind convenient but it had no warrant in law since cattle could only be seized under Section 10 of the Act for the purpose of being impounded in the pound established for the village. ('56) AIR 1956 Punj 185 (187): 1956 Cri L Jour 1096 (DB).

(2) If persons, who are entitled to do so, round up cattle which are trespassing and causing damage, and set off to take the cattle to the pound, the owners of the cattle are not entitled to attack them and rescue the cattle simply because those persons do not state in so many words that they have seized the cattle under Section 10, and are taking them away for the purpose of impounding them. ('56) AIR 1956 Punj 185 (186): 1956 Cri L Jour 1096 (DB).

**Section 11 — Note 1**

(1) Sub-section (4) of Section 125, Railways Act, 1890, runs as follows: "The expression 'public road' in Sections 11 and 26, Cattle-Trespass Act, 1871, shall be deemed to include a railway, and any railway servant may exercise the powers conferred on officers of police by the former of those sections".

(2) Section 70, Forest Act, 1927, is as follows: "Cattle trespassing in a reserved forest or in any portion of a protected forest which has been lawfully closed to grazing shall be deemed to be cattle doing damage to a public plantation within the meaning of Section 11, Cattle-Trespass Act, 1871, and may be seized and impounded as such by any Forest Officer or Police Officer".

(3) Though, in terms, Section 11 cannot apply to causes of trespass on Reserved Forest land, the provisions of the said section are attracted to such causes by virtue of Section 57 of the Madras Forest Act and, as such, an accused can be convicted under Section 24 for allowing cattle

## STATE AMENDMENTS

Andhra Pradesh

In its application to the State of Andhra Pradesh in Sec. 11, after the word "plantations" add the word "aerodromes" at both places; and after the words "or found straying thereon", insert the words " or within the premises of such aerodromes" — A. P. Act 30 of 1961, S. 2 [21-9-1961].

Madhya Pradesh

In Section 11 after the words "and the like" insert the words "officers and servants of the local authorities".— C. P. and Berar Act 12 of 1935, S. 3 [30-3-1935] and M. P. Act 23 of 1958, S. 3 and Sch., Pt. A.

[a][12. **Fines for cattle impounded.**—For every head of cattle impounded as aforesaid, the pound-keepers shall levy a fine in accordance with the scale for the time being prescribed by the [b][State Government] in this behalf by notification in the Official Gazette. Different scales may be prescribed for different local areas.

All fines so levied shall be sent to the Magistrate of the District through such officers as the [b][State Government] may direct.

**List of fines and charges for feeding:**

A list of the fines and of the rates of charge for feeding and watering cattle shall be posted in a conspicuous place on or near to every pound.]

[a] Substituted by the Cattle-Trespass (Amendment) Act, 1921 (17 of 1921), S. 2, for original S. 12. The Amendment Act 17 of 1921 has been declared to be in force in—

(1) Madras Presidency, from 1st April 1928, see Fort St. George Gazette, 1928, Pt. I, p. 488; (2) Bombay Presidency (excluding the town of Bombay), from 1st May 1924, see Bombay Government Gazette, 1924, Pt. I, p. 654; (3) Bengal Presidency, except the town of Calcutta, from 1st April 1928, see Calcutta Gazette, 1928, Pt. I, p. 455; (4) Punjab, from 28th April 1922, see Punj. Gaz., 1922 Pt. I, p. 401; (5) Bihar and Orissa, from 1st October 1923, see B. and O. Gazette, 1923, Pt. II, p. 1264; Santhal Parganas under the Santhal Parganas Settlement Regulation (3 of 1872), S. 3 (3) (a), see ibid, 1922, Pt. II, p. 271; (6) Central Provinces, from 1st May 1922, see C. P. Gazette, 1922, Pt. III, p. 351; (7) Delhi, from 10th December 1925, see Gazette of India 1925, Pt. II-A, p. 397; (8) Coorg, from 22nd August 1935, see Coorg Gazette, 1938, Pt. I, p. 39; and (9) Andamans and Nicobar Islands, see the Chief Commissioner's Notification No. 2 of 1938, dated 20th January 1938.

See the Indian Forest Act, 1927 (16 of 1927), S. 71 under which the State Government may fix different scale of fines for cattle impounded under S. 70 of that Act.

[b] Substituted by A. L. O., 1950.

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**Section 11 — Note 1 (contd.)**

to trespass on Reserved Forest land. ('58) AIR 1958 Mad 312 (313): ILR (1958) Mad 507: 1958 Cri L Jour 779.

(4) Actual damage must be proved to sustain conviction under Section 24. ('30) AIR 1930 Oudh 250 (250): 6 Luck 26: 31 Cri L Jour 1015. (Cattle passing over regular Railway track — No fencing — Damage not proved — No conviction.)

[See however ('34) AIR 1934 Sind 34 (36): 28 Sind LR 73: 35 Cri L Jour 830. (Straying cattle may be seized and impounded before damage to property is caused — Actual damage is not necessary.)]

(5) There is "trespass" within the meaning of Section 70, Forest Act, even where the cattle do not go into the reserved forest themselves but are driven into it. Such cattle are liable to seizure. ('92) Rat Un Cr C 602 (603).

**Section 12 — Note 1**

(1) Section 71, Forest Act, 1927, is as follows: 'The Provincial Government may, by notification in the Official Gazette, direct that, in lieu of the fines fixed under Section 12, Cattle Trespass Act, 1871, there shall be levied for each head of cattle impounded under Section 70 of this Act such fines as it thinks fit but not exceeding the following, that is to say, for each elephant — ten rupees; for each buffalo or camel—two rupees; for each horse, mare, gelding, pony, colt, filly, mule, bull, bullock, cow, or heifer—one rupee; for each calf, ass, pig, ram, ewe, sheep, lamb, goat, or kid—eight annas".

(2) A fine levied by a pound-keeper under this section is not a punishment imposed on conviction for an 'offence'. ('70) 7 Bom HCR (Cr) 55 (56).

## STATE AMENDMENTS

**Gujarat**

Amendments in the State of Gujarat in S. 12 are the same as in Maharashtra—Bombay Act 34 of 1950, read with Guj A. L. (8th Am.) Order 1961.

**Maharashtra**

In its application to the State of Maharashtra, in S. 12.

(a) delete the words "head of";

(b) for the words "Different scales may be prescribed for different local areas" substitute the following, namely,—

"Progressively increasing scales may be prescribed in respect of cattle belonging to or kept by the same person according to the number of cattle impounded at a time and the number of times such cattle are impounded and different scales may be prescribed for different local areas".—Bom. Act 34 of 1950, S. 2 (2).

**Orissa**

In Section 12—

(a) for the words "the pound-keepers shall levy a fine" substitute the words "the Local Authority exercising jurisdiction within the area in which the pound is situated shall impose a fine";

(b) the second paragraph beginning with the words "All fines so levied" and ending with the words "may direct" shall be omitted — Orissa Acts 15 of 1948, S. 2 and Sch. I (Part A); 22 of 1950, S. 2 and Sch. II and 23 of 1950, S. 2 and Sch. II.

**Tamil Nadu**

In its application to the State of Tamil Nadu, in Sec. 12, for the words "Magistrate of the District" substitute the words "District Collector".— Madras Act 20 of 1957, S. 2 [11-12-1957] and Mad. Act 23 of 1960, S. 3 and Sch. I.

## STATE AMENDMENTS

**Section 12A**

**Gujarat**

Section 12A is the same as in Maharashtra—See Act 11 of 1960, S. 87.

**Madhya Pradesh**

After Section 12, the following section shall be inserted, namely,—

"**12A. Security in respect of cattle impounded.**—In any local area to which the State Government may, by notification, apply this section, every pound-keeper shall, before releasing any cattle, require the owner or his agent to make, in the form to be prescribed by the State Government, a declaration regarding the ownership of such cattle and to deposit, by way of security such sum as the State Government may, by rule, prescribe. Different scales may be prescribed for different areas or different classes of cattle.

If the cattle of such owner are impounded, within six months from the date of deposit, and if the seizure is not adjudged illegal, the amount of deposit or part thereof in accordance with the rules made by the State Government in this behalf shall stand forfeited to Government.

If the cattle of such owner are not impounded as aforesaid the amount of security shall, on application by or on behalf of the depositor, be refunded to him on the expiry of such period.

A fresh security shall be required to be deposited on every occasion on which the release of cattle impounded under the Act is applied for."—C. P. and Berar Act 27 of 1949, S. 2 [6-5-1949] and Act 37 of 1956, S. 119 and M. P. Act 23 of 1958, S. 3 and Sch. Pt. A.

Maharashtra

After Sec. 12, the following new section shall be inserted, namely,—

"12A. Security in respect of impounded cattle.—(1) In any local area to which the State Government may by notification in the Official Gazette, apply this section, every pound-keeper shall, before releasing any impounded cattle, require the owner of the impounded cattle or his agent to make, in the form to be prescribed by the State Government, a declaration regarding the ownership of such cattle and to deposit by way of security such sum as the State Government may, by rules, prescribe. Different scales may be prescribed for different areas or different classes of cattle.

(2) If any cattle belonging to such owner are impounded within a period of six months from the date on which the security is deposited, and if the seizure is not adjudged illegal, the amount of deposit or a part thereof, as may be directed by the State Government by rules made in this behalf, shall stand forfeited to the State Government. If cattle are not impounded as aforesaid, the amount of security deposit shall, on an application made by or on behalf of the depositor, be refunded to him on the expiry of that period.

(3) On every occasion on which the release of the cattle impounded under this Act is claimed, the owner of the cattle shall deposit a fresh security".— Bom. Act 13 of 1959, S. 5 [19-3-1959].

## STATE AMENDMENTS

**Section 12B**

**Gujarat**

Section 12B is the same as in Maharashtra—See Act 11 of 1960, S. 87 and Guj. A.L.O., 1960.

**Madhya Pradesh**

After S. 12A, the following section shall be inserted, namely,—

"12B. Special provisions regarding cattle habitually allowed to go astray.—(1) If, on a report received from the Magistrate of the District or a local authority, it appears to the State Government that severe damage is being caused to crop, produce or other property in the local area under the jurisdiction of such Magistrate of the District or Local authority by reason of the cattle being allowed to go astray, the State Government may, by notification, apply the provisions of this section to such local area generally or in respect of such cattle or class of cattle as may be specified therein.

(2) Every owner or keeper of cattle in respect of which the provisions of sub-section (1) have been made applicable shall keep his cattle in confinement or in detention during the period between one hour after sun set and one hour after sun rise.

(3) It shall be lawful for any person to seize any such cattle found astray in such local area and to send it immediately to the nearest pound. All officers of police, shall, when required, aid in preventing resistance to such seizure and rescue from person making such seizure.

(4) Whoever contravenes the provisions of sub-sec. (2) on conviction for the first offence, be punished with fine which may extend to one hundred rupees and in case of a second or subsequent offence with fine which may extend to five hundred rupees or with imprisonment which may extend to six months or with both.

(5) Any fine imposed under this section shall, without prejudice to any other mode of recovery provided by law, be realised by the sale of all or any of the cattle in respect of which the offence has been committed.

Explanation.—For the purposes of this section—

(i) "to keep in confinement" shall mean to keep the cattle effectively confined within any fencing, wall or compound; and

(ii) "to keep in detention" shall mean to keep the cattle effectively detained by any rope or other sufficiently strong tie."—M. P. Act 11 of 1960, S. 2 [31-3-1960].

**Maharashtra**

After Sec. 12A, the following section shall be inserted, namely,—

"**12B. Removal of cattle to specified places.**—(1) If in any local area to which the State Government may, by notification in the Official Gazette, apply this section, a Mamlatdar, Tahsildar, Naib-Tahsildar or Mahalkari is satisfied—

(i) that the grazing land set apart for the use of cattle of one or more villages in the taluka, tahsil or mahal under his jurisdiction is insufficient for the cattle belonging to the permanent residents of such village; or

(ii) that the crops or grass standing on any agricultural land or grazing land so set apart are likely to be damaged by cattle belonging to persons who are not residents of such village or villages and who own more than twenty heads of cattle,

he may,

(a) in any case referred to in clause (i) direct any such resident owner, by special or general order, to remove or cause to be removed all or any dry or useless cattle belonging to him to such place or places within the State and within such period as may be specified in the order, and

(b) in any case referred to in clause (ii) direct any such non-resident owner, by special or general order, to remove or cause to be removed all or any of his cattle to such place or places within the State and within such period as may be specified in the order.

(2) If the owner of the cattle fails to remove the cattle as directed under sub-section (1), the Mamlatdar, Tahsildar, Naib-Tahsildar or Mahalkari, as the case may be, may direct a police officer not below the rank of a head constable to remove or cause to be removed such cattle to the place or places specified in the order.

(3) If the Mamlatdar, Tahsildar, Naib-Tahsildar or Mahalkari is satisfied that the order issued by him under sub-section (1) is contravened by any owner or keeper of cattle, he may impose a fine not exceeding one thousand rupees. Any fine so imposed may, on failure of such owner or keeper to pay the same within the specified time, be recovered by sale of all or any of the cattle ordered to be removed under sub-section (1)".—Bom. Act 13 of 1959, S. 5 [19-3-1959] and Maha. A. L. O., 1961.

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## CHAPTER IV

## DELIVERY OR SALE OF CATTLE

**13. Procedure when owner claims the cattle and pays fines and charges.**—If the owner of the impounded cattle or his agent appear and claim the cattle, the pound-keeper shall deliver them to him on payment of the fines and charges incurred in respect of such cattle.

The owner or his agent, on taking back the cattle, shall sign a receipt for them in the register kept by the pound-keeper.

### STATE AMENDMENTS

**Gujarat**

Same as in Maharashtra—Bom. Act 13 of 1959 and Guj. A.L.O., 1960.

**Madhya Pradesh**

In the first paragraph of Sec. 13, add at the end the words and figures "and on deposit of the amount of security prescribed under Section 12A."—C. P. and Berar Act 27 of 1949, S. 3 [6-5-1949] and M. P. Act 23 of 1958, S. 3 (1) and Sch. Pt. A

**Maharashtra**

To the first paragraph of S. 13, add the following, namely,—

"and on depositing the amount of security prescribed under Section 12A".—Bom. Act 13 of 1959, S. 6 [19-3-1959] and Maha. A. L. O., 1961.

**14. Procedure if cattle be not claimed within a week.**—If the cattle be not claimed within seven days from the date of their being impounded, the pound-keeper shall report the fact to the officer in charge of the nearest police station or to such other officer as the Magistrate of the District appoints in this behalf.

Such officer shall thereupon stick up in a conspicuous part of his office a notice stating—

(a) the number and description of the cattle,
(b) the place where they were seized,
(c) the place where they are impounded.

and shall cause proclamation of the same to be made by beat of drum in the village and at the market-place nearest to the place of seizure.

If the cattle be not claimed within seven days from the date of the notice, they shall be sold by public auction by the said officer, or an officer of his establishment deputed for that purpose, at such place and time and subject to such conditions as the Magistrate of the District by general or special order from time to time directs:

Provided that, if any such cattle are, in the opinion of the Magistrate of the District, not likely to fetch a fair price if sold as aforesaid, they may be disposed of in such manner as he thinks fit.

## STATE AMENDMENTS

**Gujarat**

Same as in Maharashtra—Bom. Act 5 of 1931 and Act 11 of 1960, S. 87.

**Haryana**

Same as in Punjab—Punjab Act 18 of 1959 and C. A. 31 of 1966, S. 88.

**Madhya Pradesh**

In Section 14, for the existing Provisos, substitute the following Provisos, namely:—

"Provided that the Magistrate of the District or an officer authorised by him in this behalf may notwithstanding anything hereinbefore contained, sell infirm and maimed cattle, pigs and asses at any time after the expiry of five days from the date of their being impounded, without the issue of a notice and proclamation :

Provided further that if no person offers to purchase at a reasonable price the cattle sold under this section, the Magistrate of the District or an officer outhorised by him in this behalf may, in the manner prescribed under rules made under Section 32, dispose of such cattle, including in the case of pigs and assess destruction."—C.P. and Berar Act 27 of 1949, S. 4 [6-5-1949] and M. P. Act 23 of 1958, S. 3 and Sch. Pt. A.

**Maharashtra**

In the proviso to Section 14, for the words "Magistrate of the District", the words "officer authorised to sell them by public auction" shall be substituted—Bombay Act 5 of 1931, S. 2 [23-5-1931].

**Punjab**

In Section 14, for the word "seven" where it occurs for the first time, substitute the word "three" and where it occurs for the second time, substitute the word "four"—Punjab Act 18 of 1959, S. 2 [30-4-1959].

**Tamil Nadu**

In Section 14, for the words "Magistrate of the District", substitute the words "District Collector"—Madras Act 20 of 1957 [11-12-1957].

**Union Territory (Chandigarh)**

Amendment in Section 14 is the same as in Punjab—see Punjab Reorganisation Act, 1966 (31 of 1966), S. 88.

**Union Territory (Himachal Pradesh)**

In its application to territories added to Himachal Pradesh from Punjab, the amendment in S. 14 is the same as in Punjab—See C.A. 31 of 1966, S. 88.

**STATE AMENDMENTS**

**Section 14A**

**Haryana**

Same as in Punjab.

**Punjab**

In its application to Punjab, add the following after S. 14—

"**14A. Procedure for speedy disposal of certain unclaimed cattle.**—Notwithstanding anything contained in Section 14 where any unattached calf, kid or lamb or any decrepit, weak or maimed cattle is impounded, the pound-keeper shall report the fact to the officer specified in that section within twenty-four hours of the impounding and such officer shall, within twenty-four hours of such report and if such unattached calf, kid or lamb or cattle has not been claimed within twenty-four hours of its impounding cause them to be disposed of by auction or otherwise after a proclamation of its disposal has been made by beat of drum in the village and at the market-place nearest to the place of seizure and in such other manner as may be prescribed:

Provided that if in the opinion of the Magistrate of the district the disposal of any such unattached calf, kid or lamb or cattle is not likely to fetch a fair price, he may send such cattle to any gosadan or pinjrapole.

Explanation.—For the purpose of this section the expression—

(a) "gosadan" or "pinjrapole" means a place or an institution where old, decrepit, wounded or otherwise non-productive or useless cattle are kept for the purpose of maintenance and not for any commercial purpose, whether such place or institution is managed by Government or by a private society or person; and

(b) "unattached calf, kid or lamb" means a calf, kid or lamb not attached to its mother."

—Punjab Act 18 of 1959, Sec. 3 [29-4-1959].

**Union Territory (Chandigarh)**

Same as in Punjab—see Act 31 of 1966, S. 88.

**Union Territory (Himachal Pradesh—Added territories)**—Same as in Punjab—See C.A. 31 of 1966, S. 88.

**15. Delivery to owner disputing legality of seizure but making deposit.**—If the owner or his agent appears and refuses to pay the said fines and expenses, on the ground that the seizure was illegal and that the owner is about to make a complaint under Section 20, then, upon deposit of the fines and charges incurred in respect of the cattle, the cattle shall be delivered to him.

**STATE AMENDMENTS**

**Gujarat**

Amendment in Section 15 in Gujarat Act is the same as in Maharashtra—Bombay Act 13 of 1959, S. 7 and Gujarat A. L. O., 1960.

**Madhya Pradesh**

For Section 15, substitute the following section, namely:—

"**15. Delivery of cattle to owner disputing legality of seizure but making deposit.**—If the owner or his agent appears and refuses to pay the said fines and expenses, and to deposit the said amount of security and to make the said declaration, on the ground that the seizure was illegal and that the owner is about to make a complaint under S. 20, then upon deposit of the fines and charges incurred in respect of the cattle as well as the amount of security and upon making a declaration as required by S. 12A, the cattle shall be deli-

vered to him."—C.P. and Berar Act 27 of 1949, S. 5 [6-5-1949] and M.P. Act 23 of 1958, S. 3 and Sch. Pt. A.

**Maharashtra**

Section 15 shall be renumbered as sub-section (1) of that section, and after sub-section (1), as so renumbered, insert the following sub-section, namely:—

"(2) If on any complaint referred to in sub-section (1) the seizure is declared to be lawful, or if the owner or his agent fails to make such complaint within a period of four weeks from the date of delivery of the cattle to him, the pound-keeper shall require such owner or agent to make a declaration and to deposit the amount of security as required by Sec. 12A. If the owner or his agent fails to make such declaration or to deposit such amount, the cattle delivered to him under sub-section (1) shall be seized again for the purposes of Section 16."—Bom. Act 13 of 1959, S. 7 [19-3-1959] and Maharashtra A.L.O., 1961.

**16. Procedure when owner refuses or omits to pay the fines and expenses.**—If the owner or his agent appear and refuse or omit to pay or (in the case mentioned in Section 15) to deposit the said fines and expenses, the cattle, or as many of them as may be necessary, shall be sold by public auction by such officer at such place and time, and subject to such conditions, as are referred to in Section 14.

**Deduction of fines and expenses.**—The fines leviable and the expenses of feeding and watering, together with the expenses of sale, if any, shall be deducted from the proceeds of the sale.

**Delivery of unsold cattle and balance of proceeds.**—The remaining cattle and the balance of the purchase money, if any, shall be delivered to the owner or his agent, together with an account showing—

(a) the number of cattle seized,
(b) the time during which they have been impounded,
(c) the amount of fines and charges incurred,
(d) the number of cattle sold,
(e) the proceeds of sale, and
(f) the manner in which those proceeds have been disposed of.

**Receipts.**—The owner or his agent shall give a receipt for the cattle delivered to him and for the balance of the purchase money (if any) paid to him according to such account.

## STATE AMENDMENTS

**Gujarat**

Amendment in S. 16 is the same as in Maharashtra—Bom. Act 13 of 1959 and Guj. A.L.O., 1960.

**Madhya Pradesh**

Same as the amendment made in Maharashtra below—C. P. and Berar Act 27 of 1949, S. 6 [6-5-1949] and M.P. Act 23 of 1958, S. 3 and Sch. Pt. A.

**Maharashtra**

In Section 16, for the first and second paragraphs, substitute the following new paragraphs, namely:—

"If the owner or his agent appears and refuses or omits to pay the said fines and expenses and to deposit the said amount of security or (in the case mentioned in S. 15) to deposit the said fines, expenses and amount of security or to make a declaration as required by S. 12A, the cattle or as many of them as may be necessary, shall be sold by public auction by such officer, at such place and time, and subject to such conditions, as are referred to in S. 14, or disposed of in accordance with the provisions therein.

The fines leviable and the expenses of feeding and watering together with the expenses of sale, if any, and the amount of security prescribed under S. 12A shall be deducted from the proceeds of the sale."—Bom. Act 13 of 1959, S. 8 [19-3-1959] and Maharashtra A.L.O., 1961.

**17. Disposal of fines, expenses and surplus proceeds of sales.**—The officer by whom the sale was made shall send to the Magistrate of the District the fines so deducted.

The charges for feeding and watering deducted under Section 16 shall be paid over to the pound-keeper, who shall also retain and appropriate all sums received by him on account of such charges under section 13.

The surplus unclaimed proceeds of the sale of cattle shall be sent to the Magistrate of the District, who shall hold them in deposit for three months and if no claim thereto be preferred and established within that period, shall, at its expiry, [a][be deemed to hold them as part of the revenues of the State].

[a] Substituted by A.O., 1937, for "dispose of them as hereinafter provided".

STATE AMENDMENTS

**Gujarat**

Amendment in Section 17 is the same as in Maharashtra—See Bombay Act 13 of 1959, S. 9 [19-3-1959], and Gujarat A. L. O., 1960.

**Haryana**

Amendment in Section 15 is the same as in Punjab—Act 31 of 1966, S. 88 [1-11-1966].

**Madhya Pradesh**

In Section 17, after the second paragraph, insert the following, namely :—

"The amount of security required under Section 12A shall be deposited with the pound-keeper".—C. P. and Berar Act 27 of 1949, Sec. 7 [6-5-1949] and M. P. Act 23 of 1958, S. 3 and Sch. Pt. A.

**Maharashtra**

In S. 17, after the second paragraph, insert the following, namely:—

"The amount of security required under S. 12A shall be deposited with the pound-keeper."—Bombay Act 13 of 1959, S. 9 [19-3-1959] and Maharashtra A.L.O., 1961.

**Orissa**

In S. 17, for the words "to be deemed to hold them as part of the revenues of the State", substitute the words "dispose of them as hereinafter provided".—Orissa Acts 15 of 1948, S. 2 and Sch. I (Pt. A); 22 of 1950, S. 2 and Sch. II and 23 of 1950, S. 2 and Sch. II.

**Punjab**

In S. 17, for the words beginning with "deposit for three months" and ending with "revenues of the State", substitute the words "and, if no claim thereto is preferred within six months from the date of deposit or if such claim having been preferred within this period is not established, such proceeds shall stand forfeited to the State."—Punjab Act 24 of 1952, S. 4 [3-12-1952].

**Tamil Nadu**

In S. 17, for the words "Magistrate of the District", substitute the words "District Collector".—Madras Act 20 of 1957, S. 2 [11-12-1957].

**Union Territory (Chandigarh)**

Amendment in S. 17 is the same as in Punjab—Act 31 of 1966, Sec. 88 [1-11-1966].

**Union Territory (Himachal Pradesh)**

In its application to territories added to Himachal Pradesh by Act 31 of 1966, amendment in S. 17 is the same as in Punjab—Act 31 of 1966, S. 88.

**18. Application of fines and unclaimed proceeds of sale.**—[Repealed by the Government of India (Adaptation of Indian Laws) Order, 1937.]

STATE AMENDMENT

**Orissa**

After Section 17, the following section shall be inserted, namely:—

"18. All sums received on account of fines and the unclaimed proceeds

of the sale of cattle shall be sent to the Local Authority concerned and out of those sums there shall be paid—

(a) the remuneration of the pound-keepers;

(b) the expenses incurred for the construction and maintenance of pounds, or for any other purposes connected with the execution of this Act and the surplus, if any, shall be credited to the fund of the said Local Authority."—Orissa Acts 15 of 1948, S. 2 and Sch. I (Part A); 22 of 1950, S. 2 and Sch. II; and 23 of 1950, S. 2 and Sch. II.

**19. Officers and pound-keepers not to purchase cattle at sales under Act.**—No officer of police or other officer or pound-keeper appointed under the provisions herein contained shall, directly or indirectly, purchase any cattle at a sale under this Act.

**Pound-keepers when not to release impounded cattle.**—No pound-keeper shall release or deliver any impounded cattle otherwise than in accordance with the former part of this Chapter, unless such release or delivery is ordered by a Magistrate or Civil Court.

## CHAPTER V[a]

## COMPLAINTS OF ILLEGAL SEIZURE OR DETENTION

**20. Power to make complaints.**—Any person whose cattle have been seized under this Act, or, having been so seized, have been detained in contravention of this Act, may, at any time within ten days from the date of seizure, make a complaint[b] to the Magistrate of the District or any Magistrate authorized to receive and try charges without reference by the Magistrate of the District.

[a] Substituted for the original Chapter V by the Cattle-trespass Act (1871), Amendment Act, 1891 (I of 1891), S. 6.

**Section 20 — Note 1 (contd.)**

(a) An act in respect of which a complaint could be made under this section was held not to be an offence in the cases decided under the Criminal P. C. of 1882; and hence a request for action against such act was not a complaint within the meaning of that Act. ('96) 18 All 353 (354) * ('71) 8 Bom HCR 22 (23) * ('86) 13 Cal 304 (305) * ('96) 23 Cal 248 (249) * ('96) 23 Cal 442 (445) * ('86) 9 Mad 102 (102) * ('86) 9 Mad 374 (375) * ('98) 11 CPLR (Cr) 10 (11).

(2) The addition of the words "it also includes any Act in respect of which a complaint may be made under Section 20 of the Cattle-Trespass Act, 1871" in the definition of the word "offence" in Section 4 (1) (o), Criminal P. C. 1898, makes it clear that such an act is an offence. ('20) AIR 1920 Bom 85 (85): 44 Bom 42: 21 Cri L Jour 95 * ('07) 6 Cri L Jour 363 (364): 34 Cal 926 * ('27) AIR 1927 Mad 396 (397): 50 Mad 841: 28 Cri L Jour 301 * ('57) AIR 1957 Mad 742 (742): 1957 Cri L Jour 1295 (2).

(3) Though a complaint under Section 20 of the Cattle-trespass Act must be entertained either by a District Magistrate or a Magistrate specially authorised, such Magistrate has power under Criminal P. C., Section 192, sub-section (1) to transfer the case, after taking cognizance of it, to any Subordinate Magistrate. ('07) 34 Cal 926 (927). (23 Cal 300; 23 Cal 442, Overruled.) * ('79) 1879 Pun Re (Cr) No. 26 p. 76 (77) (FB) * AIR 1959 Orissa 116: 1959 Cri LJ 884 (DB). (AIR 1951 Orissa 40, No longer good law on this point.)

(4) A Magistrate authorised under Section 190, Criminal P. C., to take cognizance of offences upon receiving complaints can take cognizance of an offence under Section 20 of the Cattle-trespass Act, 1871, though there is no special authorisation in that behalf. ('20) AIR 1920 Bom 85 (85): 44 Bom 42: 21 Cri L Jour 95 * ('27) AIR 1927 Mad 396 (397): 50 Mad 841: 28 Cri L Jour 301.

(5) The different heads of losses suffered by a complainant must be specifically indicated in the petition of complaint or at any rate in the evidence adduced for the complainant. ('51) AIR 1951 Orissa 40 (41): ILR (1950) Cut 149: 52 Cri L Jour 15.

(6) The commission of an offence under Section 20 would not give rise to the right of private defence of property. The owner of the cattle, therefore, cannot plead this right in defence of charges of offences like rioting, hurt, etc., alleged to be committed by him while rescuing by force cattle being illegally taken away to the pound although such illegal act of taking away the cattle to the pound is an offence under Section 20, Cattle Trespass Act. ('49) AIR 1949 All 180 (183): ILR (1949) All 211: 50

[b] The term "offence", as defined by the Code of Criminal Procedure, 1898 (5 of 1898), S. 4 (1) (o), includes any act in respect of which a complaint may be made under this section. Offences under this section may be tried in a summary way, see Criminal P. C., 1898, S. 260 (1) (m). In Assam and Uttar Pradesh, offences under Ss. 20 to 24 of this part are triable by Panchayati Adalats—see Assam Act 24 of 1959, S. 95 (2) and U.P. Act 26 of 1947, S. 52 (1) (b). In Manipur, Hill Areas, offences under Ss. 24, 26 and 27 and in West Bengal those under Ss. 26 and 27 are triable by village Courts and Nyaya Panchayats—see C.A. 80 of 1956, S. 20 and West Bengal Act 1 of 1957, S. 71 and Sch. III: offences under Ss. 24 and 26 are triable by a Nyaya Panchayat in Andhra Pradesh and Madhya Pradesh; by a Gram Cutcherry in Bihar and by a Gram Panchayat in Punjab—see Andhra Pradesh Act 2 of 1964, S. 195 (1) (d); Madhya Pradesh Act 7 of 1962, S. 228; Bihar Act, S. 62 (2); and Punjab Act, 4 of 1953, S. 38, Sch. IA, respectively.

## STATE AMENDMENTS

### Haryana

Same as in Punjab—Punjab Act 25 of 1964, S. 2 and Sch. Part II and C.A. 31 of 1966, S. 88 [1-11-1966].

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**Section 20 — Note 1 (contd.)**

Cri L Jour 232. (Person seizing cattle for impounding on ground that they were trespassing and were causing damage to crop, does not commit an offence of theft, however mistaken he may be about his right to that land or crop. The remedy of the cattle owner is under Section 20. He has no right to use force or to rescue the seized cattle.) * AIR 1965 SC 926 (931): 1965 (2) Cri LJ 18: (1965) 1 SCR 293 * ('49) AIR 1949 All 180 (183): ILR (1949) All 211: 50 Cr LJ 232. (Owner has no right of private defence of property although illegal act of taking cattle is an offence under Section 20.)* AIR 1968 Pat 442 (444): 1968 Cri LJ 1440: 1968 BLJR 380.

(7) A person against whom a complaint is made under Section 20 is not an accused; if the seizure is found to be wrongful he is not convicted of any offence and the amount of compensation which he is required to pay is not a fine. ('51) AIR 1951 Nag 287 (288): ILR (1950) Nag 393.

(8) Subject to the conditions mentioned in Section 260 (1), Criminal P. C., the offence under this section is triable in a summary way. See Cl. (m) of Section 260 (1), Criminal P. C.

(9) Complaint after ten days of seizure is barred by time under Section 20. ('35) AIR 1935 Cal 116 (116): 36 Cri L Jour 495.

(10) Where a complaint under Section 20 is made to a Magistrate not competent to entertain it and the statutory period of ten days expires, a complaint to a competent Magistrate is barred, and Section 14 of Limitation Act is not applicable. ('51) AIR 1951 Orissa 40 (40): ILR (1950) Cut 149: 52 Cri L Jour 15.

(11) Where a complaint is filed under Section 22 within ten days from date of seizure of cattle to a Court having no jurisdiction and that Court transfers it to a proper Court after expiry of ten days, the complaint cannot be entertained. Section 537, Criminal P. C., would not cure the defect. ('38) AIR 1938 Oudh 183 (184): 39 Cri L Jour 827.

(12) Though the General Clauses Act does not apply to this Act Section 10, General Clauses Act (which provides for extension of period of limitation in case of last day being holiday) should be applied to complaints under Section 20. ('29) AIR 1929 Nag 96 (96): 30 Cri L Jour 125.

(13) Under Section 4 (1) (a), Criminal P. C., 'offence' includes any act in respect of which a complaint may be made under Section 20. But the effect of this inclusion is only to confer jurisdiction on a Magistrate to hear such complaints and to hold an enquiry into the wrongful seizure and detention of the cattle but the enquiry does not result in acquittal or conviction. AIR 1962 Madh Pra 273 (273, 274): 1962 (2) Cri LJ 375: 1962 Jab LJ 124 (DB) *AIR 1951 Nag 287 (288): ILR (1950) Nag 393.

(14) Complaint under, presented within time before Assistant Superintendent of the office of District Magistrate — Complaint put up before District Magistrate after expiry of ten days from the date of seizure of cattle — Held, that the complaint was not barred by time — Physical delivery of complaint taken by the Assistant Superintendent was presentation to District Magistrate. AIR 1962 Madh Pra 273 (274): 1962 (2) Cri LJ 375: 1962 Jab LJ 124 (DB).

(15) Where cattle is seized when no damage is caused and the intention of the person seizing was only to put the cattle-owner to wrongful loss, the cattle owner gets a right of private defence of property. AIR 1963 Orissa 52 (53): 1963 (1) Cri LJ 308: 28 Cut LT 613. (AIR 1943 Oudh 280; 24 WR (Cr) 7; AIR 1949 All 180, Dissent.)

(16) It cannot be said that in law any compensation for incurring cost and litigation cannot be allowed at all. AIR 1967

**Punjab**

In S. 20, for the words "a Magistrate of the District or any Magistrate authorised to receive and try charges without reference by the Magistrate of the District", substitute the words "the Chief Judicial Magistrate or any other Judicial Magistrate authorised to receive and try charges without reference by the Chief Judicial Magistrate."—Punjab Act 25 of 1964, S. 2 and Sch. Part II [2-10-1964]. This Act did not extend to Lahaul and Spiti Districts then in Punjab.

**Union Territory (Chandigarh)**

Amendment in S. 20 is the same as in Punjab—see Act 31 of 1966, S. 88 [1-11-1966].

**Union Territory (Himachal Pradesh)**

Amendment in S. 20, in its application to added territories, is the same as in Punjab—See Act 31 of 1966, S. 88.

**21. Procedure on complaint.**—The complaint shall be made by the complainant in person, or by an agent personally acquainted with the circumstances. It may be either in writing or verbal. If it be verbal, the substance of it shall be taken down in writing by the Magistrate.

If the Magistrate, on examining the complainant or his agent, sees reason to believe the complaint to be well founded, he shall summon the person complained against, and make an enquiry into the case.

**22. Compensation for illegal seizure or detention.**—If the seizure or detention be adjudged illegal, the Magistrate shall award to the complainant, for the loss caused by the seizure or detention, reasonable compensation, not exceeding one hundred rupees, to be paid by the person who made the seizure or detained the cattle together with all fines paid and expenses incurred by the complainant in procuring the release of the cattle.

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**Section 20 — Note 1 (contd.)**

Orissa 150 (152): 1967 Cri LJ 1357: 33 Cut LT 226.

(17) In law it is necessary in order to justify a claim for compensation to give broad details in relation thereto and if no detail is given in the complaint, a complainant may not be entitled to it. AIR 1967 Orissa 150 (152): 1967 Cri LJ 1354: 33 Cut LT 226.

(18) The presumption in law is that proceedings by a Magistrate must have been taken in accordance with law. Objection as to authority of a Magistrate to receive and to try a charge under Section 20 cannot be allowed to be raised for the first time in revision. AIR 1967 Orissa 150 (151): 1967 Cr LJ 1354: 33 Cut LT 226.

**Section 21 — Note 1**

(1) The expression 'agent personally acquainted' in Section 21 means an agent or servant who could be said to have acted as an agent, such as a kamdar who, if not present at the time of seizure, had received information of it soon after the event. It cannot, however, include an agent, who lives at a distance and who has received information of the seizure at second hand. Where a complaint is made by a wrong person, there is no complaint at all and the Court has no jurisdiction to inquire into the matter. ('31) AIR 1931 Nag 98 (99): 27 Nag LR 167: 32 Cri L Jour 896.

(2) Agent is authorised to file a complaint though he is not capable of giving direct evidence of all circumstances. ('23) AIR 1923 Nag 156 (156): 26 Cri L Jour 327.

(3) Grazier of cattle is agent of owner of cattle within the meaning of Section 21. ('29) AIR 1929 Nag 152 (153): 26 Nag LR 201: 30 Cri L Jour 633.

(4) Where the cattle belonging to one person are in the custody of another, and are seized from his custody the owner, if he is not personally acquainted with the circumstance, is not entitled to institute a complaint under Section 21. ('03) 5 Bom LR 205 (206).

(5) Under Section 21, the District Magistrate is enjoined to summon the person complained against for impounding cattle illegally and make an inquiry into the case. ('37) AIR 1937 Lah 748 (750) (DB).

**SECTION 22 — SYNOPSIS**

1. Applicability and scope.
2. Appeal.
3. Compensation.
4. Compensation, to whom awarded.
5. Compensation order against several persons — Joint liability.
6. 'Fines and expenses".
7. Proceeding under S. 22, nature of.
8. Sentence of fine.
9. Sentence of imprisonment.
10. Specific claim for compensation, whether necessary.

**1. Applicability and scope.**— (1) Where there was a dispute between the complainant and party charged as to the ownership of land on which the complainant's cattle were found the order of the Magistrate referring the parties to the Civil Court was

**Release of cattle**

and, if the cattle have not been released, the Magistrate shall, besides awarding such compensation, order their release and direct that the fines and expenses leviable under this Act shall be paid by the person who made the seizure or detained the cattle.

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**Section 22 — Note 1 (contd.)**

illegal; he should dispose of the case himself under Section 22. ('75) 23 Suth WR (Cr) 2 (3).

(2) Where the seizure and detention of cattle were wrongful and illegal, the jurisdiction of the Magistrate to grant compensation under this section is not affected even if the person detaining them happens to be a Forest Officer who claims to act under the colour of the Forest Act, if the seizure and detention had nothing to do with any forest. ('38) AIR 1938 Mad 820 (821): 39 Cri L Jour 956 (1).

(3) Where an accused person was found to have loosened the complainant's cattle at night and to have driven them to the pound with the object of sharing with the pound-keeper the fees to be paid for the release: Held, that the accused was not liable under this section inasmuch as there was no illegal seizure and detention of the cattle. The accused was ordered to be charged and tried for theft. ('95) 22 Cal 139 (142).

(4) The fact that the damage was likely to be very small does not make the seizure of the cattle illegal though it may be unreasonable. Hence, compensation under Section 22 cannot be awarded in such cases. ('39) 1939 Oudh WN 150 (151, 152).

(5) The person who is held liable under Section 22 of the Act is not 'an accused' nor is he 'convicted' of the 'offence'. Under Section 22 compensation together with fines and expenses, can only be ordered against the person who is adjudged liable. This money is recoverable under Section 23 of the Act as if it were a fine. ('49) AIR 1949 Nag 117 (118): 50 Cri L Jour 289: ILR (1948) Nag 620.

(6) Accused is entitled to be supplied with copies of statements of prosecution witnesses taken by police during investigation of a non-cognizable offence under Section 22 Cattle Trespass Act. AIR 1960 Bom 476 (477): 1960 Cri LJ 1421: 62 Bom LR 497.

(7) Proceedings under, are not criminal Provisions in Criminal P. C. with regard to appeals do not apply to order under Section 22. AIR 1962 Madh Pra 273 (274): 1962 (2) Cri LJ 375: 1962 Jab LJ 124 (DB).

(8) Under Rajasthan Panchayat Act though a Nyaya Panchayat can take cognizance of an offence under the Cattle Trespass Act yet a Panchayat Samiti has no such power and cannot pass an order of the nature provided by Section 22. 1965 Raj LW 486 (486): ILR (1965) 15 Raj 1058.

**2. Appeal.**— (1) By Section 4 of the Code of Criminal Procedure, 1898, the word "offence" includes an act in respect of which a complaint may be made under Section 20 of the Cattle-Trespass Act. It follows, therefore, that a person against whom an order under Section 22 of the Cattle-Trespass Act is made is "a person convicted on a trial." An 'appeal against the conviction lies, therefore, under Ss. 407 and 408 of the Criminal P. C. ('05) 1 Weir 712 (713) * ('22) AIR 1922 Bom 191 (191): 46 Bom 58: 22 Cri L Jour 624. (Compensation awarded under Section 22 not being a fine, the restrictive provisions of Section 413 of the Criminal P. C. are not applicable.) * ('08) 6 Cri L Jour 121 (122): 4 Low Bur Rul 10 * ('57) AIR 1957 Mad 742 (742): 1957 Cri L Jour 1295 (2). [But see ('57) ILR (1957) Mad 422 (425).]

**3. Compensation.**— (1) Compensation for wrongful seizure of cattle under Section 22 should be by way of reasonable compensation for the costs caused by the seizure and detention of cattle; and not by way of penalty, or of an award of general damages to the complainant. ('78) 1878 Pun Re (Cr) No. 25, p. 65 (65).

(2) There is a difference in the nature of the orders under Sections 22 and 24. A person hauled up for forcible seizure of cattle is an accused but under Section 22 only a reasonable compensation is awarded. ('51) AIR 1951 Nag 287 (288): ILR (1950) Nag 393.

(3) In awarding compensation for illegal seizure of cattle, the complainant's costs incurred in prosecuting his complaint may be included in the compensation awarded. (1872-92) 1872-92 Low Bur Rul 515.

(4) Compensation to be awarded under Section 22 would include the amount which the complainant had to spend for procuring the release of cattle. ('49) AIR 1949 Nag 136 (137): 50 Cri L Jour 335.

(5) Court-fees paid by the Complainant may form part of the compensation. ('78) 2 Cri L Rep 507 (508) * ('05) 1 Weir 715 (715).

(6) Under the head of compensation for the loss caused by the seizure and detention of cattle, it is open to a Magistrate to include the process fees. ('05) 1 Weir 715 (715).

(7) Section 22 does not contemplate the award of conpensation for damage to the reputation of the complainant. ('78) 1878 Pun Re (Cr) No. 37, p. 87 (88).

(8) In awarding compensation under Section 22, fees paid by the complainant to his counsel should not be considered. ('38) AIR 1938 Mad 820 (821): 39 Cri L

**Section 22 — Note 3 (contd.)**
Jour 956 * ('33) AIR 1933 Mad 502 (502): 34 Cri L Jour 676. (Especially when the cattle had been released long before the complainant engaged a pleader.)

(9) Where some compensation was awarded in addition to the sum allowed on account of the fines and "expenses" or other charges incurred in procuring the release of the cattle, held that the High Court would not consider the sufficiency or insufficiency of the amount allowed. ('05) 1 Weir 715 (716).

(10) High Court will interfere in cases where the compensation awarded is excessive. ('51) AIR 1951 Orissa 40 (41): ILR (1950) Cut 149: 52 Cri L Jour 15.

(11) Where an order under Section 22 directed that the amount mentioned be paid to the complainant as compensation for the cost and damages incurred by him, and the words with which the decretal part of the judgment began were "I therefore fine the accused": held that latter portion was a mere surplusage and that, although the order was inaccurately worded, the intention to award compensation was clear. ('05) 1 Weir 715 (716).

(12) An order of compensation by a Magistrate, incompetent to entertain a complaint under Section 20, is illegal and the illegality is not curable under Sec. 529 or 537, Cr. P. C. ('51) AIR 1951 Orissa 40 (40): ILR (1950) Cut 149: 52 Cri L Jour 15.

(13) No claim for compensation for loss incurred for incurring cost and litigation either in petition of complaint or in evidence — Held, compensation could not be allowed for same. AIR 1967 Orissa 150 (152): 1967 Cri LJ 1354: 33 Cut LT 226.

**4. Compensation, to whom awarded.**— (1) Compensation may be awarded to owner of the cattle and not to agent filing complaint. ('29) AIR 1929 Nag 152 (153): 26 Nag LR 201: 30 Cri L Jour 633.

**5. Compensation order against several persons — Joint liability.**—(1) Where compensation is ordered to be paid by two persons without specifying the proportionate amount payable by each they are jointly and severally liable to pay it. ('87) 14 Cal 175 (176).

**6. "Fines and expenses".**— (1) A Magistrate is not authorised under Section 22 to fine, but only to award compensation. But he is also authorised to add to the compensation, fines and expenses paid to the pound keeper by the owner on releasing the cattle and order them to be paid by the party who made the seizure. ('05) 1 Weir 710 (710).

**7. Proceeding under Section 22, nature of.**— (1) A proceeding under Section 22 is not a regular criminal proceeding but a quasi-civil proceeding in which a Magistrate is authorised to assess and enforce, in a summary manner, compensation for an injury, for which a civil action might be brought. ('87) 14 Cal 175 (176).

(2) The summary procedure laid down in Chapter XXII of the Criminal P. C., is applicable to the trial of offences under Section 22. ('96) 1896 All WN 136 (136).

(3) A person refusing to release cattle illegally seized unless money was paid to him commits an offence under Section 384 Penal Code. Remedy under Section 22 is no bar to action under Section 384, Penal Code. (1956) 22 Cut LT 417 (419).

**8. Sentence of fine.**— (1) A Magistrate is not competent, under Section 22, to pass any sentence of fine. He can only award compensation for an illegal seizure of cattle. (1900) 27 Cal 992 (992) * ('49) AIR 1949 Nag 136 (136): 50 Cri L Jour 335 * ('05) 1 Weir 710 (710) * ('78) 1878 Pun Re (Cr) No. 37, p. 87 (88).

[But see ('80) 1880 Pun Re (Cr) No. 5, p. 11 (11) * ('78) 1878 Pun Re (Cr) No. 36, p. 87 (87).]

**9. Sentence of imprisonment.**— (1) Order for imprisonment in default of payment of compensation awarded under Section 22, is illegal. ('96) 19 Mad 238 (239) * ('49) AIR 1949 Nag 117 (118): 50 Cri L Jour 289: ILR (1948) Nag 620 * ('30) AIR 1930 Nag 149 (149): 31 Cri L Jour 278: 26 Nag LR 158 * ('39) AIR 1939 Oudh 37 (38): 14 Luck 325: 40 Cri L Jour 141 * ('05) 1 Weir 712 (712) * (1872-92) 1872-92 Low Bur Rul 515 * ('05) 1 Weir 711 (711, 712) * (1900) 27 Cal 992 (992) * (1872-92) 1872-92 Low Bur Rul 429 * AIR 1966 Orissa 191 (192): 1966 Cri LJ 1044: 31 Cut LT 1127.

**10. Specific claim for compensation whether necessary.**— (1) No compensation can be awarded for loss caused by the seizure of cattle unless the complainant makes the specific claim for it. ('39) AIR 1939 Oudh 37 (38): 14 Luck 325: 40 Cri L Jour 141 * ('30) AIR 1930 Nag 149 (149): 31 Cri L Jour 278: 26 Nag LR 158 * ('23) AIR 1923 Pat 292 (293): 24 Cri L Jour 311 * ('07) 6 Cri L Jour 122 (122): 4 Low Bur Rul 11. (But he is entitled to a refund of the expenses incurred in procuring the release of the cattle, fees paid on the complaint and process fees.)

[But see ('49) AIR 1949 Nag 136 (137): 50 Cri L Jour 335 * ('35) AIR 1935 All 925 (926): 37 Cri L Jour 29 * ('28) AIR 1928 Mad 369 (370): 29 Cri L Jour 825.]

(2) It is essential to specifically indicate the different heads on which losses have been suffered, either in the complaint or in the evidence. ('51) AIR 1951 Orissa 40 (41): ILR (1950) Cut 149: 52 Cri L Jour 15.

## STATE AMENDMENTS

**Section 22A**

**Madhya Pradesh**

After Section 22, the following section shall be inserted:—

"**22A. Refund of security deposit and cancellation of forfeiture, if any.**—Where the seizure of any cattle has been adjudged illegal, the security deposit made in respect of such seizure shall be refunded and the forfeiture of any security deposit made in consequence of such seizure shall be cancelled."—C.P. and Berar Act 27 of 1949, S. 8 [6-5-1949] and M.P. Act 23 of 1958, S. 3 and Sch. Pt. A.

**Tamil Nadu**

After Section 22, the following section shall be inserted:—

"**22A. Appeal against order of compensation.**—(1) Any person who has been ordered by a Magistrate under Section 22 to pay compensation may appeal from the order as if such person had been convicted on a trial held by such Magistrate.

(2) When an order for payment of compensation to a complainant is made in a case which is subject to appeal under sub-section (1), the compensation shall not be paid to him before the period allowed for the presentation of the appeal has elapsed, or, if an appeal is presented, before the appeal has been decided and, where such order is made in a case which is not so subject to appeal, the compensation shall not be paid before the expiration of one month from the date of the order."—Madras Act 20 of 1957, S. 3 [11-12-1957].

**23. Recovery of compensation.**—The compensation, fines and expenses mentioned in Section 22 may be recovered as if they were fines imposed by the Magistrate.[a]

[a] See Sections 63 to 70, Penal Code, 1860, and Section 386, Criminal P. C., 1898; see also Section 25, General Clauses Act, 1897.

## CHAPTER VI

## PENALTIES

**24. Penalty for forcibly opposing the seizure of cattle or rescuing the same.**—Whoever forcibly opposes the seizure of cattle liable to be seized under this Act, and whoever rescues the same after seizure either from a pound, or from any person taking or about to take them to a pound, such person being near at hand and acting under the powers conferred by this Act,

shall, on conviction before a Magistrate, be punished with imprisonment for a period not exceeding six months, or with fine not exceeding five hundred rupees, or with both.

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**Section 23 — Note 1 (contd.)**

(1) Section 25 of the General Clauses Act, 1897, is as follows: "Sections 63 to 70 of the Indian Penal Code and the provisions of the Code of Criminal Procedure for the time being in force in relation to the issue and the execution of warrants for the levy of fines shall apply to all fines imposed under any Act, Regulation, rule or bye-law unless the Act, Regulation, rule or bye-law contains an express provision to the contrary."

(2) Though compensation money awarded under Section 22 is recoverable under Section 23 of the Act as if it were a fine, no imprisonment can be ordered in default of payment of this money. ('49) AIR 1949 Nag 117 (118): ILR (1948) Nag 620: 50 Cri L Jour 289.

**SECTION 24 — SYNOPSIS**

1. Appeal.
2. Conviction — Legality of.
3. Offence under Penal Code.
4. Offence whether compoundable.
5. Opposing seizure.
6. Rescue of cattle.
7. Stay of proceedings.
8. Withdrawal of complaint.

**1. Appeal.**— (1) Where a person was convicted under Section 447, Penal Code, and Section 24, Cattle-trespass Act and the two punishments of fine of Rs. 50 and of Rs. 20 were combined just as in Sec. 414, Cr. P. C., the sentence was held to be appealable. ('32) AIR 1932 Oudh 27 (28): 7 Luck 501: 33 Cri L Jour 278.

**2. Conviction — Legality of.**— (1) For a conviction under Section 24, it is not

## STATE AMENDMENTS

**Haryana**

Same as in Punjab—Punjab Act 25 of 1964 and C.A. 31 of 1966, S. 88.

**Punjab**

In S. 24 omit the words "before a Magistrate"—Punjab Act 25 of 1964, S. 2 and Sch. Part II [2-10-1964].

**Union Territory (Chandigarh)**

Amendment in S. 24 is the same as in Punjab—See Act 31 of 1966, S. 88.

**Union Territory (Himachal Pradesh added territories)**—Amendment in S. 24 same as in Punjab.

**West Bengal**

In S. 24, section shall be renumbered as sub-section (1) and to it following be added as sub-section (2):—(2) Offences under this section shall be cognizable and bailable—West Bengal Act 4 of 1956, S. 3 [16-1-1956].

## STATE AMENDMENT

**Section 24A**

**Uttar Pradesh**

After Section 24, the following section shall be inserted:—

"**24A. Compounding of offences under Section 24.**—The offences punishable under Section 24 may, with the permission of the Court before which any prosecution for such offence is pending, be compounded—

(a) where the cattle is rescued after seizure from a pound, by the local authority owning or maintaining the pound or, if such local authority has nominated any person in that behalf, by such person; and

(b) in other cases, by the person who was opposed in seizing the cattle or, as the case may be, from whom the cattle was rescued."—U.P. Act 12 of 1957, S. 3 [30-3-1957].

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**Section 24 — Note 2 (contd.)**

enough that the cattle were removed from the pound or from a person taking or about to take them to a pound. The cattle must be proved to be liable to seizure under this Act. ('18) AIR 1918 Pat 649 (650): 19 Cri L Jour 157 * ('26) AIR 1926 All 276 (276): 27 Cri L Jour 313.

(2) Where a conviction was not justified under Section 24 and especially where the fine was arbitrary, High Court interfered to set aside the conviction is revision. ('30) AIR 1930 Oudh 250 (251): 6 Luck 26: 31 Cri L Jour 1015.

(3) Where an act is punishable both under the Penal Code and this Act, the accused can be punished only under one of the two enactments and not both. A person convicted for theft under the Penal Code cannot be convicted under Section 24 of this Act. ('31) AIR 1931 Mad 18 (19): 32 Cri L Jour 354.

(4) Where a charge is framed under Section 379, Penal Code, and the defence is directed only to that charge, conviction for an offence under Section 24 of this Act is illegal in the absence of the framing of another charge and giving proper opportunity to produce evidence. ('18) AIR 1918 Pat 628 (630): 19 Cri L Jour 202.

(5) A person proceeded against under Section 24 is an accused and the result of the proceedings is either acquittal or conviction. ('51) AIR 1951 Nag 287 (288): ILR (1950) Nag 393.

(6) Conviction under Section 24 cannot be set aside merely for omission to record a finding of damage. AIR 1963 Pat 199 (200): 1963 (1) Cri LJ 607 (DB). (AIR 1920 Pat 832, Commented upon.)

(7) An offence under Section 24 is triable by Panchayati Adalat, in J. and K. State. But when the offence is along with offences under Ss. 323 and 427, I. P. C., as Panchayati Adalat would not try an offence under Section 427, I. P. C. the magistrate was competent to try the entire case. (1963) Kash LJ 45 (48).

**3. Offence under Penal Code.**— (1) A conviction under Section 24 is not essential before any offence under the Penal Code connected with such an offence can be taken into consideration. ('45) AIR 1945 Oudh 116 (117).

(2) "Offence" in Section 441, Penal Code includes offence under Section 24 of this Act. ('27) AIR 1927 Lah 495 (496): 8 Lah 331: 28 Cri L Jour 665.

(3) Entering the cattle pound with intent to commit an offence under Sec. 24 amounts to criminal trespass within Section 447, Penal Code. ('27) AIR 1927 Lah 495 (496): 8 Lah 331: 28 Cri L Jour 665.

(4) Accused prosecuted under Ss. 143, 447, Penal Code and Section 24 Cattle Trespass Act when acquired on all those charges cannot be convicted under S. 426, Penal Code when the offence of mischief did not form part of the same transaction. 1963 (2) Cri LJ 112 (113) (Tripura).

**Section 24 (contd.)**

**4. Offence whether compoundable.—** (1) Offence under Section 24 is not compoundable. ('19) AIR 1919 All 31 (31): 42 All 202: 21 Cri L Jour 305 * ('49) AIR 1949 Mad 501 (502): 50 Cri L Jour 778. (Even with the permission of the Court.)

**5. Opposing seizure.—** (1) Opposition to unlawful seizure of cattle is not an offence punishable under Section 24. ('91) 1891 Pun Re (Cr) No. 4, p. 10 (11).

(2) To resist the seizure of the cattle, which escaped from pound and which were found grazing in charge of their owner, is not an offence punishable under Section 24. ('86) Rat. Un-Cr. C 294 (295).

(3) Where an owner of the cattle opposes the seizure of the cattle trespassing a land, on the ground that he has a title over that land, the question of title does not affect the right of the person in exclusive possession of the land to seize the cattle. ('16) AIR 1916 Lah 281 (281): 1916 Pun Re (Cr) No. 3: 17 Cri L Jour 63.

(4) Where no damage is done by the cattle trespassing upon the fields of another, no offence is committed under S. 24 by persons who forcibly oppose their seizure and removal to the pound. ('49) AIR 1949 All 180 (183): ILR (1949) All 211: 50 Cri L Jour 232.

(5) In cases where the "seizure of the cattle" is not proved but damage of the crop is proved, a conviction under S. 426, I. P. C., could be altered into one under Section 24, in an appeal under Section 423 (1) (b), Cr. P. C. ('54) AIR 1954 Orissa 145 (148): ILR (1953) Cut 713: 1954 Cri L Jour 883 (DB).

(6) Section 57 of the Madras Forest Act attracts the provisions of Section 11 of the Cattle Trespass Act and any cattle trespassing in a reserved forest will be deemed to be cattle doing damage to a public plantation within the meaning of Sec. 11 of the Cattle-Trespass Act. Such cattle may be seized and impounded by any forest officer. Consequently Section 24 of the Cattle-Trespass Act also will apply when the seizure is forcibly opposed and the person so opposing may be convicted by a Magistrate under that section. ('58) AIR 1958 Mad 312 (313): ILR (1958) Mad 507: 1958 Cri L Jour 779.

**6. Rescue of cattle. —** (1) A conviction under Section 24 can only be supported if the cattle were "liable to be seized" under the Act. If not their rescue is no offence. ('01) 24 Mad 318 (319) * ('19) AIR 1919 Cal 93 (93): 20 Cri L Jour 398.

(2) Offence under Section 24 would be committed, only if the cattle liable to be seized under Section 10 are rescued. There should, therefore, be a specific finding that the cattle rescued were liable to be seized under Section 10. But the absence of a specific findings would not entile the accused to an acquittal if it can be reasonably inferred from the evidence in the case. The absence of such a finding would at the worst be a curable irregularity. ('54) AIR 1954 Mad 135 (136): 1954 Cri L Jour 95.

(3) 'Rescue' in Section 24 includes driving away cattle by shouts and cries. ('23) AIR 1923 Mad 608 (608): 24 Cri L Jour 456.

(4) A person who removes cattle from the pound without paying the fees has undoubtedly the dishonest intention of escaping from the payments. Such removal amounts to theft. ('31) AIR 1931 Mad 18 (19): 32 Cri L Jour 354.

[But see ('91) 1 Weir 716 (716). (Removing of cattle from a pound with intention of returning it to the owner is an offence punishable under Section 24 and not of theft in a building.)]

(5) The offence of causing hurt is a separate offence from that of rescuing cattle and separate sentence may legally be passed. ('28) AIR 1928 Mad 18 (18): 28 Cri L Jour 982.

(6) Cattle grazing in Zamindari forest treated for some purposes as reserve forest under Sections 26 and 32, Madras Forest Act — Seizure of cattle under orders of officer in charge of forest under Zamindar who is occupier of such forest — Seizure is lawful within Section 10 — Accused rescuing cattle commit offence under Section 24. ('48) AIR 1948 Mad 467 (468): 48 Cri L Jour 689.

(7) Where six accused forming an unlawful assembly and in pursuance of their common object used force and inflicted injuries in rescuing their cattle which were lawfully being taken to the pound, the accused are guilty of offence under Sec. 24 and other sections of the I. P. Code. Even if the motive of each group was to release its own cattle nevertheless the object to rescue remains common. ('58) AIR 1958 All 348 (351): 1958 Cri L Jour 588.

(8) Where a person knowing that the cattle have not caused any damage seizes them and drives them to a cattle pound with the intention to compel the cattle owner to incur expenditure is getting the cattle released, the cattle owner gets a right of private defence of property. AIR 1963 Orissa 52 (53): 1963 (1) Cri LJ 308: 28 Cut LT 613. (AIR 1943 Oudh 280; 24 WR (Cr) 7: AIR 1949 All 180, Dissented.)

**7. Stay of proceedings.—** (1) An offence under Section 24 falls within Chapter XVII of the Indian Penal Code and hence proceedings in respect of that offence can be stayed under Section 5 of the Madras Preservation of Private Forests Act (27 of 1949). ('53) AIR 1953 Mad 999 (999): 1953 Cri L Jour 1864.

**8. Withdrawal of complaint.—** (1) An offence under this section is triable as a summons case. Hence, a complaint of such an offence can be withdrawn under section 248, Cr. P. C. ('19) AIR 1919 All 31 (31): 42 All 202: 21 Cri L Jour 305.

[a]**25. Recovery of penalty for mischief committed by causing cattle to trespass.**—Any fine imposed [b][under the next following section or] for the offence of mischief by causing cattle to trespass on any land may be recovered by sale of all or any of the cattle by which the trespass was committed, whether they were seized in the act of trespassing or not, and whether they are the property of the person convicted of the offence, or were only in his charge when the trespass was committed.

[a] As to the application of S. 25 in the case of the cattle trespassing on a railway, see the Indian Railways Act, 1890 (9 of 1890), S. 125 (3).

[b] Inserted by the Cattle-trespass Act (1871), Amendment Act, 1891 (1 of 1891), S. 7.

**26. Penalty for damage caused to land or crops or public roads by pigs.**—Any owner or keeper of pigs who, through neglect or otherwise, damages or causes or permits to be damaged any land, or any crop or produce of land, or any public road[a], by allowing such pigs to trespass thereon, shall, on conviction before a Magistrate, be punished with fine not exceeding ten rupees.

[b][°[The State Government], by notification[c] in the Official Gazette, may from time to time, with respect to any local area specified in the notification, direct that the foregoing portion of this section shall be read as if it had reference to cattle generally, or to cattle of a kind described in the notification, instead of to pigs only, or as if the words "fifty rupees" were substituted for the words "ten rupees", or as if there were both such reference and such substitution.]

[d][° ° ° °]

[a] "Public road" includes a railway, see the Indian Railways Act, 1890 (9 of 1890), S. 125 (4).

[b] Inserted by the Cattle-trespass Act (1871), Amendment Act, 1891 (1 of 1891), S. 8.

[c] For such notification issued by the State Government of Orissa, see Notification No. 3176, L.S.G. of 24-4-1949 published in Orissa Gazette, 1949, Pt. III, p. 578.

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**Section 24 — Note 8 (contd.)**

(2) Offence under this section joined with Section 323, Penal Code — Offence under Penal Code compounded — Offence under this section should be deemed to be withdrawn. ('19) AIR 1919 All 31 (31): 42 All 202: 21 Cri L Jour 305.

**Section 25 — Note 1**

(1) As to application of fine recovered under this section, see Section 28.

(2) Sub-section (3) of Section 125, Railways Act, 1890, runs as follows: — "Any fine imposed under this section may, if the Court so directs, be recovered in manner provided by Section 25 of the Cattle-Trespass Act, 1871."

**Section 26 — Note 1**

(1) As to application of fine recovered under this section, see Section 28.

(2) Seciton 125, sub-sections (1) and (2) Railways Act, (1890) run as follows: "(1) The owner or person in charge of any cattle straying on a railway provided with fences suitable for the exclusion of cattle shall be punished with fine which may extend to five rupees for each head of cattle in addition to any amount which may have been recovered or may be recoverable under the Cattle Trespass Act, 1871.

(2) If any cattle are wilfully driven, or knowingly permitted to be, on any railway otherwise than for the purpose of lawfully crossing the railway or for any other lawful purpose, the person in charge of the cattle, or at the option of the railway administration, the owner of the cattle shall be punished with fine which may extend to ten rupees for each head of cattle, in addition to any amount which may have been recovered or may be recoverable under the Cattle-trespass Act, 1871."

(3) Sub-section (4) of Section 125, Railways Act, 1890, runs as follows:— "The expression 'public road' in Sections 11 and 26 of the Cattle-trespass Act, 1871, shall be deemed to include a railway, and any railway servant may exercise the powers conferred on officers of police by the former of those sections."

(4) Before any person can be convicted under Section 26, prosecution must establish that owner has through neglect or otherwise, damaged or caused or permitted to be damaged land, etc., by allowing his cattle to trespass thereon. A personal neglect on the part of the owner, and his allowing his cattle to trespass must, if they cannot be inferred from the circumstances of the case, be shown affirmatively to exist. ('96) Rat Un Cr C 867: Cr Rg 36 of 1896.

[d] The last paragraph was repealed by the Repealing and Amending Act, 1914 (10 of 1914).

## STATE AMENDMENTS

**Gujarat**

Same as in Maharashtra—See Act 11 of 1960, S. 87.

**Haryana**

Same as in Punjab—Punjab Act 25 of 1964 and C.A. 31 of 1966, S. 88.

**Maharashtra**

In Section 26—

(a) number the first paragraph as sub-section (1) of Section 26.

(b) after sub-section (1) so numbered, insert the following:—

"(2) The Magistrate trying the offence under sub-section (1) may order,—

(a) that the accused shall pay such compensation, not exceeding two hundred and fifty rupees, as the Magistrate considers reasonable, to any person for any damage proved to have been caused to his crop or other produce of land by the accused committing the offence;

(b) that the pigs in respect of which the offence has been committed shall be forfeited to the State Government.

(3) Any compensation awarded under sub-section (2) may be recovered as if it was a fine imposed under this section."

(c) number the second paragraph as sub-section (4) of Section 26 and in sub-section (4) so numbered delete the words "the foregoing portion of".

—Bom. Act 34 of 1950, S. 2 (3) [6-11-1950].

**Punjab**

(i) Renumber S. 26 as sub-section (1) thereof and add the following sub-section:—

"(2) While convicting such person, the Magistrate may also—

(a) require him to pay to the person whose land, crop or produce has been damaged such compensation, not exceeding two hundred and fifty rupees, as may be considered reasonable, and

(b) order that the cattle in respect of which the offence has been committed shall, in addition to pay other penalty imposed, be forfeited to the State."

—Punjab Act 24 of 1952, S. 5 [3-12-1952].

(ii) Omit the words "before a Magistrate"—Punjab Act 25 of 1964, S. 2 and Sch. Pt. II [2-10-1964].

**Union Territory (Chandigarh)**

Amendments in S. 26 are the same as in Punjab—Act 31 of 1966, S. 88.

**Union Territory (Himachal Pradesh)**

Added Territories: Amendments in S. 26 are the same as in Punjab — See Act 31 of 1966, S. 88.

**Uttar Pradesh**

For S. 26, substitute the following:—

"**26. Penalty for damage caused to land by cattle.**—Any owner, keeper or attendant of cattle, who through neglect or otherwise, damages or causes or permits to be damaged any land, or any crop or produce of land by allowing such cattle to trespass thereon, shall, on conviction before the Magistrate, be liable to a fine not less than Rs. 10 but not exceeding Rs. 250 or to imprisonment for a term not exceeding three months or to both."

—U.P. Act 7 of 1954, S. 2 [26-3-1954].

Note.—Section 3 of the Cattle-Trespass (U.P. Amendment Act 7 of 1954) is as follows:—

"3. The State Government may, by notification in the Official Gazette, with respect to any local area specified in the notification, declare that Section 26 of the principal Act, as amended by this Act and Sec. 28 of the principal Act, shall stand further amended and modified as specified in the Schedule and with effect from the date of the said declaration the principal Act shall stand amended accordingly.

**SCHEDULE**

1. For Sec. 26 of the principal Act, as amended by this Act, the following shall be substituted:—

"**26. Penalty for damage caused to land by cattle.**—Any owner, keeper or attendant of cattle, who through neglect or otherwise, damages or causes or permits to be damaged any land or any crop or produce of land by allowing such cattle to trespass thereon, shall, on conviction before a Magistrate, be liable—

(a) for the first offence to a fine not less than Rs. 10, but not exceeding Rs. 250 or to imprisonment for a term not exceeding three months or to both,

(b) for the second or subsequent offence to an imprisonment for a term not exceeding three months and fine not exceeding Rs. 500."

2. For Section 28 of the principal Act, the following shall be substituted:—

"**28. Applications of fines recovered under Section 25, 26 or 27.**—All fines recovered under Section 25, clause (a) of Section 26, or Section 27 may be appropriated in whole or in part as compensation for loss or damage proved to the satisfaction of the convicting Magistrate."—U.P. Act 7 of 1954, S. 3.

**West Bengal**

For Section 26, substitute—

"**26. Penalty for damage caused to land or crop or public road by cattle.**—Any owner or keeper of cattle who through neglect or otherwise, damages or causes or permits to be damaged any land or any public road by allowing such cattle to trespass thereon, shall, on conviction before a Magistrate, be punished with a fine not exceeding two hundred rupees."—West Bengal Act 4 of 1956, S. 4 [16-1-1956].

**STATE AMENDMENT**

**Section 26A.**

**Madhya Pradesh**

After Section 26, insert the following section, namely:—

"**26A. Cognizance of offence.**—No Court shall take cognizance of any offence punishable under Section 26 except on a report in writing of the facts constituting such offence made by the person aggrieved by such offence or by a person who is a public servant as defined in Section 21 of the Indian Penal Code, 1860."—C.P. and Berar Act 27 of 1949, S. 9 [6-5-1949] and M.P. Act 23 of 1958, S. 3 and Sch. Pt. A.

**27. Penalty on pound-keeper failing to perform duties.**—Any pound-keeper releasing or purchasing or delivering cattle contrary to the provisions of Section 19, or omitting to provide any impounded cattle with sufficient food and water, or failing to perform any of the other duties imposed upon him by this Act, shall, over and above any other penalty to which he may be liable, be punished, on conviction before a Magistrate, with fine not exceeding fifty rupees.

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**Section 27 — Note 1**

(1) A person, who is not himself a pound-keeper but has been merely engaged by a Police Patel, who was ex-officio the pound-keeper, is not a pound-keeper within the meaning of Section 27, and cannot, therefore, be convicted under that section. ('72) 9 Bom HCR (AC) 164 (165).

(2) Where the pound-keeper falsifies accounts, the offence committed does not fall under Section 27, but falls under Sections 409 and 511 of the Penal Code. ('96) Rat Un Cr C 632: Cr Rg 2 of 1893.

(3) As to application of fine recovered under section, see Section 28.

Such fines may be recovered by deductions from the pound-keeper's salary.

STATE AMENDMENTS

**Haryana**

Same as in Punjab—Punjab Act 25 of 1964 and C. A. 31 of 1966, S. 88.

**Punjab**

In S. 27, omit the words "'before a Magistrate"—Punjab Act 25 of 1964, S. 2 and Sch. Pt. II [2-10-1964].

**Union Territory (Chandigarh)**

Amendment in S. 27 is the same as in Punjab—Punjab Act 31 of 1966, S. 88.

**Union Territory (H. P.)**

Added Territories: Amendment in S. 27 is the same as in Punjab — Act 31 of 1966, S. 88.

**28. Application of fines recovered under Section 25, 26 or 27.**—All fines recovered under Section 25, Section 26 or Section 27 may be appropriated in whole or in part as compensation for loss or damage proved to the satisfaction of the convicting Magistrate.

STATE AMENDMENT

**Uttar Pradesh**

For Section 28 as may be substituted in its application to Uttar Pradesh, see under "Uttar Pradesh" in State Amendments under Section 26.

STATE AMENDMENT

**Section 28A.**

**Gujarat**

Section 28A is the same in Gujarat as in Maharashtra—Bombay Act 34 of 1950, Gujarat A.L. (Eighth Amendment) Order, 1961.

**Maharashtra**

After Section 28, insert the following section:—

"28A Offence under Section 26 to be cognizable.—The offence under Section 26 shall be cognizable."—Bombay Act 34 of 1950, S. 2 (4).

## CHAPTER VII
## SUITS FOR COMPENSATION

**29. Saving of right to sue for compensation.**—Nothing herein contained prohibits any person whose crops or other produce of land have been damaged by trespass of cattle from suing for compensation in any competent Court.

**Section 28 — Note 1**

(1) Where the accused have been sentenced to a fine of Rs. 10 and they have been also ordered to pay Rs. 10 as compensation to the complainant the manner in which the Magistrate has worded the order is irregular and properly speaking he should have imposed a fine of Rs. 20 and under Section 28 awarded Rs. 10 as compensation to the complainant out of the fine, if recovered. (1951) 4 Sau LR 245 (DB).

**Section 29 — Note 1**

(1) In a suit for damages for illegal seizure of cattle the onus lies on defendant to prove that the seizure was justifiable. Such a suit is not barred by reason of Chapter 5. ('18) AIR 1918 Nag 124 (125) * ('71) 15 Suth WR 279 (280) * ('89) 16 Cal 159 (160). (2 Cal L Rep 344, Dissented from.)

(2) Where in a suit against joint tortfeasors for damages, the plaintiff compromises with some of them without releasing the entire cause of action, he is not debarred from getting a decree against the others. ('42) AIR 1942 Oudh 73 (74): 17 Luck 284.

(3) In a suit for damages under this section it was alleged that the defendants dishonestly let loose their cattle. It was not alleged that the defendants did so with a view to have the defendant's crops grazed. It was not found that the defendants had acted jointly or in concert. The extent of damage caused by the cattle of each defendant was not known. It was held that a joint decree for all the damages against all the defendants could not be passed. Further, in the absence of evidence to show what damages were caused by the cattle of each defendant, only nominal damages could be awarded against each defendant. ('42) AIR 1942 Oudh 73 (74, 75): 17 Luck 284.

## STATE AMENDMENTS

**Gujarat**

Section 29 is the same as in Maharashtra.—Bom. Act 13 of 1959 and Guj. A. L. (8th Am.) Order, 1961.

**Maharashtra**

For the existing Section 29, substitute the following section, namely,—

"29. Saving of right to sue for compensation.—Nothing herein contained prohibits any person whose property, crops or other produce of land have been damaged or to whom any hurt or injury or obstruction has been caused by trespass of cattle from suing for compensation in any competent Court".—Bom. Act 13 of 1959, S. 10 [19-3-1959] and Maha. A. L. O., 1961.

**Madhya Pradesh**

In Section 29 for the words "whose crops or other produce of land have been damaged" substitute the words "whose property, crops or other produce of land have been damaged or to whom any hurt or injury or obstruction has been caused".—C. P. and Berar Act 12 of 1935, S. 4 [30-3-1935] and M. P. Act 23 of 1958, S. 3 and Sch. Pt. A.

30. Set-off.—Any compensation paid to such person under this Act by order of the convicting Magistrate shall be set-off and deducted from any sum claimed by or awarded to him as compensation in such suit.

## CHAPTER VIII[a]

## SUPPLEMENTAL

31. Power for State Government to transfer certain functions to local authority.—The °[State Government] may, from time to time by notification in the Official Gazette,—

(a) transfer to any local authority within any part of the territories under its administration in which this Act is in operation, all or any of the functions of the °[State Government] or the Magistrate of the District under this Act, within the local area subject to the jurisdiction of the local authority.

[b][° ° ° ° ° °]

[a] Chapter VIII was added by the Cattle-trespass Act (1871) Amendment Act, 1891 (1 of 1891), S. 9.

[b] Originally there were the following words:— "Or (b) direct that the whole or any part of the surplus accruing in any district under Sec. 18 of this Act shall be placed to the credit of such local fund or funds as may be formed for any local area or local areas comprised in that district, [and may from time to time, by notification in the Official Gazette, cancel or vary any notification under this section]. The bracketed words were repealed by the Repealing and Amending Act, 1914 (10 of 1914) and the rest by A. O., 1937.

## STATE AMENDMENTS

**Madhya Pradesh**

In Section 31, add the following Proviso to Clause (a)—

"Provided that if in any area any of the functions of the State Government or the Magistrate of the District under this Act were, immediately before the commencement of the Madhya Pradesh Extension of Laws Act, 1958, being performed by a local authority, then on such commencement all such functions shall be deemed to have been transferred to such local authority under this section."— M. P. Act 23 of 1958, S. 3 (1) and Sch. (Part A).

**Tamil Nadu**

In Section 31, for the words "Magistrate of the District" substitute the words "District Collector".—Madras Act 20 of 1957, S. 2 [11-12-1957].

## STATE AMENDMENTS

**Section 32**

**Andhra Pradesh**

In its application to the State of Andhra Pradesh, after Section 31, add the following section—

"**32. Power to make rules.**—(1) The State Government may, by notification published in the Andhra Pradesh Gazette, make rules to carry out the purposes of this Act.

(2) All rules made under this section shall, as soon as may be, after they are made, be placed on the table of the Legislative Assembly and shall be subject to such modifications, whether by way of repeal or amendment, as the Legisaltive Assembly may make within fourteen days thereafter during the session in which they are so placed".—A. P. Act 16 of 1959, S. 6 [15-10-1962].

**Gujarat**

Section 32 is the same in Gujarat as in Maharashtra.—Bom. Act 13 of 1959 read with Guj. A. L. (8th Am.) Order, 1961.

**Maharashtra**

After Section 31, insert the following new section—

"**32. Powter to make rules.**—(1) The State Government may, by notification in the Official Gazette, make rules for carrying into effect the purposes of this Act.

(2) In particular but without prejudice to the generality of the foregoing provision, such rules may provide for the following matters, namely,—

(i) the form of, and the procedure relating to the declaration, and the scales of deposits to be made, under Section 12A;

(ii) the procedure regulating the making of security deposits, custody and refund thereof;

(iii) the manner in which any cattle may be disposed of;

(iv) any other matter which is to be or may be prescribed.

(3) The power to make rules under this section shall be subject to the condition of previous publication in the Official Gazette.

(4) All rules made under this section shall be laid before each House of the Legislature as soon as may be after they are made, and shall be subject to such modifications as the State Legislature may make during the session in which they are so laid, or the session immediately following".—Bom. Act 13 of 1959, S. 11 [19-3-1959] and Maha. A. L. O., 1961.

**Madhya Pradesh**

After Section 31, insert the following section—

"**32. Power to make rules.**—The State Government may make rules—

(a) prescribing the form of, and the procedure relating to the making of, the declaration and the scales of deposit to be made under Section 12A;

(b) prescribing the procedure regulating the making of security deposit, custody and refund thereof;

(c) the manner in which any cattle may be disposed of".

—C. P. and Berar Act 27 of 1949, S. 10 [6-5-1949] and M. P. Act 23 of 1958, S. 3 and Sch. Pt. A.

**Tamil Nadu**

In its application to the territories added to the State by Act 56 of 1959, S. 32 added is the same as in Andhra Pradesh — See Mad. (A. T.) A. L. O., 1961 [w. e. f. 1-4-1961].

**West Bengal**

For Section 32 as inserted by Beng. Act 5 of 1934, substitute the following section—

"**32. Power for Magistrate of the District to appoint Chairmen of Municipalities or Presidents of Union Boards to discharge the functions of an officer under Section 14.**—(1) The Magistrate of the District may appoint for the purposes of this Act, a Chairman of a Municipality constituted under the Bengal Municipal Act, 1932, or a President of a Union Board constituted under the Bengal Village Self-Government Act, 1919, to discharge the functions of an officer appointed under Section 14, in respect of cattle impounded within the area included within that municipality or within the area subject to the jurisdiction of that Union Board as the case may be:

Provided that a Chairman or President so appointed may, by general or special order, delegate to the Vice Chairman of such municipality or the Vice-President of such Union Board, as the case may be, all, or any of the functions of an officer appointed under Sec. 14 which such Chairman or President is entitled to discharge and may at any time withdraw the same.

(2) A Chairman or President so appointed, or a Vice-Chairman or Vice-President to whom the Chairman or the President, as the case may be, may have delegated all or any of the functions referred to in sub-section (1), shall not, directly or indirectly, purchase any cattle at a sale under this Act".—Beng. Act 4 of 1947, S. 3 [12-6-1947].

**STATE AMENDMENT**

**Section 33**

**West Bengal**

"33. Delegation of certain powers of the Magistrate of the District.—The Magistrate of the District may, by an order in writing, delegate the powers specified below to any Magistrate subordinate to him—

(1) the determination of the manner of disposal of unclaimed impounded cattle under the proviso to S. 14; and

(2) the settlement of claims in respect of surplus unclaimed proceeds of the sale of cattle held in deposit under Sec. 17".—Beng. Act 4 of 1947, S. 3 [12-6-1947].

SCHEDULE.—[Repealed by the Repealing Act, 1938 (1 of 1938), S. 2 and Sch.]

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# [THE] CENSUS ACT, 1948
## (ACT XXXVII OF 1948)

[The text of the Act is printed here is as on 15-4-1969].

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**ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION**

—Adapted by A. O. 1937; A. C. A. O. 1948; A. L. O., 1950; A. L. O. (No. 3) 1956.
—Amended by Acts 40 of 1949; 51 of 1950; 22 of 1959.
—Extended by Act 30 of 1950; Regn. 11 of 1963; 8 of 1965.
—Repealed in part by Act 36 of 1957.

# [THE] CENSUS ACT, 1948
## (ACT XXXVII OF 1948)[a]

[3rd September, 1948.]

**An Act to provide for certain matters in connection with the taking of census.**

Whereas it is expedient to provide for the taking of census [b][° ° °] India or any part thereof whenever necessary or desirable and to provide for certain matters in connection with the taking of such census;

It is hereby enacted as follows:—

[a] For Statement of Objects and Reasons, see Gazette of India, 1948, Pt. V, p. 475.

This has been applied—

(i) all the partially excluded areas in Assam specified in the schedule to the Government of India (Excluded and Partially Excluded Areas) Order, 1936—see Assam Gazette, 1948, Pt. II, p. 1269;

(ii) all the partially excluded areas in the Central Provinces and Berar subject to certain modification—see C. P. and Berar Gaz., 1948, Pt. I, p. 622;

(iii) the new Provinces and merged States by the Merged States (Laws) Act, 1949 (59 of 1949), S. 3 (1-1-1950) and to the Union Territories of Manipur, and Tripura, by the Union Territories (Laws) Act, 1950 (30 of 1950), S. 3 (16-4-1950). Vindhya Pradesh now forms part of the State of Madhya Pradesh—see Act 37 of 1956, S. 9 (1) (e).

The Act has been extended to Goa, Daman and Diu by Reg. 11 of 1963 (w.e.f. 1-2-1965); Laccadive, Minicoy and Amindivi Islands by Reg. 8 of 1965.

The Act as in force in Gujarat has been extended to the Union Territory of Dadra and Nagar Haveli, with modifications, by S. O. 464 — Gaz. Ind., 9-2-62, Pt. II, S. 3 (ii) Ext., p. 391.

The Act has been extended to the Union Territory of Pondicherry (Consisting of former French Establishments in India) by the French Establishments A. L. O., 1954 as amended by S. O. 1375 D/-20-6-1959 [w. e. f. 1-7-1959.]

[b] The words "the Provinces and Acceding States of" were omitted by A.L.O., 1950.

**1. Short title and extent.**—(1) This Act may be called THE CENSUS ACT, 1948.

[a][(2) It extends to the whole of India [b][• • •].]

[a] Substituted for former sub-section (2) by A. L. O., 1950.

[b] The words "except the State of Jammu and Kashmir" were omitted by the Census (Amendment) Act, 1959 (22 of 1959), S. 2 [19-5-1959].

[a][2. **Rule of construction respecting enactments not extending to Jammu and Kashmir.**—Any reference in this Act to the Indian Penal Code or the Indian Evidence Act, 1872, shall, in relation to the State of Jammu and Kashmir, be construed as a reference to the corresponding enactment in force in that State.]

[a] Inserted by the Census (Amendment) Act, 1959 (22 of 1959), S. 3 [19-5-1959].

**Modification :**

Union territory (Dadra and Nagar Haveli)—Omit S. 2 — See S. O. 464, Gaz. of Ind., 9-2-62, Pt. II, S. 3 (ii), Ext., p. 391.

Note 1 : References, wherever they occur, to State Government shall be construed as reference to the Administrator; to the Official Gazette, as to Gazette of India and to State, to include a Union Territory.

Note 2 : In its application to the Union Territory of Pondicherry, the expression 'State Government' wherever occurring shall be substituted by the expression "Chief Commissioner". — French Establishments A. L. O., 1954 as amended by S. O. 1375 D/-20-6-1959.

**3. Central Government to take census.**—The Central Government may, by notification in the Official Gazette, declare its intention of taking a census in the whole or any part of the territories to which this Act extends, whenever it may consider it necessary or desirable so to do, and thereupon the census shall be taken.

**4. Appointment of census staff.**—(1) The Central Government may appoint a Census Commissioner to supervise the taking of the census throughout the area in which the census is intended to be taken, and Superintendents of Census Operations to supervise the taking of the census within the several [a][States].

(2) The [a][State] Government may appoint persons as census-officers to take, or aid in, or supervise the taking of, the census within any specified local area and such persons, when so appointed, shall be bound to serve accordingly.

(3) A declaration in writing, signed by any authority authorised by the [a][State] Government in this behalf, that any person has been duly appointed a census-officer for any local area shall be conclusive proof of such appointment.

(4) The [a][State] Government may delegate to such authority as it thinks fit the power of appointing census-officers conferred by sub-section (2).

[a] Substituted for 'Provincial' by A. L. O., 1950.

**5. Status of census authorities as public servants.**—The Census Commissioner, all Superintendents of Census Operations and all census-officers shall be deemed to be public servants within the meaning of the Indian Penal Code.

**6. Discharge of duties of census-officers in certain cases.**—(1) Where the District Magistrate, or such authority as the [a][State] Government may appoint in this behalf, by a written order so directs—

(a) every officer in command of any body of men belonging to the naval, military or air forces, or of any vessel of war, of India,

(b) every person (except a pilot or harbour-master) having charge or control of a vessel,

(c) every person in charge of a lunatic asylum, hospital, workhouse, prison, reformatory or lock-up or of any public, charitable, religious or educational institution,

(d) every keeper, secretary or manager of any sarai, hotel, boarding-house, lodging-house, emigration depot or club,

(e) every manager or officer of a railway or any commercial or industrial establishment, and

(f) every occupant of immovable property wherein at the time of the taking of the census persons are living,

shall perform such of the duties of a census-officer in relation to the persons who at the time of the taking of the census are under his command or charge, or are inmates of his house, or are present on or in such immovable property or are employed under him as may be specified in the order.

(2) All the provisions of this Act relating to census-officers shall apply, so far as may be, to all persons while performing such duties under this section, and any person refusing or neglecting to perform any duty which under this section he is directed to perform shall be deemed to have committed an offence under Sec. 187 of the Indian Penal Code.

[a] Substituted for 'Provincial' by A. L. O., 1950.

**7. Power to call upon certain persons to give assistance.**—The District Magistrate, or such authority as the [a][State] Government may appoint in this behalf for

any local area, may, by written order which shall have effect throughout the extent of his district or of such local area, as the case may be call upon—

(a) all owners and occupiers of land, tenure-holders, and farmers and assignees of land revenue, or their agents,

(b) all members of the district, municipal, panchayat and other local authorities and officers and servants of such authorities, and

(c) all officers and members of staff of any factory, firm or establishment,

to give such assistance as shall be specified in the order towards the taking of a census of the persons who are, at the time of the taking of the census, on the lands of such owners, occupiers, tenure-holders, farmers and assignees, or on the premises of factories, firms and other establishments, or within the areas for which such local authorities are established, as the case may be, and the persons to whom an order under this section is directed shall be bound to obey it and shall, while acting in pursuance of such order, be deemed to be public servants within the meaning of the Indian Penal Code.

[a] Substituted for 'Provincial' by A. L. O., 1950.

**8. Asking of questions and obligation to answer.**—(1) A census-officer may ask all such questions of all persons within the limits of the local area for which he is appointed as, by instructions issued in this behalf by the [a][State] Government and published in the Official Gazette, he may be directed to ask.

(2) Every person of whom any question is asked under sub-section (1) shall be legally bound to answer such question to the best of his knowledge or belief:

Provided that no person shall be bound to state the name of any female member of his household, and no woman shall be bound to state the name of her husband or deceased husband or of any other person whose name she is forbidden by custom to mention.

[a] Substituted for 'Provincial' by A. L. O., 1950.

**9. Occupier to permit access and affixing of numbers.**—Every person occupying any house, enclosure, vessel or other place shall allow census-officers such access thereto as they may require for the purposes of the census and as, having regard to the customs of the country, may be reasonable, and shall allow them to paint on or affix to, the place such letters, marks or numbers as may be necessary for the purposes of the census.

**10. Occupier or manager to fill up schedule.**—(1) Subject to such orders as the [a][State] Government may issue in this behalf, a census-officer may, within the local area for which he is appointed, leave or cause to be left a schedule at any dwelling-house or with the manager or any officer of any commercial or industrial establishment, for the purpose of its being filled up by the occupier of such house or of any specified part thereof or by such manager or officer with such particulars as the [a][State] Government may direct regarding the inmates of such house or part thereof, or the persons employed under such manager or officer, as the case may be, at the time of the taking of the census.

(2) When such schedule has been so left, the said occupier, manager or officer, as the case may be, shall fill it up or cause it to be filled up to the best of his knowledge or belief so far as regards the inmates of such house or part thereof or the persons employed under him, as the case may be, at the time aforesaid, and shall sign his name thereto and, when so required, shall deliver the schedule so filled up and signed to the census-officer or to such person as the census-officer may direct.

[a] Substituted for 'Provincial' by A. L. O., 1950.

**11. Penalties.**—(1) (a) Any census-officer or any person lawfully required to give assistance towards the taking of a census who refuses or neglects to use reasonable diligence in performing any duty imposed upon him or in obeying any order issued to him in accordance with this Act or any rule made thereunder, or any person who hinders or obstructs another person in performing any such duty or in obeying any such order, or

(b) any census-officer who intentionally puts any offensive or improper ques-

tion or knowingly makes any false return or, without the previous sanction of the Central Government or the [a][State] Government, discloses any information which he has received by means of, or for the purposes of, a census return, or

(c) any sorter, compiler or other member of the census staff who removes, secretes, damages or destroys any census document or deals with any census document in a manner likely to falsify or impair the tabulations of census results, or

(d) any person who intentionally gives a false answer to, or refuses to answer to the best of his knowledge or belief, any question asked of him by a census-officer which he is legally bound by Section 8 to answer, or

(e) any person occupying any house, enclosure, vessel or other place who refuses to allow a census-officer such reasonable access thereto as he is required by Section 9 to allow, or

(f) any person who removes, obliterates, alters, or damages any letters, marks or numbers which have been painted or affixed for the purposes of the census, or

(g) any person who, having been required under Section 10 to fill up a schedule, knowingly and without sufficient cause fails to comply with the provisions of that section, or makes any false return thereunder, or

(h) any person who trespasses into a census office,

shall be punishable with fine which may extend to one thousand rupees and in case of a conviction under part (b) or (c) shall also be punishable with imprisonment which may extend to six months.

(2) Whoever abets any offence under sub-section (1) shall be punishable with fine which may extend to one thousand rupees.

[a] Substituted for 'Provincial' by A. L. O., 1950.

**12. Sanction required for prosecutions.**—No prosecution under this Act shall be instituted except with the previous sanction of the [a][State] Government or of an authority authorised in this behalf by the [a][State] Government.

[a] Substituted by A. L. O., 1950.

**13. Operation of other laws not barred.**—Nothing in this Act shall be deemed to prevent any person from being prosecuted under any other law for any act or omission which constitutes an offence under this Act:

Provided that no such prosecution shall be instituted except with the previous sanction referred to in Section 12.

**14. Jurisdiction.**—No Court inferior to that of a Presidency Magistrate or a Magistrate of the second class [a][° ° °] shall try, whether under this Act or under any other law, any act or omission which constitutes an offence under this Act.

[a] The words "or in a Part B State, a Magistrate corresponding to a Magistrate of the second class" were omitted by 3 A. L. O., 1956.

**Modifications:**

Union Territory (Dadra and Nagar Haveli); In its application to Dadra and Nagar Haveli, for S. 14, substitute the following:

"14. No Magistrate other than a Magistrate specially empowered in this behalf by the Administrator shall try, whether under this Act or under any other law, any act or omission which constitutes an offence under this Act".—S. O. 464, Gaz. of Ind., 1962, Pt. II, S. 3 (ii), Ext., p. 391.

Union Territory (Pondicherry)

S. 14 in the territory is the same as in Dadra Nagar Haveli except that for the word Administrator words 'Chief Commissioner are there'—see S. O. 1375, Gaz. Ind., 1959, Pt. II, S. 3 (ii), p. 1387.

**15. Records of census not open to inspection nor admissible in evidence.**—No person shall have a right to inspect any book, register or record made by a

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**Section 15 — Note 1**

(1) The reports of Census in India prior to the coming into force of the Constitution were made by Superintendents of Census Operations for each Presidency or Province as the case may be. These reports are printed and published by the Government and are available for sale to the Public. The reports of Census compiled by the superinten-

census-officer in the discharge of his duty as such, or any schedule delivered under Section 10, and notwithstanding anything to the contrary in the Indian Evidence Act, 1872, no entry in any such book, register, record or schedule shall be admissible as evidence in any civil proceeding whatsoever or in any criminal proceeding other than a prosecution under this Act or any other law for any act or omission which constitutes an offence under this Act.

**16. Temporary suspension of other laws as to mode of taking census in municipalities.**—Notwithstanding anything in any enactment or rule with respect to the mode in which a census is to be taken in any municipality, the municipal authority, in consultation with the Superintendent of Census Operations or with such other authority as the [a][State] Government may authorise in this behalf, shall, at the time appointed for the taking of any census cause the census of the municipality to be taken wholly or in part by any method authorised by or under this Act.

[a] Substituted by A. L. O., 1950.

**17. Grant of statistical abstracts.**—The Census Commissioner or any Superintendent of Census Operations or such person as the [a][State] Government may authorise in this behalf may, if he so thinks fit, at the request and cost (to be determined by him) of any local authority or person, cause abstracts to be prepared and supplied containing any such statistical information as can be derived from the census returns for [a][India or any State], as the case may be, being information which is not contained in any published report and which in his opinion it is reasonable for that authority or person to require.

[a] Substituted for the words "the Provinces of India or the Province" by A. L. O., 1950.

**18. Power to make rules.**—(1) The Central Government may make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, the Central Government may make rules providing for the appointment of census-officers and of persons to perform any of the duties of census-officers or to give assistance towards the taking of a census, and for the general instructions to be issued to such officers and persons.

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## [THE] CENTRAL BOARDS OF REVENUE ACT, 1963
## (ACT 54 OF 1963)

[The text of the Act printed here is as on 15-4-1969].

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SECTIONS
1. Short title and commencement.
2. Definitions.
3. Constitution of separate Central Boards for Direct Taxes and for Excise and Customs.
4. Procedure of the Board.
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**Section 15 — Note 1 (contd.)**

dents of the Census Operations do not fall within the scope of S. 15 and therefore the section is not a bar to the Court looking into the Census reports and placing reliance on the information contained therein. AIR 1967 Mys 182 (187): (1967) 2 Mys LJ 277.

(2) Section 15 does not bar a reference to any historical or statistical or similar information relating to tribes, castes or religions of persons inhabiting a particular area and it only bars inspection of any book, register or record made by a Census Officer in the discharge of his duty as such. That must have reference only to the original books or documents which the Census Officer himself prepared while carrying out the task of taking census in accordance with the provisions of the Act. AIR 1968 Punj 331 (334) : ILR (1968) 1 Punj 593.

(3) Entries in census register are inadmissible in evidence — No reliance can be placed on certified copies of extracts of census register. (1968) 1 Andh WR 429.

## STATEMENT OF OBJECTS AND REASONS

The object of this Bill is to replace the Central Board of Revenue Act, 1924, by this law which provides for the constitution of two Boards named, respectively, as the Central Board of Direct Taxes and the Central Board of Excise and Customs. Owing to the very considerable expansion of the Union revenue administration since 1924, substantial strengthening of the Board of Revenue at the Centre as well as its functional bifurcation has become a matter of urgent necessity. Such separation has also been recommended by the Direct Taxes Administration Enquiry Committee and more recently, by the Central Excise Reorganisation Committee. This Bill seeks to give effect to those recommendations which have since been accepted by Government. — See Gazette of India, 1963, Pt. II-Sec. 2, Extra, p. 775.

# THE CENTRAL BOARDS OF REVENUE ACT, 1963
## (ACT 54 OF 1963)[a]

[30th December, 1963.]

**An Act to provide for the constitution of separate Boards of Revenue for Direct Taxes and for Excise and Customs and to amend certain enactments for the purpose of conferring powers and imposing duties on the said Boards.**

Be it enacted by Parliament in the Fourteenth Year of the Republic of India as follows :—

[a] For Statement of Objects and Reasons, see Gaz. of Ind., 30-12-1963, Pt. II, S. 2, Ext., page 775.

**1. Short title and commencement.**—(1) This Act may be called THE CENTRAL BOARDS OF REVENUE ACT, 1963.

(2) It shall come into force on such date[a] as the Central Government may, by notification in the Official Gazette, appoint.

[a] The date appointed is 1-1-1964, see Gaz. of India, 30-12-1963, Pt. II, S. 3 (ii), Ext., p. 897.

**2. Definitions.**—In this Act, unless the context otherwise requires,—

(a) "Board" means the Central Board of Direct Taxes or the Central Board of Excise and Customs constituted under Sec. 3;

(b) "Central Board of Revenue" means the Central Board of Revenue constituted under the Central Board of Revenue Act, 1924;

(c) "direct tax" means—

(1) any duty leviable or tax chargeable under—

(i) the Estate Duty Act, 1953;
(ii) the Wealth-tax Act, 1957;
(iii) the Expenditure-tax Act, 1957;
(iv) the Gift-tax Act, 1958;
(v) the Income-tax Act, 1961;
(vi) the Super Profits Tax Act, 1963; and

(2) any other duty or tax which, having regard to its nature or incidence, may be declared by the Central Government, by notification[a] in the Official Gazette, to be a direct tax.

[a] Tax chargeable under the Income-tax Act, 1922 (11 of 1922); Excess Profits Tax Act, 1940 (15 of 1940), the Business Profits Tax Act, 1947 (21 of 1947) declared to be a direct tax within the meaning of the section — See Gaz. of Ind., 1-1-1964, Pt. II, S. 3 (ii), p. 2.

**3. Constitution of separate Central Boards for Direct Taxes and for Excise and Customs.**—(1) The Central Government shall, in place of the Central Board of Revenue, constitute two separate Boards of Revenue to be called the Central Board of Direct Taxes and the Central Board of Excise and Customs, and each such Board shall, subject to the control of the Central Government, exercise such powers and perform such duties, as may be entrusted to that Board by the Central Government or by or under any law.

(2) Each Board shall consist of such number of persons not exceeding five as the Central Government may think fit to appoint.

**4. Procedure of the Board.**—(1) The Central Government may make rules[a] for the purpose of regulating the transaction of business by each Board and every order made or act done in accordance with such rules shall be deemed to be the order or act, as the case may be, of the Board.

(2) Every rule made under this section shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thiry days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be, so however, that any modification of annulment shall be without prejudice to the validity of anything previously done under that rule.

[a] For the Central Board of Direct Taxes (Regulation of Transaction of Business) Rules, 1964 and Central Board of Excise and Customs (Regulation of Transaction of Business) Rules, 1964, see Gaz. of Ind., 1-1-1964, Pt. II, S. 3 (ii), Ext., pages 3, 4.

**5. Amendment of certain enactments.**—(1) In the Estate Duty Act, 1953, the Wealth-tax Act, 1957, the Expenditure-tax Act, 1957, the Gift-tax Act, 1958, the Income-tax Act, 1961 and the Super Profits Tax Act, 1963, for the words and figures "Central Board of Revenue constituted under the Central Board of Revenue Act, 1924" or "Central Board of Revenue", wherever they occur, the words and figures "Central Board of Direct Taxes constituted under the Central Boards of Revenue Act, 1963" shall be substituted.

(2) In the Central Excises and Salt Act, 1944, and the Customs Act, 1962, for the words and figures "Central Board of Revenue constituted under the Central Board of Revenue Act, 1924" or "Central Board of Revenue" wherever they occur, the words and figures "Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963" shall be substituted.

(3) The functions entrusted to the Central Board of Revenue by or under any other enactment shall,—

(a) if such functions relate to matters connected with direct taxes, be discharged by the Central Board of Direct Taxes; and

(b) if such functions relate to any other matter, unless they are entrusted by the Central Government to the Central Board of Direct Taxes, be discharged by the Central Board of Excise and Customs.

**6. Transfer of certain proceedings.**—(1) Every proceeding pending at the commencement of this Act, before the Central Board of Revenue shall—

(a) if it is a proceeding relating to direct taxes, stand transferred to the Central Board of Direct Taxes; and

(b) in any other case, stand transferred to the Central Board of Excise and Customs.

(2) If any question arises as to whether any proceeding stands transferred to the Central Board of Direct Taxes or to the Central Board of Excise and Customs, it shall be referred to the Central Government whose decision thereon shall be final.

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**Section 4 — Note 1**

(1) There is nothing in the Income-tax Act, 1961, nor in the Central Board of Revenue Act, 1963, which required the Central Board of Direct Taxes to act as a single body and to perform all the functions of that Board sitting together without assigning some or all of its various duties to the individual members constituting it. The words "for the purpose of regulating the transaction of business" in S. 4 of the Central Board of Revenue Act, 1963, are extremely wide and include in their ambit the power to make rules empowering the Chairman of the Central Board of Direct Taxes to pass an order distributing the business of the Board among himself and the member or the members of the Board. (1968) 2 ITJ 69 (73) (All) (DB).

(3) In any legal proceeding pending at the commencement of this Act to which the Central Board of Revenue is a party,—

(a) if it is a proceeding relating to direct taxes, the Central Board of Direct Taxes shall be deemed to be substituted for the Central Board of Revenue in such proceeding; and

(b) if it is a proceeding relating to any other matter, the Central Board of Excise and Customs shall be deemed to be substituted for the Central Board of Revenue in such proceeding.

**7. Power to remove difficulties.**—(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the purposes of this Act, as appear to it to be necessary or expedient for removing the difficulty.

(2) An order under sub-section (1) may be made so as to have retrospective effect from a date not earlier than the date of the commencement of this Act.

**8. Repeal and saving.**—(1) The Central Board of Revenue Act, 1924, is hereby repealed.

(2) Nothing contained in sub-section (1) shall affect any appointment, assessment, order (including quasi-judicial order) or rule made, or exemption, approval or recognition granted, or any notice, notification, direction or instruction issued, or any duty levied, or penalty or fine imposed, or confiscation adjudged, or any form prescribed, or any other thing done or action taken by the Central Board of Revenue under any law and any such appointment, assessment, order, rule, exemption, approval, recognition, notice, notification, direction, instruction, duty, penalty, fine, confiscation, form, thing or action shall be deemed to have been made, granted, issued, levied, imposed, adjudged, prescribed, done or taken by the Central Board of Direct Taxes, or as the case may be, by the Central Board of Excise and Customs and shall continue to be in force unless and until it is revised, withdrawn or superseded by the concerned Board.

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# [THE] CENTRAL EXCISES AND SALT ACT, 1944
## (ACT 1 OF 1944)

[The text of the Act printed here is as on 15-4-1969].

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14-D. Synthetic Organic dyestuffs (including pigment dyestuffs) and synthetic organic derivatives used in any dyeing process.
14-DD. Synthetic organic products of a kind used as organic luminiphores; products of the kind known as opticle bleaching agents, substantive to the fibre.
14-E. Patent or proprietary Medicines not containing alcohol, opium, Indian hemp or other narcotic drugs or other narcotics or other than those medicines which are exclusively Ayurvedic, Unani sidha or Homeopathic.
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THIRD SCHEDULE [Repealed.]

## STATEMENT OF OBJECTS AND REASONS

"The administration of internal commodity taxation in British India has grown up piecemeal over many years and has been considerably expanded during the last decade. Hitherto, the introduction of a new central duty of excise has required the enactment of self-contained law and the preparation of a separate set of statutory rules. There are no less than 10 separate excise Acts (the excise on kerosene being covered by a part of the Indian Finance Act, 1922) and 11 sets of statutory rules: and there are also 5 Acts relating to salt, the duty on which is by a wide margin the oldest of our taxes on indigenous commodities. The taxes being closely akin to one another, the methods of collection follow the same general pattern and many of the provisions of the various Acts are identical or closely similar; and this is the case also with many of the statutory rules. The agglomeration of statutes and regulations dealing with similar matters is neither convenient for the public nor conducive to well organised administration. Moreover, under this disjunctive arrangement, we have not, and cannot readily construct, a comprehensive code of standing instructions for the governance of the excise staff and each set of statutory rules is burdened with departmental instructions in which the public has no concern or interest and which, even taken together, do not form an adequate administrative code.

(2) It is accordingly proposed to consolidate in a single enactment all the laws relating to central duties of excise and to the tax on salt and to embody therein a Schedule, similar to that in the Indian Tariff Act, 1934, setting forth the rates of duty leviable on each class of goods. At the same time the statutory rules will be similarly amalgamated and disembarrassed of their unnecessary detail. The Act and the consolidated statutory rules, together with as many manuals of departmental instructions as may be necessary, will then form a complete Central Excise Code, which will simplify the administration of this branch of the revenue system and aid such further development as may be necessary; and any proposal for a new excise which may be hereafter be laid before the Legislature may then take the simpler and more convenient form of a clause in the annual Finance Bill.

3. The intention of the Bill is to reproduce provisions already existing in the Acts which it is proposed to repeal, but in the process certain small amendments have been made, either in modernising the language or for dovetailing the provisions and otherwise adapting them to present circumstances. These amendments are the minimum consistent with such blending and adaptation.

4. The combination of a number of separate measures, each of which has been moulded to fit its particular subject, necessarily includes their special features as well as those which are common to others in the group and it follows that certain provisions which have hitherto applied only to certain goods will, after consolidation, become applicable over the whole field,

either as a matter of course or by notification as circumstances may require. In particular the Bill provides that certain features of the salt law relating to transport by small coastal craft will become adaptable, as necessary, in the administration of other excise duties.

5. No interference of any kind is made in any of the existing duties. These have been merely collected from the various Acts and reproduced in the Schedule; and the item relating to salt has been so worded as to preserve to the Central Legislature the right which it has so long exercised of voting annually on the rate of duty to be fixed."

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—Gazette of India, 1943, Part V, p. 243.

## EXTRACT FROM THE SELECT COMMITTEE REPORT

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"The changes made in the Bill are nearly all of a formal nature dictated by the advisability of emphasising, more pointedly than the Bill as drafted did the differences between salt and the other articles subjected to duties of central excise, and the difference between the salt duty and the other central excise duties, differencs referred to in the judgment of the Federal Court in the case, Lahore Municipality v. Daulat Ram, 1942 F. C. R. 31. It is inadvisable to exhibit, as the Bill did, the duty on salt as indistinguishable from those other duties of excise. The competence of the Central Legislature to legislate on salt is derived from entry 47 of List I of the Seventh Schedule to the Government of India Act and extends to salt in all its aspects. Legislative competence in respect of other articles is derived from item 45 of that list and extends only to the imposition of dutics of excise upon them and, in so far as provisions which might fall within the scope of Entries 27 and 29 of List II of the Seventh Schedule are concerned, to the making only of such provisions as are essential for the purpose of effectively implementing the power of imposing such duties.

The changes made by us in the long title, preamble, short title, and clause (2) (d) and (e) recognise the peculiar status under the Constittuion Act of salt as compared with the other excisable articles with which the Bill deals, while leaving the provisions applicable generally to all excisable articles applicable also to salt. The alteration of Clause (3) (1) again recognizes a distinction between other central excise duties and the duty on salt and is responsible for the small consequential amendment made in Clause (5).

The limitations on the power of the Central Legislature to legislate on matters coming ordinarily within the scope of Items 27 and 29 of the Provincial Legislative List have suggested the alterations made by us in Clauses (6) and (8) and in the Items (v), (x) and (xiv) of Clause 37 (1)[a]. The extent to which incursion into the Provincial legislative field is necessitated for the purpose of effective legislation on the subject dealt with by the Bill is particularised. Under Clause (6) the power to control manufacture by licence is essential for the purpose of effectively levying and collecting the excise duty in all cases, but so far as purchase, sale and storage are concerned the power is essential and has so far been taken only in respect of tobacco, though subsequent additions to the articles subjected to duties of central excise may necessitate further entries in Part A of the new Schedule II. Clause (8) dealing with the possession of excisable goods has been recast on similar lines for similar reasons. The alterations in Clause 3 (1) again specifically state the limitations which are, under the Constitution Act, attached to Central legislation on the matters dealt with."

* * * * * *

—Gazette of India, 1944, Part V, p. 13.

[a] This seems to be a discrepancy for Clause 37 (2).

## ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A. C. A. O. 1948; A. L. O. 1950; A. L. O. 1954; 3 A. L. O., 1956.

—Amended by Finance Acts of 1944 and 1945.

—Amended by Acts 6 of 1945; 7 of 1946; 20 of 1948; 14 of 1949; 25 of 1950; 23 of 1951; 45 of 1951; 48 of 1952; 14 of 1953; 15 of 1953; 17 of 1954; 34 of 1954; 41 of 1954; 15 of 1955; 18 of 1956; 58 of 1956; 76 of 1956; 81 of 1956; 26 of 1957; 49 of 1957; 11 of 1958; 27 of 1958; 45 of 1958; 12 of 1959; 37 of 1959; 13 of 1960; 38 of 1960; 14 of 1961; 11 of 1962; 20 of 1962; 13 of 1963; 30 of 1963; 54 of 1963; 5 of 1964; 17 of 1964; 10 of 1965; 15 of 1965; 13 of 1966; 12 of 1967; 20 of 1967; 19 of 1968.

—Extended by Acts 59 of 1949; 30 of 1950.

—Repealed in part by Acts 2 of 1948; 48 of 1952; 58 of 1960.

## COGNATE ACTS AND PROVISIONS

1. Dhoties (Additional Excise Duty) Act, 39 of 1953.
2. Mineral Oils (Additional Duties of Excise and Customs) Act, 27 of 1958.
3. Sugar (Temporary Additional Excise Duty) Act 67 of 1952.

# [THE] CENTRAL EXCISES AND SALT ACT, 1944
## (ACT 1 OF 1944)[a]

[24th February, 1944.]

An Act to consolidate and amend the law relating to central duties of excise and to salt.

WHEREAS it is expedient to consolidate and amend the law relating to central duties of excise on goods manufactured or produced in *[certain parts of India] and to salt;

It is hereby enacted as follows:

[a] For Statement of Objects and Reasons, see Gaz. of Ind., 1943, Pt. V, page 243; and for Select Committee Report, see ibid, 1944, Pt. V, page 13.

The Act has been extended to the new Provinces and Merged States by the Merged States (Laws) Act, 1949 (59 of 1949), S. 3 (1-1-1950) and to the States of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act, 1950 (30 of 1950), S. 3 (16-4-1950). Vindhya Pradesh now forms part of the State of Madhya Pradesh—see Act 37 of 1956, S. 9 (1) (e).

The Act has been extended to the Union Territories of Goa, Daman and Diu, by Regulation 12 of 1962; Dadra and Nagar Haveli by Regn. 6 of 1963; Laccadive, Minicoy and Amindivi by Regn. 8 of 1965.

The Act has been extended to the French Establishments in India by the French Establishments A.L.O., 1954 (w.e.f. 1-11-1954); said French Establishments now constitute the Union Territory of Pondicherry.

## CHAPTER I

**1. Short title, extent and commencement.**—(1) This Act may be called THE CENTRAL EXCISES AND SALT ACT, 1944.

(2) It extends to the whole of India *[* * *].

(3) It shall come into force on such date[b] as the Central Government may, by notification in the Official Gazette, appoint in this behalf.

[a] The words "except the State of Jammu and Kashmir" were omitted by the Taxation Laws (Extension to Jammu and Kashmir) Act, 1954 (41 of 1954), S. 2 and Sch. [8-10-1954].

[b] This Act came into force on 28th February, 1944—See Gazette of India, 1944, Extraordinary, page 293.

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**Preamble — Note 1**

(1) The operation of the excise law is confined to enumerated commodities and salt only. AIR 1966 SC 805 (808): (1962) 2 SCR 942.

(2) Restrictions imposed by Act are not unreasonable. AIR 1960 SC 424 (430): (1960) 2 SCR 362.

**Section 1 — Note 1**

(1) The Central Excises and Salt Act, 1944, was extended to the State of Rajasthan by S. 11, Finance Act, 25 of 1950 from 1-4-1950 and the necessary rules under that Act also came into force from that date. ('53) AIR 1953 Raj 145 (148) : ILR (1953) 3 Raj 128 (FB).

(2) Once the notification for bringing the Act into force throughout the area in which it was intended to be in force was issued and the Act was brought into force in that area the power of the Central Government to issue any notification in that behalf was exhausted. The Act did not postulate its extension to any other area either at once or from time to time. AIR 1961 Madh Pra 353 (355): 1961 Jab LJ 1193 (DB).

(3) Even otherwise the power to issue a notification to bring an Act into force is a delegated power and the Legislature is competent to subsequently enact, when extending the Act to a new area, that it shall come into force immediately and so to take away the delegated power by necessary implication. AIR 1961 Madh Pra 353 (355) : 1961 Jab LJ 1193.

**2. Definitions.**—In this Act, unless there is anything repugnant in the subject or context,—

(a) "broker" or "commission agent" means a person who in the ordinary course of business makes contracts for the sale or purchase of excisable goods for others;

(b) "Central Excise Officer" means any officer of the Central Excise Department or any person (including an officer of the [b][State] Government) invested by the [a][Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963] with any of the powers of a Central Excise Officer under this Act;

[a] Substituted for "Central Board of Revenue" by Central Boards of Revenue Act, 1963 (54 of 1963), S. 5 (2) [1-1-1964].

[b] Substituted by A.L.O., 1950.

(c) "curing" includes wilting, drying, fermenting and any process for rendering an unmanufactured product fit for marketing or manufacture;

(d) "excisable goods" means goods specified in the First Schedule as being subject to a duty of excise and includes salt;

(e) "factory" means any premises, including the precincts thereof, wherein or in any part of which excisable goods other than salt, are manufactured, or wherein or in any part of which any manufacturing process connected with the production of these goods is being carried on or is ordinarily carried on;

[a][(ee)• • • •]

[a] Clause (ee), inserted by the Finance Act, 1950 (25 of 1950), was omitted by the Taxation Laws (Extension to Jammu and Kashmir) Act, 1954 (41 of 1954), S. 2 and Sch. [8-10-1954].

(f) "manufacture" includes any process incidental or ancillary to the completion of a manufactured product; and

(i) in relation to tobacco includes the preparation of cigarettes, cigars cheroots, biris, cigarette or pipe or hookah tobacco, chewing tobacco or snuff, [a][•]

(ii) in relation to salt, includes collection, removal, preparation, steeping, evaporation, boiling, or any one or more of these processes, the separation or purification of salt obtained in the manufacture of saltpetre, the separation of salt from earth or other substance so as to produce alimentary salt, and the excavation or removal of natural saline deposits or efflorescence; [b][• • •];

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**Section 2(a) — Note 1**

(1) The expression 'in the ordinary course of business is susceptible of one meaning namely that there should be a series of transactions as distingushed from one transaction. The course of business should consist in making some purchases as an agent. A stray transaction may not be said to constitute an ordinary course of business. It is not essential that the agent should have several customers to fall within the purview of the definition. AIR 1959 Andh Pra 647 (648) (DB).

**Section 2 (c) — Note 1**

(1) Whatever be the process of curing and however inclusive be its definition in the Act, it must be completed only by a licenced curer and no other person can carry out any process of curing. AIR 1959 Punj 357 (360) : 61 Pun LR 154.

**Section 2 (f) — Note 1**

(1) The word "manufacture" implies a change but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character or use. AIR 1968 SC 922 (928) : (1968) 2 SCJ 433.

(2) The definition cl. (f) of S. 2 is specially inserted in the Act with a view to remove any ambiguity that may arise as to the precise stage when the manufacture of certain class of goods may be said to have been completed. AIR 1966 Pat 248 (250) : 1966 BLJR 790 (DB).

(3) The stage of completion of a manufactured produce is not reached until all the processes incidental or ancillary have also been completed. AIR 1966 Pat 248 (250) : 1966 BLJR 790 (DB).

(4) Person engaging in production or manufacture through independent contractor is also manufacturer under Section 2 (f) (ii). AIR 1965 Guj 215 (224, 225) (1965) 6 Guj LR 137 (DB).

[c][(iii) In relation to patent or proprietary medicines, as defined in Item No. 14-E of the First Schedule and in relation to cosmetics and toilet preparations as defined in Item No. 14-F of that Schedule, includes the conversion of powder into tablets or capsules, the labelling or relabelling of containers intended for consumers and repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumers.]

[d][(iv) In relation to goods comprised in Item No. 18-A of the First Schedule, includes sizing, beaming, warping, wrapping, winding or reeling, or any one or more of these processes, or the conversion of any form of the said goods into another form of such goods;

and the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account.]

[a] The word "and" was omitted by the Finance (No. 2) Act, 1962 (20 of 1962), Sec. 16.

[b] Certain words were omitted by the Finance Act, 1964 (5 of 1964), Sec. 60 (1) (i).

[c] Clause (iii) was inserted by Finance (No. 2) Act, 1962 (20 of 1962), S. 16.

[d] Clause (iv) was inserted by Finance Act, 1964 (5 of 1964), S. 60 (1) (ii).

(g) "prescribed" means prescribed by rules made under this Act;

(h) "sale" and "purchase", with their grammatical variations and cognate expressions, mean any transfer of the possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuable consideration;

(i) "Saltpetre" includes rasi, sajji, and all other substances manufactured from saline earth, and kharinun and every form of sulphate or carbonate of soda;

(j) "salt factory" includes—

(i) a place used or intended to be used in the manufacture of salt and all embankments, reservoirs, condensing and evaporating pans, buildings and waste places situated within the limits of such place, as defined from time to time by the Collector of Central Excise;

(ii) all drying grounds and storage platforms and storehouses appertaining to any such place;

(iii) land on which salt is spontaneously produced;

and a "private salt factory" is one not solely owned or not solely worked by the Central Government;

[a][(jj) • • • •]

[a] Clause (jj) inserted by A.L.O., 1950, was omitted by the Finance Act, 1950 (25 of 1950), S. 11 and Sch. IV (31-3-1950).

(k) "wholesale dealer" means a person who buys or sells excisable goods wholesale for the purpose of trade or manufacture, and includes a broker or commission agent who, in addition to making contracts for the sale or purchase of excisable goods for others, stocks such goods belonging to others as an agent for the purpose of sale.

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**Section 2(j) — Note 1**

(1) 'Mineral" in S. 231, Revenue Act, 1949 includes Marwar Land salt wherever produced. AIR 1957 Raj 213 (215) : ILR (1956) 6 Raj 305 (DB).

## CHAPTER II

## LEVY AND COLLECTION OF DUTY

**3. Duties specified in the First Schedule to be levied.**—(1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in [a][India] and a duty on salt manufactured in, or imported by land into, any part of [a][India] as, and at the rates set forth in the First Schedule.

[b][(1A) The provisions of sub-section (1) shall apply in respect of all excisable goods other than salt which are produced or manufactured in India by, or on behalf of, Government as they apply in respect of goods which are not produced or manufactured by Government.]

(2) The Central Government may, by notification in the Official Gazette, fix, for the purpose of levying the said duties, tariff values of any articles enumerated, either specifically or under general headings, in the First Schedule as chargeable with duty ad valorem and may alter any tariff values for the time being in force.

(3) Different tariff values may be fixed for different classes or descriptions of the same article.

[a] Substituted for "the States" by the Finance Act, 1950 (25 of 1950), S. 11 and Sch. IV [31-3-1950].

[b] Substituted by the Customs and Central Excises (Amendment) Act, 1963 (30 of 1963), S. 3 [1-10-1963].

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**Section 3 — Note 1**

(1) Though levy of duty is valid it must be collected by authority of law and in manner prescribed by law. No rules are prescribed for collection of duty on excisable goods which have already been removed from warehouse and hence duty cannot be collected on such goods. AIR 1952 Nag 139 (144) : ILR (1952) Nag 156 (DB).

(2) There is nothing unconstitutional if a taxing statute while providing for levy in the Act itself delegates to the rule-making authority the power of providing for the collection of tax. AIR 1966 Pat 248 (252) : 1966 BLJR 790 (DB).

(3) The duty collected under S. 7(2) of the Finance Act (1951) is a duty of excise and not a direct tax. AIR 1952 Nag 139 (141) : ILR (1952) Nag 156 (DB).

(4) (Per Sinha C. J., Gajendragadkar, Wanchoo, Shah and Ayyangar JJ.) The immunity granted to the States in respect of Union taxation does not extend to duties of customs including export duties or duties of excise on the production or manufacture in India, of the property of a State used for purposes other than those specified in Clause (2) of Article 289 of the Constitution. AIR 1963 SC 1760 (1777): (1964) 3 SCR 787.

(5) The agricultural implements manufactured by the State Government are not excisable goods. AIR 1968 Mys 237 (242): (1968) 1 Mys LJ 178 (DB).

(6) Excise duty on tobacco can legally be recovered by the Central Government from persons storing tobacco in their licensed warehouses. The realising of the duty at the stage of storage instead of at the stage of primary production is only for the sake of convenience; and storage must be treated as ancillary to production or manufacture. 1962 (2) Cri LJ 407 (408) (All).

(7) Notifications under — Notification of Government of India, dated 13-3-1962 — Notification of Government of India, dated 15-9-1962 — "Hank" — Meaning of — Coils of cotton yarn cleared out of appellant's factory held not exempt from excise duty under notifications. AIR 1967 Ker 62 (62): 1966 Ker LJ 23 (DB).

(8) An Excise Duty is a duty on production and though according to the economists, it is an indirect tax capable of being passed on to the consumer as part of the price yet the mere passing on of the duty is not its essential characteristic. Even if borne by the producer or manufacturer it does not cease to be a duty of excise. AIR 1963 SC 104 (106): (1963) 3 SCR 642 * AIR 1960 Raj 92 (99): 1960 Raj LW 44 (DB). (It is recoverable from the manufacturer even if the manufacturer is unable to recover it from the consumer.)

(9) The question whether in calculating the duty ad valorem, the Collector of Excise is justified in including in the price, the cost of packing, charges for freight and commission for distribution, or not, is a matter for the decision of the authorities constituted under the Central Excises and Salt Act subject to such appeals and revisions as might lie but not a matter for consideration directly under Article 32 of the Constitution. AIR 1963 SC 104 (106): (1963) 3 SCR 642.

(10) A suit for the refund or reimbursement of the excise duty is maintainable even though the plaintiff has collected the same from consumers over

**3A. Emergency power of Central Government to increase duties of excise.—** [Repealed by the Repealing and Amending Act, 1960 (58 of 1960), S. 2 and Sch. 1 [26-12-1960].]

[a][4. **Determination of value for the purposes of duty.**—Where, under this Act, any article is chargeable with duty at a rate dependent on the value of the article, such value shall be deemed to be—

(a) the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold at the time of the removal of the article chargeable with duty from the factory or any other premises of manufacture or production for delivery at the place of manufacture or production, or if a wholesale market does not exist for such article at such place, at the nearest place where such market exists, or

(b) where such price is not ascertainable, the price at which an article of the like kind and quality is sold or is capable of being sold by the manufacturer or producer, or his agent, at the time of the removal of the article chargeable with duty from such factory or other premises for delivery at the place of manufacture or production, or if such article is not sold or is not capable of being sold at such place, at any other place nearest thereto.

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**Section 3 — Note 1 (contd.)**

and above the ex-mill price of the cloth. AIR 1960 Raj 92 (99): 1960 Raj LW 44 (DB).

(11) In the case of manufactured goods the payment of duty and the clearance of goods may be synchronous or the payment may be postponed although the goods may be removed. AIR 1967 SC 1564 (1568).

**Section 4 — Note 1**

(1) Excise duty is a duty on the manufacture of goods and, is chargeable on the value of goods manufactured. It is necessary to determine the value of the goods manufactured. This must then be the value of the goods at the place of manufacture. It is to be noted that the value is not to be determined on the basis of the sale of the article in question but on the basis of the wholesale cash price for which an article of the like kind is sold or is capable of being sold. 1967 All LJ 393.

(2) The determination of excise duty in terms of Section 4, depends on the determination of the value for the purpose of duty, for the calculation of which there are three factors, (1) the location where the calculation is to be made. (2) the time at which the calculation should be made and (3) the method of calculation. AIR 1961 Cal 477 (480).

(3) First, the Court must determine the location where the wholesale cash price is to be determined. What would be the location of the nearest wholesale market and the particular wholesale price for a specified class of goods must be determined upon the facts of each case. AIR 1968 Cal 154 (155) (DB).

(4) So far as time is concerned, the calculation must be made with reference to the time when the goods are removed from factory or place of manufacture or production for delivery. AIR 1968 Cal 154 (156) (DB).

(5) Cost price is not a decisive factor in deciding the value for the purpose of Section 4. Cost price can only indicate at what price, as rock bottom price, it was possible for the plaintiff to sell under normal conditions as a prudent business concern and not as a philanthropic or charitable institution. It does not necessarily indicate the actual price as contemplated by Section 4 of the Act. AIR 1967 Andh Pra 281 (285, 287); (1967) 2 Andh WR 20 (DB).

(6) The expression "the article of the like kind and quality occurring both in Section 4 (a) and (b) includes an article of the same kind and quality as the dutiable article as well as an article of similar kind and quality. AIR 1967 Bom 338 (339): 68 Bom LR 597.

(7) The expression "place of manufacture or production means the factory and the connected premises and not the whole city in which the factory is situated. AIR 1967 Bom 338 (339, 340): 68 Bom LR 597.

(8) "Wholesale price" means the price which a wholesale dealer and not a retail dealer, charges for his goods, when he sells them in wholesale units, in a wholesale market. These wholesale units may be different for different classes of goods at different places. Normally, the wholesale price to be taken into account, would be the wholesale price in the nearest wholesale market. AIR 1968 Cal 154 (155) (DB) • AIR 1967 Andh Pra 281 (285): (1967) 1 An WR 20 (DB) • AIR 1963 Mys 216 (218): 1962 Mys LJ (Sup) 568.

(9) The assessment cannot be based on the highest of the various prices declared by the seller in his price list unless the highest price happens to be

**Explanation.**—In determining the price of any article under this section, no abatement or deduction shall be allowed except in respect of trade discount and the amount of duty payable at the time of the removal of the article chargeable with duty from the factory or other premises aforesaid.]

[a] Substituted for old S. 4 by the Finance Act, 1955 (15 of 1955), S. 24 [1-4-1955].

**5. Power of Central Government to impose customs duty on goods mentioned in the First Schedule.**—[Repealed by the Taxation Laws (Extension to Jammu and Kashmir) Act, 1954 (41 of 1954), S. 2 (2) and Schedule (8-10-1954).]

**6. Certain operations to be subject to licence.**—The Central Government may, by notification[a] in the Official Gazette, provide that, from such date as may be specified in the notification, no person shall, except under the authority and in accordance with the terms and conditions of a licence granted under this Act, engage in—

(a) the production or manufacture or any process of the production or manufacture of [b][any specified goods included in the First Schedule] or of saltpetre or of any specified component parts or ingredients of such goods or of specified containers of such goods, or

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**Section 4 — Note 1 (contd.)**

the one at the market place nearest the place of manufacture. Whatever the prices at which the seller sells his goods in other zones the department can assess the value only on the basis of cash price at the wholesale market nearest the place of manufacture. The department cannot insist that the seller should furnish a uniform price list for all zones. 1967 All LJ 393 (395).

(10) The word "wholesale market" means a place where the article in question is habitually sold to anybody who wishes to make a sale or purchase at wholesale prices. It is not that a factory cannot be a wholesale market, if it can be shown that goods are habitually sold there at wholesale rates to every one who wishes to sell or purchase. But the mere fact that a factory manufactures the articles at a particular place and sells them there to its stockists or dealers will not by itself convert it into a wholesale market. AIR 1968 Cal 154 (155) (DB) * AIR 1967 Bom 338 (339, 340): 68 Bom LR 597. (AIR 1963 Mys 216, Dissented.) * AIR 1963 Mys 216 (218): 1962 Mys LJ (Sup) 568.

(11) If the precise goods in question are not sold in the nearest wholesale market, then it might be necessary to consider the price of goods of like kind and quality. If no actual sale of those goods is discernible in any market within reasonable proximity, it might be sufficient to establish that such goods were capable of being sold at such prices in the nearest wholesale market. AIR 1968 Cal 154 (155, 156) (DB) * AIR 1963 Mys 216 (218): 1962 Mys LJ (Sup) 568.

(12) Explanation does not allow any other deduction except the trade discount from the wholesale price. Hence, apart from trade discount no further deductions in respect of freight handling, packing and advertisement charges can be allowed. AIR 1967 Bom 338 (341): 68 Bom LR 597. (AIR 1963 Mys 216, Dissented from.)

(13) Trade discount need not always be in the form of money and not in the shape of goods. All that is necessary is that a trade discount must operate as a deduction of the price chargeable to the purchaser. AIR 1967 Bom 338 (341): 68 Bom LR 597.

(14) A quantity discount in the form of free gift of an article for the same price, has precisely the same effect as a money discount, for in both cases there is deduction in the price charged to the purchaser. AIR 1967 Bom 338 (341): 68 Bom LR 597.

**Section 6 — Note 1**

(1) Provisions of Sections 6, 8, 9 and 10 are not ultra vires — Act is within legislative competence of Central Legislature under List I, Item 45 of Government of India Act 1935 — Incidental encroachment on Item 27 or 29 of List II does not affect its validity. AIR 1960 SC 424 (429): (1960) 2 SCR 362.

(2) In order to engage in wholesale purchase or sale, etc., whether on one's own account or as a commission agent or broker, a licence should be obtained. AIR 1959 Andh Pra 647 (648) (DB). (Trading without a licence is transgression of the provisions of S. 6 and constitutes an offence.)

(3) The word "person" in Section 6 does not take in a partnership. Hence where the relationship between the parties is one of partnership simpliciter, Section 6 (b) cannot be invoked. (1960) 2 Andh WR 151: 1960 Andh LT 650.

(4) There is no prohibition against the formation of a partnership in regard to the business conducted under a licence

(b) the wholesale purchase or sale (whether on his own account or as a broker or commission agent) or the storage of [c][any specified goods included in the First Schedule].

[a] For such notification, see Gazette of India, 1944, Extraordinary, dated 28-2-1944, p. 297.

[b] Substituted for the words "any specified excisable goods" by the Finance Act, 1953 (18 of 1956), S. 33 [1-4-1956].

[c] Substituted for "any excisable goods specified in this behalf in Part A of the Second Schedule", ibid.

**7. Form and conditions of licence.**—Every licence under Section 6 shall be granted for such area, if any, for such period, subject to such restrictions and conditions and in such form and containing such particulars, as may be prescribed.

**8. Restriction on possession of excisable goods.**—From such date as may be specified in this behalf by the Central Government by notification in the Official Gazette, no person shall, except as provided by rules made under this Act, have in his possession [a][any goods specified in the Second Schedule] in excess of such

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**Section 6 — Note 1 (contd.)**

granted under the Act. The new partner is not required to take out a fresh licence. AIR 1960 Andh Pra 444 (446, 447) (DB) * AIR 1960 Andh Pra 39 (41, 42): (1959) 2 Andh WR 550 * AIR 1962 Mad 240 (242, 243): (1962) 2 Mad LJ 109 (FB) * (1960) 2 Andh WR 151.

[But see AIR 1967 Raj 280 (281): 1967 Raj LW 451.]

(5) The right to exploit or manufacture salt irrespective of the manner of its production whether in Khalsa or Jagir, in the territory of the former State of Marwar, vested in the Government of that State or its assignee, and after the integration of that State in the present State of Rajasthan, the same right became vested in the new State. Hence, the lessor Jagirdar himself having no right of ownership with respect to any salt deposits in his Jagir, the lease obtained by the petitioner from the Jagirdar is of no avail whatsoever so far as the manufacture of salt is concerned. AIR 1957 Raj 213 (217): ILR (1956) 6 Raj 305 (DB).

(6) Where salt, wherever produced and in whichever manner is the property of a former State (in this case, State of Marwar) or of the successor State or for that matter of a third party, mere freedom to manufacture salt without obtaining a license from the Government of India, as envisaged in the Press Note, dated 23-4-1948 issued under Section 6 of the Central Excises and Salt Act, will not and cannot serve as any justification for interference with such right of ownership. In such a case it cannot be said that the party seeking to manufacture salt has lawful access to the relevant land for the purpose of manufacturing salt. AIR 1957 Raj 213 (215): ILR (1956) 6 Raj 305 (DB).

**Section 7 — Note 1**

(1) Under the provisions of Sections 6 to 9 and the Rules made under the Act a licence under the Act is necessary before a person engages in the tobacco trade. Such licence is personal to the grantee and if he should admit others as partners into the licensed business, he must intimate to the authorities this fact and have the licence duly amended. The breach of this rule is visited with the penalties specified in Section 9. AIR 1957 Mad 186 (187, 188, 189): ILR (1957) Mad 1245 (DB) * AIR 1960 Andh Pra 39 (41, 42): (1959) 2 Andh WR 550 * (1960) 2 Andh WR 151. (Notwithstanding the omission to give information, he will still be responsible for the terms and conditions of licence.) * AIR 1960 Andh Pra 444 (446, 447) (DB).

(2) Imposition of penalty, does not make partnership illegal or invalid. AIR 1960 Andh Pra 39 (41, 42): (1959) 2 Andh WR 550 (DB).

(3) The act of taking in a partner does not amount to a transfer of the licence. AIR 1960 Andh Pra 444 (447) (DB).

(4) Licence to heir of deceased licensee in actual possession coupled with direction by Excise Authorities stopping clearance of goods — Direction illegal. AIR 1960 Assam 207 (208): ILR (1958) 10 Assam 65 (DB).

**Section 8 — Note 1**

(1) Provisions of Sections 6, 8, 9 and 10 are not ultra vires — Act is within legislative competence of Central Legislautre under List I, Item 45 of the Government of India Act, 1935 — Incidental encroachment on Item 27 or 29 of List II does not affect its validity. AIR 1960 SC 424 (429): (1960) 2 SCR 362.

(2) Case under Bihar and Orissa Excise Act (2 of 1915) — Excisable article in custody of wife on husband's behalf is not in her possession within meaning of Section 47 (f) of Act (2 of 1915). AIR 1961 Pat 327 (328): 1961 (2) Cri LJ 265 (1): 1961 Pat LR 54.

quantity as may be prescribed for the purposes of this section as the maximum amount of such goods or of any variety of such goods which may be possessed at any one time by such a person.

[a] Substituted for "any excisable goods specified in this behalf in Part B of the Second Schedule" by the Finance Act, 1956 (18 of 1956), S. 34 [1-4-1956].

**9. Offences and penalties.**—Whoever commits any of the following offences namely:—

(a) contravenes any of the provisions of a notification issued under Sec. 6 or of Sec. 8, or of a rule made under clause (iii) of sub-sec. (2) of Sec. 37;

(b) evades the payment of any duty payable under this Act;

(c) fails to supply any information which he is required by rules made under this Act to supply, or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information;

(d) attempts to commit, or abets the commission of, any of the offences mentioned in clauses (a) and (b) of this section;

shall, for every such offence, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both.

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**Section 9 — Note 1**

(1) License issued for tobacco business is personal. The licensee cannot admit other partners into the tobacco business without getting his licence amended. Failure to get the licence amended would be penalised. The question whether after the levy of the penalty the partnership becomes legal depends upon the question whether the partnership is prohibited. If partnership is prohibited the contract of partnership would become illegal. AIR 1957 Mad 186 (187, 189): ILR (1957) Mad 1245 (DB) * AIR 1967 Raj 280 (281): 1967 Raj LW 451.

[But see AIR 1960 Andh Pra 444 (446, 448) (DB). (Original licensee entering in partnership — Partnership does not amount to transfer of licence — Failure of original licencee to amend licence is no bar to file suit for accounts by new partner. AIR 1957 Mad 186, Dissented.)]

(2) Provisions of Sections 6, 8, 9 and 10 are not ultra vires — Act is within legislative competence of Central Legislature under List I, Item 45 of Government of India Act, 1935 — Incidental encroachment on Item 27 or 29 of List II, does not affect its validity. AIR 1960 SC 424 (429): (1960) 2 SCR 362.

(3) Section 9 is in its scope expressly restricted. AIR 1962 Madh Pra 112 (114): 1961 Jab LJ 1185 (DB).

(4) Trading without a licence either on one's own account or as commission agent or to co-operate with or render aid to another so to trade in transgression of the provisions of Section 6 constitutes an offence under S. 9. AIR 1959 Andh Pra 647 (648, 649) (DB).

(5) The owner of the goods warehoused cannot be convicted under Section 9 (a) for wrongful removal of those goods by a person in his employ unless it is established that he was responsible for the removal or was at least aware of the removal. 1967 All WR (HC) 304 (307): 1967 All Cri R 209.

(6) Where it is proved that the owner is not criminally liable for breach of Rule 151 by his servant, the owner cannot be held guilty under Section 9 (b) for evading payment of duty. 1967 All WR (HC) 304 (307): 1967 All Cri R 209.

(7) Before the responsibility of the Manager of the firm can be put on the footing of the owner, and the Manager can be penalised under Section 9 (a), it is necessary to establish that the authority of the Manager as an agent had been approved by the Collector. 1966 All WR (HC) 497: 1966 All Cri R 309 (DB).

(8) Where though the charges against the accused were vague, he was tried with clear understanding that he had contravened Cls. (a) and (b) of S. 9 and subsequently acquitted, the appellate Court cannot convict him for abetment with the aid of Cl. (d) of S. 9. 1966 All WR (HC) 497: 1966 All Cri R 309 (DB).

(9) A police officer for purposes of Clause (b) of Section 190, Cr. P. C. can only be a police-officer properly so called as the scheme of the Cr. P. C. shows and it seems therefore that a Central Excise Officer will have to make a complaint under Cl. (a) of Section 190, Cr. P. C. if he wants the Magistrate to take cognizance of an offence, for example, under Section 9 of the Act. AIR 1966 SC 1746 (1749): 1966 Cri LJ 1353: (1966) 3 SCR 698.

(10) The effect of Repealing and Amending Act (1948) was that the Notification of 1928 under Madras Act 4 of 1889 ceased to exist and therefore, a person could manufacture Salt in area less than ten acres without obtaining licence. Hence he could not be con-

**10. Power of Courts to order forfeiture.**—Any Court trying an offence under this Chapter may order the forfeiture to [a][Government] of any goods in respect of which the Court is satisfied that an offence under this Chapter has been committed, and may also order the forfeiture of any receptacles, packages or coverings in which such goods are contained and the animals, vehicles, vessels, or other conveyances used in carrying the goods and any implements or machinery used in the manufacture of the goods.

[a] Substituted by A.L.O., 1950.

**11. Recovery of sums due to Government.**—In respect of duty and any other sums of any kind payable to the Central Government under any of the provisions of this Act or of the rules made thereunder, the officer empowered by the [a][Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963] to levy such duty or require the payment of such sums may deduct the amount so payable from any money owing to the persons from whom such sums may be recoverable or due which may be in his hands or under his disposal or control, or may recover the amount by attachment and sale of excisable goods belonging to such person, and if the amount payable is not so recovered, he may prepare a certificate signed by him specifying the amount due from the person liable to pay the same and send it to the Collector of the district in which such person resides or conducts his business and the said Collector, on receipt of such certificate, shall proceed to recover from the said person the amount specified therein as if it were an arrear of land revenue.

[a] Substituted for "Central Board of Revenue" by Central Boards of Revenue Act, 1963 (54 of 1963), S. 5 (2) [1-1-1964].

**12. Application of the provisions of Act VIII of 1878 to Central excise duties.**—The Central Government may, by notification[a] in the Official Gazette, declare that any of the provisions of the Sea Customs Act, 1878, relating to the

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**Section 9 — Note 1 (contd.)**

victed under S. 9. (1964) 2 Andh W R 416 : (1964) 2 Andh LT 308.

(11) A wife may be in custody of an excisable article on behalf of her husband in his absence, but that does not mean that the wife can be held to be in possession — Much less in conscious possession of the article. Hence the wife cannot be convicted under S. 47 (a) of the Bihar and Orissa Excise Act (2 of 1915). AIR 1961 Pat 327 (328) : 1961 (2) Cri LJ 265 (1) : 1961 Pat LR 54.

**Section 10 — Note 1**

(1) Provisions of Ss. 6, 8, 9 and 10 are not ultra vires — Act is within legislative competence of Central legislature under List I Item 45 of Govt. of India Act 1935 — Incidental encroachment on Item 27 or 29 of List II does not affect its validity. AIR 1960 SC 424 (429) : (1960) 2 SCR 362.

(2) The provision in S. 10 is not exhaustive of the machinery set up under the Act and Rules for action against the offending conveyances by land by way of confiscation. Therefore, the vehicles in which the offending goods were conveyed may also be liable to be confiscated under S. 33 by virtue of R. 215 read with S. 168, Sea Customs Act. The authorities will not be unjustified in detaining the vehicles. AIR 1961 Ker 93 (95) : 1961 (1) Cri LJ 379: 1960 Ker LJ 777 : 1959 Ker LT 627 : 1959 Ker LJ 584.

(3) Whereas under S. 10 certain sentences can be passed by the Magistrate, inclusive of orders concerning confiscation, there is yet another hierarchy of authorities that can pass orders of confiscation. The confiscation under the Sea Customs Act is proceedings in rem whereas the proceedings before the Magistrate is in personam. The proceedings in rem are not punishment so as to exclude further proceedings before the Magistrate against the same persons on the ground of the latter being in violation of the rule against double jeopardy. AIR 1961 Ker 93 (95) : (1961) 1 Cri LJ 379 : 1960 Ker LJ 777.

**Section 11 — Note 1**

(1) Section 11 empowers the Government to attach and sell one variety of goods for the excise duty payable on another variety of goods belonging to the same owner. (1959) 2 Mad LJ 165 (172).

**Section 12 — Note 1**

(1) Notification, applying provisions of S. 129 of Customs Act, 1962, to appeals under S. 35 of Central Excises and Salt Act (1944), is not valid. AIR 1968 SC 13 (16) : (1968) 1 SCR 82.

[But see AIR 1968 Andh Pra 282 (283) : (1968) 2 Andh WR 164 (FB). (Deemed to have been overruled by AIR 1968 SC 13).]

(2) The provisions of S. 129 of the Customs Act regarding deposit of the amount before preferring appeals or be-

levy of and exemption from customs duties, drawback of duty, warehousing offences and penalties, confiscation, and procedure relating to offences and appeals shall, with such modifications and alterations as it may consider necessary or desirable to adopt them to the circumstances, be applicable in regard to like matters in respect of the duties imposed by Section 3.

[a] For such notification, see Gazette of India, 1944, Extraordinary, dated 28-2-1944, p. 297.

## CHAPTER III

## POWERS AND DUTIES OF OFFICERS AND LANDHOLDERS

**13. Power to arrest.**—(1) Any Central Excise Officer duly empowered by the Central Government in this behalf may arrest any person whom he has reason to believe to be liable to punishment under this Act.

(2) Any person accused or reasonably suspected of committing an offence under this Act or any rules made thereunder, who on demand of any officer duly empowered by the Central Government in this behalf refuses to give his name and residence, or who gives a name or residence which such officer has reason to believe to be false, may be arrested by such officer in order that his name and residence may be ascertained.

**14. Power to summon persons to give evidence and produce documents in inquiries under this Act.**—(1) Any Central Excise Officer duly empowered by the Central Government in this behalf shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making for any of the purposes of this Act. A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned.

(2) All persons so summoned shall be bound to attend, either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and to produce such documents and other things as may be required:

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**Section 12 — Note 1 (contd.)**

fore hearing them cannot be regarded as "procedure relating to appeals" within S. 12 of the Central Excises and Salt Act. AIR 1968 SC 13 (15): (1968) 1 SCR 82.

(3) The applicability of the provisions of Ss. 168, 172, 178, 179, 180, 189 and 192 of the Sea Customs Act, 1878, relating to matters specified therein to like matters in respect of the duties imposed by S. 3 of the Central Excises and Salt Act, 1944, is subject to the modifications and alterations as detailed in the Notification No. 9/59 dated 24-1-1959 as superseded or amended by subsequent Notifications. AIR 1965 All 543 (545) : 1965 (2) Cri LJ 582 : 1964 All WR (HC) 128.

(4) The contention that the application of S. 189 and other sections of the Sea Customs Act can be made only by a notification under S. 12 and not by a rule under S. 37 is not sustainable. The question is whether Rule 215 is validly enacted and is within the scope of S. 37. If it is so the fact that there is no notification under Section 12 is not of any material consequence. AIR 1960 Andh Pra 294 (296, 297) • ILR (1963) Andh Pra 42 (DB).

(5) The word 'confiscation' in Section 12 indicates that rules concerning confiscation in the Sea Customs Act were to be brought into the Central Excises and Salt Act. AIR 1961 Ker 93 (95, 96) : 1961 (1) Cri LJ 379: 1960 Ker LJ 777 (DB).

(6) Section 12 of the Act cannot be held to transgress the limits of proper delegation, and therefore Rules framed thereunder cannot be said to be invalid. AIR 1961 Ker 93 (96) : 1961 (1) Cri LJ 379 : 1960 Ker LJ 777 (DB).

**Section 14 — Note 1**

(1) When a penalty is imposed for committing an offence, the enquiry to be conducted before deciding whether such a penalty be imposed or not would be and shall be treated to be of the form of a judicial proceeding. For conducting such a proceeding the Presiding Officer should not be one who is interested in the case or one who is in substance responsible for the prosecution of the offender. AIR 1960 All 402 (404): 1960 Cri LJ 867.

Provided that the exemptions under Sections 132 and 133 of the Code of Civil Procedure shall be applicable to requisitions for attendance under this section.

(3) Every such inquiry as aforesaid shall be deemed to be a "judicial proceeding" within the meaning of Section 193 and Section 228 of the Indian Penal Code.

**15. Officers required to assist Central Excise officers.**—All officers of Police and Customs and all officers of Government engaged in the collection of land revenue, and all village officers are hereby empowered and required to assist the Central Excise officers in the execution of this Act.

**16. Owners or occupiers of land to report manufacture of contraband excisable goods.**—Every owner or occupier of land, and the agent of any such owner or occupier, in charge of the management of that land, if contraband excisable goods are manufactured thereon, shall, in the absence of reasonable excuse, be bound to give notice of such manufacture to a Magistrate, or to an officer of the Central Excise, Customs, Police, or Land Revenue Department, immediately the fact comes to his knowledge.

**17. Punishment for connivance at offences**—Any owner or occupier of land or any agent of such owner or occupier in charge of the management of that land, who wilfully connives at any offence against the provisions of this Act or of any rules made thereunder shall, for every such offence, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

**18. Searches and arrests how to be made.**—All searches made under this Act or any rules made thereunder and all arrests made under this Act shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1898, relating respectively to searches and arrests made under that Code.

**19. Disposal of persons arrested.**—Every person arrested under this Act shall be forwarded without delay to the nearest Central Excise officer empowered to send persons so arrested to a Magistrate, or, if there is no such Central Excise officer within a reasonable distance, to the officer in charge of the nearest police station.

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**Section 18 — Note 1**

(1) The excise officers are empowered in their own right to make a search and that power would be analogous to that of a police officer empowered to make a search himself. By virtue of S. 18, S. 165 of Criminal Procedure Code authorising a public officer to make a search after certain formalities becomes applicable and that brings in the further requirement of stating the grounds of the belief and the specification of the article to be searched to be recorded in writing. AIR 1958 Raj 296 (297) : 1958 Cri LJ 1350 (DB).

(2) The recording of reasons under Section 165, Cr. P. C. is an important step in the matter of search and to ignore it is to ignore the material part of the provisions governing searches. If that can be ignored it cannot be said that the search is carried out in accordance with the "provisions of the Code of Criminal Procedure" within S. 18. AIR 1960 SC 210 (212, 213) : 1960 Cri LJ 280 : (1960) 1 SCR 901.

(3) Mere fact that the money was seized unnecessarily, together with other articles, does not indicate that the motive of the Excise Officer was dishonest. Honesty on the part of the citizens as well as the officers of the State is to be zealously safeguarded, and any evidence of dishonesty has to be ruthlessly, scrutinised and investigated. AIR 1966 All 42 (44) : 1966 Cri LJ 4 : 1966 All WR (HC) 149.

(4) A charge of dishonesty or mala fides against officers performing rather arduous duties, cannot, in any case, be lightly accepted by courts without adequate reasons. AIR 1966 All 42 (44) : 1966 All WR (HC) 149 : 1966 Cri LJ 4.

(5) Mere circumstance that there was an infirmity or illegality in the matter of non-compliance with the provisions of S. 165 of the Code of Criminal Procedure, would not by itself invalidate the entire proceedings which resulted in the conviction of the party on the basis of the materials discovered in the course of the search. AIR 1963 Ker 241 (246): 1963 (2) Cri LJ 279: 1962 Ker LJ 1212 : 1965 (2) Cri LJ 279: 1964 Ker LJ 149.

**20. Procedure to be followed by officer-in-charge of police station.**—The officer-in-charge of a police station to whom any person is forwarded under S. 19 shall either admit him to bail to appear before the Magistrate having jurisdiction, or in default of bail forward him in custody to such Magistrate.

**21. Inquiry how to be made by Central Excise officers against arrested persons forwarded to them under Section 19.**—(1) When any person is forwarded under Section 19 to a Central Excise officer empowered to send persons so arrested to a Magistrate, the Central Excise officer shall proceed to enquire into the charge against him.

(2) For this purpose the Central Excise officer may exercise the same powers and shall be subject to the same provisions as the Officer-in-charge of a police station may exercise and is subject to under the Code of Criminal Procedure, 1898, when investigating a cognizable case:

Provided—

(a) if the Central Excise officer is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in the case, or forward him in custody to such Magistrate;

(b) if it appears to the Central Excise officer that there is not sufficient evidence or reasonable ground of suspicion against the accused person, he shall release the accused person on his executing a bond, with or without sureties as the Central Excise officer may direct, to appear, if and when so required, before the Magistrate having jurisdiction, and shall make a full report of all the particulars of the case to his official superior.

**22. Vexatious search, seizure, etc., by Central Excise Officer.**—Any Central Excise or other officer exercising powers under this Act or under the rules made thereunder who—

(a) without reasonable ground of suspicion searches or causes to be searched any house, boat or place;

(b) vexatiously and unnecessarily detains, searches or arrests any person;

(c) vexatiously and unnecessarily seizes the moveable property of any person, on pretence of seizing or searching for any article liable to confiscation under this Act;

(d) commits, as such officer, any other act to the injury of any person, without having reason to believe that such act is required for the execution of his duty,

shall, for every such offence, be punishable with fine which may extend to two thousand rupees.

Any person wilfully and maliciously giving false information and so causing an arrest or a search to be made under this Act shall be punishable with fine which may extend to two thousand rupees or with imprisonment for a term which may extend to two years or with both.

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**Section 21 — Note 1**

(1) Though under S. 21(2) the Excise Officer has powers of an Officer-in-charge of a police station when investigating a cognizable case the power is for purpose of enquiry under S. 21(1) and the power does not include power to submit a charge-sheet under S. 173 Cr. P. C. AIR 1966 SC 1746 (1749): 1966 Cri LJ 1353 : (1966) 3 SCR 698.

(2) The provisions of S. 21(2) of the Central Excises and Salt Act invests Excise Officers with the powers of Inspectors of Police investigating cases and entrusts them with the duties of such investigating officers acting under the Code of Criminal Procedure. AIR 1966 All 42 (44) : 1966 Cri LJ 4 : 1966 All WR (HC) 149.

(3) An officer of the Central Excise, though he may be a police officer so far as he conducts an investigation in respect of offences under the Excise Act, is not a police officer while discharging his duties under the Customs Act. AIR 1965 Bom 195 (207) : 1965 (2) Cri LJ 616 : 67 Bom LR 317.

**23. Failure of Central Excise officer in duty.**—Any Central Excise officer who ceases or refuses to perform or withdraws himself from the duties of his office, unless he has obtained the express written permission of the Collector of Central Excise, or has given to his superior officer two months' notice in writing of his intention or has other lawful excuse, shall on conviction before a Magistrate be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to three months' pay or with both.

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## CHAPTER IV

## TRANSPORT BY SEA

**24. Penalties for carrying excisable goods in certain vessels.**—When any excisable goods are carried by sea in any vessel other than a vessel of the burden of three hundred tons and upwards, the owner and master of such vessel shall each be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

**25. Exceptions.**—Nothing in Section 24 applies to—

(a) any excisable goods covered by a permit granted under rules made under this Act;

(b) any excisable goods covered by a pass granted by any officer whom the [a][Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963] may appoint in this behalf;

(c) such amount of excisable goods carried on board any vessel for consumption by her crew or by the passengers or animals (if any) on board as the [a][Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963] may from time to time exempt from the operation of Section 24.

[a] Substituted for "Central Board of Revenue" by Central Boards of Revenue Act, 1963 (54 of 1963), S. 5 (2) [1-1-1964].

**26. Power of stoppage, search and arrest.**—When any officer empowered by the [a][Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963] to act under this section has reason to believe, from personal knowledge or from information taken down in writing, that any excisable goods are being carried or have within the previous twenty-four hours been carried, in any vessel so as to render the owner or master of such vessel liable to the penalties imposed by Section 24, he may require such vessel to be brought to and thereupon may—

(a) enter and search the vessel;

(b) require the master of the vessel to produce any documents in his possession relating to the vessel or the cargo thereof;

(c) seize the vessel if the officer has reason to believe it liable to confiscation under this Act, and cause it to be brought with its crew and cargo into any port in [b][India]; and

(d) where any excisable goods are found on board the vessel, search and arrest without a warrant any person on board the vessel whom he has reason to believe to be punishable under Section 24.

[a] Substituted for "Central Board of Revenue" by Central Boards of Revenue Act, 1963 (54 of 1963), S. 5 (2) [1-1-1964].

[b] Substituted by Act 25 of 1950 for the "States".

**27. Penalties for resisting officer.**—Any master of a vessel refusing or neglecting to bring to the vessel or to produce his papers when required to do so by an officer acting under Section 26, and any person obstructing any such officer in the

performance of his duty, may be arrested by such officer without a warrant, and shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both.

**28. Confiscation of vessel and cargo.**—(1) Every vessel (including all appurtenances) in which any excisable goods are carried so as to render the owner or master of such vessel liable to penalties imposed by Section 24, the cargo on board such vessel and the excisable goods in respect of which an offence under this Act has been committed shall be liable to confiscation on the orders of the officer empowered in this behalf by the Central Government.

(2) Whenever any Customs officer is satisfied that any article is liable to confiscation under this section, he may seize such article, and shall at once report the seizure to his superior officer for the information of the officer empowered to order confiscation under sub-section (1) and such officer may, if satisfied on such report or after making such inquiry as he thinks fit, that the article so seized is liable to confiscation, either declare it to be confiscated, or impose a fine in lieu thereof not exceeding the value of the article.

**29. Jurisdiction.**—Any offence punishable under Section 24 or Section 27 may be deemed to have been committed within the limits of the jurisdiction of the Magistrate of any place where the offender is found, or, to which, if arrested under Section 26 or Section 27, he may be brought.

**30. Power to exempt from operation of this Chapter.**—The Central Government may, by notification in the Official Gazette, exempt the carriage of excisable goods within any local limits or in any class of vessels from the operation of this Chapter, and, by like notification, again subject such carriage to the operation of this Chapter.

## CHAPTER V

## SPECIAL PROVISIONS RELATING TO SALT

**31. Special and permanent rights of manufacturing salt to be recognised.**—The proprietor of a private salt factory who has by virtue of a sanad granted by [a][the Government] or any former Government, a special and permanent right to manufacture salt, or to excavate or collect natural salt, shall on application made in accordance with the rules made under this Act be entitled to a licence for such purpose and to the annual renewal thereof, unless on a breach of the provisions of this Act, his licence has been cancelled by an officer duly empowered by the Central Government in this behalf.

[a] Substituted for "the British" by A.L.O., 1950.

**32. Rights of ordinary proprietors of existing salt-works.**—Every proprietor of a private salt work, other than a private salt factory, to which S. 31 applies, of which, under the provisions of Section 17 of the Bombay Salt Act, 1890,* the proprietor was entitled on application to a licence to manufacture or to excavate or collect natural salt at such factory, shall continue to be entitled, on application made in accordance with the rules made under this Act, to a licence for such purpose and to the annual renewal thereof, unless on a breach of the provisions of this Act, his licence has been cancelled by an officer duly empowered by the Central Government in this behalf:

Provided that the Collector of Central Excise may at any time withdraw or withhold a licence from the proprietor of any such salt factory, if no salt has been manufactured, excavated or collected in such salt factory for the three years ending on the thirtieth day of June last preceding the date of his order, or, with the previous sanction of the [b][Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963], if such salt factory has not pro-

duced, on an average, during the said three years, at least five thousand maunds of salt per annum.

[a] Repealed by S. 39 and Sch. III of the Central Excises and Salt Act, 1944 (1 of 1944).

[b] Substituted for "Central Board of Revenue" by Central Boards of Revenue Act, 1963 (54 of 1963), S. 5 (2) [1-1-1964].

## CHAPTER VI

## ADJUDICATION OF CONFISCATIONS AND PENALTIES

**33. Power of adjudication.**—Where by the rules made under this Act any thing is liable to confiscation or any person is liable to a penalty, such confiscation or penalty may be adjudged—

(a) without limit, by a Collector of Central Excise;

(b) up to confiscation of goods not exceeding five hundred rupees in value and imposition of penalty not exceeding two hundred and fifty rupees, by an Assistant Collector of Central Excise:

Provided that the Central Board of Revenue may, in the case of any officer performing the duties of an Assistant Collector of Central Excise, reduce the limits indicated in clause (b) of this section, and may confer on any officer the powers indicated in clause (a) or (b) of this section.

**34. Option to pay fine in lieu of confiscation.**—Wherever confiscation is adjudged under this Act or the rules made thereunder, the officer adjudging it shall give the owner of the goods an option to pay in lieu of confiscation such fine as the officer thinks fit.

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**Section 33 — Note 1**

(1) Central Excise Rules (1944), Rr. 211 and 212 — Non-duty paid tobacco — Seizure and confiscation — Tobacco sold in spite of payment of duty and redemption fine — Suit for recovery of tobacco or its market price against Union of India maintainable and was not barred under S. 40. Selling of confiscated tobacco was ultra vires and such action could not be said to be "anything done or ordered to be done under this Act" within the meaning of S. 40. AIR 1958 Pat 439 (440) (DB).

(2) Adjudication of cases of confiscation and penalties under S. 33 is judicial or at least quasi-judicial function and therefore, subject to principles of natural justice. AIR 1965 Guj 215 (232): (1965) 6 Guj LR 137 (DB) * AIR 1960 All 402 (404) : 1960 Cri LJ 867.

(3) Confiscation of goods belonging to plaintiff — Statements recorded by Enquiry Officer in absence of plaintiff — Plaintiff not allowed to cross-examine them — Statements are inadmissible. AIR 1967 Andh Pra 338 (352) : (1967) 2 Andh LT 141 (DB).

(4) In view of the fact that proceedings under S. 33 is subject to judicial process and principle of natural justice Rule 9(2) cannot be assailed on the ground that it is unreasonable as there is no machinery or procedure provided for in the rule. AIR 1965 Guj 215 (232, 233) : (1965) 6 Guj LR 137 (DB).

(5) Suit challenging decision of Excise Authority — Point not raised before Excise Authority cannot be allowed to be taken in suit. AIR 1967 Andh Pra 338 (351): (1967) 2 Andh LT 141 (DB).

(6) Tobacco seized lawfully by excise authorities — Release of tobacco subject to condition precedent of paying full excise duty and provisional penalty — Excise authorities held not unjustified in imposing conditions. AIR 1962 Madh Pra 112 (114, 115): 1961 Jab LJ 1185 (DB).

(7) Where an order of the Assistant Collector, Central Excise, was set aside in appeal not on merits but on technical ground for not giving the owner a personal hearing as requested by him, the Assistant Collector was quite free to initiate fresh proceedings against the said owner on the same grounds with a view to observe correct procedure. AIR 1961 Andh Pra 324 (325): ILR (1961) 2 Andh Pra 279 (DB).

**Section 34 — Note 1**

(1) Central Excise Rules (1944), Rr. 211 and 212 — Non-duty paid tobacco — Seizure and confiscation — Tobacco sold in spite of payment of duty and redemption fine — Suit for recovery of tobacco or its market price against Union of India was maintainable and was not barred under Section 40. Selling of confiscated tobacco was ultra vires and such

**35. Appeals.**—(1) Any person deeming himself aggrieved by any decision or order passed by a Central Excise officer under this Act or the rules made thereunder may, within three months from the date of such decision or order, appeal therefrom to the Central Board of Revenue, or, in such cases as the Central Government directs, to any Central Excise Officer not inferior in rank to an Assistant Collector of Central Excise and empowered in that behalf by the Central Government. Such authority or officer may thereupon make such further inquiry and pass such order as he thinks fit, confirming, altering or annulling the decision or order appealed against:

Provided that no such order in appeal shall have the effect of subjecting any person to any greater confiscation or penalty than has been adjudged against him in the original decision or order.

(2) Every order passed in appeal under this section shall, subject to the power of revision conferred by Section 36, be final.

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**Section 34 — Note 1 (contd.)**

action could not be said to be "anything done or ordered to be done under this Act" within the meaning of Section 40. ('58) AIR 1958 Pat 439 (440) (DB).

**Section 35 — Note 1**

(1) Provision for appeal, viz., S. 35 is not applicable to cases where the Excise Officer acts beyond the powers conferred by the Act or the Rules or acts in an arbitrary manner. AIR 1967 All 546 (548).

(2) A person aggrieved by any decision or order has an unfettered right to appeal under Section 35. Section 129 of Customs Act 1962, requiring deposit of duty or penalty levied pending appeal, applied to such appeal by notification dated 4-5-63 whittles down substantive right of appeal. Notification is therefore not valid. AIR 1968 SC 13 (15, 16): (1968) 1 SCR 82. (AIR 1966 Ker 195, Affirmed. AIR 1960 Andh Pra 294, Impliedly Overruled.) * (1958) 60 Pun LR 205: ILR 1958 Punj 1343 * AIR 1968 Andh Pra 282 (283) : (1968) 2 Andh WR 164 (FB) * ILR (1963) Andh Pra 42 (DB).

[See however AIR 1960 Andh Pra 294 (297, 298). (There is nothing intrinsically illegal in a rule which prescribes certain limitations to the right of appeal. There is nothing like an absolute, inherent and unfettered right of appeal. Though adaptation of Section 189 of the Sea Customs Act to appeals under the Central Excises and Salt Act prescribes limitation to the right of appeal under Section 35 there is nothing illegal in it. Impliedly Overruled in AIR 1968 SC 13.) ]

(3) Remedies under Ss. 35 and 36 — Availability of — No bar to invoke extraordinary jurisdiction of High Court under Article 226. AIR 1962 Madh Pra 112 (114): 1961 Jab LJ 1185 (DB) * AIR 1965 All 305 (307). (Remedy of appeal and revision available under Ss. 35, 36 — In absence of good grounds, remedy should not be by-passed before filing writ petition.)

(4) Collector while hearing appeal acts quasi judicially — Directions issued by Central Board of Revenue which are not under Rule 238, cannot be binding on him for purposes of deciding the appeal. AIR 1969 SC 48 (51): (1969) 1 SCJ 110.

(5) Order passed by subordinate executive officer does not merge in appellate or revisional order — Writ petition against such order lies in High Court. AIR 1961 Madh Pra 148 (151) : 1961 Jab LJ 59 (DB).

(6) Appeal and revision — Quasi judicial function — Reasonable opportunity should be given to assessee of being heard. AIR 1966 Pat 248 (254): 1966 BLJR 790 (DB) * AIR 1960 All 402 (404): 1960 Cri LJ 867.

(7) Levy of tax outside scope of Act — Jurisdiction of Civil Court not ousted by Sections 35, 36 and 40 (1). (1968) 70 Punj LR 412 * AIR 1957 Mad 110 (113): (1956) 2 Mad LJ 455 (DB) * AIR 1967 Andh Pra 338 (347,348): (1967) 2 Andh LT 141 (DB) * (1962) 3 Guj LR 762.

(8) The appellate authority functions as tribunal and does not figure as disputant. AIR 1968 Mys 237 (239): (1968) 1 Mys LJ 178.

(9) There is no indication in S. 35 to show that an oral enquiry is contemplated. The expression "such further enquiry" need not necessarily mean oral hearing of appeal. The enquiry may be of many kinds. There is nothing to warrant that the expression means and can only mean the oral enquiry. AIR 1961 Andh Pra 350 (355).

(10) Absence of specific provision as to remand in Section 35, which speaks only of the appellate authority passing such order as he thinks fit, confirming, altering or annulling the decision or order appealed against, does not disable the appellate authority from sending the matter back to the authority that passed the order for fresh enquiry. AIR 1961 Andh Pra 324 (325): ILR (1961) 2 Andh Pra 279 (DB). (1958 Andh LT 627, Foll.)

(11) Point not raised before Excise Authority cannot be raised in appeal. AIR 1967 Andh Pra 338 (351): (1967) 2 Andh LT 141 (DB).

36. **Revision by Central Government.**—The Central Government may, on the application of any person aggrieved by any decision or order passed under this Act or the rules made thereunder by any Central Excise officer or by the [a][Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963], and from which no appeal lies, reverse or modify such decision or order.

[a] Substituted for "Central Board of Revenue" by Central Boards of Revenue Act, 1963 (54 of 1963), S. 5 (2) [1-1-1964].

## CHAPTER VII

## SUPPLEMENTAL PROVISIONS

37. **Power of Central Government to make rules.**—(1) The Central Government may make rules[a] to carry into effect the purposes of this Act.

[a] For the Central Excise Rules, 1944, see Gazette of India, 1944, Extraordinary, dated 28-2-1944, p. 297.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may—

(i) provide for the assessment and collection of duties of excise, the authorities by whom functions under this Act are to be discharged, the

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**Section 35 — Note 1 (contd.)**

(12) If appellate authority after examining whole case on merits communicates a copy of its judicial order to the subordinate authority with a post script which post script is absent in the copy of final order communicated to the party, such post script cannot form part of judicial order. Reopening of case relying on such uncommunicated post script would offend against finality conferred on appellate decision. (1965) 6 Guj LR 350.

(13) After the disposal of the matter by the Appellate Tribunal, jurisdiction can be revived in the original Tribunal only if there are specific directions in the appellate order to that effect. AIR 1964 Mad 111 (112): (1963) 2 Mad LJ 332 (DB).

**Section 36 — Note 1**

(1) The Central Government exercising powers of revision under Section 36 must act quasi-judicially and give the petitioner a reasonable opportunity of being heard. When a mixed question of law and fact arises the petitioner must be given a reasonable opportunity to prove by affidavit or otherwise. AIR 1966 Pat 248 (254): 1966 BLJR 790 (DB).

(2) Existence of remedy by way of revision under Section 36 to Central Government does not bar jurisdiction of High Court under Art. 226 of the Constitution. AIR 1968 SC 13 (15): (1961) 1 SCR 82 * AIR 1965 All 305 (307). (Remedy of appeal and revision under Sections 35 and 36 available — Absence of good ground for by-passing remedy of appeal — Writ petition should be dismissed.) * AIR 1960 All 402 (403): 1960 Cri LJ 867 * AIR 1962 Madh Pra 112 (114) : 1961 Jab LJ 1513 (DB).

(3) The fact that Central Government is interested in the recovery of duty properly payable under the Act does not transform it from Tribunal as envisaged under Section 36 into a disputant. Consequently, issue of writ in favour of State Government, challenging the order of Central Government is not excluded by Article 131 of Constitution. AIR 1968 Mys 237 (238, 239): (1968) 1 Mys LJ 178 (DB).

(4) Order passed by subordinate executive officer and that of appellate authority under Section 35 (1) does not merge in revisional order — Writ petition against such order lies in High Court even if revisional authority is outside its jurisdiction. AIR 1961 Madh Pra 148 (151) : 1961 Jab LJ 59 (DB).

(5) In an appeal filed to the Supreme Court against the order passed in revision under Section 36, if there is no difficulty in holding that the claim of the appellant is definite and of ascertainable amount, the proper Court-fee payable is as prescribed by Entry 2, Part II of 3rd Schedule of Supreme Court Rules (1950). AIR 1966 SC 1754 (1757, 1758): (1966) 3 SCR 657.

(6) Section 35 (2) makes the order passed in appeal under Section 35 final subject to the power of revision conferred on the Central Government under Section 36. (1965) 6 Guj LR 350 (356): ILR (1965) Guj 240 (DB).

**SECTION 37 — SYNOPSIS**

1. General.
2. Rules framed under.

1. General. — (1) Power of assessment conferred on assessing officer by the rules made under Section 37 (2) cannot be exercised arbitrarily or capriciously. AIR 1966 Pat 248 (252): 1966 BLJR 790.

(2) The Act or the Rules made under Section 37 and published under S. 38 provide no machinery whatsoever for

issue of notices requiring payment, the manner in which the duties shall be payable, and the recovery of duty not paid;

(ii) prohibit absolutely, or with such exceptions, or subject to such conditions as the Central Government thinks fit, the production or manufacture, or any process of the production or manufacture, of excisable goods, or of any component parts or ingredients or containers thereof, except on land or premises approved for the purpose;

(iii) prohibit absolutely, or with such exceptions, or subject to such conditions as the Central Government thinks fit, [a][ ° ° ° ] the transit of excisable goods from any part of [b][India] to any other part thereof;

[a] The words "the bringing of excisable goods into India from the State of Jammu and Kashmir" were omitted by the Taxation Laws (Extension to Jammu and Kashmir) Act, 1954 (41 of 1954), S. 2 and Schedule [8-10-1954].

[b] Substituted for "the States" by the Finance Act, 1950 (25 of 1950), S. 11 and Schedule IV [31-3-1950].

(iv) regulate the removal of excisable goods from the place where produced, stored or manufactured or subjected to any process of production or manufacture and their transport to or from the premises of a licensed person, or a bonded warehouse, or to a market;

(v) regulate the production or manufacture, or any process of the production or manufacture, the possession, storage and sale of salt, and so far as such regulation is essential for the proper levy and collection of the duties imposed by this Act, of any other excisable goods, or of any component parts or ingredients or containers thereof;

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**Section 37 — Note 1 (contd.)**

recovery of duty paid under a mistake, therefore, neither the order passed by Asstt. Collector rejecting claim for refund of amount paid by mistake, nor subsequent order passed by appellate authority, were the orders passed under the Act. AIR 1967 Pat 363 (365): 1968 BLJR 137 (DB).

**2. Rules framed under — Rule 7.** — (1) Amount paid by a licensee in tobacco to warehouse licensee along with price of tobacco purchased by him — Is not excise duty paid by him to Central Government — Liability to pay excise duty is not his but of the person who produces, cures or manufactures an excisable goods, or who stores such goods in a warehouse. 1957 Ker LT 842.

**Rule 8** — (2) Rule 8 which confers upon the Central Government the power to exempt partly or wholly any excisable goods does not suffer from the vice of excessive delegation of power to exempt and the Rule and the Notification No. 74 of 1959 dated 31-7-1959 as well as Notification No. 70 of 1960 dated 30-4-1960 issued under Rule 8 do not violate Articles 14 and 19 (1) (f) and (g) of the Constitution on the ground that the power of exemption conferred is uncontrolled and unguided. AIR 1963 SC 98 (103): (1962) Supp 3 SCR 481 * AIR 1964 Punj 192 (197) (DB).

(3) The validity of the notification under R. 8, granting exemption is not affected by not placing it before the Parliament. AIR 1964 Punj 192 (196) (Pr 14) (DB).

**Rules 8 and 11.** — (4) Notification No. 2 — Salt 47, dated 28th February, 1947, for refund of salt duty paid and exempted by Notification No. 1 Salt/47 of same date have no statutory force — The claim for refund under it cannot be enforced. AIR 1954 Punj 159 (161, 162): ILR (1954) Punj 602.

[But see AIR 1961 Pat 72 (73) (DB). (AIR 1954 Punj 159, Dissented from.) * AIR 1961 Cal 217 (222, 224, 225): 65 Cal WN 670 (DB). (AIR 1954 Punj 159, Dissent. from.)]

(5) Where the same persons owned two factories which carried on identical kind of manufacture and the manufacture was of the commodity stated in the notification the exemption did not relate to both the factories but one. AIR 1958 Cal 283 (284).

(6) The assessment notices to the effect that the exemption for each firm must be assessed per capita between its partners, treating the partners as distinguished from firm, as manufacturers, a partner being disentitled to claim the benefit in all the firms of which he is a partner but only in one of them at his choice go outside the scope of the notifications and are therefore illegal. 1960 Ker LJ 1205: 1960 Ker LT 1087.

(7) The discrimination based on the use of particular goods in a particular area in the notification of Central Government dated 29-11-1955 cannot be said to be without reasonable basis. AIR 1959 Bom 256 (260): 60 Bom LR 991.

(vi) provide for the employment of officers of the [a][Government] to supervise the carrying out of any rules made under this Act;

[a] Substituted by A.L.O., 1950.

(vii) require a manufacturer or the licensee of a warehouse to provide accommodation within the precincts of his factory or warehouse for officers employed to supervise the carrying out of regulations made under this Act and prescribe the scale of such accommodation;

(viii) provide for the appointment, licensing, management and supervision of bonded warehouses and the procedure to be followed in entering goods into and clearing goods from such warehouses;

(ix) provide for the distinguishing of goods which have been manufactured under licence, of materials which have been imported under licence, and of goods on which duty has been paid, or which are exempt from duty under this Act;

(x) impose on persons engaged in the production or manufacture, storage or sale (whether on their own account or as brokers or commission agents) of salt, and, so far as such imposition is essential for the proper levy and collection of the duties imposed by this Act, of any other excisable goods, the duty of furnishing information, keeping records and making returns, and prescribe the nature of such information and the form of such records and returns, the particulars to be contained therein, and the manner in which they shall be verified;

(xi) require that excisable goods shall not be sold or offered or kept for sale in [a][India] except in prescribed containers, bearing a banderol, stamp or label of such nature and affixed in such manner as may be prescribed;

[a] Substituted for "the States" by the Finance Act, 1950 (25 of 1950), S. 11 and Schedule IV [31-3-1955].

(xii) provide for the issue of licences and transport permits and the fees, if any, to be charged therefor:

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**Section 37 — Note 2 (contd.)**

(8) Under Central Government notification of 29-11-1955 the Collector has the authority to issue the second notification removing a particular area from the operation of the exemption. AIR 1959 Bom 256 (259, 260): 60 Bom LR 991.

(9) The exemption of excise duty given under Notification No. 70 of 1960 dated 30-4-60 applies to cotton fabrics manufactured or produced by the co-operative society through its members on looms either owned by the society or its members and not in the case of cotton fabrics got manufactured on the society's power-looms by an outsider, by supplying yarn to the society. AIR 1965 Guj 215 (222, 223): (1965) 6 Guj LR 137 (DB).

(9A) Exemption from Excise Duty to manufacturers who applied for licence prior to 13-6-62 — 'D' a manufacturer-licensee applying for exemption — Before he could get the orders of exemption 'D' selling his manufacturing concern with goodwill to 'G' — 'G' applying for licence and exemption as successor to 'D' — Held, under Rule 178 licence is personal and is not transferable — Held further that nobody can claim exemption from liability to pay a tax or an excise duty as a matter of right — It is for the State to grant exemption in suitable cases — There is no equality either in matter of taxation or in its exemption — Person who sets up new units or purchased old units cannot be exempted and there is no discrimination under Article 14 of the Constitution — The differentiation between manufacturers prior to 13-6-62 and subsequent thereto is reasonable. AIR 1969 Punj 50 (55): ILR (1969) 1 Punj 456 (DB).

**Rule 9** — (10) Provision under Rule 9 for confiscation of goods is not unreasonable on the ground that the Rule does not provide machinery and procedure for confiscation as the right to hold goods is affected only when demand is made under Rule 9 (2) and right to object has been provided under S. 33. AIR 1965 Guj 215 (232, 233): (1965) 6 Guj LR 137 (DB).

(11) In case of manufactured goods, payment of duty and clearance of goods may be synchronous or the payment may be postponed, although goods may be removed (Provisos to Rule 9). This immediately sets up two kinds of cases in respect of manufactured goods. The critical time thus becomes the removal from factory or warehouse but if payment of duty is made before the removal then critical time is the payment of duty. AIR 1967 SC 1564 (1568): (1967) 3 SCR 205.

(12) Goods removed by manufacturer on strength of account current under

**Provided** that the fees for the licensing of the manufacture and refining of salt and saltpetre shall not exceed, in the case of each such licence, the following amounts, namely:—

| | Rs. |
|---|---|
| Licence to manufacture and refine saltpetre and to separate and purify salt in the process of such manufacture and refining | 50 |
| Licence to manufacture saltpetre | 2 |
| Licence to manufacture sulphate of soda (Kharinun) by solar heat in evaporating pans | 10 |
| Licence to manufacture sulphate of soda (Kharinun) by artificial heat | 2 |
| Licence to manufacture other saline substances | 2 |

(xiii) provide for the detention of goods, plant, machinery or material for the purpose of exacting the duty, the procedure in connexion with the confiscation, otherwise than under Section 10 or Section 28, of goods in respect of which breaches of the Act or rules have been committed, and the disposal of goods so detained or confiscated;

(xiv) authorise and regulate the inspection of factories and provide for the taking of samples, and for the making of tests, of any substance produced therein, and for the inspection or search of any place or conveyance used for the production, storage, sale or transport of salt, and so far as such inspection or search is essential for the proper levy and collection of the duties imposed by this Act, of any other excisable goods;

(xv) authorise and regulate the composition of offences against, or liabilities incurred under, this Act or the rules made thereunder;

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**Section 37 — Note 2 (contd. )**

second proviso to Rule 9 and account settled every month — Rule 10 is attracted and in case of short levy of duty written demand must be made within three months from date of adjustment of account — Provisional acceptance of value of goods declared by manufacturer held, could not be called "provisional assessment" and Rule 10-B did not apply. AIR 1967 Cal 269 (274, 275): 71 Cal WN 1 (DB). (Judgment and Order of Banerjee J. dated 3-1-1964 (Cal), Affirmed.)

(13) Demand for duty under Rule 9 (2) for contravention of Rule 9 (1) — Rule 10 has no application. AIR 1965 Guj 215 (234): (1965) 6 Guj LR 137 (DB).

(14) By removing excisable goods without payment of duty the offender does not escape the liability for payment of duty. AIR 1966 Cal 101 (107).

(15) From the time of demand under Rule 9 (2), the liability of the manufacturer to pay the duty arises. It is a binding order as soon as duty is demanded from the date of initial order itself and it does not cease to be so binding merely because the other side has right to appeal or get it set aside in the said proceeding or in an appeal. (1965) 6 Guj LR 350: ILR (1965) Guj 240.

(16) Order under Rule 9 made with jurisdiction but stating wrong part of section — No interference under Article 226 unless party is prejudiced. AIR 1965 Guj 215 (225): (1965) 6 Guj LR 137 (DB).

**Rule 9A** — (17) Duty payable on goods at rate in force when goods were cleared — Goods cleared between 1st March 1951 and 28th April 1951 — Finance Bill passed on 28th April 1951 increasing duty with retrospective effect from 1st March 1951 — Duty payable on date of clearance is one levied under Finance Act, 1951. ('52) AIR 1952 Nag 139 (143): ILR (1952) Nag 156 (DB).

(18) Goods removed out of factory and loaded in wagons which were sealed by Railway — Duty paid and gate pass obtained — Goods, held, could not be considered to be lying in factory — Payment of duty is the critical time — Assessee not liable for enhanced duty. AIR 1967 SC 1564 (1568) : (1967) 3 SCR 205.

**Rule 9-B** — (19) Power of assessment conferred on assessing officer by rules — Assessing officer performs quasi-judicial functions — There is no abdication of function by Legislature. AIR 1966 Pat 248 (252): 1966 BLJR 790.

(20) Though provisional assessment is left discretionary with the Excise Authority, on refusal to make provisional assessment the assessee can go in appeal or revision. AIR 1965 Guj 215 (230): (1965) 6 Guj LR 137 (DB).

(xvi) provide for the grant of a rebate of the duty paid on goods which are exported out of India or shipped for consumption on a voyage to any port outside India:

[a][ ° ° ° ° ° ]

[a] The Proviso was omitted by the Central Excises and Salt (Amendment) Act, 1957 (49 of 1957), S. 2 [20-12-1957].

(xvii) exempt any goods from the whole or any part of the duty imposed by this Act;

(xviii) define an area no point in which shall be more than one hundred yards from the nearest point of any place in which salt is stored or sold by or on behalf of the Central Government, or of any factory in which saltpetre is manufactured or refined, and regulate the possession, storage and sale of salt within such area;

(xix) define an area round any other place in which salt is manufactured, and regulate the possession, storage and sale of salt within such area;

(xx) authorise the [a][Central Board of Excise and Customs constituted under the Central Boards of Revenue Act. 1963] or Collectors of Central Excise appointed for the purpose of this Act to provide by written instructions, for supplemental matters arising out of any rule made by the Central Government under this section.

[a] Substituted for "Central Board of Revenue" by Central Boards of Revenue Act, 1963 (54 of 1963), S. 5 (2) [1-1-1964].

(3) In making rules under this section, the Central Government may provide that any person committing a breach of any rule shall, where no other penalty is provided by this Act, be liable to a penalty not exceeding two thousand rupees and that any article in respect of which any such breach is committed shall be confiscated.

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**Section 37 — Note 2 (contd.)**

**Rule 10** — (21) Rules 10 and 160 — Though levy of duty is valid it must be collected by authority of law and in a manner prescribed by rules. Where no rules are prescribed for the collection of duty on excisable goods which have already been removed from warehouse duty cannot be collected. ('52) AIR 1952 Nag 139 (144): ILR (1952) Nag 156 (DB).

(22) Case of short levy falling under Rule 10 — Rule 10-A is excluded — Action for recovery should be brought within 3 months from the time tax was initially levied. AIR 1967 All 546 (548, 549) * (1964) 68 Cal WN 541 * AIR 1967 Cal 269 (274, 275): 71 Cal WN 1 (DB). (Judgment and Order of Banerjee, J. dated 3-1-1964 (Cal), Affirmed.)

(23) Short levy due to inadvertence of Excise Officer falls under Rule 10 and not under Rule 10-A. AIR 1967 All 546 (548, 549).

(24) Rule 10-A is residuary provision — It is automatically excluded where Rule 10 applies. AIR 1967 Cal 269 (273): 71 Cal WN 1 (DB).

(25) Demand for duty under Rule 9 (2) for contravention of Rule 9 (1) — Rule 10 has no application. AIR 1965 Guj 215 (234): (1965) 6 Guj LR 137 (DB).

(26) Bond executed in terms of proviso to Rule 10-B (2) on 22-5-1958 — Assessments subsequent to that are provisional while prior to it are final. AIR 1968 Cal 154 (158) (DB).

(27) Where after realising that certain bottles were erroneously considered as laboratory glasswares and the duty was levied as such, the Department could ask for recovery of additional duty without giving show cause notice, when the time required in giving the notice would have barred the claim for additional duty and when the authorities were already knowing what the assessee would have replied. Principles of natural justice would not apply and all that was necessary was an attitude of impartiality and fairness on part of authorities. AIR 1965 All 305 (308) (DB).

(28) Recovery of duties or charges short levied or erroneously refunded — Higher duty can be demanded on ground that an error had been committed by officials earlier. AIR 1965 All 305 (308) (DB).

**Rule 10-A** — (29) As a general rule the proper time for collection of excise duty from a producer or manufacturer is when he wishes to remove the excisable goods from the place of manufacture etc., and secures the permission of the proper officer for that purpose. But exceptional cases may and do arise when the excise duty has been ordered to be levied after the goods have been already cleared away. Such cases are clearly covered by Rule 10-A. ('55) AIR 1955 Raj 114 (123): ILR (1955) 5 Raj 832 (DB).

[a][(4) Notwithstanding anything contained in sub-section (3), and without prejudice to the provisions of Section 9, in making rules under this section, the Central Government may provide that if any manufacturer, producer or licensee of a warehouse—

(a) removes any excisable goods in contravention of the provisions of any such rule, or

(b) does not account for all such goods manufactured, produced or stored by him, or

(c) engages in the manufacture, production or storage of such goods without having applied for the licence required under Section 6, or

(d) contravenes the provisions of any such rule with intent to evade payment of duty,

then—

(i) any land, building, plant, machinery, materials, conveyance, animal or any other thing used in connection with the manufacture, production, storage, removal or disposal of such goods, and

(ii) all excisable goods on such land or in such building or produced or manufactured with such plant, machinery, materials or thing,

belonging to such manufacturer, producer or licensee shall be liable to confiscation and the manufacturer, producer or licensee shall be liable to a penalty not exceeding three times the value of the excisable goods in respect of which any contravention of the nature referred to in clause (a), (b), (c) or (d) has been committed, or five thousand rupees, whichever is greater.]

[a] Inserted by Finance Act, 1968 (19 of 1968), S. 38 (1) [11-5-1968].

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**Section 37 — Note 2 (contd.)**

(30) Rule 10-A is residuary provision — It is automatically excluded where Rule 10 applies. AIR 1967 Cal 269 (273): 71 Cal WN 1 (DB) * AIR 1967 All 546 (548, 549).

(31) The words "deficiency in duty if the duty has for any reason been short-levied" under Rule 10-A are wide enough to include cases of deficiency arising like those where 8 annas out of the 14 annas of the duty has been collected in the first instance but 6 annas remains to be collected. AIR 1962 SC 1006 (1023, 1024): 1962 Supp (2) SCR 1.

**Rule 10-B** — (32) Provisional acceptance of value of goods declared by manufacturer held, could not be called "provisional assessment" and R. 10-B did not apply. AIR 1967 Cal 269 (274, 275): 71 Cal WN 1 (DB).

(33) Bond executed in terms of proviso to Rule 10-B (2) on 22-5-1958 — Assessments subsequent to that are provisional while prior to it are final. AIR 1968 Cal 154 (158) (DB).

**Rule 11** — (34) Rules 8 and 11 — Notification No. 2 — Salt 47, dated 28th February, 1947, for refund of salt duty paid and exempted by Notification No. 1 Salt/47 of same date have no statutory force — The claim for refund under it cannot be enforced. ('54) AIR 1954 Punj 159 (161, 162): ILR (1954) Punj 602.

**Rule 15** — (35) Rule 15 has got relation to the object in view and it does not in any way offend Article 19 (1) (g) of the Constitution. AIR 1960 Andh Pra 498 (500): ILR (1960) 1 Andh Pra 307 (DB).

**Rule 18** — (36) Rule 18 has got relation to the object in view and it does not in any way offend Article 19 (1) (g) of the Constitution. AIR 1960 Andh Pra 498 (500): ILR (1960) 1 Andh Pra 307 (DB).

**Rule 19** — (37) Excise duty — Payment of — Liability is on curer-dealer in tobacco — Customers agreeing to pay excise duty — Levy of sales tax upon it is valid. AIR 1959 Pat 389 (392): 1959 BLJR 343 (DB).

**Rule 21** — (38) Rule 21 has got relation to the object in view and it does not in any way offend Article 19 (1) (g) of the Constitution. AIR 1960 Andh Pra 498 (500): ILR (1960) 1 Andh Pra 307 (DB).

**Rule 22** — (39) Rule 22 has got relation to the object in view and it does not in any way offend Art. 19 (1) (g) of the Constitution. AIR 1960 Andh Pra 498 (500): ILR (1960) 1 Andh Pra 307 (DB).

**Rule 23** — (40) Rule 23 has got relation to the object in view and it does not in any way offend Art. 19 (1) (g) of the Constitution. AIR 1960 Andh Pra 498 (500): ILR (1960) 1 Andh Pra 307 (DB).

**Rule 24** — (41) Excise duty — Payment of — Liability is on curer-dealer in tobacco — Customers agreeing to pay excise duty — Levy of sales tax upon it is valid. AIR 1959 Pat 389 (392): 1959 BLJR 343 (DB).

**Rule 25** — (42) Excise duty — Payment of — Liability is on curer-dealer in

**Section 37 — Note 2 (contd.)**

tobacco — Customers agreeing to pay excise duty — Levy of sales tax upon it is valid. AIR 1959 Pat 389 (392): 1959 BLJR 343 (DB).

**Rule 28** — (43) Excise duty — Payment of—Liability is on curer-dealer in tobacco — Customers agreeing to pay excise duty — Levy of sales tax upon it is valid. AIR 1959 Pat 389 (392): 1959 BLJR 343 (DB).

**Rule 29** — (44) Excise duty — Payment of—Liability is on curer-dealer in tobacco — Customers agreeing to pay excise duty — Levy of sales tax upon it is valid. AIR 1959 Pat 389 (392): 1959 BLJR 343 (DB).

**Rule 32** — (45) Adoption of Sec. 115 (2) of Customs Act, 1962 for Central excise adjudication — Authority under, to adjudge penalty for removal of excisable goods in contravention of Rr. 32 and 33, was Collector — Collector has, as a necessary corollary, also the power to direct confiscation of vehicles concerned in the contravention, notwithstanding non-adoption of S. 122 of Customs Act 1962. 1966 Ker LJ 1105: 1967 Ker LT 1066 (DB).

**Rule 33** — (46) Adoption of Section 115 (2) of Customs Act, 1962 for Central excise adjudication — Authority under, to adjudge penalty for removal of excisable goods in contravention of Rr. 32 and 33, was Collector — Collector has, as a necessary corollary, also the power to direct confiscation of vehicles concerned in the contravention, notwithstanding non-adoption of S. 122 of Customs Act 1962. 1966 Ker LJ 1105: 1967 Ker LT 1066 (DB).

**Rule 34**— (47) Rule 34 has got relation to the object in view and it does not in any way offend Art. 19(1)(g) of the Constitution. AIR 1960 Andh Pra 498 (500) : ILR (1960) 1 Andh Pra 307 (DB).

**Rule 36** — (48) Rule 36 has got relation to the object in view and it does not in any way offend Art. 19(1)(g) of the Constitution. AIR 1960 Andh Pra 498 (500) : ILR (1960) 1 Andh Pra 307 (DB).

**Rule 52**—(49) Power of assessment conferred on assessing officer by rules — Assessing officer performs quasi judicial functions — There is no abdication of function by Legislature. AIR 1966 Pat 248 (252) : 1966 BLJR 790 (DB).

**Rule 83 (7)**—(50) Central Excise officers are not empowered to seize the books of accounts not maintained in accordance with the Rules and they cannot take such registers in their possession either during course of inspection or during search though they can demand such registers from manufacturer. AIR 1965 All 543 (545) : 1965 (2) Cri LJ 582 : 1964 All WR (HC) 128.

**Rule 96-V**—(51) The operation of the Rule 96-V is not retrospective in that, where the manufacturer obtains permission to opt to the compounded system for a particular period but exercises his option on a later date, he cannot claim that he should be taxed for the entire period, as if he had exercised the option for the whole of the period. AIR 1968 Guj 29 (34) (DB).

**Rule 103**—(52) The sale by Court of the leasehold interest in the salt pans is not void ab initio as being against public policy or prohibited under the Salt Act. ('52) AIR 1952 Mad 293 (296) (DB).

**Rule 104**—(53) The sale by Court of the leasehold interest in the salt paus is not void ab initio as being against public policy or prohibited under the Salt Act. ('52) AIR 1952 Mad 293 (296) (DB).

**Rule 151**—(54) Rule 151(c) and (d) will be attracted only if a removal of goods from warehouse is established. 1963 KLT 1109 : 1965 (2) Cri LJ 279.

(55) Rule 225 cannot be taken into consideration for interpreting R. 151. 1967 All Cr R 209 : 1967 All WR (HC) 304.

(56) Order under Rule 151 passed in violation of rules of natural justice is liable to be quashed. AIR 1968 Delhi 64 (68).

(57) The liability imposed upon the owner of the goods warehoused under Rule 151 is not absolute and unconditional but requires proof of mens rea on his part. Thus if the impugned act is not performed by the "owner of goods warehoused" himself but is committed by a 'person in his employ' then the former can be made liable for it, only if the prosecution is able to prove, that it was done either at his asking or to his knowledge or with his connivance. 1967 All Cr R 209 : 1967 All WR (HC) 304.

(58) Rule 160 enables the authority to impose the duty that would have been imposed on the goods if they were removed from warehouse without permission. 1963 KLT 1109 : 1965 (2) Cri LJ 279.

**Rule 160**—(59) Though levy of duty is valid it must be collected by authority of law and in a manner prescribed by rules. Where no rules are prescribed for the collection of duty on excisable goods which have already been removed from warehouse duty cannot be collected. ('52) AIR 1952 Nag 139 (144) : ILR (1952) Nag 156 (DB).

**Rule 178**—(60) Contract entered into in violation of Rule 178(4) of Central Excise Rules (1944) does not become illegal on ground of its being against public policy. 1968 Ker LR 405 : 1968 Ker LJ 769.

(61) Rule 178 assumes that a partnership can be entered into even before the license is amended

**Section 37 — Note 2 (contd.)**

under Rule 178(4). AIR 1962 Mad 240 (242) : (1962) 2 Mad LJ 109 (FB).

(62) Rule 178(4) does not prohibit a licensee from entering into any partnership with strangers. It only declares that the terms and conditions of the licence already issued will also be binding upon the person admitted in the partnership. 1968 Ker LJ 769 : 1968 Ker LR 405 * (1960) 2 Andh WR 151.

[See also AIR 1960 Andh Pra 39 (41) : (1959) 2 Andh WR 550 (DB). (The omission to intimate that the licensee has entered into partnership within the prescribed time may expose the persons concerned to a fine only.)]

(63) Where there was a division of the looms as between the two partners who operated all the looms under a single licence, it could not be regarded, notwithstanding the intrusion of the partnership, as an acquisition by those persons from another entity. The firm was not a person and therefore, proviso to the Notification in G. S. R. 373 dated 18-3-1961 as amended by Notification No. 81/61 dated 1-4-61 could not apply. Consequently higher rate of duty could not be demanded from each partner individually. 77 Mad LW 563 : ILR (1965) 1 Mad 542.

(64) All that proviso to Rule 178 (3A) means is that the grant of a licence to the person in actual possession of the premises, will not in any manner affect prejudicially the rights of the person who may be ultimately found to be entitled to the premises. The excise authorities have nothing to do with any dispute between the heirs of a deceased licensee inter se, so long as they grant the license to the heir in "actual possession" of the premises. AIR 1960 Assam 207 (208) : ILR (1958) 10 Assam 65 (DB).

(65) Cases under the Abkari, Opium or Forest Acts have no application in determining the validity of partnerships made in contravention of the provisions of the Central Excises and Salt Act. AIR 1960 Andh Pra 39 (41) : (1959) 2 Andh WR 550 (DB).

**Rule 200**—(66) Notifications Nos. 5 and 6, dated the 27th February, 1948, issued under S. 3(1), Land Customs Act 1924, referred to the then existing jurisdictions of the Collectors of Central Excise and of subordinate staff as descriptive of the area in regard to which the Collector of Land Customs and its subordinate staff would exercise jurisdiction. The jurisdiction of the Land Customs Collector or the subordinate staff was not made dependant on the retention by the Collector of Central Excise or the subordinate staff of their existing jurisdiction by the Central Excises and Salt Act, 1944. ('53) AIR 1953 Cal 663 (666) : ILR (1955) 1 Cal 343 (DB).

(67) Under notification No. 5 of 29-3-1947, the Province of Assam became a separate Collectorate with Headquarters at Shillong with effect from 1-4-1947 from which date, under another notification of the same date, the power under R. 200 could only be conferred by Collector of Central Excise Shillong on the officers of department within its territorial jurisdiction. Without such power being conferred detention and search of a vehicle under R. 200 by any officer subordinate to Collector would be illegal. That prior to 1-4-1947 such power was conferred by circular order No. 4-G 1/47, dt. 20-1-1947 is immaterial. ILR (1959) 11 Assam 397.

**Rule 213**—(68) The words "date of hearing" and "shall be heard" in R. 213 do not necessarily imply an oral hearing. AIR 1961 Andh Pra 350 (355).

**Rule 215**—(69) A person aggrieved by any decision or order has an unfettered right to appeal under S. 35. Section 129 of Customs Act 1962, requiring deposit of duty or penalty levied pending appeal, applied to such appeal by notification dt. 4-5-63 whittles down the substantive right of appeal. Notification is therefore not valid. AIR 1968 SC 13 (15, 16) : (1968) 1 SCR 82. (AIR 1960 Andh Pra 224, Impliedly Overruled.)

(70) R. 215 is not ultra vires of the rule-making power under S. 37. AIR 1960 Andh Pra 294 (297).

[But see ILR (1958) Punj 1343].

(71) Merely because R. 215 provides that for deposit of duty pending appeal, it does not mean either in fact or law that S. 189 of the Sea Customs Act can only be applied in cases where there has been a confiscation or withholding of the goods as provided for in Sea Customs Act. AIR 1960 AP 294 (297).

**Rule 223A**—(72) Rule 223-A envisages levy of penalty where it is found that there is a deficiency in the weight of the commodity which is not accounted for to the satisfaction of the officer. It is only in cases where assessing authority finds that there has been deficiency in the weight of the commodity at the warehouse which is not attributable to evaporation or dryage that the procedure mentioned in the rule should be adopted. AIR 1961 Andh Pra 540 (543, 544) : (1961) 1 Andh WR 367.

(73) Where assessing authorities made an allowance of only 5 per cent of the actual loss of weight in tobacco due to dryage at warehouse, held, that since assessee was entitled to an allowance of the actual loss of weight due to evaporation or dryage, the department was bound to allow all the loss of weight and not only 5 per cent. AIR 1961 Andh Pra 540 (544) : (1961) 1 Andh WR 367.

38. **Publication of rules and notifications.**—All rules made and notifications issued under this Act shall be made and issued by publication in the Official Gazette. All such rules and notifications shall thereupon have effect as if enacted in this Act:

Provided that every such rule shall be laid as soon as may be after it is made before [a][ ° ° ° ] [b][Parliament], while it is in session, for a total period of thirty days which may be comprised in one session or in two or more sessions, and if before the expiry of that period, °[[d][Parliament] makes any modification in the rule or directs] that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be.

[a] The words "each of the Chambers of" were omitted by A.C.A.O., 1948.
[b] Substituted for the words "the Central Legislature" by A.L.O., 1950.
[c] Substituted for the words "or where the period for which the rule is so laid before one Chamber does not coincide with that for which it is so laid before the other, before the expiry of the later of these periods, both Chambers agree in making any modification in the rule or both Chambers agree" by A.C.A.O., 1948.
[d] Substituted for "that Legislature" by A.L.O., 1950.

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**Section 37 — Note 2 (contd.)**

**Rule 225**—(74) Rule 225 does not impinge upon the fundamental right guaranteed under Art. 19(1)(g) of the Constitution. AIR 1961 Andh Pra 350 (354).

(75) Rule 225 cannot be taken into consideration for interpreting R. 151. 1967 All Cr. R. 209 : 1967 All WR (HC) 304.

**Rule 226**—(76) Rule 226 is concerned only with the question of maintaining proper registers and deals with cases of failure to maintain registers prescribed therein. (1965) 6 Guj LR 350 : ILR (1965) Guj 240.

**Section 38 — Note 1**

(1) The first part of S. 38 of the Act by use of the word 'thereupon' makes it clear that the Notification of the Rule issued under the Act immediately on its publication in the official gazette has the effect of being enacted in the Act. That means that it acquires statutory force immediately on the publication in the official gazette. It has not to wait for its statutory force to be laid before Parliament. AIR 1961 Cal 217 (221): 65 Cal WN 670 (DB) * AIR 1961 Punj 192 (196) (DB).

(2) These Rules or notifications although they become part of Statute immediately on their publication will go out of the Statute book if Parliament modifies or annuls them within time and during the session mentioned in the proviso. AIR 1961 Cal 217 (221): 65 Cal WN 670 (DB).

(3) All that the proviso means is that as soon as may be such Rule shall be laid before Parliament and Parliament is given the right to modify or annul such Rule within time and session specified therein. AIR 1961 Cal 217 (221) : 65 Cal WN 670 (DB).

(4) If there is any conflict between Rules or Notifications and a section of the Act, it must be dealt with in the same spirit as a conflict between two sections of the Act would be dealt with and if reconciliation is impossible, the subordinate provision must give way, and probably the Rules or Notifications would be treated as subordinate to the section. AIR 1961 Cal 217 (223) : 65 Cal WN 670 (DB) * (1958) 60 Punj LR 205: ILR (1958) Punj 1343.

(5) The Act or the Rules made under Section 37 and published under Section 38 provide no machinery whatsoever for recovery of duty paid under a mistake. Therefore, neither the order passed by Asstt. Collector rejecting claim for refund of amount paid by mistake, nor subsequent order passed by appellate authority, were the orders passed under the Act. AIR 1967 Pat 363 (365) : 1968 BLJR 137 (DB).

(6) That, however, cannot mean that the Court cannot go into the question or rules being ultra vires on the ground that the impugned rule or notification was not "under this Act" within the meaning of Section 38. AIR 1961 Cal 217 (223): 65 Cal WN 670 (DB).

(7) Where there is nothing on record to show that the Rules or Notifications were not placed before Parliament, Court is entitled to presume that officials acts have been performed in their regular course. AIR 1961 Cal 217 (221): 65 Cal WN 670 (DB).

(8) In view of Proviso to Section 38 it cannot be said that Parliament has completely abdicated its functions as far as collection of excise duties is concerned. The rules framed under the Act cannot, therefore, be struck down on the ground of excessive delegation by legislature. AIR 1966 Pat 248 (252): 1966 BLJR 790 (DB).

(9) The Notification No. 2/Salt/47 dated 28-2-47 is a valid Notification and

**39. Repeal of enactments.**—[Repealed by the Repealing and Amending Act, 1947 (2 of 1948), S. 2 and Sch.]

**Section 38 — Note 1 (contd.)**

is binding on the Union of India. On a proper construction of Sections 37 and 38, the Central Government has power to make rules for refund of duty paid on salt subsequently exempted. AIR 1961 Cal 217 (222): 1966 Cri LJ 530 (DB). (AIR 1954 Punj 159, Dissented from.) * AIR 1961 Pat 72 (73) (DB). (AIR 1954 Punj 159, Dissented from.)

[But see AIR 1954 Punj 159 (161, 162): 56 Pun LR 68]

(10) Government Notification in G. S. R. No. 373 of 18th March, 1961 as amended by Notification No. 81/61 Central Excise of 1st April 1961, proviso — Two persons producing cotton fabrics under firm name — License issued in favour of both partners and not firm — Dissolution of partnership and both partners sharing looms and commencing production separately — Held, the looms were not acquired from another person and hence the Proviso to the Notification did not apply. (1964) 77 Mad LW 563: ILR (1965) 1 Mad 542.

**Section 39 — Note 1**

(1) By Repealing and Amending Act (2 of 1948), Section 39 and Third Schedule to Central Excises and Salt Act (1944) were repealed and no saving clause was inserted. Hence, Notification made under Madras Salt Act (1889) cannot continue to be in force. (1964) 2 Andh WR 416.

(2) The important criterion is whether the act was done in the discharge or purported discharge of official duty and the act must be an official act. 1963 (2) Cri LJ 202 (208) (Andh Pra). (It has got to be seen whether the act was integrally connected with the duties and was in separable from the duties and that the duties did not furnish a mere occasion or an opportunity for committing that act. The mere fact that the act is an offence is not sufficient to decide the question whether the protection is available.)

(3) Only suits of tortious nature for compensation or damages are barred. AIR 1967 Andh Pra 338 (343): (1967) 2 Andh LT 141. (Questions of collecting illegal taxes or orders imposing tax, duty or penalty are not dealt with by S. 40.) * AIR 1961 Andh Pra 540 (544): (1961) 1 Andh WR 367.

(4) Where any order or act passed or done is assailed or challenged, the matter would not be within ambit of S. 40. AIR 1967 All 546 (548).

(5) Civil Courts have jurisdiction to entertain suits with regard to illegal recovery of Central excise duty. AIR 1957 Mad 110 (113) (DB) * AIR 1961 Andh Pra 540 (543, 544): (1961) 1 Andh WR 367 * (1962) 3 Guj LR 762 * (1968) 70 Pun LR 412 * AIR 1967 Andh Pra 338 (343): (1967) 2 Andh LT 141 * AIR 1967 Andh Pra 281 (284): (1967) 1 Andh WR 20 (DB).

(6) Bar of limitation — Applies not only to prosecutions by private parties but also to prosecutions by State. 1963 (2) Cri LJ 202 (205) (Andh Pra).

(7) Central Excise Rules (1944), Rules 211 and 212 — Non-duty paid tobacco — Seizure and confiscation — Tobacco sold in spite of payment of duty and redemption fine — Suit for recovery of tobacco or its market price against Union of India was maintainable and was not barred under Section 40. Selling of confiscated tobacco was ultra vires and such action could not be said to be "anything done or ordered to be done under this Act" within the meaning of Section 40. Suit was governed by Article 62, Limitation Act, the terminus a quo for the period of limitation being the date of the sale. ('58) AIR 1958 Pat 439 (440) (DB).

(8) Suit for declaration that order of Excise Authority levying penalty and duty was illegal — Suit is not barred by Section 40 and hence limitation prescribed by Section 40 (2) is not applicable to it — General law of limitation will apply. AIR 1967 Andh Pra 338 (348): (1967) 2 Andh LT 141 * AIR 1967 Pat 363 (365): 1968 BLJR 137 (DB).

(9) Conspiracy (i) to defraud Central Government of its legitimate revenue by issue of bogus permit and (ii) to transport tobacco, cheat merchant and receive money from him — Charge against official and non-official — Prosecution more than 6 months after issue of permit — Prosecution was barred by Section 40 (2) as regards object (i) but was not barred by that provision, as regards object (ii). 1963 (2) Cri LJ 546 (554): (1963) 1 Andh LT 57.

(10) The prosecution against accused having been instituted after the expiration of six months of the commission of the alleged offences is barred by time under Section 40 (2). 1963 (1) Cri LJ 650 (658): (1962) 2 Andh WR 312 * (1959)2 Mad LJ 165.

(11) Point not raised before Central Excise Authority cannot be allowed to be urged in suit challenging decision of Authority. AIR 1967 Andh Pra 338 (351): (1967) 2 Andh LT 141.

(12) Wrongful attachment and sale of goods — Suit for damages — Burden is upon plaintiff to show want of good faith on part of Excise Officials. 1959-2 Mad LJ 165. (Suit for damages — Plaintiff failing to prove want of good faith — Suit is barred under S. 40 (1).)

**40. Bar of suits and limitation of suits and other legal proceedings.**—(1) No suit shall lie against the Central Government or against any officer or the *[Government] in respect of any order passed in good faith or any act in good faith done or ordered to be done under this Act.

(2) No suit, prosecution, or other legal proceedings shall be instituted for anything done or ordered to be done under this Act after the expiration of six months from the accrual of the cause of action or from the date of the act or order complained of.

## THE FIRST SCHEDULE

(See Section 3)

[NOTE:—This Schedule is substituted for the Original First Schedule, by the Central Excises (Conversion to Metric Units) Act, 1960 (38 of 1960), S. 2 and First Schedule, with effect from 1st October 1960. The Schedule is subsequently amended by Acts 14 of 1961; 11 of 1962; 20 of 1962; 13 of 1963; 30 of 1963; 5 of 1964; 10 of 1965; 15 of 1965; 13 of 1966; 12 of 1967; 20 of 1967 and 19 of 1968. The items in the Schedule here are given as amended by the relevant last amending Act. To ascertain the current rate of excise duty relating to the particular item reference should be made to the current annual Finance Act and the amending Act, if any, subsequent to the above mentioned Acts. For special duties of excise on certain goods and the regulatory duties of excise, see Sections 39 and 40 of the Finance Act, 1968 (19 of 1968).]

| Item No. | Description of goods | Rate of duty |
|---|---|---|
| (1) | (2) | (3) |
| | **Food** | |
| 1 | SUGAR, PRODUCED IN A FACTORY ORDINARILY USING POWER IN THE COURSE OF PRODUCTION OF SUGAR—<br>"Sugar" means any form of sugar in which the sucrose content, if expressed as a percentage of the material dried to constant weight at 105° Centigrade, would be more than ninety. | |
| | (1) Sugar other than Khandsari or Palmyra. | Thirty rupees and fifty paise per quintal. |
| | (2) Khandsari sugar—<br>that is to say, sugar in the manufacture of which neither a vacuum pan nor a vacuum evaporator is employed. | Fifteen rupees per quintal. |
| | (3) Palmyra sugar—<br>that is to say, sugar manufactured from jaggery obtained by boiling the juice of the palmyra palm. | Nil. |
| 1A | CONFECTIONERY AND CHOCOLATES IN OR IN RELATION TO THE MANUFACTURE OF WHICH ANY PROCESS IS ORDINARILY CARRIED ON WITH THE AID OF POWER NAMELY:—<br>(1) Boiled sweets, toffees, caramels, candies, nuts (including almonds) and fruit kernels coated with sweetening agent, and chewing gums. | Eighty paise per kilogram. |

### Schedule 1 — Note 1

(1) Though the amendments of the First Schedule made by sub-section (1) of Section 7 of the Finance Act, 1951, did not become law until 28-4-1951, yet because the Parliament expressly stated that they are to be treated as if they had become law on the preceding 1st March the liability for payment of excise duty is to be determined on the assumption that as and from 1-3-1951 the rates of duty were those set out in sub-section (1) of Section 7. ('57) AIR 1957 All 84 (86) (DB).

(2) Excise duty is on the manufacture of goods and not on the sale. The fact, therefore, that the substance produced by the manufacturer at an intermediate stage is not put in the market, would not make any difference to the chargeability of the substance to excise duty, if it is covered by an item in Schedule 1 of the Act. AIR 1963 SC 791 (793): (1963) Supp 1 SCR 586 * AIR 1968 SC 922 (928): (1968) 2 SCJ 433.

| Item 1-A (contd.) | Description of goods | Rate of duty. |
|---|---|---|
| (1) | (2) | (3) |
| | (2) Chocolates in the form of slabs, tablets, bars, pastilles or croquettes, whether or not containing nuts, fruit kernels or fruits. | |
| 2 | COFFEE, cured—<br>"Coffee" means the seed of the coffee tree (coffea), whether with or without husk, whether cured or uncured, but does not include the seed while still attached to the tree. | Eighty-five rupees per quintal. |
| 3 | TEA—<br>"Tea" includes all varieties of the product known commercially as tea, and also includes green tea. | |
| | (1) Tea, all varieties except package tea falling within sub-item (2) of this item. | Not exceeding sixty-six paise per kilogram as the Central Government may, by notification in the Official Gazette, fix. |
| | (2) Package tea, that is to say, tea packed in any kind of container containing not more than 27 kilograms net of tea. | Forty-six paise per kilogram, plus the duty for the time being leviable under sub-item (1) of this item, if not already paid. |
| | **Beverages and Tobacco** | |
| 4 | TOBACCO—<br>"Tobacco" means any form of tobacco, whether cured or uncured and whether manufactured or not, and includes the leaf, stalks and stems of the tobacco plant, but does not include any part of a tobacco plant while still attached to the earth. | |
| I. | Unmanufactured tobacco— | Per kilogram. |
| | (1) if flue cured and used in the manufacture of cigarettes. | Three rupees and fifty paise. |
| | (2) if flue cured and used for the manufacture of smoking mixtures for pipes and cigarettes. | Twenty-seven rupees and fifty paise. |
| | (3) if flue cured and not otherwise specified. | Two rupees and fifty paise. |
| | (4) if other than flue cured and used for the manufacture of— | Two rupees and eighty-five paise. |
| | (a) cigarettes or (b) smoking mixtures for pipes and cigarettes. | |

**Sch. I, Item 3 — Note 1**

(1) The green leaves of tea are liable to sales tax under the provisions of the Travancore General Sales Tax Act, 1124. ('54) ILR (1954) Trav-Co 1035 (1041).

**Sch. I, Item 4 — Note 1**

(1) The provisions of the Central Excises and Salt Act are not contrary to the provisions of Section 66 (1) (e), C. P. and Berar Municipalities Act or to the levy of octroi duty on tobacco. Tobacco becomes subject to excise duty when it reaches the stage of manufacture mentioned in Schedule 1, Item 9 (presently, Item 4) of the Act. Even before it is converted into bidis it becomes excisable goods and liable to pay excise duty. The levy of such duty is not therefore in conflict with octroi duty. ('50) AIR 1950 SC 11 (14): 1950 SCR 15.

(2) Tariff of tax imposed by Cls. (5) and (6) are not discriminatory — Clause (6) cannot be impugned under Article 14. AIR 1962 SC 148 (150): (1962) 2 SCR 118.

(3) Price at which cheroots were sold by manufacturer to sole selling agents at factory — Cannot be basis for charging excise duty. AIR 1967 Andh Pra 281 (285): (1967) 1 Andh WR 20 (DB).

(4) Snuff falls within the definition of tobacco under Sch. I, Item 9 (Item 4 after amendment of 1960). (1966) 17 STC 116: ILR (1966) 1 Cal 274 * (1964) 68 Cal WN 19.

(5) Zarda is tobacco of the category of chewing tobacco within Item 9 (Item No. 4, presently). AIR 1965 Cal 498 (503).

(6) Where the curing was completed by a curer before the consignment reached the company's warehouse and the duty at that stage was payable on unmanufactured tobacco, the allowance of 1 per cent. on weight given by the excise authorities for loss of weight during the time that it was in the wholesale dealer's warehouse, must be held to have been done ex gratia and not as a matter of right. AIR 1959 Punj 357 (359, 360): 61 Pun LR 154.

| Item 4 (contd.) | Description of goods | Rate of duty |
|---|---|---|
| (1) | (2) | (3) |
| | (5) if other than flue cured and not actually used for the manufacture of (a) cigarettes or (b) smoking mixtures for pipes and cigarettes or (c) biris— | One rupee and seventy-five paise. |
| | (i) stems of tobacco larger than 6.35 millimetres in size, | |
| | (ii) dust of tobacco. | |
| | * * * | |
| | (iv) tobacco cured in whole leaf form and packed or tied in bundles, hanks or bunches or in the form of twists or coils. | |
| | * * * | |
| | (6) if other than flue cured and not otherwise specified. | Two rupees and fifty paise. |
| | (7) if used for agricultural purposes. | Nil. |
| | (8) stalks. | Twenty-five paise. |
| II. | Manufactured tobacco— | Per hundred. |
| | (1) Cigars and cheroots of which the value— | |
| | (i) exceeds Rs. 25 a hundred. | Twenty-one rupees. |
| | (ii) exceeds Rs. 15 a hundred, but does not exceed Rs. 25 a hundred. | Twelve rupees and seventy-five paise. |
| | (iii) exceeds Rs. 5 a hundred, but does not exceed Rs. 15 a hundred. | Four rupees and fifty paise. |
| | (iv) exceeds Rs. 1·25 a hundred, but does not exceed Rs. 5 a hundred. | One rupee and twenty Paise. |
| | (2) Cigarettes | Per thousand. |
| | | One hundred per cent. ad valorem. |
| | (3) Biris in the manufacture of which any process has been conducted with the aid of machines operated with or without the aid of power. | Three rupees per thousand. |
| | **Crude materials, except fuels** | |
| 5 | SALT— | |
| | "Salt" includes swamp salt, spontaneous salt, and salt, or saline solutions made or produced from any saline substance or from salt earth. | The rate fixed annually by a Central Act. |
| | **Mineral fuels, Lubricants and related materials** | |
| 6 | MOTOR SPIRIT— | |
| | Motor spirit, that is to say— | |
| | (i) any mineral oil (excluding crude mineral oil) which has its flashing point below seventy-six degrees of Fahrenheit's thermometer, and which, either by itself or in admixture with any other substance, is suitable for use as fuel for internal combustion engines; and | Five hundred and fifty rupees per kilolitre at fifteen degrees of Centigrade thermometer. |
| | (ii) power alcohol, that is to say, ethyl alcohol of any grade (including such alcohol when denatured or otherwise treated which, either by itself or in admixture with any other substance, is suitable for being used as aforesaid. | |
| | Explanation I.—"Mineral oil" means an oil consisting of a single liquid hydrocarbon or a liquid mixture of hydrocarbons (except for associated impurities) derived from petroleum, coal shale, peat or any other bituminous substance, and includes any similar oil produced by synthesis or otherwise. | |
| | Explanation II.—"Flashing point" shall be determined in accordance with the tests specified in this behalf in the rules made under the Petroleum Act, 1934 (30 of 1934). | |
| 7 | KEROSENE— | |
| | Kerosene, that is to say, any mineral oil (excluding mineral colza oil and turpentine substitute) which has a flame height of eighteen millimetres or more and is ordinarily used as an illuminant in oil burning lamps. | Two hundred and thirty-five rupees per kilolitre at fifteen degrees of Centigrade thermometer. |

| Item 7 (contd.) | Description of goods | Rate of duty |
|---|---|---|
| (1) | (2) | (3) |
| | Explanation I. — The expression "mineral oil" has the meaning assigned to it in Explanation I to Item No. 6. | |
| | Explanation II.—"Flame height" shall be determined in the apparatus known as the smoke point lamp in the manner prescribed in this behalf by the Central Government by notification in the Official Gazette. | |
| 8 | REFINED DIESEL OILS AND VAPORIZING OIL— that is to say, any mineral oil (excluding mineral colza oil and turpentine substitute), which has its flashing point at or above seventy-six degrees of Fahrenheit's thermometer, and satisfies either of the following requirements :— (i) the oil has a flame height of ten millimetres or more but less than eighteen millimetres ; or (ii) the oil has a flame height of less than ten millimetres but has a viscosity of less than one hundred seconds by Redwood I Viscometer at one hundred degrees of Fahrenheit's thermometer, and contains less than one quarter of one per cent. by weight of any bituminous substance. | |
| | (a) Refined diesel oils. | Four hundred and eighty-nine rupees per kilolitre at fifteen degrees of Centigrade thermometer. |
| | (b) Vaporizing oil. | Four hundred and eighty-nine rupees per kilolitre at fifteen degrees of Centigrade thermometer. |
| | Explanation. — The expressions "mineral oil", "flashing point" and "flame height" have the meanings respectively assigned to them in Explanations I and II to Item No. 6 and in Explanation II to Item No. 7. | |
| 9 | DIESEL OIL, NOT OTHERWISE SPECIFIED, that is to say, any mineral oil which— | One hundred and sixty-eight rupees and twenty-five paise per kilolitre at fifteen degrees of Centigrade thermometer. |
| | (i) has a flame height of less than ten millimetres ; (ii) contains one quarter of one per cent. or more by weight of any bituminous substance ; and (iii) possesses a viscosity of less than one hundred seconds by Redwood I Viscometer at one hundred degrees of Fahrenheit's thermometer. | |
| | Explanation. — The expressions "mineral oil" and "flame height" have the meanings respectively assigned to them in Explanation I to Item No. 6 and in Explanation II to Item No. 7. | |
| 10 | FURNACE OIL, that is to say, any mineral oil which— | Seventy-five rupees and forty-five paise per kilolitre at fifteen degrees of Centigrade thermometer. |
| | (i) has a flame height of less than ten millimetres ; (ii) contains one quarter of one per cent. or more by weight of any bituminous substance ; and (iii) possesses a viscosity of one hundred seconds or more by Redwood I Viscometer at one hundred degrees of Fahrenheit's thermometer. | |
| | Explanation. — The expressions "mineral oil" and "flame height" have the meanings respectively assigned to them in Explanation I to Item No. 6 and in Explanation II to Item No. 7. | |

| Item No. | Description of goods | Rate of duty |
|---|---|---|
| (1) | (2) | (3) |
| 11 | ASPHALT, BITUMEN AND TAR— | |
| | (1) Asphalt and Bitumen (including cutback Bitumen and Asphalt) natural or produced from petroleum or shale. | Thirty per cent. ad valorem. |
| | (2) Tar distilled from coal or lignite, and other mineral tars, including partially distilled tars and blends of pitch with creosote oils or with other coal tar distillation products. | Thirty per cent. ad valorem. |
| | **Mineral fuels, lubricants and related materials** | |
| 11A | ALL PRODUCTS DERIVED FROM REFINING OF CRUDE PETROLEUM OR SHALE (WHETHER GASEOUS, LIQUID, SEMISOLID OR SOLID IN FORM), NOT OTHERWISE SPECIFIED, INCLUDING REFINERY GASES, LUBRICATING OIL AND GREASES, WAXES AND COKE— | Twenty per cent. ad valorem. |
| | **Vegetable oils and fats** | |
| 12 | VEGETABLE NON-ESSENTIAL OILS, all sorts, in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power. | One hundred and ten rupees and twenty-five paise per metric tonne. |
| 13 | VEGETABLE PRODUCT— | |
| | "Vegetable product" means any vegetable oil or fat which, whether by itself or in admixture with any other substance, has by hydrogenation or by any other process been hardened for human consumption. | Thirty-two rupees per quintal. |
| | **Chemicals** | |
| 14 | PIGMENTS, COLOURS, PAINTS, ENAMELS, VARNISHES, BLACKS AND CELLULOSE LACQUERS— | |
| | I. (1) Pigments, colours, paints and enamels— | |
| | (i) Zinc oxide, red lead, white lead and titanium dioxide white. | Nineteen rupees and seventy-five paise per quintal. |
| | (ii) Aluminium paste. | Seventy-five paise per kilogram. |
| | (2) Dry colours, namely, the following lead chromes and Brunswick green. | Seventeen rupees and twenty-five paise per quintal. |
| | (3) Water paints— | |
| | (i) Dry distemper including cement-based water paints. | Seventeen rupees and twenty-five paise per quintal. |
| | (ii) Oil-bound distemper. | Thirty rupees and fifty paise per quintal. |

**Sch. 1, Item 12 — Note 1**

(1) All vegetable oils which are not essential oils may be classified as non-essential oils. (1965) 69 Cal WN 561.

(2) Mustard oil not being essential oil, it can be said to be non-essential oil. From point of view of user mustard oil may be treated as an essential cooking medium, but because that is so, it does not become chemically anything but non-essential oil. (1965) 69 Cal WN 561.

(3) Expression "non-essential oil" is not vague and incapable of being made applicable to fixed or fatty oil produced from mustard seeds. (1965) 69 Cal WN 561.

(4) As the raw oil though purified in the process of manufacturing Vanspati, is not deodorised before its hydrogenation, it does not become at any stage 'refined oil' as is known to the consumers and the commercial community and no excise duty is leviable on it under Item 12 (old Item 23) of Sch. I as 'refined oil'.

Further, the producers of Vanaspati cannot be held to manufacture some kind of 'non-essential vegetable oil' within Item 12 by applying to the raw material purchased by them, the processes of neutralisation by alkali and bleaching by activated earth and/or carbon. AIR 1963 SC 791 (793, 794, 795): 1963 SCD 524: (1963) Supp 1 SCR 586.

**Sch. 1, Item 13 — Note 1**

(1) There is no legal basis for the demand of excise duty on the manufacture of hydrogenated oil known as Vanaspati under Item No. 12 (old Item No. 23) of Sch. 1. AIR 1963 SC 791 (795).

**Sch. 1, Item 14 — Note 1**

(1) French Polish is included in the word 'varnishes' and is, therefore taxable under Item 22 (before amendment of 1960 presently Item 14) of the Act. AIR 1961 MP 353 (356) : 1961 Jab LJ 1193.

| Item No. 14 (contd.) | Description of goods | Rate of duty |
|---|---|---|
| (1) | (2) | (3) |
| | (iii) Water pigment finishes for leather. | Forty-two paise per litre. |
| | (iv) Plastic emulsion paint. | One rupee and five paise per litre. |
| | (4) Oil paints and enamels— | |
| | (i) Tinting paste (Blue). | Seventyfive paise per kilogram. |
| | (ii) Stiff paints. | Nineteen rupees and fifty paise per quintal. |
| | (iii) Ready-mixed paints and enamels. | Seventy-five paise per litre. |
| | (4-A) Dispersed organic pigments ordinarily used for printing of textiles, whether in the form of powder paste, or in emulsion. | Two rupees and fifty naye paise per kilogram. |
| | (5) Pigments, colours, paints and enamels, not otherwise specified. | Seventeen rupees and twenty-five paise per quintal. |
| | II. Varnishes and blacks— | |
| | (i) Varnishes. | Thirty-five paise per litre. |
| | (ii) Bituminous and coal-tar blacks. | Eighteen paise per litre. |
| | III. Cellulose lacquers— | |
| | (i) Nitrocellulose lacquers, clear and pigmented and nitrocellulose ancillaries in liquid form. | One rupee and fifty paise per litre. |
| | (ii) Nitrocellulose ancillaries in semi-solid and pasty forms. | Fifty paise per kilogram. |
| | (iii) Cellulose lacquers, not otherwise specified. | One rupee and forty paise per litre. |
| 14A | SODA ASH. | Two rupees per quintal. |
| 14B | CAUSTIC SODA— | |
| | (i) if in a solid form | Four rupees per quintal. |
| | (ii) if in lye | Four rupees per quintal on the basis of hundred per cent strength of caustic soda. |
| 14BB | SODIUM SILICATE | Eighteen rupees per quintal. |
| 14C | GLYCERINE | Seventeen rupees per quintal. |
| 14D | SYNTHETIC ORGANIC DYESTUFFS (INCLUDING PIGMENT DYESTUFFS) AND SYNTHETIC ORGANIC DERIVATIVES USED IN ANY DYEING PROCESS. | Fifteen per cent ad valorem. |
| 14DD | SYNTHETIC ORGANIC PRODUCTS OF A KIND USED AS ORGANIC LUMINOPHORES; PRODUCTS OF THE KIND KNOWN AS OPTICAL BLEACHING AGENTS, SUBSTANTIVE TO THE FIBRE— | Fifteen per cent ad valorem. |
| 14E | PATENT OR PROPRIETARY MEDICINES NOT CONTAINING ALCOHOL, OPIUM, INDIAN HEMP OR OTHER NARCOTIC DRUGS OR OTHER THAN THOSE MEDICINES WHICH ARE EXCLUSIVELY AYURVEDIC, UNANISIDHA OR HOMOEOPATHIC. | Ten per cent ad valorem, |
| | Explanation I.—'Patent or proprietary medicines' means any drug for medicinal preparation, in whatever form, for use in the internal or external treatment of, or for the prevention of ailments in, human beings or animals, which bears either on itself or on its container or both, a name which is not specified in a monograph in a Pharmacopoeia, Formulary or other publications notified in this behalf by the Central Government in the Official Gazette, or which is a brand name, that is, a name or a registered trade mark under the Trade and Merchandise Marks Act, 1958 (43 of 1958), or any other | |

**Sch. 1, Item 14-E — Note 1**

(1) Excise duty on "patent and proprietary medicines" as defined in S. 3 (h) of Drugs Act cannot be avoided on the ground of absence of executive clarification. AIR 1966 Cal 101 (106).

| Item No. 14E (contd.) | Description of goods | Rate of duty |
|---|---|---|
| (1) | (2) | (3) |
| | mark such as a symbol, monogram, label, signature or invented words or any writing which is used in relation to that medicine for the purpose of indicating or so as to indicate a connection in the course of trade between the medicine and some person having the right either as proprietor or otherwise to use the name or mark with or without any "indication" of the identity of that person. | |
| | **Explanation II.**—'Alcohol', 'Opium', 'Indian hemp', 'Narcotic drugs' and 'Narcotics' have the meanings respectively assigned to them in S. 2 of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (16 of 1955). | |
| 14F | COSMETICS AND TOILET PREPARATIONS NOT CONTAINING ALCOHOL OR OPIUM, INDIAN HEMP, OR OTHER NARCOTIC DRUGS OR NARCOTICS NAMELY— | **Twenty five per cent ad valorem.** |
| | (i) Preparations for the care of the skin including beauty creams, vanishing creams, cold creams, make-up creams, cleansing-creams, skin foods and tonics, face powders, baby powders, toilet powders and talcum powders. | |
| | (ii) Hair lotion, cream and pomade. | |
| | Explanation.—'Alcohol', 'Opium', Indian Hemp', 'Narcotic Drugs' and Narcotics have the meaning respectively assigned to them in S. 2 of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (16 of 1955). | |
| 14G | NITRIC, HYDROCHLORIC AND SULPHURIC ACIDS (INCLUDING FUMING ACIDS AND ANHYDRIDES THEREOF), ALL SORTS. | **Ten per cent ad valorem.** |
| 14H | COMPRESSED, LIQUEFIED OR SOLIDIFIED GASES THE FOLLOWING, NAMELY— | |
| | (i) Oxygen. | **Ten per cent ad valorem.** |
| | (ii) Chlorine. | **Ten per cent ad valorem.** |
| | (iii) Ammonia. | **Ten per cent ad valorem.** |
| | (iv) Carbonic acid (Carbon dioxide). | **One rupee per kilogram.** |
| | (v) Refrigerant gases, not otherwise specified, such a sulphur dioxide and freon. | **Twenty per cent ad valorem.** |
| 15 | **"SOAP" means all varieties of the product known commercially as soap—** | |
| | **I. Soap, in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power or of steam for heating—** | |
| | **(1) Soap, household and laundry—** | |
| | **(i) plain bars of not less than 454 grams in weight.** | **Eighteen rupees per quintal.** |
| | **(ii) other sorts.** | **Thirty eight rupees per quintal.** |

**Sch. 1, Item 14-H — Note 1**

(1) Though in the process of manufacture of sugar by carbonisation process and of soda ash by solvay ammonia soda process the manufacturer does require carbon dioxide for the purpose of producing the two articles and sets up lime kiln for that purpose, the gas generated by the kilns is kiln gas and not carbon dioxide as known to the trade, i.e. to those who deal in it or who use it. The kiln gas in question therefore is neither carbon dioxide nor compressed carbon dioxide known as such to the commercial community and therefore cannot attract Item 14-H in the First Schedule. AIR 1968 SC 922 (929): (1968) 2 SCJ 433. (Civil Writ Nos. 587-D, 590-D and etc. of 1963, dated 13th July, 1964 (Punj). Reversed. AIR 1963 SC 791, Ref. to.)

| Item No. 15 (contd.) | Description of goods | Rate of duty |
|---|---|---|
| (1) | (2) | (3) |
| | II. Soap, in or in relation to the manufacture of which no process has been carried on with the aid of power or of steam for heating. | |
| | (i) plain bars of not less than 454 grams in weight. | Thirteen rupees and twenty five paise per quintal. |
| | (ii) other sorts. | Fifteen rupees and fifty five paise per quintal. |
| | **MANUFACTURED GOODS CLASSIFIED CHIEFLY BY MATERIAL CHEMICALS.** | |
| 15A | ARTIFICIAL OR SYNTHETIC RESINS AND PLASTIC MATERIALS, AND ARTICLES THEREOF. | Thirty per cent ad valorem. |
| | (1) Artificial or synthetic resins and plastic materials in any form, whether solid, liquid or pasty, or as powder, granules or flakes, or in the form of moulding powders, the following, namely:— | |
| | (i) Condensation, Poly-condensation and Poly-addition products, whether or not modified or polymerised, including Phenoplasts, Aminoplasts, Alkyds, Polyurethane, Polyallyl Esters and other Unsaturated Polyesters; | |
| | (ii) Plymerisation and Copolymerisation products including Polyethylene and Polytetrahaloethylene, Polyisobutylene, Polystyrene, Polyvinyl chloride, Polyvinyl acetate, Polyvinyl Chloracetate and other Polyvinyl derivatives, Polyamides, Polyacrylic and Polymethacrylic derivatives and Coumarone-Indene resins; and | |
| | (iii) Cellulose acetate (including di-or tri-acetate), Cellulose acetate butyrate and Cellylose propionate, Cellulose acetate-propionate, Ethyl cellulose and Benzyl cellulose, whether plasticised or not, and plasticised Cellylose nitrate. | |
| | (2) Articles made of plastics, all sort, including tubes, rodes, sheets, folls, sticks, other rectangular or profile shapes, whether laminated or not, and whether rigid or flexible, including layflat tubings and Polyvinyl chloride sheets. | |
| | **Explanation.**—For the purpose of sub-item (2), 'plastics' means the various artificial or synthetic resins or plastic material included in sub-item (1). | |
| 15AA | ORGANIC SURFACE-ACTIVE AGENTS (OTHER THAN SOAP), SURFACE-ACTIVE PREPARATIONS AND WASHING PREPARATIONS WHETHER OR NOT CONTAINING SOAP. | Ten per cent ad valorem. |
| 15B | CELLOPHANE, THAT IS ANY FILM OR SHEET OF REGENERATED CELLULOSE. | Twenty per cent ad valorem. |
| 16 | TYRES— | |
| | "Tyre" means a pneumatic tyre in the manufacture of which rubber is used, and includes the inner tube and the outer cover of such a tyre. | |
| | (1) Tyres for motor vehicles. | Forty per cent. ad valorem |
| | (2) For cycles (other than motor cycles)— | |
| | (a) tyres. | Sixty paise per tyre or fifteen per cent. ad valorem, whichever is higher. |
| | (b) tubes. | Thirty paise per tube or fifteen per cent. ad valorem, whichever is higher. |
| | (3) All other tyres. | Fifteen per cent. ad valorem. |

| Item No. | Description of goods | Rate of duty |
|---|---|---|
| (1) | (2) | (3) |
| "16-A | RUBBER PRODUCTS, THE FOLLOWING, NAMELY : | |
| | (i) Latex foam sponge. | Twenty per cent. ad valorem. |
| | (ii) Plates, sheets and strips unhardened, whether vulcanized or not, and whether combined with any textile material or otherwise. | Twenty per cent. ad valorem. |
| | (iii) Piping and tubing of unhardened vulcanized rubber. | Fifteen per cent. ad valorem. |
| | (iv) Transmission, conveyor or elevator belts or belting of vulcanised rubber. | Fifteen per cent. ad valorem. |
| 16-B | PLYWOOD, BLOCK BOARD, LAMINBOARD, BATTEN BOARD, HARD OR SOFT WALL BOARDS OR INSULATING BOARD AND VENEERED PANELS, WHETHER OR NOT CONTAINING ANY MATERIAL OTHER THAN WOOD; CELLULAR WOOD PANELS; BUILDING BOARDS OF WOOD PULP OR OF VEGETABLE FIBRE, WHETHER OR NOT BONDED WITH NATURAL OR ARTIFICIAL RESINS OR WITH SIMILAR BINDERS; AND ARITIFICIAL OR RECONSTITUTED WOOD BEING WOOD SHAVINGS, WOOD CHIPS, SAW DUST, WOOD FLOUR OR OTHER LIGNEOUS WASTE AGGLOMERATED WITH NATURAL OR ARTIFICIAL RESINS OR OTHER (ORGANIC BINDING SUBSTANCES, IN SHEETS, BLOCKS, BOARDS OR THE LIKE. | |
| | (i) Plywood for Tea-chests when cut to size in panels or shooks and packed in sets. | Ten per cent. ad valorem. |
| | (ii) All others..... | Fifteen per cent. ad valorem". |
| 17 | PAPER, all sorts (including pasteboard, millboard, strawboard, and cardboard), in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power— | |
| | (1) cigarette tissue. | One rupee per kilogram. |
| | (2) blotting, toilet, target, tissue other than cigarette tissue, teleprinter, typewriting, manifold, bank, bond, art paper, chrome paper, tubsized paper, cheque paper, stamp paper, cartridge paper and parchment and coated board (including art board, chrome board and board for playing cards). | Fifty paise per kilogram. |
| | (3) printing and writing paper, packing and wrapping paper, straw board and pulp board, including grey board, corrugated board, duplex and triplex boards, other sorts. | Thirty-five paise per kilogram. |
| | (4) all other kinds of paper and paper board not otherwise specified packing and wrapping paper, other sorts. | Fifty paise per kilogram. |
| 18 | RAYON AND SYNTHETIC FIBRES AND YARN. | Forty-five rupees per kilogram. |
| | Explanation.—'Rayon and synthetic fibres and yarn' shall be deemed to include man-made fibres and yarn made out of man-made fibres. | |
| 18-A | COTTON TWIST, YARN AND THREAD ALL SORTS, sized or unsized in all forms including skeins, hanks cops, cones, bobbins, pins, spools, reels, cheeses balls or on warp beams in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power— | |
| | (i) of 29 or more counts. | Six rupees and fifty paise per kilogram. |
| | (ii) of counts less than 29. | One rupee per kilogram. |

**Sch. I, Item 17 — Note 1**

(1) Determination by Collector whether 'M G. Poster paper' was 'packing and wrapping paper' chargeable under Item 17 (4) or "printing paper" chargeable under Item 17 (3) of First Schedule — Direction of Board that it must be treated as 'packing and wrapping paper, held, could not be binding on the Collector. AIR 1969 SC 48 (52, 53): (1969) 1 SCJ 110. (When the direction was not issued under R. 233.)

| Item No. 18A (contd.) | Description of goods | Rate of duty |
|---|---|---|
| (1) | (2) | (3) |
| | **Explanation.** — (1) "Count" means the size of grey yarn expressed as the number of 1,000 meter hanks per one-half kilogram.<br>(2) For multiple fold yarn, 'count' means the count of the basic single yarn. | |
| **18-B** | WOOLLEN YARN ALL SORTS INCLUDING KNITTING WOOL, in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power— | |
| | (1) worsted yarn. | |
| | (a) of 48s counts and more. | Twenty per cent. ad valorem. |
| | (b) of less than 48s counts. | Twenty per cent. ad valorem. |
| | (2) others. | Fifteen per cent. ad valorem. |
| | **Explanation.** — 'Counts' means the size of single yarn expressed as the number of 560 yards hanks per pound. | Seven and a half per cent. ad valorem. |
| **19** | COTTON FABRICS— | |
| | "Cotton fabrics" mean all varieties of fabrics manufactured either wholly or partly from cotton and include dhoties, saries, chadars, bed-sheets, bed-spreads, counter-panes and table-cloths, but do not include any such fabric—<br>(a) if it contains 40 per cent. or more by weight of wool;<br>(b) if it contains 40 per cent. or more by weight of silk; or<br>(c) if it contains 60 per cent. or more by weight of rayon or artificial silk. | |
| | (1) Cotton fabrics, superfine— | |
| | that is to say, fabrics in which the average count of yarn is 48s or more. | Eighty paise per square metre. |
| | (2) Cotton fabrics, fine— | |
| | that is to say, fabrics in which the average count of yarn is 35s or more but is less than 48s. | Eighty paise per square metre. |
| | (3) Cotton fabrics, medium— | |
| | that is to say, fabrics in which the average count of yarn is 17s or more but is less than 35s. | Sixty paise per square metre. |
| | (4) Cotton fabrics, coarse— | |
| | that is to say, fabrics in which the average count of yarn is less than 17s. | Sixty paise per square metre. |
| | (5) Cotton fabrics, not otherwise specified. | Eighty paise per square metre. |
| | Explanation I. — "Count" means count of grey yarn. | |
| | Explanation II.—For the purpose of determining the average count of yarn, the following rules shall apply, namely:— | |
| | (a) Yarn used in the borders or selvedges shall be ignored. | |
| | (b) For multiple-fold yarn, the count of the basic single yarn shall be taken and the number of ends per 25.4 millimetres in the reed or the number of picks per 25.4 millimetres, as the case may be, shall be multiplied by the number of plies in the yarn. | |
| | (c) In the case of fabrics manufuctured from cotton and other yarns, the other yarns shall, for the aforesaid purpose, be deemed to be cotton yarn. | |
| | (d) The average count shall be obtained by applying the following formula, namely:— | |
| | "(Count of warp × number of ends per 25.4 millimetres in the reed) + (Count of weft × number of picks per 25.4 millimetres). | |

(Number of ends per 25-4 millimetres in the reed) + (Number of picks per 25.4 millimetres), the result being rounded off, wherever necessary by treating any fraction which is one-half or more as one, and disregarding any fraction which is less than one-half."

| Item No. | Description of goods | Rate of duty |
|---|---|---|
| (1) | (2) | (3) |
| 20 | SILK FABRICS—<br>"Silk fabrics" include all varieties of fabrics manufactured either wholly or partly from silk but do not include any such fabric—<br>(i) if it contains 40 per cent or more by weight of wool;<br>(ii) if it contains cotton or artificial silk or both and less than 40 per cent. by weight of silk;<br>(iii) if it contains no cotton and no artificial silk and less than 40 per cent. by weight of wool and less than 40 per cent. by weight of silk; or<br>(iv) if manufactured on a handloom. | Thirty-six paise per square metre. |
| 21 | WOOLLEN FABRICS—<br>"Woollenfabrics" mean all varieties of fabrics manufactured wholly of wool or which contain 40 per cent, or more by weight of wool, and include blankets, lohis, rugs and shawls. | Six and a quarter per cent. ad valorem. |
| 22 | RAYON OR ARTIFICIAL SILK FABRICS—<br>"Rayon or fartificial silk fabrics" include all varieties of fabrics manufactured either wholly or partly from rayon or artificial silk, but do not include any such fabric—<br>(i) if it contains 40 per cent. or more by weight of wool;<br>(ii) if it contains 40 per cent. or more by weight of silk;<br>(iii) if it contains cotton and less than 60 per cent. by weight of rayon or artificial silk; or<br>(iv) if it contains no cotton and less than 40 per cent. by weight of wool and less than 40 per cent. by weight of rayon or artifical silk. | Seven paise per square metre. |
| 22A | JUTE MANUFACTURES (INCLUDING MANUFACTURES OF BIMLIPATAM JUTE OR OF MESTA FIBRE), ALL SORTS—<br>(i) Hessians ..... | Four hundred and fifty rupees per metric tonne. |
| | (ii) All other descriptions of jute manufactures not otherwise specified (including cloth, bags, twist, yarn, rope and twine). | Two hundred and fifty rupees per metric tonne. |
| 22B | TEXTILE FABRICS IMPREGNATED OR COATED WITH PREPARATIONS OF CELLULOSE DERIVATIVES OR OF OTHER ARTIFICIAL PLASTIC MATERIALS. | Twenty five per cent. ad valorem. |
| 22C | EMBROIDERY, IN THE PIECE, IN STRIPS OR IN MOTIFS. IN OR IN RELATION TO THE MANUFACTURE OF WHICH ANY PROCESS IS ORDINARILY CARRIED ON WITH THE AID OF POWER. | Twenty per cent ad valorem. |
| 23 | CEMENT, all varieties. | Twenty-three rupees and sixty paise per metric tonne. |
| 23A | GLASS AND GLASSWARE—<br>(1) Sheet glass and plate glass.<br>(2) Laboratory glass ware.<br>(3) Glass shells, glass globes and chimneys for lamps and lanterns.<br>(4) Other glassware including table ware. | Ten per cent. ad valorem.<br>Five per cent. ad valorem.<br>Ten per cent. ad valorem.<br>Fifteen per cent. ad valorem. |
| 23B | CHINAWARE AND PORCELAINWARE ALL SORTS—<br>(1) Table ware.<br>(2) Sanitary ware. | Fifty per cent. ad valorem.<br>Fifteen per cent. ad valorem. |

**Sch. 1, Item 23-A — Note 1**

(1) Where the bottles were manufactured for purposes of being used in order to contain medicine and toilet goods, the mere giving them the name of tincture bottles by assessee, would not bring them from the category of Items 23-A (4) to 23-A (2). AIR 1965 All 305 (308).

**Sch. I, Item 23-B — Note 1**

(1) Demand for excise duty on stoneware articles manufactured during the period taken by the Finance Bill (10 of 1961) was illegal. AIR 1964 Ker 18 (23): (1963) 1 Ker LR 312.

| Item No. 23B (contd.) | Description of goods | Rate of duty |
|---|---|---|
| (1) | (2) | (3) |
| | (3) Glazed tiles. | Ten per cent. ad valorem. |
| | (4) Not otherwise specified. | Ten per cent. ad valorem. |
| | Explanation.—Chinaware includes all glazed clayware but does not include terracotta. | |
| 23C | ASBESTOS CEMENT PRODUCTS, ALL SORTS, INCLUDING FLAT AND CORRUGATED SHEETS, PIPES AND TUBES AND TILES. | Ten per cent. ad valorem. |
| 24 | SILVER. ... ... ... ... | Seven paise per every ten grams. |
| 25 | IRON IN ANY CRUDE FORM INCLUDING PIG IRON, SCRAP IRON, MOLTEN IRON OR IRON CAST IN ANY OTHER SHAPE OR SIZE ... ... ... | Forty five rupees per metric tonne. |
| 26 | STEEL INGOTS. INCLUDING STEEL MELTIEG SCRAP. | Seventy five rupees per metric tonne. |
| 26A | COPPER AND COPPER ALLOYS CONTAINING NOT LESS THAN FIFTY PER CENT BY WEIGHT OF COPPER. ... ... ... ... ... | |
| | (1) In any crude form including ingots, bars, blocks, slabs, billets, shote and pellets. | One thousand and five hundred rupees per metric tonne. |
| | (2) Manufactures, the following namely, plates, sheets, circles, strips and foils in any form or size. | Two thousand rupees per metric tonne. |
| | (3) Pipes and tubes. . . . | Ten per cent ad valorem"; |
| 26AA | IRON OR STEEL PRODUCTS, THE FOLLOWING NAMELY : | |
| | (i) Semi-finished steel including blooms, billets, slabs, sheet bars, tin-bars and hoe bars. | Fifty rupees per metric tonne plus the excise duty for the time being leviable on steel ingots. |
| | (i-a) Bars, rods, foils, wires, joists, girders, angles, channels, tees, flats, beams, zeds, trough, piling, and all other rolled, forged or extruded shapes and sections, not otherwise specified. | Fifty rupees per metric tonne plus the excise duty for the time being leviable on steel ingots. |
| | (ii) Plates and sheets, (including uncoated plates and sheets intended for tinning, and forms such as ridges, channels, rain water pipes and their fittings made from plates or sheets but not includidg plates and sheets after tinning), and hoops all sorts, other than skelp and strips. | Three hundred rupees per metric tonne plus the excise duty for the time being leviable on steel ingots. |
| | (iii) Flats skelp and strips. | Three hundred rupees per metric tonne plus the excise duty for the time being leviable on steel ingots. |

**Sch. I, Item 26-A — Note 1**

(1) The plaintiff carried on business of manufacturing Kansi and brass utensils, Kansi being an alloy of copper and tin, and brass of copper and zinc. The plaintiff, after melting the metals, prepared billets of Kansi and brass, and sent to the rolling mills for rolling into uncut circles. Subsequently these uncut circles were subjected to various manufacturing processes and ultimately assumed the shape of utensils.

Held, that when the billets of Kansi and brass were rolled into uncut circles, they did not lose their character as raw materials for the manufacture of utensils and had not undergone "any stage of manufacture," and so duty could not be levied under Item 26-A. (1968) 70 Pun LR 412.

**Sch. 1 Item 26-AA — Note 1**

(1) Iron and Steel products under Item 26-AA (i) (as amended in 1962 and 1963 by Finance Act XX of 1962 and XIII of 1963 respectively) refers to products manufactured out of iron in any crude form such as pig iron, scrap iron and product manufactured from such iron and again used for manufacture of another produce is not contemplated by Item 26-AA. AIR 1968 Mys 237 (241): (1968) 1 Mys LJ 178 (DB).

| Item No. 26AA (contd.) | Description of goods | Rate of duty |
|---|---|---|
| (1) | (2) | (3) |
| | (iv) Pipes and tubes (including blanks thereof) all sorts, whether rolled, forged, spun, cast, drawn, annealed, wedded or extruded. | Fifteen per cent, ad valorem plus the excise duty for the time being leviable on pig iron or steel ingots as the case may be. |
| | (v) All other steel castings, not otherwise specified. | Five per cent ad valorem plus the excise duty for the time being leviable on steel ingots. |
| 26B | ZINC— | |
| | (1) Unwrought including ingots, cakes, bars, blocks, hard or soft slabs, billets, plates, cathodes anodes, pellets, spelter, dross, ashes and broken zinc. | Five hundred rupees per metric tonne. |
| | (2) Manufactures, the following, namely plates, sheets, circles, strips and foils in any form or size. | Eight hundred rupees per metric tonne. |
| | (3) Pipes and tubes. | Ten per cent ad valorem. |
| 27 | ALUMINIUM — | |
| | (a) In any crude form including ingots, bars, blocks, slabs, billets, shots and pellets — | Nine hundred and fifty rupees per metric tonne. |
| | (b) Manufactures of the following, namely plates, sheets, circles and strips in any form or size, not otherwise specified. | One thousand four hundred and fifty rupees per metric tonne. |
| | (bb) Foils, that is a product of thickness excluding any backing not exceeding O. 15 milimetres. | Two thousand rupees per metric tonne. |
| | (c) Pipes and tubes, other than extruded pipes and tubes. | Twenty per cent ad valorem. |
| | (d) Extruded shapes and sections including extruded pipes and tubes. | Twenty per cent ad valorem. |
| 27A | LEAD — Unwrought, including ingots, pigs, anodes, slabs, cakes and cast sticks. | Five hundred rupees per metric tonne. |
| 28 | TIN PLATE AND TINNED SHEETS INCLUDING TIN TAGGERS, AND CUTTINGS OF SUCH PLATES, SHEETS OR TAGGERS. | Three hundred and seventy-five rupees per metric tonne. |
| | **Machinery and transport equipment.** | |
| 29 | INTERNAL COMBUSTION ENGINES, ALL SORTS, NAMELY — | |
| | (i) those designed for use as a primemover for transport vehicles and have been given for that purpose some special shape, size or quality which would not be essential for their use for any other purpose. | Ten per cent. ad valorem. |
| | (ii) others. . . . . | Five per cent. ad valorem. |
| 29-A | REFRIGERATING AND AIR CONDITIONING APPLIANCES AND MACHINERY ALL SORTS, AND PARTS THEREOF— | |
| | (1) Refrigerators and others refrigerating, appliances which are ordinarily sold or offered for sale as ready assembled units, such as ice makers, bottle coolers, display cabinets and water coolers. | Thirty per cent. ad valorem. |
| | (2) Air-conditioners and other air-conditioning appliances, which are ordinarily sold or offered for sale as ready assembled units, including package type air-conditioners and evaporative type of coolers. | Thirty per cent. ad valorem. |
| | (3) Parts of refrigerating and air-conditioning appliances and machinery all sorts. | Forty per cent. ad valorem. |
| 30 | ELECTRIC MOTORS, ALL SORTS AND PARTS THEREOF NAMELY — | |
| | (1) those designed for use in circuits of less than 10 amperes and at a pressure not exceeding 250 volts. | Fifteen per cent. ad valorem. |
| | (2) those designed for use in circuits at a pressure exceeding 400 volts, and | |
| | (i) with a rated capacity not exceeding to 10 H. P. . | Ten per cent. ad valorem. |
| | (ii) exceeding 10 H. P. . . . . | Five per cent. ad valorem. |

| Item No. 30 (contd.) | Description of goods | Rate of duty |
|---|---|---|
| (1) | (2) | (3) |
| | (3) all others . . . . . | Fifteen per cent. ad valorem. |
| | (4) parts of electric motors . . . . . | Fifteen per cent. ad valorem. |
| | **Explanation.** — This Item does not include motors specially designed for use in gramophones or record players and all parts of such motors. | |
| **31** | ELECTRIC BATTERIES AND PARTS THEREOF— | |
| | (1) Dry . . . . . | Fifteen per cent, ad valorem. |
| | (2) Storage . . . . . | Fifteen per cent. ad valorem. |
| | (3) Parts of storage batteries, the following, namely, containers, covers and plates. | Seventeen and half per cent. ad valorem. |
| **32** | ELECTRIC LIGHTING BULBS AND FLUORESCENT LIGHTING TUBES— | |
| | (1) Vacuum and gas-filled bulbs— | |
| | (i) not exceeding 100 watts, and train lighting bulbs . | Ten paise per bulb. |
| | (ii) exceeding 100 watts but not exceeding 300 watts, and engine headlight bulbs . . . . | Forty paise per bulb. |
| | (iii) exceeding 300 watts . . . . . | Eighty paise per bulb. |
| | (2) Fluorescent tubes . . . . . | One rupee and thirty-one paise per metre. |
| | (3) Sodium and mercury vapour discharge lamps . . | Five per cent. ad valorem. |
| | (4) All sorts, not otherwise specified . . . . | Fifteen per cent. ad valorem. |
| **33** | ELECTRIC FANS, including air circulators but excluding those which are designed for use in an industrial system as parts indispensable for its operation and have been given for that purpose some special shape or quality which would not be essential for their use for any other purpose, and parts of such electric fans— | |
| | (1) Table, cabin, carriage, pedestal and air circulator fans, not exceeding 40.6 centimetres. | Seven rupees and fifty paise per fan. |
| | (2) All other fans . . . . . | Fifteen rupees per fan. |
| | (3) Parts of fans above, the following, namely, complete motors, stators and rotors— | |
| | (a) if designed for use in respect of any fan falling within sub-item (1)— | |
| | (i) complete motors . . . . . | Five rupees and twenty-five paise per motor. |
| | (ii) stators . . . . . | Two rupees and sixty-five paise per stator. |
| | (iii) rotors . . . . . | Two rupees and sixty-five paise per rotor. |
| | (b) if designed for use in respect of any fan falling within sub-item (2)— | |
| | (i) complete motors . . . . . | Ten rupees and fifty paise per motor. |
| | (ii) stators . . . . . | Five rupees and twenty-five paise per stator. |
| | (iii) rotors . . . . . | Five rupees and twenty-five paise per rotor. |
| **33A** | WIRELESS RECEIVING SETS, ALL SORTS, INCLUDING TRANSISTOR SETS AND RADIOGRAMS WITH OR WITHOUT LOUD SPEAKER. | Twenty per cent. ad valorem. |
| **33-AA** | PARTS OF WIRELESS RECEIVING SETS (INCLUDING PARTS OF TRANSISTOR-SETS AND RADIOGRAMS), NAMELY, ELECTRONIC VALVES AND TUBES, TRANSISTORS AND SEMI-CONDUCTOR DIODES. | Five rupees each. |

| Item No. | Description of goods | Rate of duty |
|---|---|---|
| (1) | (2) | (3) |
| 33-B | ELECTRIC WIRES AND CABLES, ALL SORTS, NOT OTHERWISE SPECIFIED— | |
| | (i) Insulated wires and cables of copper, aluminium or other metals and alloys, whether sheathed or unsheathed, the conductor of any core of which not being one specially designed as a pilot core has a sectional area not exceeding 1.5 square milimetres in the case of copper, or not exceeding 2.5 square milimetres in the case of aluminium or of not more than equivalent conductivity as of copper in the case of other metals and alloys, when designed for use in circuits of less than two amperes and at a pressure not exceeding 250 volts . . . . . | Fifteen per cent. ad valorem. |
| | (ii) All others . . . . . | Five per cent. ad valorem. |
| | Explanation. — The expression "Electric wires and cables all sorts" used in this item shall not include square or rectangular conductors, whether insulator or not. | |
| 34 | MOTOR VEHICLES — | |
| | "Motor vehicles" means all mechanically propelled vehicles adapted for use upon roads, and includes a chassis and a trailer; but does not include a vehicle running upon fixed rails— | |
| | (1) Auto-cycles, motor cycles, scooters, auto-rickshaws and any other three-wheeled motor vehicles. | One hundred and seventy-five rupees each or Seven and a half per cent. ad valorem whichever is higher. |
| | (2) Motor vehicles of not more than 16 H. P. by Royal Automobile Club (R. A. C.) rating. | One thousand rupees each or ten per cent. ad valorem, whichever is higher. |
| | (3) Motor cars of more than 16 H. P. by Royal Automobile Club (R. A. C.) rating, constructed or adapted to carry not more than nine persons. | Three thousand rupees each or fifteen per cent. ad valorem whichever is higher. |
| | (3-a) Tractors, including agricultural tractors. | Ten per cent. ad valorem. |
| | (4) Motor vehicles, not otherwise specified. | Two thousand five hundred rupees each or twelve and half per cent. ad valorem whichever is higher. |
| | Explanation.—For the purposes of this item, where a motor vehicle is mounted, fitted or fixed with any weight-lifting, earth-moving and similar specialised material handling equipment, then such equipment other than the chassis shall not be taken into account. | |
| 35 | CYCLES, PARTS OF CYCLES OTHER THAN MOTOR CYCLES, NAMELY | |
| | (i) free wheels . . . . . | Two rupees each. |
| | (ii) rims . . . . . | Four rupees each. |
| | Miscellaneous manufactured articles | |
| 36 | FOOTWEAR AND PARTS THEREOF, IN OR IN RELATION TO THE MANUFACTURE OF WHICH ANY PROCESS IS ORDINARILY CARRIED ON WITH THE AID OF POWER— | |
| | (1) Footwear . . . . . | Ten per cent. ad valorem. |
| | (2) Parts of footwear . . . . . | Fifteen per cent. ad valorem. |
| | Explanation.—'Footwear' includes all varieties of footwear whether known as boots, shoes, sandals, chappals, or by any other name. | |

**Sch. 1, Item 36 — Note 1**

(1) Levy of excise duty on footwears under Item 17 of Sch. I as it stood before amendment of 1960, is not discriminatory — It is valid and cannot be attacked under Articles 19 and 31 of Constitution. AIR 1963 SC 104 (107): (1963) 3 SCR 642.

| Item No. | Description of goods | Rate of duty |
|---|---|---|
| (1) | (2) | (3) |
| 37 | CINEMATOGRAPH FILMS, EXPOSED— | Of a width of 30 mm. or higher / Below 30 mm. in width. |
| | (1) News-reels and shorts not exceeding 500 metres. | Fifteen paise per metre. / Ten paise per metre. |
| | (2) Feature films, advertisement shorts, and films not otherwise specified. | Fifty paise per metre. / Thirty-three paise per metre. |
| 37A | GRAMOPHONES, INCLUDING RECORD PLAYERS, WHETHER MECHANICALLY OR ELECTRICALLY DRIVEN, AND WITH ACOUSTIC, ELECTRONIC, OR TRANSISTORISED SYSTEMS OF REPRODUCTION OR AMPLIFICATION, AND PARTS AND ACCESSORIES THEREOF, AND GRAMOPHONE RECORDS, ALL SORTS— | |
| | (i) Gramophones or record players, including radiograms. | Twenty per cent. ad valorem. |
| | (ii) Parts and accessories of gramophones or record players, all sorts. | Thirty per cent. ad valorem. |
| | (iii) Gramophone records, all sorts, other than matrices. | Fifteen per cent. ad valorem. |
| | (iv) Matrices for records, impressed. | Thirty per cent. ad valorem. |
| | (v) Gramophone needles or styli— | |
| | (a) Wholly made of steel. | Twenty per cent. ad valorem. |
| | (b) others... | Twenty-five per cent. ad valorem. |
| 38 | MATCHES— | |
| | "Match" includes a firework in the form of a match; and, where a matchstick has more heads than one capable of being ignited by striking, each such head shall be deemed to be a match. | Sixty-five paise for every 1,000 matches or fraction thereof. |
| 39 | MECHANICAL LIGHTERS— | |
| | "Mechanical lighter" means any mechanical or chemical contrivance for causing ignition which is portable and which operates by producing a spark or flame whether by itself or when brought into contact with gas, and includes a mechanical lighter issued from a factory in an incomplete state or requiring for its completion the addition of a flint. | Three rupees per lighter. |
| 40 | STEEL FURNITURE MADE PARTLY OR WHOLLY OF STEEL IN OR IN RELATION TO THE MANUFACTURE OF WHICH ANY PROCESS IS ORDINARILY CARRIED ON WITH THE AID OF POWER, WHETHER IN ASSEMBLED OR UNASSEMBLED CONDITION. | Twenty per cent. ad valorem. |
| 41 | CROWN CORKS WITH OR WITHOUT WASHERS OR OTHER FITTINGS OF CORK, RUBBER, POLYETHYLENE OR ANY OTHER MATERIAL. | One paisa each. |

## [a][THE SECOND SCHEDULE

(See Section 8)

TOBACCO.]

[a] Substituted for former Sch. II by the Finance Act, 1956 (18 of 1956), S. 86.

### Sch. I, Item 37 — Note 1

(1) According to the Notification No. 62 of 1960 dated 20-4-1960, the "slab system" concessions necessarily apply to any footage of film, in the widest sense, made by the producer after 1-3-1960 and certified for public exhibition which the producer does actually release for such exhibition depending upon the number of prints taken. (1967) 2 Mad LJ 355: 80 Mad LW 487 (DB).

## THIRD SCHEDULE

[Repealed by the Repealing and Amending Act, 1947 (2 of 1948), S. 2 and Schedule.]

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# [THE] CENTRAL INDUSTRIAL SECURITY FORCE ACT, 1968
## (ACT No. 50 OF 1968)

[The text of the Act printed here is as on 1-5-1969.]

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SCHEDULE

## STATEMENT OF OBJECTS AND REASONS

"At present security arrangements at important industrial undertakings in the public sector are handled by the Watch and Ward staff of the Organisation concerned. The watch and ward staff is generally engaged in guarding the entrances or the perimeter of the industrial undertaking and in preventing entries of unauthorised persons. Unplanned recruitment, inadequate supervision, training and discipline have made the existing watch and ward staff illequipped to discharge its responsibilities. It is considered necessary to strengthen the security arrangements in vital industrial undertakings. For that purpose it is proposed to constitute a centrally recruited, organised and trained Industrial Security Force. The Force will primarily be responsible for the watch and ward of industrial undertakings owned by the Central Government and may be deployed at the request and cost of managements, for security duties of industrial undertakings in public sector."

—Gaz. Ind. 2-8-1966, Pt. II-Sec. 2, Ext., p. 435. For Joint Committee Report and the Minutes of Dissent by members of the Committee, see Gazette of India, 1968, Pt. II-Sec. 2, Extra., p. 4.

## COGNATE ACTS AND PROVISIONS

(1) Essential Services Maintenance Act, 59 of 1968;
(2) Central Reserve Police Force Act, 66 of 1949.
(3) Assam Rifles Act, 5 of 1941;
(4) Border Security Force Act, 47 of 1968.

# [THE] CENTRAL INDUSTRIAL SECURITY FORCE ACT, 1968
## (ACT No. 50 OF 1968)[a]

[2nd December, 1968.]

An Act to provide for the constitution and regulation of a Force called the Central Industrial Security Force for the better protection and Security of certain industrial undertakings.

Be it enacted by Parliament in the Nineteenth Year of the Republic of India as follows :—

[a] For Statement of Objects and Reasons, see Gaz. of Ind., 2-8-1966, Pt. II, S. 2, Ext. page 435, and for Joint Committee Report, see Gaz. of Ind., 12-2-1968, Pt. II, S. 2, Ext., page 4.

**1. Short title, extent and commencement.**—(1) This Act may be called THE CENTRAL INDUSTRIAL SECURITY FORCE ACT, 1968.

(2) It extends to the whole of India.

(3) It shall come into force on such date[a] as the Central Government may, by notification in the Official Gazette, appoint.

[a] The Act came into force on 10-3-1969, see Gaz. of Ind., 3-3-69, Pt. II, S. 3 (ii), Ext., page 291.

**2. Definitions.**—(1) In this Act, unless the context otherwise requires,—

(a) "Force" means the Central Industrial Security Force constituted under Section 3;

(b) "industrial undertaking" means any undertaking pertaining to a scheduled industry and includes an undertaking engaged in any other industry, or in any trade, business or service which may be regulated by Parliament by law;

(c) "industrial undertaking in public sector" means an industrial undertaking owned, controlled or managed by—

(i) a Government company as defined in Section 617 of the Companies Act, 1956,

(ii) a corporation established by or under a Central, Provincial or State Act, which is controlled or managed by the Government;

(d) "Inspector-General" means the Inspector-General of the Force appointed under Section 4;

(e) "Managing Director", in relation to an industrial undertaking, means a person (whether called a managing agent, general manager, manager, chief executive officer or by any other name) who exercises control over the affairs of that undertaking;

(f) "members of the Force" means a person appointed to the Force under this Act, other than a supervisory officer;

(g) "prescribed" means prescribed by rules made under this Act;

(h) "scheduled industry" means any industry engaged in the manufacture or production of the articles mentioned in the First Schedule to the Industries (Development and Regulation) Act, 1951;

(i) "supervisory officer means any of the officers appointed under Section 4 and includes any other officer appointed by the Central Government as a supervisory officer of the Force.

(2) Any reference in this Act to a law which is not in force in the State of Jammu and Kashmir shall, in relation to that State, be construed as a reference to the corresponding law, if any, in force in that State.

**3. Constitution of the Force.**—(1) There shall be constituted and maintained by the Central Government a Force to be called the Central Industrial Security Force for the better protection and Security of Industrial undertakings owned by that Government.

(2) The Force shall be constituted in such manner shall consist of such number of supervisory officers and members of the Force who shall receive such pay and other remuneration as may be prescribed.

**4. Appointment and powers of supervisory officers.**—(1) The Central Government may appoint a person to be the Inspector-General of the Force and may appoint other persons to be Deputy Inspectors-General, Chief Security Officers or Security Officers of the Force.

(2) The Inspector-General ad every other supervisory officer so appointed shall have, and may exercise, such powers and authority as is provided by or under this Act.

**5. Appointment of members of the Force.**—The appointment of members of the Force shall rest with the Inspector-General who shall exercise that power in accordance with rules made under this Act.

Provided that the power of appointment under this section may also be exercised by such other supervisory officer as the Central Government may by order specify in this behalf.

**6. Certificates of members of the Force.**—(1) Every member of the Force shall receive on his appointment a certificate in the form specified in the Schedule, under the seal of the Inspector-General or such other supervisory officer as the Inspector-General may specify in this behalf, by virtue of which the person holding such certificate shall be vested with the powers of a member of the Force.

(2) Such certificate shall cease to have effect whenever the person named in it ceases for any reason to be a member of the Force.

**7. Superintendence and administration of the Force.**—(1) The superintendence of the Force shall vest in the Central Government, and subject thereto the administration of the Force shall vest in the Inspector-General and shall be carried on by him in accordance with the provisions of this Act and of any rules made thereunder.

(2) Subject to the provisions of sub-section (1), the administration of the Force within such local limits as may be prescribed shall be carried on by a Deputy Inspector-General, Chief Security Officer or Security Officer in accordance with the provisions of this Act and of any rules made thereunder and every supervisory officer placed in charge of the protection and security of an industrial undertaking shall, subject to any directions that may be given by the Central Government in this behalf, discharge his functions under the general supervision, direction and control of the Managing Director of that undertaking.

**8. Dismissal, removal, etc., of members of the Force.**—Subject to the provisions of Article 311 of the Constitution and to such rules as the Central Government may make under this Act, any supervisory officer may—

(i) dismiss, suspend or reduce in rank any member of the Force whom he thinks remiss or negligent in the discharge of his duty, or unfit for the same; or

(ii) award any one or more of the following punishments to any member of the Force who discharges his duty in a careless or negligent manner, or who by any act of his own renders himself unfit for the discharge thereof, namely:—

(a) fine to any amount not exceeding seven days' pay or reduction in pay scale;

(b) drill, extra guard, fatigue or other duty;

(c) removal from any office of distinction or deprivation of any special emolument.

## OBJECTS AND REASONS

"The Committee are of the opinion that there is no necessity for providing for punishment of 'confinement to quarters' in view of the various punishments laid down in the clause. Hence the words 'confinement to quarters for a period not exceeding fourteen days with or without punishment' have been omitted from sub-clause (b) of the clause".—J. C. R.

**9. Appeal and revision.**—(1) Any member of the Force aggrieved by an order made under Section 8 may, within thirty days from the date on which the order is communicated to him, prefer an appeal against the order to such authority as may be prescribed, and subject to the provisions of sub-section (3), the decision of the said authority thereon shall be final:

Provided that the prescribed authority may entertain the appeal after the expiry of the said period of thirty days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(2) In disposing of an appeal, the prescribed authority shall follow such procedure as may be prescribed.

(3) The Central Government may call for and examine the record of any proceeding under Section 8 or under sub-section (2) of this section and may make such inquiry or cause such inquiry to be made and subject to the provisions of this Act, may pass such order thereon as it thinks fit:

Provided that no order imposing an enhanced penalty under sub-section (2) or sub-section (3) shall be made unless a reasonable opportunity of being heard has been given to the person affected by such order.

**10. Duties of members of the Force.**—It shall be the duty of every supervisory officer and member of the Force—

(a) promptly to obey and execute all orders lawfully issued to him by his superior authority;

(b) to protect and safeguard the industrial undertakings owned by the Central Government together with such other installations as are specified by that Government to be vital for the carrying on of work in those undertakings, situate within the local limits of his jurisdiction:

Provided that before any installation not owned or controlled by the Central Government is so specified, the Central Government shall obtain the consent of the Government of the State in which such installation is situate;

(c) to protect and safeguard such other industrial undertakings and installations for the protection and security of which he is deputed under Section 14;

(d) to do any other act conducive to the better protection and security of the industrial undertakings referred to in Clauses (b) and (c).

**11. Power to arrest without warrant.**—(1) Any supervisory officer or member of the Force may, without any order from a Magistrate and without a warrant arrest any person who has been concerned in, or against whom a reasonable suspicion exists of his having been concerned in or who is found taking precautions to conceal his presence under circumstances which afford reason to believe that he is taking such precautions with a view to committing, a cognizable offence relating to,—

(i) the property belonging to any industrial undertaking, or

(ii) the other installations,

referred to in clauses (b) and (c) of Section 10.

(2) If any person is found trespassing on the premises of any industrial undertaking referred to in clauses (b) and (c) of Section 10, he may, without prejudice to any other proceedings which may be taken against him, be removed from such premises by any supervisory officer or member of the Force.

**12. Power to search without warrant.**—(1) Whenever any supervisory officer, or any member of the Force, not below the prescribed rank, has reason to believe that any such offence as is referred to in Section 11 has been or is being committed and that a search warrant cannot be obtained without affording the offender an opportunity of escaping or of concealing evidence of the offence, he may detain the offender and search his person and belongings forthwith and, if he thinks proper, arrest any person whom he has reason to believe to have committed the offence.

(2) The provisions of the Code of Criminal Procedure, 1898, relating to searches under that Code shall, so far as may be, apply to searches under this section.

13. **Procedure to be followed after arrest.**—Any supervisory officer or member of the Force making an arrest under this Act, shall, without unnecessary delay, make over the person so arrested to a police officer, or, in the absence of a police officer, take such person or cause him to be taken to the nearest police station together with a report of the circumstances occasioning the arrest.

**14. Deputation of the Force to industrial undertakings in public sector.**—(1) Subject to any general directions which may be issued by the Central Government, it shall be lawful for the Inspector-General on a request received in this behalf from the Managing Director concerned of an industrial undertaking in public sector, showing the necessity thereof, to depute such number of supervisory officers and members of the Force as the Inspector-General may consider necessary for the protection and security of that industrial undertaking and any installations attached thereto and the officers and members of the Force so deputed shall be at the charge of the Managing Director :

Provided that in the case of an undertaking, owned, controlled or managed,—

(i) by a Government company of which the Central Government is not a member;

(ii) by a corporation established by or under a Provincial or State Act,

no such request shall be entertained unless it is made with the consent of the Government of the State in which the undertaking is situate.

(2) If the Inspector-General is of the opinion that circumstances necessitating the deputation of the officers and members of the Force in relation to an industrial undertaking under sub-section (1) have ceased to exist, or for any other reason it is necessary so to do, he may, after informing the Managing Director of that industrial undertaking, withdraw the officers and members of the Force so deputed :

Provided that the Managing Director may, on giving one month's notice in writing to the Inspector-General require that the officers and members of the Force so deputed shall be withdrawn, and the Managing Director shall be relieved from the charge from the date of expiration of such notice or from any earlier date on which the Force is so withdrawn.

(3) Every officer and member of the Force, while discharging his functions during the period of deputation, shall continue to exercise the same powers and be subject to the same responsibilities, discipline and penalties as would have been applicable to him under this Act, if he had been discharging those functions in relation to an industrial undertaking owned by the Central Government.

**15. Officers and members of the Force to be considered always on duty and liable to be employed anywhere in India.**—(1) Every supervisory officer and member of the Force shall, for the purpose of this Act, be considered to be always on duty, and shall, at any time, be liable to be employed at any place within India.

(2) Save as provided in Section 14, no supervisory officer or members of the Force shall engage himself in any employment or office other than his duties under this Act.

**16. Responsibilities of members of the Force during suspension.**—A member of the Force shall not by reason of his suspension from office cease to be a member of the Force; and he shall during that period, be subject to the same responsibilities, discipline and penalties to which he would have been subject if he were on duty.

**17. Surrender of certificate, arms, etc., by persons ceasing to be members of the Force.**—(1) Every person who for any reason ceases to be a member of the Force, shall forthwith surrender to any supervisory officer empowered to receive the same, his certificate of appointment, the arms accoutrements, clothing and other articles which have been furnished to him for the performance of duties as a member of the Force.

(2) Any person who wilfully neglects or refuses to surrender his certificate of appointment or the arms, accoutrements, clothing and other articles furnished to him, as required by sub-section (1), shall, on conviction, be punished with imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

(3) Nothing in this section shall be deemed to apply to any article which, under the orders of the Inspector-General, has become the property of the person to whom the same was furnished.

**18. Penalties for neglect of duty, etc.**—(1) Without prejudice to the provisions contained in Section 8, every member of the Force who shall be guilty of any violation of duty or wilful breach or neglect of any rule or regulation or lawful order made by a supervisory officer, or who shall withdraw from the duties of his office without permission, or who, being absent on leave, fails, without reasonable cause, to report himself for duty on the expiration of the leave, or who engages himself without authority in any employment other than his duty as a member of the Force, or who shall be guilty of cowardice, shall, on conviction, be punished with imprisonment for a term which may extend to six months.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1898, an offence punishable under this section shall be cognizable.

(3) Nothing contained in this section shall be construed to prevent, any member of the Force from being prosecuted under any other law for any offence made punishable by that law, or for being liable under any such law to any other or higher penalty or punishment than is provided for such offence by this section:

Provided that no person shall be punished twice for the same offence.

**19. Application of Act 22 of 1922 to officers and members of the Force.**—The Police (Incitement to Disaffection) Act, 1922, shall apply to supervisory officers and members of the Force as it applies to members of a police force.

**20. Certain Acts not to apply to members of the Force.**—Nothing contained in the Payment of Wages Act, 1936, or the Industrial Disputes Act, 1947, or the Factories Act, 1948, or any corresponding law relating to investigation and settlement of industrial disputes in force in a State shall apply to members of the Force.

**21. Protection of acts of officers and members of the Force.**—(1) In any suit or proceeding against any supervisory officer or member of the Force for any act done by him in the discharge of his duties, it shall be lawful for him to plead that such act was done by him under the orders of a competent authority.

(2) Any such plea may be proved by the production of the order directing the act, and if it is so proved, the supervisory officer or member of the Force shall thereupon be discharged from any liability in respect of the act so done by him, notwithstanding any defect in the jurisdiction of the authority which issued such order.

(3) Notwithstanding anything contained in any other law for the time being in force, any legal proceeding, whether civil or criminal, which may lawfully be brought against any supervisory officer or member of the Force for anything done or intended to be done under the powers conferred by, or in pursuance of, any provision of this Act or the rules thereunder shall be commenced within three months after the act complained of shall have been committed and not otherwise; and notice in writing of such proceeding and of the cause thereof shall be given to the person concerned and his supervisory officer at least one month before the commencement of such proceeding.

**22. Power to make rules.**—(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing powers, such rules may provide for—

(a) regulating the classes, ranks, grades, pay and remuneration of supervisory officers and members of the Force and their conditions of service in the Force;

(b) regulating the powers and duties of supervisory officers and members of the Force authorised to exercise any functions by or under this Act;

(c) fixing the period of service for supervisory officers and members of the Force;

(d) prescribing the description and quantity of arms, accoutrements, clothing and other necessary articles to be furnished to the members of the Force;

(e) prescribing the places of residence of members of the Force;

(f) institution, management and regulation of any fund for any purpose connected with the administration of the Force;

(g) regulating the punishments and prescribing authorities to whom appeals shall be preferred from orders of punishment; or remission of fines or other punishments, and the procedure to be followed for the disposal of such appeals;

(h) the terms and conditions subject to which supervisory officers and members of the Force may be deputed under Section 14 and the charges therefor; and

(i) any other matter which has to be, or may be, prescribed.

(3) Every rule made under this section shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days, which may be comprised in one session or in two successive sessions, and if before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule, or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

## OBJECTS AND REASONS

"The Committee feel that specific provision be made in the clause to provide for making of rules regarding the terms and conditions subject to which supervisory officers and members of the Force may be deputed for the protection of industrial undertakings in the public sector and for charges in respect thereof. A new paragraph (h) has accordingly been added to sub-clause (2) of the clause".—J. C. R.

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## THE SCHEDULE

(See Section 6)

A. B. has been appointed a member of the Central Industrial Security Force under the Central Industrial Security Force Act, 1968, and is vested with the powers, functions and privileges of a member of the Force.

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# [THE] CENTRAL LAWS (EXTENSION TO JAMMU AND KASHMIR) ACT, 1968

## (ACT 25 OF 1968)[a]

[The text of the Act printed here is as on 15-4-1969.]

[24th May, 1968.]

**An Act to provide for the extension of certain Central Laws to the State of Jammu and Kashmir.**

Be it enacted by Parliament in the Nineteenth Year of the Republic of India as follows :—

[a] For Statement of Objects and Reasons, see Gaz. of Ind., 19-7-1967, Pt. II, S. 2, Ext., p. 581.

**1. Short title and commencement.**—(1) This Act may be called THE CENTRAL LAWS (EXTENSION TO JAMMU AND KASHMIR) ACT, 1968

(2) It shall come into force on such date[a] as the Central Government may, by notification in the Official Gazette, appoint.

[a] The Act came into force on 15-8-1968, see Gaz. of Ind., 9-8-68, Pt. II, S. 3 (i), Ext. page 467.

**2. Extension and amendment of certain laws.**—(1) The Acts mentioned in the Schedule and all rules, orders and regulations made thereunder are hereby extended to, and shall be in force in the State of Jammu and Kashmir.

(2) With effect from the commencement of this Act, the Acts mentioned in the Schedule shall be amended as specified therein.

**3. Construction of references to laws not in force in Jammu and Kashmir.**—Any reference in any Act mentioned in the Schedule to a law which is not in force in the State of Jammu and Kashmir shall, in relation to that State, be construed as a reference to the corresponding law, if any, in force in that State.

**4. Construction of references to authorities where new authorities have been constituted.**—Any reference by whatever form of words in any law for the time being in force in the State of Jammu and Kashmir to any authority competent at the date of the passing of that law to exercise any powers or discharge any functions in that State shall, where a corresponding new authority has been constituted by or under any law now extended to that State, have effect as if it were a reference to the new authority.

**5. Repeals and savings.**—If immediately before the commencement of this Act there is in force in the State of Jammu and Kashmir any law corresponding to any Act now extended to that State, that law shall, save as otherwise expressly provided in this Act, stand repealed on such commencement :

Provided that the repeal shall not affect—

(a) the previous operation of any law so repealed or anything duly done or suffered thereunder,

(b) any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed,

(c) any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed, or

(b) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if this Act had not been passed :

Provided further that, subject to the preceding proviso, anything done or any action taken (including any appointment or delegation made , notification,

instruction or direction issued, form, bye-law or scheme framed, certificate obtained, permit or licence granted or registration effected) under any such law shall be deemed to have been done or taken under the corresponding provisions of the Act now extended to that State, and shall continue to be in force accordingly unless and until superseded by anything done or any action taken under the said Act.

**6. Power to remove difficulties.**—(1) If any difficulty arises in giving effect to the provisions of any act now extended to the State of Jammu and Kashmir, the Central Government may, by order notified in the Official Gazette, make such provisions or give such directions as appear to it necessary for the removal of the difficulty.

(2) In particular, and without prejudice to the generality of the foregoing power, any such notified order may,—

(a) specify the corresponding authorities within the meaning of Section 4,

(b) provide for the transfer of any matter pending immediately before the commencement of this Act before any Court, tribunal or other authority, to any corresponding Court, tribunal or other authority for disposal,

(c) specify the areas or circumstances in which, or the extent to which, or the conditions subject to which, anything done or any action taken (including any of the matters specified in the second proviso to Section 5) under any law repealed by that section shall be recognised or given effect to under the corresponding provision of the Act now extended.

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## THE SCHEDULE

(See Section 2)

### ACTS

### THE OFFICIAL TRUSTEES ACT, 1913

(2 OF 1913)

Section 1.—In sub-section (2), omit "except the State of Jammu and Kashmir."

### THE MOTOR VEHICLES ACT, 1939

(4 OF 1939)

Section 1.—In sub-section (2), omit "except the State of Jammu and Kashmir".

Section 2.—Omit clause (9-A).

Section 9.—Omit sub-sections (2) and (4).

Section 28.—Omit sub-sections (2), (3), (4) and (5).

Section 29.—In sub-section (1),—

(a) in clause (a) omit "or",

(b) omit clause (b).

Section 38.—For sub-section (4), substitute—

"(4) A certificate of fitness issued under this Act shall, while it remains effective, be valid throughout India".

Section 42.—In sub-section (3), omit clause (h).

Section 63.—Omit sub-section (5).

Section 96.—(a) In sub-section (2A), omit "in the State of Jammu and Kashmir or" and in the proviso, omit "of the State of Jammu and Kashmir or".

(b) In sub-section (6), omit "of the State of Jammu and Kashmir or":

The Sixth Schedule.—In the first and second columns, after "West Bengal" and the entry relating thereto in the second column, insert "Jammu and Kashmir" and "J and K" respectively.

THE CHARTERED ACCOUNTANTS ACT, 1949
(38 OF 1949)

Section 1.—In sub-section (2), omit "except the State of Jammu and Kashmir."

THE TRANSFER OF PRISONERS ACT, 1950
(29 OF 1950)

Section 1.—In sub-section (2), omit "except the State of Jammu and Kashmir."

THE ROAD TRANSPORT CORPORATIONS ACT, 1950
(64 OF 1950)

Section 1.—In sub-section (2), omit "except the State of Jammu and Kashmir and",

THE MINES ACT, 1952
(35 OF 1952)

Section 1.—In sub-section (2), omit "except the State of Jammu and Kashmir."

THE NOTARIES ACT, 1952
(53 OF 1952)

Section 1.—In sub-section (2), omit "except the State of Jammu and Kashmir."

Section 2.—(a) Omit clause (a);

(b) In the proviso to clause (d)—

(i) for "either under," substitute "under";

(ii) omit "or by the Master of Faculties in England";

(iii) for "any part of India", substitute—

"any part of India:

Provided further that in relation to the State of Jammu and Kashmir the said period of two years shall be computed from the date on which this Act comes into force in that State;"

Section 9.—In sub-section (2), insert—

"Provided that in relation to the State of Jammu and Kashmir the said period of two years shall be computed from the date on which this Act comes into force in that State".

THE ESSENTIAL COMMODITIES ACT, 1955
(10 OF 1955)

Section 1.—In sub-section (2), omit "except the State of Jammu and Kashmir."

THE COMPANIES ACT, 1956
(1 OF 1956)

Section 1.—In sub-section (3),—

(a) omit first proviso;

(b) in the second proviso, omit "further."

Section 3.—In sub-clause (f) (2) of clause (ii) of sub-section (l), insert at the end "in so far as banking insurance and financial corporations are concerned, and before the commencement of the Central Laws (Extension to Jammu and Kashmir) Act, 1968 in so far as other corporations are concerned".

After Section 620B, insert—

"620C. Special provision as to companies in Jammu and Kashmir.

The Central Government may by notification in the Official Gazette, direct that with effect from the commencement of the Central Laws (Extension to Jammu

and Kashmir) Act, 1968 or any subsequent date, any of the provisions of this Act specified in the notification shall not apply, or shall apply only with such exceptions and modifications or adaptations as may be specified in the notification, to—

(a) any existing company in the State of Jammu and Kashmir;

(b) any company registered in the State under this Act after the commencement of the Central Laws (Extension to Jammu and Kashmir) Act, 1968."

## THE COST AND WORKS ACCOUNTANTS ACT, 1959
## (23 OF 1959)

Section 1.—In sub-section (2), omit "except the State of Jammu and Kashmir."

## THE APPRENTICES ACT, 1961
## (52 OF 1961)

Section 1.—In sub-section (2), omit "except the State of Jammu and Kashmir."

## THE ADMINISTRATORS-GENERAL ACT, 1963
## (45 OF 1963)

Section 1.—In sub-section (2), omit "except the State of Jammu and Kashmir."

Section 20.—(a) In sub-section (1), for "the territories to which this Act extends," substitute "India";

(b) after sub-section (2), insert—

"(3) Any probate or letters of administration granted by the High Court for the State of Jammu and Kashmir before the commencement of the Central Laws (Extension to Jammu and Kashmir) Act, 1968 shall, after such commencement, be as effective as if such probate or letters of administration had been granted under this section."

Omit Section 21.

Section 37.—(a) In clause (a), for "to which this Act extends", substitute "in India";

(b) Omit "or in the State of Jammu and Kashmir".

Section 56.—For "the territories to which this Act extends" and for "the said territories", substitute "India".

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## [THE] CENTRAL PROVINCES LAWS ACT, 1875
## (ACT XX OF 1875)

[The text of the Act printed here is as on 1-5-1969.]

### CONTENTS

SECTIONS

1. Short title.
Local extent.
Commencement.
2. Repeal of enactments and rules.
3. Certain enactments to be deemed to be in force.
4. Confirmation of existing Acts.
5. Rule of decision in cases of certain classes.
6. Rules in cases not expressly provided for.
7. Articles exempt from attachment.
8. Power to make residuary rules.
9. Penalty for breach of rules.
10. Publication of rules.
Force of rules.
11. Local repeal, in part, of Code of Civil Procedure.
12. Sections substituted in same Code.

SCHEDULE

## ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A. O., 1937; A. L. O., 1950; Bom. (Vidarbha Region) A.L.O., 1956; M. P. A. L. O., 1956.

—Amended by Acts II of 1879; VIII of 1935.

—Amended by C. P. Act IX of 1923; M. P. Act XV of 1950.

—Extended by M. P. Act XII of 1950.

—Repealed in part by Acts VI of 1878; III of 1879; IV of 1882; X of 1882; XIII of 1889; VIII of 1890; XII of 1891; XXXVIII of 1920; IV of 1922.

—Section 5 repealed by Act XXVI of 1937 (to limited extent).

—Repealed in part in Sambalpur District by Act VII of 1905; by Bengal Act II of 1908.

# [THE] CENTRAL PROVINCES LAWS ACT, 1875
## (ACT XX OF 1875)[a]

[9th December, 1875.]

**An Act to declare and amend the law in force in the Central Provinces**

**Preamble.**—Whereas it is expedient to declare and amend certain portions of the law in force in the Central Provinces; It is hereby enacted as follows:

[a] For Statement of Objects and Reasons, see Gazette of India, 1875, Pt. V, page 159.

This Act is extended to the States merged in the former State of Madhya Pradesh by M. P. Act XII of 1950.

The Act is repealed in part in Sambalpur District by Act VII of 1905. Sambalpur District is in Orissa State.

**1. Short title.**—This Act may be called THE CENTRAL PROVINCES LAWS ACT, 1875;

**Local extent.**—It extends to the territories now under the administration of the State Government of the Central Provinces;

**Commencement.**—And it shall come into force on the passing thereof.

## STATE ADAPTATIONS

**Maharashtra**

Vidarbha—In its application to the Vidarbha region of the State of Maharashtra, in Section 1, for the words "State Government of the Central Provinces", substitute the words "State Government of the area comprised within the districts of Nagpur, Wardha, Chanda and Bhandara."—The Bombay (Vidarbha Region) Adaptation of Laws (State and Concurrent Subjects) Order, 1956.

**Madhya Pradesh**

Mahakoshal—In its application to the Mahakoshal region of the State of Madhya Pradesh, in Section 1, for the words beginning with "It extends" and ending with the words "Central Provinces" substitute the words "It extends to the whole of the Mahakoshal region".

Note.—"Mahakoshal region" means the territories comprised within the districts of Jabalpur, Sagar, Damoh, Mandla, Hoshangabad, Narsimhapur, Chhindwara, Seoni, Betul, Nimar, Raipur, Bilaspur, Durg, Bastar, Surguja Raigarh and Balaghat of the State of Madhya Pradesh.—M.P. Adaptation of Laws (State and Concurrent Subjects) Order, 1956.

2. **Repeal of enactments and rules.**—On and from the date on which this Act comes into force, the following shall be repealed, that is to say,—

(a) all Bengal Regulations except the Regulations or parts of Regulations hereinafter declared to be in force;

(b) all [a][Central Acts], (except the Acts mentioned in the schedule hereto annexed) which do not expressly or by necessary implication extend to the said territories or any part thereof, and have not been extended thereto in exercise of a power conferred by a [b][Central Act];

(c) all rules, regulations and enactments not being Statutes, Bengal Regulations, [a][Central Acts], or rules or regulations made in exercise of a power conferred by a Statute, Bengal Regulation or [b][Central Act].

[c][ ° ° ° ° ° ° ° ]

[a] Substituted for "Acts of the Central Legislature" by A.L.O., 1950.

[b] Substituted for "Act of the Central Legislature", ibid.

[c] The proviso as to the law relating to land revenue and Courts of Wards was repealed by the Amending Act, 1891 (XII of 1891).

3. Certain enactments to be deemed to be in force.—On and from the said date the enactments specified in the schedule hereto annexed shall be deemed to be in force throughout the said territories to the extent mentioned in the third column of the said schedule.

But the powers and duties incident to the operation of the same enactments, so far as such powers and duties are referred to in the fourth column of the said schedule, shall be exercised and performed by the authorities mentioned in that column.

Nothing in this section shall be deemed to affect the operation of any enactment not mentioned in the said schedule.

4. **Confirmation of existing Acts.**—Every [a][Central Act] which extends, or can by notification be extended, to the territories which were under the administration of the said State Government at the time of the passing thereof, shall extend, or may by notification be extended, as the case may be, to all the territories now under the administration of the said State Government.

[a] Substituted for "Act of the Central Legislature" by A.L.O., 1950.

## STATE ADAPTATIONS

**Madhya Pradesh**

Mahakoshal—In its application to the Mahakoshal region of the State of Madhya Pradesh, Section 4 as adapted reads as follows:—

"4. Every Central Act which extends, or can by notification be extended, to the said territories at the time of the passing thereof, shall extend, or may by notification be extended, as the case may be, to all the said territories."—M.P. Adaptation of Laws (State and Concurrent Subjects) Order, 1956.

**Maharashtra**

Vidarbha region—In its application to the Vidarbha region of the State of Maharashtra, in Section 4—

(i) for the words "the territories" occurring twice, substitute the words "the said territories";

(ii) omit the words "which were under the administration of the said State Government" and "now under the administration of the said State Government".—Bombay (Vidarbha Region) Adaptation of Laws (State and Concurrent Subjects) Order, 1956.

[a]**5. Rule of decision in cases of certain classes.**—In questions regarding inheritance, special property of females, betrothal, marriage, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions or any religious usage or institution, the rule of decision shall be the Muhammadan Law in cases where the parties are Muhammadans, and the Hindu Law in cases where the parties are Hindus, except in so far as such law has been by the legislative enactment altered or abolished, or is opposed to the provisions of this Act:

Provided that when among any class or body of persons or among the members of any family any custom prevails which is inconsistent with the law applicable between such persons under this section, and which if not inconsistent with such law, would have been given effect to as legally binding, such custom shall, notwithstanding anything herein contained, be given effect to.

[a] The provisions of this section have been repealed in so far as they are inconsistent with the provisions of the Muslim Personal Law (Shariat) Application Act, 1937 (XXVI of 1937)—see Section 6 of that Act.

**6. Rules in cases not expressly provided for.**—In cases not provided for by S. 5, or by any other law for the time being in force, the Courts shall act according to justice, equity and good conscience.

**7. Articles exempt from attachment.**[a].—Implements of husbandry and cattle for agricultural purposes and implements of trade are exempted from attachment and sale in execution of decrees of the Civil Courts.

[a] Cf. S. 60, Civil Procedure Code, 1908 (5 of 1908).

**8. Power to make subsidiary rules.**—The said State Government may from time to time make rules consistent with this Act as to the following matters:—

(a) the maintenance of watch and ward and the establishment of proper system of conservancy and sanitation at fairs and other large public assemblies;

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**Section 5 — Note 1**

(1) If there were a system or body of law received and acknowledged by Gonds in general, the provisions of such law if proved might have some effect to cast doubt upon the truth of the recorded statements. They could be given effect. if proved, as a matter of justice, equity and good conscience under Section 5 of the C. P. Laws Act (20 of 1875). AIR 1943 PC 48 (52): ILR (1943) Kar (PC) 53.

(2) The term 'Hindu' in Section 5 refers to profess some form of Hindu religion, whatever be the branch, school sect, or off-shoot to which they belong, but it does not extend to persons who have never possessed any form of the Hindu religion or to those who have been converted from it to some entirely different religion. The word would apply to dissenters and non-conformists but not to apostates. Thus a Jain is a Hindu but a Brahmin converted to Buddhism or Islam is not. Gonds in the Central Provinces are not Hindus and they are not governed by the Hindu Law except when it is adopted by any family, sect or branch. AIR 1918 Nag 7 (11): 2 Nag LJ 129.

(3) Under Section 5, C. P. Laws Act, the burden of proving a custom at variance with and seeking to alter the personal law of the parties, lies heavily on the person relying on it. The custom should be ancient and invariable and such a custom must be established to be so by clear and unambiguous evidence. AIR 1933 Nag 16 (17) : 28 Nag LR 267(2).

**Section 6 — Note 1**

(1) In absence of specific provisions the Courts are entitled, under Section 6, to apply the principles of English Law, if applicable to Indian conditions, as rules of justice, equity and good conscience. AIR 1946 Nag 114 (116): 1945 Nag LJ 468.

(b) the imposition of taxes for the purposes mentioned in clause (a) of this section on persons holding or joining any of the assemblies therein referred to;

(c) the custody of judicial records, civil and criminal; [a][° ° °];

[b][(d)° ° ° °]

[a] The words "and the destruction from time to time of such of the said records as it may be deemed unnecessary to keep" were repealed by the Destruction of Records Act, 1879 (III of 1879).

[b] Clause (d) relating to the appointment, duties, punishment, suspension and dismissal of all ministerial officers was repealed by A.O., 1937.

**9. Penalty for breach of rules.** — The State Government may, in making any rule under this Act, attach to the breach of it, in addition to any other consequences that would ensue from such breach, a punishment, on conviction before a Magistrate, not exceeding one month's imprisonment, or two hundred rupees fine, or both.

**10. Publication of Rules, Force of rules.**—All rules made under this Act shall [a][° ° °] be published in the [b][Official Gazette] and shall thereupon have the force of law.

[a] The words "when sanctioned by the Governor-General in Council" were omitted by the Devolution Act, 1920 (XXXVIII of 1920), S. 2 and Sch. I.

[b] Substituted for "C.P. Gazette" by A.O., 1937.

[a][11. **Local Repeal, in part, of Code of Civil Procedure.**—Sections 184, 185 and 189 of the Code of Civil Procedure[b] are hereby repealed.]

[a] Inserted by the C.P. Laws Act, 1879 (II of 1879), S. 2.

[b] See now the Code of Civil Procedure, 1908 (V of 1908), Sch. I, O. XVIII, Rr. 8, 9 and 13.

[a][12. **Sections substituted in same Code.**—For Sections 182, 190 and 191 of the same Code[b] the following shall be substituted (namely):—

"182. **Note of evidence taken.**—A note of the essential points of the evidence of each witness shall be made at the time, and in the course of oral examination, by the Judge, in his own language, or in English if he is sufficiently acquainted with that language, and such notes shall be filed with, and form part of, the record of the case.

"190. **Judge unable to make note to record reason of his inability.**—If the Judge be prevented from making a note as above required, he shall record the reason of his inability to do so, and shall cause such note to be made in writing from his dictation in open Court, and shall sign the same, and such note shall form part of the record.

"191. **Power to use note made by Judge dying or removed before conclusion of suit.**—When the Judge making a note of the evidence, or causing one to be made as above required, dies or is removed from the Court before the conclusion of the suit, his successor may, if he thinks fit, deal with such note as if he himself had made it or caused it to be made."]

[a] Inserted by the C.P. Laws Act, 1879 (II of 1879), S. 2.

[b] See now the Code of Civil Procedure, 1908 (V of 1908), Sch. I, O. XVIII, Rr. 5, 14 and 15.

## SCHEDULE

(See section 3)

### A.—BENGAL REGULATIONS[a]

| Number and year of Regulation | Subject | Extent of operation | Power to duties how to be exercised or performed |
|---|---|---|---|
| 1 | 2 | 3 | 4 |
| [a][* | * | * | *] |
| V of 1799 . | Estates of Intestates. | [b][Sections 4, 5, 6 and 7.] | [b][The functions of the Court of "Sadr Diwani Adalat" and of the "Board of Revenue'; shall be performed respectively by the Judicial Commissioner[c] and by the State Government.] |
| [a][* | * | * | *] |
| [d][* | * | * | *] |
| [a][* | * | * | *] |
| XI of 1812 . | Foreign Immigrants. | So much as has not been repealed. | The powers of the "Nizamat Adalat" shall be exercised by the Judicial Commissioner.[c] |
| [a][* | * | * | *] |
| III of 1818 . | :State Prisoners. | So much as has not been repealed. | |
| [a][* | * | * | *] |
| [e][* | * | * | *] |
| XI of 1825 . | Alluvion and Diluvion. | The whole . . . | |
| [a][* | * | * | *] |
| V of 1827 . | Administration of landed property. | So much as has not been repealed, except the words and figures "and clauses 5 and 6, section XVI, regulation III, 1803". | The powers of the "Board of Revenue" shall be exercised by the [f][State Government]. |

[a] So much of this Act as relates to the following Bengal Regulations was repealed by the Act noted against each :—

Beng. Reg. 1 of 1793 ... Transfer of Property Act, 1882 (4 of 1882).
Beng. Reg. 10 of 1804 ... Special Laws Repeal Act, 1922 (4 of 1922).
Beng. Reg. 17 of 1806 ... Transfer of Property Act, 1882 (4 of 1882).
Beng. Reg. 20 of 1810 ... Cantonments Act, 1889 (13 of 1889).
Beng. Reg. 5 of 1817 ... Indian Treasure-Trove Act, 1878 (6 of 1878).
Beng. Reg. 20 of 1825 ... Code of Criminal Procedure, 1882 (10 of 1882).
Beng. Reg. 6 of 1819 was repealed in the C. P. by Act 17 of 1878, and later generally, by Act 12 of 1891.

[b] Substituted for the original entries by the C. P. Laws (Amendment) Act, 1928 (C. P. IX of 1928), S. 2. [c] See however the C. P. Courts Act, 1917 (C. P. I of 1917), S. 31. [d] The entry relating to Reg. 11 of 1806 was repealed by the M. P. Laws (Amendment) Act, 1950 (M. P. XV of 1950), S. 2. [e] The entry relating to Reg. 6 of 1825 was repealed, ibid, S. 2. [f] Substituted for "Chief Commissioner" by A. O., 1937.

### STATE ADAPTATIONS

Regulations V of 1799 and XI of 1812.

**Madhya Pradesh**

Mahakoshal—In its application to the Mahakoshal Region of the State of Madhya Pradesh, in col. (4) against the above mentioned Regulations for the "High Court of Judicature at Nagpur" substitute "the High Court of Madhya Pradesh".—M. P. Adaptation of Laws (State and Concurrent Subjects) Order, 1956.

Maharashtra

In its application to the Vidarbha Region of the State of Maharashtra, in col. (4) against the said two Regulations, for the words "High Court of Judicature at Nagpur" (as substituted by C. P. and Berar Act I of 1917, S. 61), substitute "the High Court at Bombay".

—Bombay (Vidarbha Region) A. L. O., 1956.

B.—ACTS OF THE GOVERNOR-GENERAL IN COUNCIL

| Number and year of Act | Subject | Extent of operation |
|---|---|---|
| 1 | 2 | 3 |
| VIII of 1851 . . | Tolls on Roads and Bridges . . | The whole Act, except section 1 and the schedule. |
| [a][* | * | *] |
| XII of 1857 . . | Opium . . . . . | Sections 21, 22, 23, 25, 26, 27, 28, 29. |
| [b][* | * | *] |
| XV of 1864 . . . | Tolls . . . . . | The whole Act. |

[a] The entry relating to Act 18 of 1853 (Sale of Spirits in Cantonments) was repealed by the Amending Act, 1891 (XII of 1891). [b] The entry relating to the Minors Act, 1858 (40 of 1858), was repealed by the Guardians and Wards Act, 1890 (VIII of 1890).

# [THE] CENTRAL RESERVE POLICE FORCE ACT, 1949
## (ACT 66 OF 1949)
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[The text of the Act printed here is as on 1-5-1969.]


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5. Enrolment.
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## STATEMENT OF OBJECTS AND REASONS

"The Crown Representative's Police Force" which was raised by the late Crown Representative as a reserve force to aid Indian States in the maintenance of law and order in times of emergency, has been retained as the Central Reserve Police Force even after the lapse of paramountcy.

2. The Crown Representative's Police Force Law, 1939, which was made under the Foreign (Jurisdiction) Order, 1937, to provide for the constitution and regulation

of the Force, automatically ceased to have effect from the 15th August, 1947, but no enactment has been made for the regulation and control of this Force by the Government of India after the 15th August, 1947. The objects of the proposed Bill are to replace the old Crown Representative's Police Force Law, 1939, and thus provide for the organisation, control and regulation of the Central Reserve Police Force, by the Central Government. For the purposes of this Bill, this Force falls within the category of "any other armed forces raised or maintained by the Dominion" mentioned in Paragraph 1 of List 1 of the Seventh Schedule to the Government of India Act, 1935, as adapted."

—Gaz. of Ind., 17-12-1949, Pt. V. p. 473.

## ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Amended by Act 3 of 1951.
—Adapted by A.L.O., 1950.

## COGNATE ACTS AND PROVISIONS

(1) Assam Rifles Act, 5 of 1941.
(2) Army Act, 46 of 1950.
(3) Border Security Force Act, 47 of 1968.
(4) Central Industrial Security Force Act, 50 of 1968.
(5) Delhi Special Police Establishment Act 25 of 1946.

# [THE] CENTRAL RESERVE POLICE FORCE ACT, 1949

## (ACT 66 OF 1949)[a]

[28th December, 1949.]

**An Act to provide for the constitution and regulation of an armed Central Reserve Police Force.**

Whereas it is expedient to provide for the constitution and regulation of an armed Central Reserve Police Force;

It is hereby enacted as follows:—

[a] For Statement of Objects and Reasons, see Gazette of India, 17-12-1949, Pt. V, p. 473.

## PRELIMINARY

**1. Short title and extent.**—(1) This Act may be called THE CENTRAL RESERVE POLICE FORCE ACT, 1949.

(2) It extends to the whole of India [a][ . . . . ] and applies to members of the Force, wherever they may be.

[a] The words "except the State of Hyderabad" inserted by A.L.O., 1950, were omitted by the Part B States (Laws) Act, 1951 (3 of 1951), S. 3 and Sch. [1-4-1951.].

**2. Definitions.**—In this Act, unless there is anything repugnant in the subject or context,—

(a) "active duty" means the duty to restore and preserve order in any local area in the event of any disturbance therein;

(b) "close arrest" means confinement within the Force or a detachment of the Force or a post quarter-guard building or tent under charge of a guard;

(c) "the Force" means the Central Reserve Police Force;

(d) "member of the Force" means a person who has been appointed to the Force by the Commandant, whether before or after the commencement of this Act, and in Sections 1, 3, 6, 7, 16, 17, 18 and 19, includes also a person appointed to the Force by the Central Government, whether before or after such commencement;

(e) "open arrest" means confinement within the precincts of any barracks, lines or camp for the time being occupied by any part of the Force;

(f) "prescribed" means prescribed by rules made under this Act;

(g) "subordinate officer" means a member of the Force of the rank of subedar-major, subedar, jemadar or sub-inspector;

(h) the expressions "assault", "criminal force" "fraudulently", "reason to believe" and "voluntarily causing hurt" have the meanings assigned to them respectively in the Indian Penal Code.

## CONSTITUTION OF THE FORCE

**3. Constitution of the Force.**—(1) There shall continue to be an armed force maintained by the Central Government and called the Central Reserve Police Force.

(2) The Force shall be constituted in such manner, and the members of the Force shall receive such pay, pension and other remuneration, as may be prescribed.

**4. Appointment and powers of superior officers.**—(1) The Central Government may appoint to the Force a Commandant and such other persons as it thinks fit to be assistant commandants and company officers.

(2) The Commandant and every other officer so appointed shall have, and may exercise, such powers and authority as may be provided by or under this Act.

**5. Enrolment.**—Before a person is appointed to be a member of the Force, the statement contained in the recruiting roll set out in the Schedule shall be read out and, if necessary, explained to him in the presence of an officer appointed under sub-section (1) of Section 4, and shall be signed by such person in acknowledgment of its having been so read out to him:

Provided that any person who has for a period of six months served with the Force, shall, on appointment to the Force thereafter, be deemed to be a member of the Force notwithstanding that the provisions of this section have not been complied with in his case.

**6. Resignation and withdrawal from the Force[a].**—No member of the Force shall be at liberty to—

(a) resign his appointment during the term of his engagement, except before the expiration of the first three months of his service; or

(b) withdraw himself from all or any of the duties of his appointment, without the previous permission in writing of the Commandant or assistant commandant or any other officer authorised by the Commandant to grant such permission.

[a] Cf. S. 8 of the Border Security Force Act, 1968 (47 of 1968).

## GENERAL DUTIES OF MEMBERS OF THE FORCE

**7. General duties of members of the Force.**—(1) It shall be the duty of every member of the Force promptly to obey and to execute all orders and warrants lawfully issued to him by any competent authority, to detect and bring offenders to justice and to apprehend all persons whom he is legally authorised to apprehend and for whose apprehension sufficient grounds exist.

(2) Every member of the Force shall be liable to serve without and beyond, as well as within, the territory of India.[a]

[a] See S. 7 of the Border Security Force Act, 1968 (47 of 1968).

## SUPERINTENDENCE, CONTROL AND ADMINISTRATION OF THE FORCE

**8. Superintendence, control and administration of the Force.**—(1) The superintendence of, and control over, the Force shall vest in the Central Govern-

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**Section 7 — Note 1**

(1) The members of the Central Reserve Police Force have a duty to detect and bring offenders to justice and, therefore, they are "police officers" within the meaning of Section 25, Evidence Act. AIR 1956 Kutch 1 (5): 1956 Cri LJ 217.

ment; and the Force shall be administered by the Central Government in accordance with the provisions of this Act and of any rules made thereunder through such officers as the Central Government may from time to time appoint in this behalf.

(2) The Headquarters of the Force shall be at Neemuch or at such other place as may from time to time be specified by the Central Government.

(3) While on active duty outside its headquarters, the Force shall be subject to the general control and direction of such authority or officer as may be prescribed or as may be specially appointed by the Central Government in this behalf.

## OFFENCES AND PUNISHMENTS

**9. More heinous offences[a].**—Every member of the Force who—

(a) begins, excites, causes or conspires to cause or joins in any mutiny, or being present at any mutiny, does not use his utmost endeavour to suppress it, or knowing, or having reason to believe in, the existence of any mutiny, or of any intention or conspiracy to mutiny or of any conspiracy against the State does not, without delay, give information thereof to his superior officer; or

(b) uses, or attempts to use, criminal force to, or commits an assault on, his superior officer, whether on or off duty, knowing or having reason to believe him to be such; or

(c) shamefully abandons or delivers up any post or guard which is committed to his charge, or which it is his duty to defend; or

(d) directly or indirectly holds correspondence with, or assists or relieves any person in arms against the State or omits to discover immediately to his superior officer any such correspondence coming to his knowledge; or

who, while on active duty,—

(e) disobeys the lawful command of his superior officer; or

(f) deserts the Force; or

(g) being a sentry, sleeps upon his post or quits it without being regularly relieved or without leave; or

(h) leaves his commanding officer, or his post or party, to go in search of plunder; or

(i) quits his guard, picquet, party or patrol without being regularly relieved or without leave; or

(j) uses criminal force to, or commits an assault on, any person bringing provisions or other necessaries to camp or quarters, or forces a safeguard or breaks into any house or other place for plunder, or plunders, destroys or damages property of any kind; or

(k) intentionally causes or spreads a false alarm in action or in camp, garrison or quarters; or

(l) displays cowardice in the execution of his duty,

shall be punishable with transportation for life[b] for a term of not less than seven years or with imprisonment for a term which may extend to fourteen years or with fine which may extend to three months' pay or with fine to that extent in addition to such sentence of transportation or imprisonment.

[a] Cf. Ss. 14 to 47 of the Border Security Force Act, 1968 (47 of 1968).

[b] For the construction of reference to transportation, now see S. 53A of the Penal Code, 1860.

**10. Less heinous offences.**—Every member of the Force who—

(a) is in a state of intoxication when on, or after having been warned for, any duty or on parade or on the line of march; or

(b) strikes or attempts to force any sentry; or

(c) being in command of a guard, picquet or patrol, refuses to receive any prisoner or person duly committed to his charge, or without proper authority releases any person or prisoner placed under his charge, or negligently suffers any such prisoner or person to escape; or

(d) being under arrest or in confinement, leaves his arrest or confinement, before he is set at liberty by lawful authority; or

(e) is grossly insubordinate or insolent to his superior officer in the execution of his office; or

(f) refuses to superintend or assist in the making of any field-work or other work of any description ordered to be made either in quarters or in the field; or

(g) strikes or otherwise ill-uses any member of the Force subordinate to him in rank or position; or

(h) designedly or through neglect injures or loses or fraudulently disposes of his arms, clothes, tools, equipments, ammunition or accoutrements, or any such articles entrusted to him or belonging to any other person; or

(i) malingers or feigns or produces disease or infirmity in himself, or intentionally delays his cure, or aggravates his disease or infirmity; or

(j) with intent to render himself or any other person unfit for service, voluntarily causes hurt to himself or any other person; or

(k) does not, when called upon by his superior officer so to do or upon ceasing to be a member of the Force forthwith deliver up, or duly account for, all or any arms, ammunition, stores, accoutrements or other property issued or supplied to him or in his custody or possession as such member; or

(l) knowingly furnishes a false return or report of the number or state of any men under his command or charge or of any money, arms, ammunition, clothing, equipments, stores or other property in his charge, whether belonging to such men or to the Government or to any member of, or any person attached to the Force, or who, through design or culpable neglect, omits or refuses to make or send any return or report of the matters aforesaid; or

(m) absents himself without leave, or without sufficient cause over-stays leave granted to him; or

(n) is guilty of any act or omission which, though not specified in this Act, is prejudicial to good order and discipline; or

(o) contravenes any provision of this Act for which no punishment is expressly provided; or

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**Section 10 — Note 1**

(1) When an Asst. Commandant invested with magisterial powers under S. 16 convicts a delinquent for an offence under Section 10 (m), appeal will lie to the Sessions Court. 1960 Raj LW 620.

(2) Where a member of the force was dealt with in a departmental enquiry for a default under Section 10 (m), and the defaulter was not allowed to cross-examine an officer who had reported against him, if no prejudice was caused the enquiry is not vitiated. AIR 1965 Raj 140 (142): 1965 Raj LW 26 (DB).

(3) Police charged under Section 10 (m), acquitted by Appellate Court not on merits of case but on ground that the trial was vitiated — Acquittal is no bar for institution of departmental enquiry. AIR 1965 Raj 140 (141): 1965 Raj LW 26 (DB).

(4) Delinquent though not prosecuted for offence under Section 10 can be awarded punishment of dismissal under Section 11. AIR 1965 Raj 140 (142): 1965 Raj LW 26 (DB).

who, while not on active duty,—

(p) commits any of the offences specified in clauses (e) to (l) (both inclusive) of Section 9,

shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to three months' pay, or with both.

**11. Minor punishments.**—(1) The Commandant or any other authority or officer as may be prescribed, may, subject to any rules made under this Act, award in lieu of, or in addition to, suspension or dismissal any one or more of the following punishments to any member of the Force whom he considers to be guilty of disobedience, neglect of duty, or remissness in the discharge of any duty or of other misconduct in his capacity as a member of the Force, that is to say,—

(a) reduction in rank;

(b) fine of any amount not exceeding one month's pay and allowances;

(c) confinement to quarters, lines or camp for a term not exceeding one month;

(d) confinement in the quarter-guard for not more than twenty-eight days; with or without punishment drill or extra guard, fatigue or other duty, and

(e) removal from any office of distinction or special emolument in the Force.

(2) Any punishment specified in clause (c) or clause (d) of sub-section (1) may be awarded by any gazetted officer when in command of any detachment of the Force away from headquarters, provided he is specially authorised in this behalf by the Commandant.

(3) The assistant commandant, a company officer or a subordinate officer, not being below the rank of subedar or inspector, commanding a separate detachment or an outpost or in temporary command at the headquarters of the Force, may, without a formal trial, award to any member of the Force who is for the time being subject to his authority any one or more of the following punishments for the commission of any petty offence against discipline which is not otherwise provided for in this Act, or which is not of a sufficiently serious nature to require prosecution before a Criminal Court, that is to say,—

(a) confinement for not more than seven days in the quarter-guard or such other place as may be considered suitable, with forfeiture of all pay and allowances during its continuance;

(b) punishment drill, or extra guard, fatigue or other duty, for not more than thirty days, with or without confinement to quarters, lines or camp;

(c) censure or severe censure: provided that this punishment may be awarded to a subordinate officer only by the Commandant.

(4) A jemadar or sub-inspector who is temporarily in command of a detachment or an outpost may, in like manner and for the commission of any like offence, award to any member of the Force for the time being subject to his authority any of the punishments specified in clause (b) of sub-section (3) for not more than fifteen days.

**12. Place of imprisonment and liability to dismissal on imprisonment.**—(1) Every person sentenced under this Act to imprisonment may be dismissed from

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**Section 11 — Note 1**

(1) Section 11 deals with only minor punishments. A plain reading of S. 11 makes it clear that a punishment of dismissal can be awarded thereunder even if the delinquent is not prosecuted for an offence under S. 10 (m). AIR 1965 Raj 140 (141, 142): 1965 Raj LW 26.

**Section 12 — Note 1**

(1) Punishment of dismissal may be given to a delinquent in addition to the sentence awarded to him. On conviction it is not necessary to hold a regular enquiry if the authorities mean to proceed under Section 12. Section does not not lay down that a person should not be liable to dismissal if he is not con-

the Force. and shall further be liable to forfeiture of pay, allowance and any other moneys due to him, as well as of any medals and decorations received by him.

(2) Every such person shall, if he is so dismissed, be imprisoned in the prescribed prison, but if he is not also dismissed from the Force, he may, if the Court or the Commandant so directs, be confined in the quarter-guard or such other place as the Court or the Commandant may consider suitable.

**13. Deductions from pay and allowances.**—The following penal deductions may be made from the pay and allowances of a member of the Force by his company officer, that is to say,—

(a) all pay and allowances for every day of absence either on desertion or without leave and for every day of imprisonment awarded by a Criminal Court or of confinement awarded under Section 11;

(b) all pay and allowances for every day whilst he is in custody on a charge for an offence of which he is afterwards convicted;

(c) all pay and allowances for every day on which he is in hospital on account of sickness certified by the medical officer attending on him at the hospital to have been caused by an offence committed by him under this Act;

(d) all pay and allowances ordered to be forfeited under Section 11; and

(e) such sum as may be ordered by the Commandant or assistant commandant in order to make good any expenses caused by the member of the Force, or any loss of, or damage or destruction done by him to, any arms, ammunition equipment, clothing, instrument or decorations belonging to the Force or to any buildings or property.

**14 Collective fines.**—Whenever any weapon, part of a weapon or ammunition, forming part of the equipment of a company or other similar unit of the Force, is lost or stolen, the Commandant may, after making such inquiry as he thinks fit and subject to such rules as may be prescribed, impose a collective fine upon the subordinate officers and men of such unit, or upon so many of them as, in his judgment, should be held responsible for such loss or theft.

## ARREST

**15. Arrest.**—(1) Any member of the Force who commits any offence specified in Section 9 or Section 10 may be placed on open or close arrest by any officer of the Force.

(2) Where any subordinate officer orders an arrest under sub-section (1), he shall forthwith or at the earliest opportunity report the arrest to his company or detachment commander who shall after investigating the case order the release or the continued arrest of the member of the Force arrested.

## MISCELLANEOUS

**16. Powers and duties conferrable and imposable on members of the Force.**—(1) The Central Government may, by general or special order, confer or impose upon any member of the Force any of the powers or duties conferred or imposed on a police officer of any class or grade by any law for the time being in force.

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**Section 12 — Note 1 (contd.)**

victed and sentenced under the Act. AIR 1965 Raj 140 (141): 1965 Raj LW 26 (DB).

**Section 16 — Note 1**

(1) Merely because some special powers or duties of police officers are not conferred or imposed on the members of the Central Reserve Police Force under Section 16 it would not mean that they are not "police officers" within the meaning of Section 25, Evidence Act. AIR 1953 Kutch 1 (4): 1956 Cri LJ 217.

(2) The act of the Central Government investing any commandant or Asst. Commandant with the powers of a magistrate, does not create any special class of Courts. Such magistrates have to look to Criminal P. C. for guidance in all matters of procedure including questions of right and forum of appeal. 1960 Raj LW 620.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1898, the Central Government may invest the Commandant or an assistant commandant with the powers of a Magistrate of any class for the purpose of inquiring into or trying any offence committed by a member of the Force and punishable under this Act, or any offence committed by a member of the Force against the person or property of another member:

Provided that—

(i) when the offender is on leave or absent from duty, or

(ii) when the offence is not connected with the offender's duties as a member of the Force, or

(iii) when it is a petty offence, even if connected with the offender's duties as a member of the Force,

the offence may, if the prescribed authority within the limits of whose jurisdiction the offence has been committed, so directs, be inquired into or tried by an ordinary Criminal Court having jurisdiction in the matter.

**17. Protection for acts of members of the Force.**—(1) In any suit or proceeding against any member of the Force for any act done by him in pursuance of a warrant or order of a competent authority, it shall be lawful for him to plead that such act was done by him under the authority of such warrant or order.

(2) Any such plea may be proved by the production of the warrant or order directing the act, and if it is so proved, the member of the Force shall thereupon be discharged from liability in respect of the act so done by him, notwithstanding any defect in the jurisdiction of the authority which issued such warrant or order.

(3) Notwithstanding anything contained in any other law for the time being in force, any legal proceeding (whether civil or criminal) which may lawfully be brought against any member of the Force for anything done or intended to be done under the powers conferred by, or in pursuance of, any provision of this Act or the rules thereunder, shall be commenced within three months after the act complained of was committed and not otherwise, and notice in writing of such proceeding and of the cause thereof shall be given to the defendant or his superior officer at least one month before the commencement of such proceeding.

**18. Power to make rules.**—(1) The Central Government may, by notification in the Official Gazette, make rules[a] for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) regulating the classes and grades of, and the pay, pension and other remuneration of, members of the Force, and their conditions of service in the Force;

(b) regulating the powers and duties of officers authorised to exercise any functions by or under this Act;

(c) fixing the period of service for members of the Force;

(d) regulating the award of minor punishments under Section 11, and providing for appeals from, or the revision of, orders under that section, or the remission of fines imposed under that section, and the remission of deductions made under Section 13;

(e) regulating the several or collective liability of members of the Force in the case of the loss or theft of weapons and ammunition;

(f) for the disposal of criminal cases arising under this Act and for specifying the prison in which a person convicted in any such case may be confined.

[a] For the Central Reserve Police Force Rules, 1955, see S.R.O. 499 published in Gazette of India, 1955, Pt. II, Section 3, p. 393 [1-7-1955].

**19. Validation of acts done before commencement of Act.**—Any order made, thing done, or action taken by or in relation to a member of the Force, on or after the 15th day of August, 1947, but before the commencement of this Act, shall, for all purposes, be deemed to have been made, done or taken under this Act as if this Act were in force on the day on which such order was made, thing was done or action was taken.

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## THE SCHEDULE

RECRUITING ROLL

(See Section 5)

After you have served in the Force for such period as the Central Government may prescribe, you may, at any time when not on active duty, apply for discharge, through the officer to whom you may be subordinate, to the Commandant, and you will be granted your discharge after two months from the date of your application, unless your discharge would cause the vacancies in the Force to exceed one-tenth of the sanctioned strength in which case you shall be bound to remain until this objection is waived or removed. But when on active duty, you shall have no claim to a discharge, and you shall be bound to remain to do your duty until the necessity for retaining you in the Force ceases when you may make your application in the above-mentioned manner:

Provided that, if you wish to withdraw from the Force, you may submit your resignation at any time before the expiration of the first three months of your service, but not afterwards until the completion of the period prescribed as aforesaid; the Commandant may either accept your resignation forthwith or at the end of three months from the date of its receipt:

Provided, also, that the Commandant may, if he thinks fit, allow you to resign at any time on your giving three months' notice of your wish to do so.

Signature of the member of the force in acknowledgment of the above having been read out to him.

Space for impression of the member's left thumb to be taken in the presence of the enrolling officer.

Signed in my presence after I had ascertained that the candidate understood the purport of what he signed.

Commandant
or other authorised enrolling officer.

Place
Date

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# [THE] CENTRAL SALES TAX ACT, 1956
## (ACT LXXIV OF 1956)

[The text of the Act printed here is as on 15-4-1969.]

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## STATEMENT OF OBJECTS AND REASONS

"In the interest of the national economy of India certain amendments were undertaken in the Constitution by the Constitution (Sixth Amendment) Act, 1956, whereby—

(a) taxes on sales or purchases of goods in the course of inter-State trade or commerce were brought expressly within the purview of the legislative jurisdiction of Parliament;

(b) restrictions could be imposed on the powers of State legislatures with respect to the levy of taxes on the sale or purchase of goods within the State where the goods are of special importance in inter-State trade or commerce.

The amendments at the same time authorised Parliament to formulate principles for determining when a sale or purchase takes place in the course of inter-State trade or commerce or in the course of export or import or outside a State in order that the legislative spheres of Parliament and the State legislatures becomes clearly demarcated. In the case of goods of special importance in inter-State trade or commerce, a law of Parliament is to lay down the restrictions and conditions subject to which any State law may regulate the tax on sales or purchases of such goods in the State.

2. This Bill seeks to provide for the legislation authorised by the Constitution as amended above with a view to enabling the State Governments to raise additional revenues by levying tax on inter-State transactions which are at present immune from tax under their respective sales tax laws. After taking into account the recommendations of the Taxation Enquiry Commission and in consultation with the States, the Government of India are of the view that the following principles should govern the scheme of the detailed legislation on the three interrelated subjects:

(i) The Central Government should authorise the State Governments to impose on behalf of the Central Government tax on the sale or purchase of goods in the ccurse of inter-State trade or commerce. The Central legislation should aiso delegate to the States the Central Government's power to levy and collect the tax and for this purpose prescribe the same system of registration, assessment, etc., as prevails in the States concerned under their own sales-tax system.

(ii) An important aspect of the Central legislation will be concerned with the definition of the locale of sales for the purpose of defining in detail the relative jurisdiction, firstly of the Union and the States, and secondly, of the States inter se. It is therefore, necessary that the law should define clearly, with specific reference to sales tax the circumstances in which a sale or purchase becomes taxable by a particular State and no other. It should also define for the purpose of the Constitutional restrictions on the State's power to impose a tax under item 54 of the State list, when a sale or purchase of goods may be said to take place:

(a) in the course of export out of India,

(b) in the course of import into India, and

(c) in the course of inter-State trade or commerce.

(iii) The Central legislation should provide for the declaration of certain commodities which are in the nature of raw materials and of special importance in inter-State trade or commerce and lay down the restrictions and conditions as to the rate, system of levy and other incidents of tax subject to which the States may impose tax on the sale or purchase thereof.

3. Necessary provisions have, therefore, been made in the different Chapters of this Bill incorporating the principles stated above". — Gaz. of India, Extra, 21-11-1956, Pt. II-S. 1, p. 857.

## ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Amended by Acts 16 of 1957; 5 of 1958; 31 of 1958; 14 of 1961; 8 of 1963; 13 of 1966; 19 of 1968.

# [THE] CENTRAL SALES TAX ACT, 1956
## (ACT LXXIV OF 1956)[a]

[21st December, 1956.]

**An Act to formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce or outside a State or in the course of import into or export from India, to provide for the levy, collection and distribution of taxes on sales of goods in the course of inter-State trade or commerce and to declare certain goods to be of special importance in inter-State trade or commerce and specify the restrictions and conditions to which State laws imposing taxes on the sale or purchase of such goods of special importance shall be subject.**

Be it enacted by Parliament in the Seventh Year of the Republic of India as follows:—

[a] For Statement of Objects and Reasons, see Gazette of India, Extraordinary, 21-11-1956, Pt. II, Sec. 1, p. 857.

## CHAPTER I
## PRELIMINARY

**1. Short title, extent and commencement.**—(1) This Act may be called THE CENTRAL SALES TAX ACT, 1956.

(2) It extends to the whole of India [a][* * *].

(3) It shall come into force on such date[b] as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act.

[a] The words "except the State of Jammu and Kashmir" were omitted by the Central Sales Tax (Amendment) Act, 1958 (5 of 1958), S. 2 [13-3-1958].

[b] The whole of the Act, except S. 15 came into force on 5-1-57: see S.R.O., 78 published in Gaz. of Ind., Pt. II, S. 3, Extra., p. 57, S. 15, as amended in 1958 was enforced on 1-10-1958; see G.S.R. 897, Gaz. of Ind., 1-10-1958, Pt. II, S. 3 (i), Ext., p. 476.

The Act has been extended to the Union Territory of—(1) Goa, Daman and Diu by Reg. 12 of 1962 [w. e. f. 21-1-1963]; (2) Pondicherry by G. S. R. 132 of 1963, Gaz. Ind., 26-1-1963, Pt. II, S. 3 (i), p. 139 (w.e.f. 3-6-1963).

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**Section 1 — Note 1**

(1) An Act which is merely enacted for the purpose of imposing tax which is to be collected and to be retained by the State does not amount to law giving, or authorising the giving of, any preference to one State over another, or making or authorising the making of, any discrimination between one State and another, merely because of varying rates of tax prevailing in different States. AIR 1969 SC 147 (156, 158): (1969) 1 SCJ 318.

(2) A measure which is intended to check evasion of tax is undoubtedly a valid measure. It is in public interest to see that in the guise of freedom of trade, they do not evade the payment of tax. AIR 1969 SC 147 (163): (1969) 1 SCJ 318.

(3) Normally a law imposing a tax on Intra-State Sales does not offend Art. 301. The Central Sales-tax Act, 1956 is no exception to this rule. Even assuming that the Act is within the mischief of Article 301, it is certainly a law made by Parliament in public interest and is saved by Article 302. There is nothing in the Act which offends Article 303 (1). AIR 1969 SC 147 (161): (1969) 1 SCJ 318.

(4) One of the purposes sought to be achieved by the Act is to specify the restrictions and conditions to which State laws, imposing taxes on the sale or purchase of certain goods which are declared to be of special importance, shall be subject. AIR 1967 SC 1618 (1620): (1967) 3 SCR 577.

(5) The Act was passed to levy and collect sales tax on inter-State sales to avoid confusion and conflict of jurisdictions; the tax is also collected only for the benefit of the States. (Per Subba Rao and Sirki JJ.) AIR 1965 SC 1510 (1514): (1965) 2 SCR 129.

(6) There is nothing in the subject-matter of the Central Sales Tax Act or in the mode of dealing with it which savours of discrimination between the citizens of one State and those of another. It enunciates one common and uniform principle applicable to all states viz., that any class of goods which was immune from taxation in any State is exempted under Section 8. AIR 1962 Andh Pra 204 (208): (1961) 2

**2. Definitions.**—In this Act, unless the context otherwise requires,

(a) "appropriate State" means—

(i) in relation to a dealer who has one or more places of business situate in the same State, that State;

(ii) in relation to a dealer who has [a][° ° °] places of business situate in different States, every such State with respect to the place or places of business situate within its territory;

[a][° ° ° ° °]

(b) "dealer" means any person who carries on the business of [b][buying or selling goods], and includes a Government which carries on such business;

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**Section 1 — Note 1 (contd.)**

Andh WR 344. (Section 8 is not violative of Article 14 of Constitution.)

(7) Act though not extended to State of J. and K. Article 1 read with Entry 15 of Schedule 1 of Constitution indicates that J. and K. is one of States in Union of India. For liability to Central Sales Tax movement of goods need not neecssarily terminate in State where Central Sales Tax Act is applicable. (1965) 67 Pun LR 891: 1965 Cur LJ 737.

(8) Notification issued by Central Government bringing into force Section 6, the charging section, as and from 1-7-1957 is not invalid in so far as it relates to declared goods until such date as the relevant provisions of Section 15 are also brought into force. Under Section 1 (3), the Act empowers Central Government to appoint different dates for bringing into force different provisions of the Act. AIR 1962 Mad 42 (44, 45) (DB).

(9) Central Sales Tax (Amendment) Ordinance came into effect immediately on 9-6-1969 with retrospective effect and sought to validate past levies and collections. P. T. I. — Nagpur Times, Dated 10-6-1969.

**Section 2 (a) — Note 1**

(1) The dealer is liable under Section 6 (1) to pay tax under the Act on all sales effected by him in the course of inter-State trade. Under Section 7 the dealer liable to pay tax has to apply for registration to the specified authority in the Appropriate State and the "appropriate State" under Section 2 (a) is defined in relation to the dealer's place of business. (1965) 67 Pun LR 891 (894): 1965 Cur LJ 737 (DB).

(2) A sale contemplated by Section 3 (b) is effected within the State in which the documents of title to the goods sold are transferred resulting in a transfer of the property in them; that state is the "appropriate state" in respect of such sale, within the meaning of Clause (ii) of Explanation to Section 2 (a). (Prior to amendment of 1958 — See now Section 2 (dd) (ii).) AIR 1961 SC 65 (80): (1961) 1 SCR 379 * AIR 1968 Delhi 211 (214): 21 STC 437. (Inter-state sales — Appropriate State would be the State in which the sale is effected.)

**Section 2 (b) — Note 1**

(1) A person can be held to be a dealer, if he engages himself in a course of dealings, buying, selling and supplying goods and commodities with the object of making a profit. Where a person in the course of carrying on the business is required to dispose of what may be called his fixed assets or his discarded goods acquired in the course of business, an inference that he desires to carry on the business of selling his fixed assets or discarded goods will not ordinarily arise. AIR 1969 SC 348 (351): (1969) 1 SCJ 376. (Assessee's main business, manufacture and sale of heavy machinery — Arc furnaces purchased for being installed in the foundry, found unsuitable for the purpose — Disposal thereof by sale 6 years later at a profit — Assessee, held not to be a dealer within Section 2 (b) in relation to this sale.)

(2) Electricity is "goods" for the purpose of the Central Sales Tax Act and the Madras General Sales Tax Act. A distributor of electricity who purchases electricity and distributes it to its local consumers in a specified area and who is required to purchase certain goods from out of the State dealers for the purpose of distributing electricity, has to be treated as a dealer and is entitled to be registered under S. 7 (2) of the Central Sales Tax Act. AIR 1964 Mad 477 (479): (1963) 2 Mad LJ 225.

(3) A person converting latex tapped from rubber trees into sheets and effecting a sale of them is not a dealer within the meaning of Section 2 (b). The usual method of selling latex is to convert it into sheets and the conversion is not a manufacturing process but a process essential for the transport and marketing of the produce concerned. AIR 1965 Ker 71 (71): 1964 Ker LJ 534 (DB).

(4) The burden of proving that the assesse was carrying on business of buying and selling goods and hence a "dealer" as defined in S. 2 (b) of the Act lay upon the Sales-tax Authorities. (1968) 1 SCJ 281 (285): (1968) 1 ITJ 103.

(5) A person coming within definition of "dealer" as defined in Section 2 (b) of Central Act need not necessarily be a dealer as defined in Sales Tax Act of a State. AIR 1962 Ker 264 (265): (1962) 13 STC 832 (DB).

(c) "declared goods" means goods declared under Sec. 14 to be of special importance in inter-State trade or commerce;

(d) "goods" includes all materials, articles, commodities and all other kinds of moveable property, but does not include [a][newspapers], actionable claims, stocks, shares and securities;

[a][(dd) "place of business" includes—

(i) in any case where a dealer carries on business through an agent (by whatever name called), the place of business of such agent;

(ii) a warehouse, godown or other place where a dealer stores his goods and

(iii) a place where a dealer keeps his books of account;]

(e) "prescribed" means prescribed by rules made under this Act;

(f) "registered dealer" means a dealer who is registered under Section 7;

(g) "sale", with its grammatical variations and cognate expressions, means any transfer of property in goods by one person to another for cash or for deferred payment or for any other valuable consideration, and includes a transfer of goods on the hire-purchase or other system of payment by instalments, but does not include a mortgage or hypothecation of or a charge or pledge on goods;

(h) "sale price" means the amount payable to a dealer as consideration for the sale of any goods, less any sum allowed as such discount according to the practice normally prevailing in the trade, but inclusive of any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof other than the cost of freight or delivery or the cost of installation in cases where such cost is separately charged;

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**Section 2 (c) — Note 1**

(1) It is only by a manufacturing process that the cotton and seed are separated and it is not correct to say that the seed so separated is cotton itself, or part of the cotton. They are two distinct goods though before the manufacturing process the seed might have been a part of the cotton itself. Therefore there is no taxation of the same goods both at the purchase point and the sale point. (1952) 13 STC 709 (713) (DB) (Andh Pra).

**Section 2 (d) — Note 1**

(1) Animals and birds in captivity are movable property and therefore goods within Section 2 (d). Even assuming that they do not fall within definition of goods in Article 366 (12) of the Constitution sale of such things will fall within List I, Entry 97 and not under List II, Entry 54 or List I, Entry 92-A of the Constitution. Levy of tax on such sales is within competence of Parliament. AIR 1960 Ker 360 (360): 1960 Ker LJ 531.

**Section 2 (g) — Note 1**

(1) To constitute a sale there must be two different persons in the ordinary sense of the term 'person.' When one partnership has transferred goods to another partnership and the partners of the two firms are identical, it will be really a case of one person transferring goods to himself. There is, therefore, no "sale" so far as the definition of 'sale' is concerned, whether it be under the Madras General Sales Tax Act or the Central Sales Tax Act. AIR 1968 Mad 241 (243): 21 STC 72 * ILR (1966) 1 All 81: 17 STC 10. (Interpretation of 'sale' under U. P. Sales Tax Act)

(2) Word "sale" includes purchase also. AIR 1963 Andh Pra 29 (31): (1962) 13 STC 779 (DB).

**Section 2 (h) — Note 1**

(1) Where the cost of freight or delivery is separately charged it does not under Section 2 (h) form part of sale price. From this it is clear that unless freight has been separately charged to the knowledge of the buyer, the cost of the freight cannot be deducted from the sale price. AIR 1962 Mad 290 (296): (1962) 2 Mad LJ 302 (DB).

(2) Under the definition of 'sale price' in Section 2 (h) any amount, whether it be tax or excise duty which is payable to the dealer as a consideration for the sale of the goods, makes up the sale price in respect of the transaction. Thus, where it is an integral part of an agreement between the dealer and his buyer that the buyer should bear the burden of the excise duty paid by the seller the excise duty forms part of the sale price of the goods. AIR 1962 Mad 290 (296): (1962) 2 Mad LJ 302.

(3) A dealer is not entitled to deduct the excise duty paid in respect of goods sold by him in determining the turnover liable to assessment under the Act. AIR 1964 Mys 212 (214): (1964) 15 STC 176 (DB).

(i) "sales tax law" means any law for the time being in force in any State or part thereof which provides for the levy of taxes on the sale or purchase of goods generally or on any specified goods expressly mentioned in that behalf, and "general sales tax law" means the law for the time being in force in any State or part thereof which provides for the levy of tax on the sale or purchase of goods generally;

(j) "turnover' used in relation to any dealer liable to tax under this Act means the aggregate of the sale prices received and receivable by him in respect of sales of any goods in the course of inter-State trade or commerce made during any prescribed period and determined in the prescribed manner;

(k) "year", in relation to a dealer, means the year applicable in relation to him under the general sales tax law of the appropriate State, and where there is no such year applicable, the financial year.

[a] The words "one or more" in sub-clause (ii) and the Explanation were omitted by the Central Sales Tax (Second Amendment) Act, 1958 (31 of 1958), S. 2 [1-10-1958].

[b] Substituted for the words "selling goods", ibid.

[c] Inserted, ibid.

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## CHAPTER II

## FORMULATION OF PRINCIPLES FOR DETERMINING WHEN A SALE OR PURCHASE OF GOODS TAKES PLACE IN THE COURSE OF INTER-STATE TRADE OR COMMERCE OR OUTSIDE A STATE OR IN THE COURSE OF IMPORE OR EXPORT

**3. When is a sale or purchase of goods said to take place in the course of inter-State trade or commerce.**—A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase—

(a) occasions the movement of goods from one State to another; or

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**Section 2 (h) — Note 1 (contd.)**

(4) Excise duty collected by seller from his customers forms part of assessable turnover. It is part of the considerations for the sale of the goods. 1962 Ker LT 710 (711) (DB).

(5) Any amount received by a dealer as consideration for the sale of any goods has to be included in the turnover of the dealer. What the assessee received from the purchasers on account of Adat, dalali, bank commission, charity and insurance was a part of the price paid by the purchasers. The payment of the amounts must be regarded as part of the consideration for the sales. The burden of proving that these charges did not form any part of the consideration for the sales was on the assessee. 1968 MPLJ 665 (666, 667): 22 STC 22 (DB).

(6) Where an assessee sells compressed cotton, packed in bales, covered with Hessian cloth and fastened with iron hoops, there is an implied contract of sale of packing material also. The price charged is a consolidated price and the assessee is liable to pay tax on the turnover relating to packing material also. The mere fact that price of the packing material was not separately fixed makes no difference to assessment as there is an implied contractor for its sale. 1968 MPLJ 665 (666, 667): 22 STC 22 (DB).

**Section 2 (j) — Note 1**

(1) Where turnover has been defined to mean the aggregate of the sale prices in respect of sales made during any prescribed period and determined in the prescribed manner, the turnover that would be liable to tax under Section 8 of the Act cannot come into existence un'ess the manner of its determination is provided for by the rules and it is so determined. AIR 1962 Mad 290 (292): (1962) 2 Mad LJ 302 (DB).

(2) Any amount received by a dealer as consideration for the sale of any goods has to be included in the turnover of the dealer. 1968 MPLJ 665 (666-667): 22 STC 22 (DB).

(3) A dealer is not entitled to deduct the excise duty paid in respect of goods sold by him in determining the turnover liable to assessment under the Act. AIR 1964 Mys 212 (214): (1964) 15 STC 176 (DB).

**Section 3 — Note 1**

(1) (Case prior to amendment in 1958). In interpreting definition clauses in Ss. 3, 4 and 5, it would be inappropriate to requisition in aid the observations made in decisions in ascertaining the true nature and incidents without the assistance of any definition clause of "sales out side the State" and "sales in the course of import

(b) is effected by a transfer of documents of title to the goods during their movement from one State to another.

Explanation 1. — Where goods are delivered to a carrier or other bailee for transmission, the movement of the goods shall, for the purposes of Cl. (b), be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee.

Explanation 2. — Where the movement of goods commences and terminates in the same State it shall not be deemed to be a movement of goods from one State to another by reason merely of the fact that in the course of such movement the goods pass through the territory of any other State.

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**Section 3 — Note 1 (contd.)**

or export" and "sales in the course of inter-State trade or commerce" used in Article 286. AIR 1961 SC 65 (72): (1961) 1 SCR 379.

(2) Inter-State sales contemplated by Article 286 (2) (before its amendment by Constitution (Sixth Amendment) Act, 1956) were the same as those defined in Section 3 (a) AIR 1967 SC 585 (586, 587): (1963) 14 STC 416.

(3) (Case prior to amendment in 1958). Sales effected in Punjab State occassioning movement of goods sold to State of Jammu and Kashmir are inter-State sales and liable to tax. For liability to Central Sales Tax movement of goods need not necessarily terminate in State where Central Sales Tax Act is applicable. (1965) 67 Pun LR 891: 1965 Cur LJ 737 (DB) * AIR 1962 Mad 290 (297): (1962) 2 Mad LJ 302. (Goods sold to dealer in State of Jammu and Kashmir — Non-applicability of Act to that State in 1957 — Its effect on sale of goods by dealer in State of Madras — Sale being inter-State is liable to tax.)

[See also AIR 1963 Pat 359 (361): 1964 BLJR 3 (DB). (Dealer in India selling goods to buyer in Nepal — Sale involving series of integrated activities ending in delivery of goods — Dealer held entitled to exemption.)]

(4) A sale becomes taxable under Section 3 (a) if the movement of goods from one State to another is under a covenant or incident of the contract of sale, and the property in the goods passes to the purchaser otherwise than by transfer of documents of title when the goods are in movement from one State to another. In respect of an inter-State sale, the tax is leviable only once and the two clauses of Section 3 are mutually exclusive. A sale taxable as falling within Clause (a) of Section 3 will be excluded from the purview of Clause (b) of Section 3. AIR 1961 SC 65 (71, 78): (1961) 1 SCR 379. (Assessee having factory in Bihar — Head Office in West Bengal — Movement of goods from Bihar to West Bengal under contract of sale — Transfer of document of title in West Bengal — Government of West Bengal has no powers to tax such sales.) * AIR 1963 SC 548 (549): (1963) 3 SCR 792. (Case of sale of cement.) * AIR 1963 SC 980 (983, 984): (1963) 3 SCR 777. (Case prior to amendment of Article 286 (2) by Constitution (Sixth Amendment) Act — 38 Mys LJ 516, Reversed.) * AIR 1967 SC 585 (586): (1963) 14 STC 416. (Where certain contracts of sale of cement contained covenants that goods were to be moved from place outside Mysore State into State of Mysore, sales effected in pursuance of such contract are inter-State sales within Section 3 (a).)

[See also AIR 1966 SC 1216 (1220): (1966) 3 SCR 352. (Sale in course of import — Movement of goods must be result of covenant or incident of contract of sale — Sale need not precede import.)]

(5) Where Coal was transported from the colliery of the assessee Company to the consumers outside the taxing State, as a result of the covenant or incident of the contract of sale, the sale must be regarded as an inter-State sale and not liable to be taxed under the Hyderabad General Sales Tax Act, 1950. AIR 1966 SC 563 (569 570): (1966) 2 SCR 190. (AIR 1962 Andh Pra 75 (DB), Reversed.) * AIR 1966 Madh Pra 215 (219, 220): 1967 Jab LJ 124 (DB) (Despatch of coal outside M. P. to various consumers including railway administrations in pursuance of allotment order issued by Coal Controller in exercise of powers under control order — Sales are inter-State sales.)

(6) In order to be an inter-State sale, there must be movement of goods in connection with the sale. Two things must co-exist, a sale of goods and the movement of goods from one State to another. Whether the goods move before or after the sale is completed is not material. AIR 1967 Punj 130 (131, 132): 69 Pun LR 130 (DB) * AIR 1968 Madh Pra 135 (136): 1968 Jab LJ 410 (DB) * (1968) 21 STC 417 (Madh Pra) * 1967 Ker LT 623: 1967 Ker LJ 17. (Movement of goods from C dealer at Z in one State to dealer A in another State — A selling goods to B in A's State — Held, property in goods passed to A when goods were unconditionally appropriated by C at Z and to B from A after invoices were received by B from A.)

(7) The movement of goods need not necessarily be preceded by an agreement of sale or purchase but may be part of or incidental to it or arises out of it. AIR 1968 Mad 407 (425): (1967) 2 Mad LJ 552 (DB). AIR 1964 Mad 162, Held no

**Section 3 — Note 1 (contd.)**
longer good law in view of AIR 1966 SC 1216.)

(8) When the movement is not under the contract but due to reasons extraneous to the obligations under the contract, it cannot be said to be a movement in the course of inter-State trade or commerce. (1957) 20 STC 345 (Cal) (DB).

(9) Delivery of goods outside the State should be pursuant to contractual obligations and not otherwise in order to impress sale with character of inter-State sale. AIR 1968 MP 135 (137): 1968 Jab LJ 410 (DB).

(10) A sale contemplated by Section 3 (b) is effected within the State in which documents of title to the goods sold are transferred resulting in a transfer of the property in them. That state is the "appropriate State" within Section 2 (a), Expln., Clause (ii). No question of resorting to Section 4 (2) for fixing the place where a sale under Section 3 (b) is effected, arises. AIR 1961 SC 65 (80, 81): (1961) 1 SCR 379 * AIR 1968 Mad 407 (425) (DB). (For fixation of its situs for jurisdiction to tax Section 4 is relevant. * (1963) 2 Mad LJ 517: (1963) 14 STC 856 (DB) * AIR 1968 Delhi 211 (214): 21 STC 437.

(11) Where contract of sale of cotton bales was completely carried through within the Madras State itself wherein the price was received by the sellers and the cotton bales were delivered to the buyers, and the movement of cotton bales outside State was by the buyers themselves after property in them had passed to them, these sales were not sales in the course of inter-State trade. AIR 1967 SC 1131 (1133): (1967) 1 SCR 627.

(12) Mere contemplation of movement at the time of sale without there being an actual movement or movements immediately after completion of sale will not however make the sale an inter-State sale. AIR 1963 Cal 442 (450, 453, 455). (Under terms of contract, goods intended to be moved from Calcutta to Jamshedpur — Fact that purchaser arranged for lorry in Calcutta in which seller could load goods or fact that seller was liable for loss or damages till delivery at delivery point did not make transaction any-the-less inter-State trade.)

[See AIR 1963 Ker 178 (179): 1963 Ker LJ 437. (Purchases of goods made in local market before despatch, after receipt of orders for those goods from buyers in other States or outside this country — Fact not sufficient for earning exemption under Sections 3 and 5.)]

(13) Case under second schedule to Madras General Sales Tax Act (1 of 1959). Where the terms of a first sale are such that it may well be said to be an inside sale, but it bears also the characteristics of an inter-State sale and, therefore, it has been taxed under the Central Act, that sale being physically a first sale inside the State out of which the inter-State sale has been carved out, the tax levied on inter-State sale must prevail and there will be no tax liability on the same sale under local Act on ground that it is an inside sale. (1968) 1 Mad LJ 344: 21 STC 163 (DB).

(14) The conclusion, as to the inter-State character of the transaction of sale or purchase, can legitimately be arrived at only after ascertaining the terms of the contract of sale which must comply with Sections 3 and 4. The production by assessee of declarations in form 'C' from out of State buyers does not by itself prove that the sale is in the course of inter-State trade. (1968) 21 STC 350 (Mad) (DB).

(15) To be regarded as within the course of export a sale or purchase must be inextricably bound up with the export. AIR 1962 Ker 66 (67, 68): 1961 Ker LT 832 (DB).

(16) The mere fact that parties to a contract are residents of the same State, does not prevent their act of making it from being inter-State sale. The true test, is to determine whether the contract of sale could have been effectuated without movement of the goods across the State border. AIR 1965 Mys 240 (243): (1964) 2 Mys LJ 316 (DB).

(17) Section 9 (1) so far as it is concerned with the first sale under Section 3 (b) has the effect of being a proviso to Section 4 (2) and treating such sale or purchase as sale or purchase inside the State from which the goods moved. AIR 1968 Mad 407 (428): (1967) 2 Mad LJ 552 (DB).

(18) In both the classes of inter-State sales or purchases under Section 3 (a) and (b), what is contemplated is completed sales. But how the sales or purchases under Section 3 (a) or 3 (b) are completed and where are irrelevant for purposes of Sections 3 (a) and 3 (b). AIR 1968 Mad 407 (427): (1967) 2 Mad LJ 552 (DB). * (1963) 77 Mad LW 111: (1963) 14 STC 899 (DB).

(19) (Case under Section 6 of A. P. General Sales Tax Act (6 of 1957)). Where skin merchant in Madras purchased raw skins in Andhra Pradesh and delivered them in Madras State, sales did not come under Section 3 (a). (1964) 15 STC 828 (Andh Pra) (DB).

(1) In determining definition clauses in Sections 3, 4 and 5 it will be inappropriate to requisition in aid the observations

**4. When is a sale or purchase of goods said to take place outside a State.—** (1) Subject to the provisions contained in Sec. 3, when a sale or purchase of goods is determined in accordance with sub-section (2) to take place inside a State, such sale or purchase shall be deemed to have taken place outside all other States.

(2) A sale or purchase of goods shall be deemed to take place inside a State if the goods are within the State—

(a) in the case of specific or ascertained goods, at the time the contract of sale is made; and

(b) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale by the seller or by the buyer, whether assent of the other party is prior or subsequent to such appropriation.

Explanation. — Where there is a single contract of sale or purchase of goods situated at more places than one, the provisions of this sub-section shall apply as if there were separate contracts in respect of the goods at each of such places.

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**Section 4 — Note 1**

made in decisions in ascertaining the true nature and incidents without the assistance of Article 286 of Constitution. AIR 1961 SC 65 (72): (1961) 1 SCR 379.

(2) Section 4 (2) defines what sales or purchases shall be deemed to take place inside a State. Section 4 (1) having been made subject to the provisions contained in Section 3, only those sales which are not in the course of inter-State trade or commerce should be determined under Section 4 (1) as having taken place outside a State. Section 4 does only seek to define "ouside sales", but also intends to locate the place where a sale is effected. AIR 1961 SC 65 (74, 75): (1961) 1 SCR 379.

(3) Section 4 is concerned only with sales outside the State and not concerned with the export sales. It is not within the competence of a state to levy, a tax on sales occurring in the course of export or import as in the case of inter-State trade or commerce. (1964) 15 STC 299: ILR (1964) Andh Pra 849 (DB).

(4) The whole object of Chapter II is to lay down principles as to where an inter-State sale takes place, and when a sale can be taken to be of an inter-State character. Section 4 (2) fixes the situs of sale Clause (a) to sub-section (2) will apply with reference to the time of the contract of sale and Clause (b) with reference to the time of appropriation of the goods to the contract by the seller or by the buyer with or without the assent of one or the other. AIR 1968 Mad 348 (349): (1967) 2 Mad LJ 436 (DB).

(5) By Section 4 (2) lex situs is made the basis for deciding which sale would be "inside". (1961) ILR (1961) 2 Ker 116 (DB). (Section 2 (j) of Travancore-Cochin Act 11 of 1162 not unconstitutional.)

(6) For determination of the question whether a dealer in cotton yarn was first seller in the State, situs of inter-State sale must be determined with light of Section 4 (2). AIR 1964 Ker 184 (185): 1963 Ker LT 82 (FB).

(7) Before a sale or purchase is taxed by a State as of an inter-State character, it must first be satisfied that the tests under Section 4 (2) are fulfilled and then it must be examined whether the transaction answers the requirements of Section 3 (a) or (b). (1968) 21 STC 350 (DB) (Mad).

(8) Once the tests under Section 4 (2) are answered in favour of a State, that becomes the appropriate State having jurisdiction to tax the sale or purchase and no other State will have power to tax the same transaction. The contract of sale or purchase is given a situs at the dealers place by business where he sells. AIR 1968 Mad 407 (425): (1967) 2 Mad LJ 552 (DB).

(9) Appropriation in respect of sale of unascertained goods as contemplated by Section 4 (2) (b) connotes the setting apart of goods as specific goods to be delivered under the contract of sale and is not an appropriation linked with passing of property. Section 4 (2) (b) does not require an unconditional appropriation as required by Section 23 of the Sales of Goods Act. AIR 1968 Delhi 211 (214): 21 STC 437.

(10) The appropriation for purposes of Section 4 (2) need not necessarily be accompanied by the assent of the party concerned, but it must be a final one so far as the seller or the buyer as the case may be who makes the appropriation is concerned. Considerations based on Sections 39 and 51 of Sale of Goods Act may have no bearing in application of Section 4 (2) (b). AIR 1968 Mad 407 (427): (1967) 2 Mad LJ 552 (DB).

(11) A sale contemplated by Section 3 (b) is effected within the State in which the documents of title to the goods sold are transferred resulting in transfer of pro-

**5. When is a sale or purchase of goods said to take place in the course of import or export.**—(1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.

(2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India.

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**Section 4 — Note 1 (contd.)**

perty in them that State is the appropriate State within Clause (ii) of Expln. to Section 2 (a). No question of resorting to Section 4 (2) for fixing the place where a sale under Section 3 (b) arises. AIR 1961 SC 65 (80-81): (1961) 1 SCR 379.

(12) Section 4 (2) cannot be taken in aid for determining an appropriate State to collect the tax in the case of a sale falling under Clause (b) of Section 3. (1963) 2 Mad LJ 517: (1963) 14 STC 856.

(13) Section 9 (1) so far as it is concerned with the first sale under Section 3 (b) has the effect of being a proviso to Section 4 (2) and treating such sale or purchase as sale or purchase inside the State from which the goods moved. AIR 1968 Mad 407 (428): (1967) 2 Mad LJ 552 (DB).

(14) Where in a contract for import and supply of certain generators and other electrical machinery to Punjab Government (buyer), the assent of the buyer was reserved until erection of the plant, but so far as the seller was concerned there was an unconditional appropriation by delivering the goods at Calcutta, the goods being within West Bengal at the time of appropriation, the State had jurisdiction to tax. AIR 1965 Cal 236 (241): 68 Cal WN 776. (Section 4 (2) is substantially reproduced in Expln. 2 to Section 2 (g) of Bengal Finance Sales Tax Act (6 of 1941).)

(15) Where the assessee to a sales was proceedings claimed exemption in respect of sales effected from their stock yards in the various States, asserting that the goods in the stockyards were still those of the assessee and that neither the property in them had passed to any one, nor had they been appropriated to contract of sale, the Assistant Commissioner of Sales Tax must give an opportunity to the assessee before disallowing the exemption. AIR 1967 SC 1401 (1403): (1967) 2 SCR 751.

(16) Where the contracts for sale of cotton between the assessee and certain Mill at Adoni in Andhra Pradesh disclose that weight of cotton was to be determined on actual weighment at the mills in Bombay State, and that payment was to be made against such weighment testing etc., and the final invoices were to be prepared by the buyers at the head office at Bombay, the sales were not within the State. (1962) 13 STC 709 (AP).

(17) When goods pursuant to the inter-State sale have been delivered outside the State but brought back into the State and then sold, that sale cannot be regarded as the first sale within the meaning of second schedule of Madras General Sales Tax Act (1 of 1959). (1968) 1 Mad LJ 344: 21 STC 163 (DB).

**Section 5 — Note 1**

(1) In order that a sale may qualify for exemption under Article 286 (1) (b) of Constitution, as being a sale in the course of export, the sale must occasion the export, the exportation must be a part of the contract of sale or must be a necessary incidence thereof. AIR 1969 All 205 (208): 1968 All LJ 497 (FB).

(2) To constitute a sale in the course of export there must be an intention on the part of both the buyer and the seller to export, there must be an obligation to export, and there must be an actual export. The obligation may arise by reason of statute, contract between the parties or from mutual understanding or agreement between them, or even from the nature of the transaction which links the sale to export. AIR 1964 SC 1752 (1755): (1964) 7 SCR 706.

(3) For a transaction to be a sale in the course of export out of territory of India, it must contain a common intention to export, actual exportation and an obligation to export goods. Mere proximity of time between acts connected with sale and acts connected with export is not a decisive test. AIR 1968 Pat 329 (332-335 336): 1968 BLJR 747 (FB) * (1967) 20 STC 345 (DB) (Cal). (The principles which apply to the expression "if the sale . . . . . occasions such import" in Section 5 (2) will also apply to the expression "occasions the movement" in Section 3 (a).) * AIR 1968 Mad 407 (425): (1967) 2 Mad LJ 552 (DB). * (1964) 15 STC 299 (DB) (Andh Pra). (A negotiating a contract of sale of cotton with a Pondicherry firm — Assessee purchased cotton, got it pressed and sent it to Pondicherry — A demand draft for 90 per cent of the value of the goods sent to the assessee — Balance to be paid

## CHAPTER III

## INTER-STATE SALES TAX

**6. Liability to tax on inter-State sales.**—[a][(1)] Subject to the other provisions contained in this Act, every dealer shall, with effect from such date[b] as the Central Government may, by notification in the Official Gazette, appoint, not being earlier than thirty days from the date of such notification, be liable to pay tax under this Act on all sales effected by him in the course of inter-State trade or commerce during any year on and from the date so notified.

[c][(2) Notwithstanding anything contained in sub-section (1), where a sale in the course of inter-State trade or commerce of goods of the description referred to in sub-section (3) of Section 8—

(a) has occasioned the movement of such goods from one State to another; or

(b) has been effected by a transfer of documents of title to such goods during their movement from one State to another;

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**Section 5 — Note 1 (contd.)**

by the buyer at their convenience and after verification of goods — Held, that all these sales were in the course of export of cotton out of the territory of India.) * (1965) 16 STC 534: (1965) 67 Pun Lr 155.

(3-A) Words "customs frontiers" in Section 5 should be construed as "customs barriers". (1963) 14 STC 904: ILR (1964) 1 Mad 367 (DB).

(4) In general, where the sale is effected by the seller and it is not connected with the export which actually takes place, it is a sale for export. Where the export is the result of sale, the export being inextricably linked up with the sale so that the bond cannot be dissociated without a breach of the obligation arising by a statute, contract or mutual understanding between the parties arising from the nature of the transaction, the sale is in the course of export. AIR 1964 SC 1752 (1755, 1756): (1964) 7 SCR 706. (Sale of tea by auction to agents of foreign buyers — Held, sale and export did not form part of single transaction — Sales were for export but not in the course of export.)

(5) Purchase must occasion export to constitute as a purchase in the course of export. AIR 1967 Madh Pra 210 (211): 1967 Jab LJ 322. (Case under Sections 7 and 50 (i) (iii) of M. P. General Sales Tax Act (2 of 1959) — Purchase held liable to pay purchase tax.) * (1961) ILR (1961) 2 Ker 698 (DB).

(6) The expression "occasions the movement of goods" occurring in Section 3 (a) and Section 5 (2) must have the same meaning. A sale occasions the movement of goods from one State to another within Section 3 (a) or an import within Section 5 (2) when the movement is the result of a convenant or incident of the contract of sale. It is wrong to hold that before a sale could be said to have occasioned import the sale should have preceded the import. AIR 1966 SC 1216 (1220): (1966) 3 SCR 351.

(7) The true test is whether the sale and the export involves a series of integrated activities commencing from the agreement of sale with a foreign buyer for transport out of the Country by land or sea. AIR 1969 All 205 (209): 1968 All LJ 497 (FB).

(8) Delivery of goods to foreign buyer within State is not per se conclusive to show that sale was not in the course of export of goods. 1967 All LJ 568 (DB).

(9) Fact that purchases of goods were made in local market before despatch after receipt of orders for those goods from buyers in other states or outside this country is not sufficient for earning exemption under Sections 3 and 5. AIR 1963 Ker 178 (179): 1963 Ker LT 196 (FB).

(10) It is proper to construe the words Customs frontiers as customs barriers in the Central Sales Tax Act. Where the property in goods is transferred by an importer to the Government while the goods were on the high seas, by delivery of documents of title against payment of price, the sale is a sale in the course of an import within the meaning of Section 5. (1963) 14 STC 904: ILR (1964) 1 Mad 383 (DB). (AIR 1960 Andh Pra 619, Dissented from.)

(11) Where movement of goods was from dealer C at place Z in one State to dealer A in another State and A sold goods to B in A's State, the property in goods passed to A when goods were unconditionally appropriated by C at Z and to B from A after invoices were received by B from A. Sales by B to his customers not being first sales were not liable to be taxed under Sections 5 and 8 of Kerala General Sales Tax Act. 1967 Ker LT 623: 1967 Ker LJ 17.

**Section 6 — Note 1**

(1) Section 6 of the Central Act is the charging section. Subject to the other provisions contained in the Act, every dealer is liable to pay tax under the Act on all sales effected by him. If the effect of another provision is to take away the liability, effect will have to be given to it. Thus, notwithstanding Section 6 the dealer may not be liable to pay any tax

any subsequent sale to a registered dealer during such movement effected by a transfer of documents of title to such goods shall not be subject to tax under this Act :

Provided that no such subsequent sale shall be exempt from tax under this sub-section unless the dealer effecting the sale furnishes to the prescribed authority in the prescribed manner a certificate duly filled and signed by the registered dealer from whom the goods were purchased, containing the prescribed particulars.]

[a] Section 6 was re-numbered by the Central Sales Tax (Second Amendment) Act, 1958 (31 of 1958), S. 3 [1-10-1958].

[b] The date appointed is 1-7-1957, see S. R. O. 940-A published in Gaz. of of Ind., 27-3-1957, Pt. II-Sec. 3, Ext., page 1233/1.

[c] Inserted, by Act 31 of 1958, S. 3; In the Union Territory of Goa, Daman and Diu, the appointed date is 1-11-1964 — Gaz. of Ind., 30-9-1964, Pt. II, S. 3 (i), Ext., p. 717.

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**Section 6 — Note 1 (contd.)**

if he comes within the proviso to Section 8 (1). The Scheme of the Act is not that every transaction in inter-State trade must bear some tax. AIR 1965 SC 1510 (1511 to 1514): (1965) 2 SCR 129. (Sales of powerloom cloth which are not first sales within Section 5 (3) (a) of Mysore Sales Tax Act not exigible to tax under State Act will also not be liable to tax under Central Act (per Subba Rao and Sikri JJ. (Shah J. Contra) * (1966) 1 SCWR 465: (1966) 17 STC 311 * (1966) 1 SCWR 466: (1966) 17 STC 309.

(2) The notification issued by the Central Government bringing into force Section 6 of the Act, the charging section, as and from 1st July 1957 is not invalid in so far as it relates to declared goods until such date as the relevant provisions of Section 15 are also brought into force, AIR 1963 Mad 42 (44): (1962) 2 Mad LJ 327 (DB).

(3) Where intra-State sales in question exempted by notification issued under Section 6, Kerala General Sales Tax Act, an assessee is not liable to be assessed for inter-State sales under Central Sales Tax Act. AIR 1966 Ker 60 (61, 62): 1965 Ker LT 862.

(4) (Case prior to amendment in 1958). For liability to Central Sales Tax movement of goods need not necessarily terminate in State where Central Sales Tax Act is applicable. (1965) 67 Punj LR 891: 1965 Cur LJ 737 (DB).

(5) It is only the last purchase that is taxable under the Madras General Sales Tax Act, turnover representing purchases not answering that description cannot be taxed under Section 6 of the Central Act. AIR 1966 Mad 404 (405, 406): (1966) 1 Mad LJ 127 (DB). (AIR 1962 Mad 457, Held, overruled by AIR 1965 SC 1510.)

(6) If the resale or subsequent sale does not fall within Section 6 (2), they will attract the proviso to Section 9 (1). (1967) 2 Mad LJ 315: 22 STC 283 (DB). (Inter-State sale — Goods despatched by rail from Rajasthan to Madras — Dealer in Madras effecting sale during transit by transferring documents of title — State of Madras can tax the sale ) * (1967) 1 Andh LT 161: 22 STC 285 (DB).

(7) If the test of appropriation is applied (Section 4 (2) (b)) the competition of the inter-State sale cannot be determined with reference to the delivery but only with reference to the appropriation itself. AIR 1968 Mad 348 (348, 349): (1967) 2 Mad LJ 436 (DB).

(8) Ban imposed by Section 26 of Trav-Co. General Sales Tax Act (as amended in 1951) having been lifted by Sales Tax Laws Validation Act (7 of 1956), State was competent to collect all taxes in respect of Sales in the course of inter-State and commerce upto 5-9-1955. AIR 1968 SC 389 (393): (1968) 1 SCR 415.

(9) In view of Section 15 (amended in 1958), where sales of declared goods are to be taxed only at a single point under the legislative policy of the State the levy at the stage of inter-State Sales should prevail and the buyer at the earlier stage should be refunded. (1966) 1 Mad LJ 541: ILR (1967) 1 Mad 709 (DB). (Turnover of a dealer in Madras chargeable to inter-State Sales under Central Act; excise duty cannot be deducted.)

(10) When goods are sent from State by V. P. P. and buyer in another State accepts them by paying the postal parcel, sale becomes complete and amounts to inter-State Sale. Sale is liable to Central Sales Tax and such tax is leviable by the first State. AIR 1967 Punj 130 (131, 132): 69 Punj LR 130 (DB).

(11) When the goods pursuant to the inter-State Sale have been delivered outside the State, but brought back in the State and then sold, that sale cannot be regarded as first sale within the meaning of Second Schedule to Madras General Sales Tax Act (1 of 1959). (1968) 1 Mad LJ 344: 21 STC 163 (DB).

(12) (Case under Kerala General Sales Tax Act) (15 of 1963). Where Government in order to supply petrol and diesel oil to dealers in State entered into contract with a dealer outside State and under

**7. Registration of dealers.**—(1) Every dealer liable to pay tax under this Act shall, within such time as may be prescribed for the purpose, make an application for registration under this Act to such authority in the appropriate State as the Central Government may, by general or special order, specify, and every such application shall contain such particulars as may be prescribed.

[a][(2) Any dealer liable to pay tax under the sales tax law of the appropriate State, or where there is no such law in force in the appropriate State or any part thereof, any dealer having a place of business in that State or part, as the case may be, may, notwithstanding that he is not liable to pay tax under this Act, apply for registration under this Act to the authority referred to in sub-section (1), and every such application shall contain such particulars as may be prescribed.

Explanation.—For the purposes of this sub-section, a dealer shall be deemed to be liable to pay tax under the sales tax law of the appropriate State notwithstanding that under such law a sale or purchase made by him is exempt from tax or a refund or rebate of tax is admissible in respect thereof.]

(3) If the authority to whom an application under sub-section (1) or sub-section (2) is made is satisfied that the application is in conformity with the provisions of this Act and the rules made thereunder, he shall register the applicant and grant to him a certificate of registration in the prescribed form which shall specify the class or classes of goods for the purposes of sub-section (1) of Sec. 8.

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**Section 6 — Note 1 (contd.)**

that contract the movement of goods took place, the sale to Government was really inter-State Sales and the Sales to dealers within the State being first sales in the State the recovery of sales tax from them was not illegal. 1966 Ker LJ 998: 20 STC 82.

(13) Central Government has to collect tax on such sales in the appropriate State. Authorities in one State must refer to their counterparts in other States to avoid conflicting orders. (1967) 21 STC 378 (Mad) (DB).

(14) Appellate Assistant Commissioner has power to extend time for production of E forms. (1967) 2 Mad LJ 365: (1967) 20 STC 266 (DB).

(15) Sub-rule (5) of Rule 9-B of Central Sales Tax (Registration and Turnover) Rules (1957) is ultra vires the rule-making power of the State Government if production of form "C" declaration cannot be insisted upon to claim exemption under Section 6 (2). (1967) 20 STC 263: ILR (1968) 2 Mad 116 (DB).

(16) (Case under Section 13 (2) of Mysore Sales Tax Act (25 of 1952)). A dealer under the Central Act who defaults in making payment of the tax payable under the Act within such time as may be prescribed becomes liable to pay the penalty as provided in the State Act. (1963) 14 STC 587 (Mys).

**Section 7 — Note 1**

(1) Under Section 7, the dealer liable to pay tax has to apply for registration to the specified authority in the appropriate State and the "appropriate State" under Section 2 (a) is defined in relation to dealer's place of business. So far liability to Central Sales Tax movement of goods need not necessarily terminate in the State where Act is applicable. (1965) 67 Pun LR 891: 1965 Cur LJ 737 (DB).

(2) The fiction created under the Explanation to Section 7 (2) entitles a dealer to get a certificate of registration even though he may not be actually paying sales tax at the particular time under the sales tax law of the appropriate State. The explanation cannot be invoked for the purpose of Section 7 (4) (b) of the Act. 1963 Ker LJ 800: (1963) 14 STC 1060.

(3) Explanation to sub-section (2) of Section 7 is not exception but deeming provision. Thus, dealers exempted from tax under State law can get themselves registered under Section 7 (2) of Act. AIR 1965 Ker 57 (58): 1964 Ker LJ 685.

(4) Distributor of electricity is a 'dealer' entitled to registration under Section 7 (2). AIR 1964 Mad 477 (479): (1963) 2 Mad LJ 225.

(5) The Act and the Rules do not impose an obligation upon the purchasing dealer to declare that the goods purchased by him are intended to be used for one purpose only even though under a certificate of registration he is entitled to purchase goods of the classes mentioned in Section 8 (3) (b) for more purposes than one. AIR 1967 SC 234 (239): (1966) Supp SCR 198 * AIR 1969 Madh Pra 53 (54, 55): 1969 Jab LJ 20 (DB).

(6) Only those articles which are directly and actually needed for turning out or making of goods fall under Rule 13 of Central Sales Tax (Registration and Turnover) Rules (1957) read with Section 8. (1964) 15 STC 711 (All).

(7) Sales Tax Officer has jurisdiction under section to modify, amend or partly cancel certificate of registration. (1964) 15 STC 711 (All) * 1964 Ker LJ 70. (Patent error requiring amendments.)

(8) It is the date on which dealer makes application for amendment and not when amendment is allowed that should be

[a][(4) A certificate of registration granted under this section may—

(a) either on the application of the dealer to whom it has been granted, or, where no such application has been made, after due notice to the dealer, be amended by the authority granting it if he is satisfied that by reason of the registered dealer having changed the name, place or nature of his business or the class or classes of goods in which he carried on business or for any other reason the certificate of registration granted to him requires to be amended; or

(b) be cancelled by the authority granting it where he is satisfied, after due notice to the dealer to whom it has been granted, that he has ceased to carry on business or has ceased to exist, or in the case of a dealer registered under sub-section (2) has ceased to be liable to pay tax under the sales tax law of the appropriate State or for any other sufficient reason.]

(5) A registered dealer may apply in the prescribed manner not later than six months before the end of a year to the authority which granted his certificate of registration for the cancellation of such registration, and the authority shall, unless the dealer is liable to pay tax under this Act, cancel the registration accordingly, and where he does so, the cancellation shall take effect from the end of the year.

[a] Substituted by the Central Sales Tax (Second Amendment) Act, 1958 (31 of 1958), S. 4 [1-10-1958].

**8. Rates of tax on sales in the course of inter-State trade or commerce.**—[a][(1) Every dealer, who in the course of inter-State trade or commerce—

(a) sells to the Government any goods; or

**Section 7— Note 1 (contd.)**

taken as the date of effectiveness of the amendment. AIR 1969 Madh Pra 53 (55): 1969 Jab LJ 20 (DB).

(9) By virtue of notifications of 30th March, 1949, under Section 3 (1) and (2) of the Governor and order of the Commissioner, Excise and Taxation under Section 15 delegating his power of cancellation the registration certificate can be cancelled by the Assessing Authority. (1963) 14 STC 549 (Punj). (Ground that dealer was making bogus and false sales to different registered dealers thereby evading tax falls within the ambit of the phrase "or for any other sufficient reason" in Section 7 (4).)

(10) A certificate of registration can be cancelled only after the dealer has been given a proper opportunity of showing cause why it should not be cancelled. (1963) 14 STC 549 (Punj).

(11) Certificate of registration under Section 7 cannot override the provisions of the concerned statute. 1964 Ker LJ 70.

(12) The expression "in mining" in R. 13 of Central Sales Tax (Registration and Turnover) Rules do not mean the business of mining. The expression cannot be extended to include delivering the coal to a siding at Railway Station. The certificate cannot include motor trucks, spare parts of motor vehicles, furniture and sanitary fittings. 1967 MPLJ 131 (133): (1966) 17 STC 510 (SC).

(13) A dealer registered under Section 7 filing petition under Article 226 of constitution against rejection of his application for specification of certain goods in his certificate must accept the position that Sections 7 (3) and 8 (3) are valid. AIR 1962 Madh Pra 128 (130): 1962 Jab LJ 349 (DB).

(14) Correctness or propriety of satisfaction of the notified authority in enquiry under Rule 5 (1) of Central Sales Tax (Registration and Turnover) Rules (1957) in issuing the certificate in Form 'B' that the goods are likely to be required for the purposes of the business will not be open to challenge before another taxing authority in proceeding for assessment of tax. Such satisfaction is however, open to challenge before the High Court and the Supreme Court. AIR 1967 SC 234 (239, 240): (1966) Supp SCR 198.

**SECTION 8 — SYNOPSIS**

**1. Scope.**
**2. Constitutional validity.**
**3. Concessional rate — Sub-sec. (1).**
**4. Turnover not falling within sub-sec. (1) — Sub-sec. (2).**
**5. "Exempt from tax generally" — Sub-sec. (2-A).**
**6. Goods referred to in Clause (b) of sub-sec. (1) — Sub-sec. (3).**
**7. Declaration to be furnished — Sub-sec. (4).**
**8. Power of State Government under sub-sec. (5).**

**Topic Indicator**

Cases under proviso to sub-s. (1) prior to amendment by Act (31 of 1958) — See Note 5.

(b) sells to a registered dealer other than the Government goods of the description referred to in sub-section (3);

shall be liable to pay tax under this Act, which shall be [d][three per cent.] of his turnover.

(2) The tax payable by any dealer on his turnover in so far as the turnover or any part thereof relates to the sale of goods in the course of inter-State trade or commerce not falling within sub-section (1)—

(a) in the case of declared goods, shall be calculated at the rate applicable to the sale or purchase of such goods inside the appropriate State; and

(b) in the case of goods other than declared goods, shall be calculated at the rate of [e][ten per cent.] or at the rate applicable to the sale or purchase of such goods inside the appropriate State, whichever is higher;

and for the purpose of making any such calculation any such dealer shall be deemed to be a dealer liable to pay tax under the sales tax law of the appropriate State, notwithstanding that he, in fact, may not be so liable under that law.

(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), if under the sales tax law of the appropriate State the sale or purchase, as the case may be, of any goods by a dealer is exempt from tax generally or is subject to tax generally at a rate which is lower than [d][three per cent.] (whether called a tax or fee or by any other name), the tax payable under this Act on his turnover in so far as the turnover or any part thereof relates to the sale of such goods shall be nil or, as the case may be, shall be calculated at the lower rate.

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**Section 8 (contd.)**

Object of the section — See Note 1.

Expression "in the same manner" in sub-s. (2) meaning of — See Note 4.

Tax under sub-s. (2) when can be demanded — See Note 4.

Refund of Tax — See Note 4.

Expression "any such dealer" in sub-sec. (2), meaning of — See Note 4.

Sales which are not first sales under State law — See Note 5.

Assessee falling under sub-s. (2) — Right to benefit of exemption — See Note 5.

Deductions — See Note 5.

Manufacture or processing of goods — See Note 6.

Hospital goods — See Note 6.

Items of general stores — See Note 6.

Containers — See Note 6.

Distributor of electricity, if a dealer — See Note 6.

Failure to make use of goods for purposes under S. 8 (3) (b) — See Note 6.

Amendment of registration certificate — See Note 6.

Vires of R. 6 (1) of Central Sales Tax (Kerala) Rules, 1957 — See Note 7.

Vires of R. 8 (2) of Central Sales Tax (U. P.) Rules — See Note 7.

Vires of R. 14-A of Central Sales Tax (Andh Pra) Rules — See Note 7.

Vires of Rr. 8 (1) and 8 (2) of Central Sales Tax (M. P.) Rules 1957 — See Note 7.

Vires of R. 5 (1), Central Sales Tax (Madras) Rules, 1950 — See Note 7.

Vires of Rr. 9 (2) (a) and 9-B (3) (a) of Central Sales Tax (Bihar) Rules, 1957 — See Note 7.

Vires of R. 7 (2) of Central Sales Tax (Punj) Rules (1957) — See Note 7.

Power to extend time for production of 'C' and "E' Forms — See Note 7.

Non-submission of Form "C" — Effect — See Note 7.

Not filling in 'C' Form rightly — Effects — See Note 7.

Certificate of registration — See Note 7.

**1. Scope.** — (1) The Act was intended to restrict the imposition of multiple taxation on a single inter-State transaction by different States, each State relying upon some territorial nexus between the State and the Sale. AIR 1969 SC 147 (153, 154): (1969) 1 SCJ 318.

(2) Sales effected in Punjab State occasioning movement of goods sold to State of Jammu and Kashmir are inter-State Sales and liable to tax. (1965) 67 Pun LR 891: 1965 Cur LJ 737 (DB).

(3) A turnover that will be liable to tax under Section 8 cannot come into existence unless the manner of its determination is provided for by the rules and it is so determined. AIR 1962 Mad 290 (293): (1962) 2 Mad LJ 302.

(4) License fee levied on dealer under Mysore Sales Tax Act (66 of 1948) is tax as contemplated in Section 8. ('62) Mys LJ 577 (DB). (On appeal, see AIR 1965 SC 1510.)

(5) Central Sales Tax (Amendment) Ordinance came into effect on 9-6-69 with retrospective effect and sought to validate

Explanation.—For the purposes of this sub-section a sale or purchase of goods shall not be deemed to be exempt from tax generally under the sales tax law of the appropriate State if under that law it is exempt only in specified circumstances or under specified conditions or in relation to which the tax is levied at specified stages or otherwise than with reference to the turnover of the goods.

(3) The goods referred to in clause (b) of sub-section (1)—

(a) [1][° ° ° ° °]

(b) [1][° ° °] are goods of the class or classes specified in the certificate of registration of the registered dealer purchasing the goods as being intended for re-sale by him or subject to any rules made by the Central Government in this behalf, for use by him in the manufacture or processing of goods for sale or in mining or in the generation or distribution of electricity or any other form of power;

(c) are containers or other materials specified in the certificate of registration of the registered dealer purchasing the goods, being containers or materials intended for being used for the packing of goods for sale;

(d) are containers or other materials used for the packing of any goods or classes of goods specified in the certificate of registration referred to in [1][° ° °] clause (b) or for the packing of any containers or other materials specified in the certificate of registration referred to in clause (c).

(4) The provisions of sub-section (1) shall not apply to any sale in the course of inter-State trade or commerce, unless the dealer selling the goods furnishes to the prescribed authority in the prescribed manner—

(a) a declaration duly filled and signed by the registered dealer to whom the goods are sold containing the prescribed particulars in a prescribed form obtained from the prescribed authority; or

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**Section 8 — Note 1 (contd.)**

past levies and collections P. T. I. Nagpur Times D/- 10-6-1969.

**2. Constitutional validity.** — (1) Section 8 is not violative of Article 14 of Constitution. AIR 1962 Andh Pra 204 (207 to 210): (1961) 2 Andh WR 344 (DB) * AIR 1962 Mad 457 (461): (1962) 13 STC 433 (DB) (Held overruled on another point by AIR 1965 SC 1510 in AIR 1966 Mad 404).

(2) Sections 8 (2), 8 (2-A), 8 (5) are intra vires Arts. 301 and 303 (1) of Constitution. AIR 1969 SC 147 (160, 161): (1959) 1 SCJ 318.

[But see AIR 1968 Mad 407 (419): (1967) 2 Mad LJ 552 (DB) (Ss. 8 (2), 8 (2-A) and 8 (5) are unconstitutional and void as offending Articles 301 and 303 (1) of Constitution — Note must be treated as impliedly overruled in AIR 1969 SC 147.)]

(3) Article 303 cannot be invoked to strike down Section 8 of the Act as discriminating between dealers of different States in the matter of granting exemption. AIR 1962 Andh Pra 204 (212): (1961) 2 Andh WR 344.

**3. Concessional rate — Sub-sec. (1).** — (1) Section 8 (1), being of the nature of an exception to normal taxation, has to be construed strictly. 1964 Ker LJ 70.

(2) The very purpose of the Act being to treat declared and other than declared goods forming the subject-matter of inter-State sales differently different mode of taxation of such sales are provided for by Section 8 (1) and (2) of the Act. They cannot be attacked on the basis that the classification has no just relation to the purpose of the Act. AIR 1962 Mad 457 (461): (1962) 13 STC (433) (DB). (Held overruled on another point by AIR 1965 SC 1510 in AIR 1966 Mad 404.)

(3) The purpose of Section 8 being only the bringing out charge on the turnover which will be assessable, Rule 11 (2) of the (Madras) General Sales Tax Act (Registration and Turnover) Rules (1957) when applied, results in "determining" the turnover as defined in S. 2 (j). AIR 1962 Mad 290 (293): (1962) 2 Mad LJ 302 (DB).

**4. Turnover not falling within sub-sec. (1) — Sub-sec. (2).** — (1) If a registered selling dealer fails to furnish to the prescribed authority a declaration duly filled and signed by him in Form "C", he is liable to pay tax at higher rate under Section 8 (2). AIR 1967 SC 1758 (1759, 1761): (1967) 3 SCR 645.

(2) The function of Section 8 (2) is to prescribe the rate and the manner of calculation of tax; it is not intended to incorporate the entire procedural and substantive State law relating to tax. (Per Shah J.) AIR 1965 SC 1510 (1511): (1965) 2 SCR 129.

(3) (Case under Mysore Sales Tax 25 of 1957) — Under Section 8 (2), the tax shall be calculated at the same rates and

(b) if the goods are sold to the Government, not being a registered dealer, a certificate in the prescribed form duly filled and signed by a duly authorised officer of the Government.]

(5) Notwithstanding anything contained in this section, [b][the State Government] may, if it is satisfied that it is necessary so to do in the public interest, by notification in the Official Gazette, direct that in respect of such goods or classes of goods as may be mentioned in the notification and subject to such conditions as it may think fit to impose, no tax under this Act shall be payable by any dealer having his place of business in [c][the State] in respect of the sale by him from any such place of business of any such goods in the course of inter-State trade or commerce or that the tax on such sales shall be calculated at such lower rates than those specified in sub-section (1) or sub-section (2) as may be mentioned in the notification.

[a] Substituted for old sub-sections (1) to (4) by the Central Sales Tax (Second Amendment) Act, 1958 (31 of 1958), S. 5 [1-10-1958].
[b] Substituted for "the Central Government" by the Central Sales Tax (Amendment) Act, 1957 (16 of 1957), S. 2 [4-6-1957].
[c] Substituted for "any Union Territory", ibid.
[d] Substituted for the words "two per cent" by the Finance Act 1966 (13 of 1966), S. 51 [w. e. f. 1-7-1966].
[e] Substituted for the words 'seven per cent.' by Central Sales Tax (Amendment) Act, 1963 (8 of 1963), S. 2 [w. e. f. 1-4-1963].
[f] Clause (a) and certain words from clauses (b) and (d) omitted, ibid.

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**Section 8 — Note 4 (contd.)**

in the same manner as would have been done if the sale had, in fact, taken place inside the appropriate State. The ambiguity in the expression "in the (same) manner" in Section 8 (2) is dispelled by Section 9 (1). (Per Subba Rao and Sikri JJ.) AIR 1965 SC 1510 (1514): (1965) 2 SCR 129.

(4) A tax can be demanded under provisions of Section 8 (2) on an inter-State Sale only in cases in which such tax could have been demanded under a law made by a State imposing Sales Tax, if the sale had taken place inside that State. (1962) 13 STC 658: (1962) 40 Mys LJ 739 (DB). (Coffee powder made out of coffee seeds purchased in State of Mysore—Powder sold to dealers in other State — Sales not taxable under S. 8(2)—Case with reference to S. 3(2) of Mysore Sales Tax Act, 46 of 1948.

(5) Section 8 (2) does not provide for the incidence of tax. It provides only the rate at which tax is to be levied on transactions involving inter-State elements. AIR 1963 Andh Pra 29 (31): (1963) 13 STC 779 (DB).

(6) Tax under Central Act is to be calculated after considering exemptions granted and rebates allowed by State Sales Tax Act. AIR 1965 All 166 (168, 169): (1964) 15 STC 245 (DB). (Case of exemption under Section 4 of U. P. Sales Tax Act (15 of 1948) — AIR 1962 Mad 457, Dissented from.)

(7) Section 8 (2) does not change inter-State character of transaction into one of intra-State. Dealer exempt from payment under State law may be liable to pay tax under Central Act. AIR 1962 Mad 290 (293): (1962) 2 Mad LJ 302 * AIR 1962 Mad 457 (458): (1962) 13 STC 433 (DB). (Note: Held overruled on another point by AIR 1965 SC 1510 in AIR 1966 Mad 404.) * AIR 1963 Mad 42 (45): (1962) 2 Mad LJ 327 (DB) * AIR 1962 Ker 264 (264, 265): (1962) 13 STC 832 (DB) * (1962) 40 Mys LJ 577 (DB). (On appeal, see AIR 1955 SC 1510.)

[See also (1966) 1 Mad LJ 541: (1966) 17 STC 396 (Mad) (DB). (Having regard to Sections 4 and 6 of Madras General Sales Tax Act (1 of 1959) and Section 15 of Central Act (as amended in 1958) charge under Central Sales Tax Act is valid and tax paid pursuant thereto is not liable to be refunded.)]

(8) The words "any such dealer" in Section 8 (2) prior to amendment in 1958 must mean a dealer as defined in Section 2(b) of the Central Act. Even if a person is dealer under both enactments, he may be liable to taxation under the Central Act and not liable to taxation under State enactment. AIR 1962 Ker 264 (265): (1962) 13 STC 432 (DB).

(9) The rate applicable referred to in Section 8 (2) (b) is the general rate prescribed by Section 3 of Madras Sales Tax Act (1 of 1959) and not the special rate imposed in certain special circumstances under Section 21-A of Madras Prohibition Act (10 of 1937). AIR 1965 Mad 115 (117, 118): (1965) 1 Mad LJ 461 (DB).

(10) The effect of Sections 8 (2) and and 9(1) is to assimilate the provisions of State enactments even in respect of the manner of levy and not merely the rate. AIR 1966 Mad 404 (405): (1966) 1 Mad LJ 127 (DB).

**Section 8 — Note 4 (contd.)**

(11) 'Appropriate State' means the State from which the goods moved pursuant to a sale. Where it is brought to the notice of the assessing authority in an appropriate State that the identical turnover' has been assessed by another State claiming jurisdiction over it and allowed a concessional rate on filing of Form "C", the authorities, in one State must refer to their counterparts in other States to avoid conflicting orders, 21 STC 378 (DB) (Madras).

**5. "Exempt from tax generally" — Sub-sec. (2-A).** — (1) Sales of Power Loom cloth which are not "first sales" within the meaning of Section 5 (3) (a) of Mysore Sales Tax Act (25 of 1957) are not exigible to tax under the State Act and they would also not be liable to tax under the Central Act when they are effected in the course of inter-State trade or commerce. (Per Majority; Shah J. Contra). AIR 1965 SC 1510 (1513, 1514): (1965) 2 SCR 129 * (1966) 1 SCWR 466: (1966) 17 STC 309 * (1966) 1 SCWR 465: (1966) 17 STC 311.

(2) Section 8 (1) Proviso (as existing prior to amendment in (1958) became applicable to the case of a dealer only if it is established that the sales made by the dealer are goods described in S. 8 (3) to registered dealers outside the State. (1962) 13 STC 658: (1962) 40 Mys LJ 737 (DB). (On appeal, see (1966) 17 STC 311 (SC) ).

(3) The exemption referred to in the proviso to Section 8 (1) (as existing prior to 1958) relates to the sale of goods in the course of inter-State, Trade or commerce referred to in Section 8 (1). (1962) 40 Mys LJ 570: (1962) 13 STC 597 (DB). (On appeal, see (1966) 17 STC 309 (SC).)

(4) Turnover representing purchases not last purchases cannot be taxed under Central Act. AIR 1966 Mad 404 (405, 406): (1966) 1 Mad LJ 127 (DB). (AIR 1962 Mad 457, Held Overruled by AIR 1965 SC 1510.) * (1966) 17 STC 396 (Mad).

(5) Transaction that falls under Section 8 (2) cannot be subjected to any tax, if they are not liable to be taxed under the Sales Tax Law of the State. (1962) 40 Mys LJ 570: (1962) 13 STC 597 (DB). (On appeal, see (1966) 17 STC 307 (SC) ) * (1968) 16 LR 714: (1969) 1 Mys LJ 46 (DB). (Assessment of inter-State Sales of "area" under Central Act — Held, Sections 8 and 9 as amended applied.)

(6) Expression "subject to tax generally" in Section 8 (2-A) of the Central Sales Tax Act does not exclude from its purview rice obtained from paddy that is made taxable under Item 8 of Second Schedule to Andhra Pradesh Central Sales Tax, Act, at 3 nP. per rupee. (1967) 20 STC 340 (Andh Pra) (DB).

(7) An assessee falling under S. 8 (2) is not entitled to the benefit of the exemption granted under Notification No. 2328, dated 13th December 1957 issued by the State Government under Section 9 (1) of the Andhra Pradesh General Sales Tax Act (6 of 1957) in respect of the turnover of hand loom cloth in course of inter-State trade. (1963) 14 STC 720: ILR (1964) Andh Pra 836 (DB).

[See also (1968) 22 STC 404 (Andh Pra) (DB). (Inter-State sales of watery coconuts during August and September 1966 by assessee having purchased those goods from registered dealers — Assessee held not liable to tax, as levy on watery coconuts had to be made on first sale point.)]

(7-A) Where inter-State Sales of tapioca clips were exempted by notification issued under Section 6 of Kerala General Sales Tax Act, for assessment years 1958-59 and 1959-60 assessee is not liable to be assessed for inter-State sales under Central Sales Tax Act. AIR 1966 Ker 60 (62) (DB).

(8) The expression "exempt only in specified circumstances or under specified conditions", occurring in the Explanation to Section 8 (2-A) means such circumstances or conditions the non-existence or non-performance of which precludes the grant of exemption. 1968 Jab LJ 764: 1968 MPLJ 625 (DB).

(9) Words "a dealer" in Section 8 (2-A) means a registered as well as unregistered dealer. 1968 Jab LJ 764: 1968 MPLJ 625 (DB).

(10) Simply because Madras General Sales Tax Act (9 of 1939) provides for exclusion from the turnover under that Act of the amount paid by way of excise duty to the Central Government the same result should not follow in respect of the inter-State Sales. AIR 1962 Mad 290 (293, 294): (1962) 2 Mad LJ 302 (DB).

(11) Excise duty collected by a dealer from his customers is part of consideration for the sale of goods and it should be assessable to sales tax under the Act. 1962 Ker LT 710 : 1963 Ker LJ 63 (DB).

(12) A dealer is not entitled to deduct the excise duty paid in respect of goods sold by him in determining the turnover liable to assessment under the Central Sales Tax Act. AIR 1964 Mys 212 (213, 214): 1964 Kant LJ 30 (DB) * 13 STC 87 (All) (DB). (Case under U. P. Govt. Notification No. 81 — 1365/X-990 — 1956-D/- 1-4-1960.)

(13) In fixing turnover of an assessee for imposing tax on him under S. 8, the turnover represented by the excise duty paid by the assessee should be deducted as they are deductible also under Rr. 7(i) and 7(a) of (Kerala) General Sales Tax Rules (1950). The discount claimed from turnover as defined in S. 2(k) (Kerala.)

**Section 8 — Note 5 (contd.)**

General Sales Tax Act (11 of 1925) should also be deducted. 1966 Ker LJ 1085: 1967 Ker LT 657 (DB).

**6. Goods Referred to in Cl. (b) of Sub-section (3).**—(1) The expression 'in the manufacture of goods' in S. 8(3)(b) should normally encompass the entire process carried on by the dealer of converting raw materials into finished goods. Where any particular process is so integrally connected with the ultimate production of goods that Drawing and photographic materials for designing cloth and humidifiers, exhaust fans and similar electrical equipments are goods intended for use "in the manufacture of goods" in factory manufacturing cotton and other textiles. But building materials including lime and cement not required in manufacture of tiles for sale cannot be so regarded. AIR 1965 SC 1310 (1312, 1313) : (1965) SCR 900.

(2) A dealer engaged both in mining operations and in manufacturing process is entitled to include in the specification (i) locomotives and motor vehicles which are used in carrying raw materials and removing materials during the process of manufacture and thereafter to different places and are also used both underground and on the surface in mining operations and in transport of crude ore and stores for mining operations, (ii) accessories and spare parts for locomotives and motor vehicles which are necessary for maintaining and ensuring continuous operation of the locomotives and motor vehicles and (iii) tyres and tubes which are necessary for the maintenance of motor vehicles set out in Item (i). AIR 1965 SC 891 (894, 895): (1965) 2 SCJ 668 (AIR 1962 Patna 366, Partly reversed.)

(3) The goods must be intended for use only in the actual activity of mining which would include raising the coal and storing it in heaps or in ware-houses. Spare parts of motor vehicles including tyres and tubes, and motor trucks cannot be included in the certificate of a company who is owner of a colliery and carrying on business of mining coal and trading in coal and coke. 1967 MPLJ 131: (1966) 17 STC 510 (SC).

(4) The cane baskets which are intended to be used by the sanitary department cannot be specified in the certificate, of registration. But the cane baskets required for carrying ore and other materials used in mining or in the manufacture of goods can be specified in the certificate. AIR 1965 SC 891 (895) : (1965) 2 SCJ 668. (AIR 1962 Pat 300, Partly Reversed.)

(5) Stationery is not intended for use in the manufacture of processing of goods for sale or for mining operations, cannot be allowed to be specified. AIR 1965 SC 891 (895) : (1965) 2 SCJ 668.

(6) Laboratory fittings which are essential for sampling and analysis of ore and other raw materials in mining operations and in the process of manufacture can be specified. AIR 1965 SC 891 (895): (1965) 2 SCJ 668. (AIR 1962 Pat 366, Partly Reversed.)

(7) Goods purchased for the hospital such as equipment, furnishings and fittings are not intended for use in the manufacture or processing of goods for sale or in the mining operations. AIR 1965 SC 891 (894) : (1965) 2 SCJ 668 * 1967 MPLJ 131: (1966) 17 STC 510 (SC).

(8) The production or storage of raw materials for manufacture is not manufacture itself. It may be an essential preclude to manufacture, but not a part of the process of manufacture as such manufacture starts only after the raw materials have been collected at the factory. 1964 Ker LJ 70. (Manure, rice, jaggery and items of general stores are not goods for use in the manufacture or processing of tea for sale.)

(9) The expressions "container" and "materials intended for being used for the packing of goods" as used in Section 8(3)(c) is deliberately couched in a language which bring within its scope all kinds of ready-made receptacles or other materials which are intended or by a slight alteration or fabrication can be converted into such receptacles for the purpose of storage of goods provided the use to which those receptacles for storage or transportation of goods contained therein for sale. (1968) 22 STC 264 : (1969) 71 Punj LR (D) 132 (DB). (Terms as 'tin sheets' and 'tin plates' intended to be used to make containers for filling up the dealer's vegetable oil preparations therein for transport and sale, ordered to be added in the certificate.) * AIR 1965 All 166 (170) : (1964) 15 STC 245 * 1964 Ker LJ 70.

(10) Turnover relating to metal containers in which Coffee powder was supplied was taxable in view of S. 8 (3) (as existing prior to 1958). (1962) 40 Mys LJ 739. (On appeal, See (1966) 17 STC 311 (SC) ).

(11) In view of Ss. 8(3) and 8(1), a distributor of electricity is a "dealer" entitled to registration under S. 7(2). AIR 1964 Mad 477 (480) : (1963) 2 Mad LJ 225.

(12) Where for assessment years 1958-59 and 1959-60, an assessee firm, who undertook execution of electrical contracts for certain corporation, purchased some of goods from outside State and upon its declaration a registration certificate was issued under S. 8(3)(b) (as it stood prior to amendment in 1958) the use of goods by the assessee even after date of amendment for fulfilment of the said contract would in terms comply with S. 8(3)(b) and he could not be proceeded against under S. 10-A for contravention

**Section 8 — Note 6 (contd.)**
of S. 10(d). AIR 1965 Mad 407 (409) : (1965) 16 STC 125 (DB).

(13) The Act and the Rules do not impose an obligation upon the purchasing dealer to declare that the goods purchased by him are intended to be used for one purpose only even though under a certificate of registration he is entitled to purchase goods of the classes mentioned in S. 8(3)(b) for more purposes than one. AIR 1967 SC 234 (239) : (1966) Supp SCR 198.

(14) The possible misuse of 'the' certificate cannot, in absence of any provision in the Act or rules framed thereunder afford any justification for putting a restriction on the number of goods the dealer can purchase. AIR 1969 Madh Pra 53 (55) : 1969 Jab LJ 20 (DB).

(15) Where after purchasing the goods for any of the purposes under S. 8(3)(b), purchaser failed to make use of the goods for any such purpose, offence under Section 10(d) is made out. AIR 1967 Ker 221 (222) : 1967 Ker LR 209 (DB).

(16) It is only where after purchase of any goods for any of the purposes specified in S. 8(3)(b), the purchaser fails, without any reasonable excuse, to make use of goods for any such purpose that he will be liable to penalty under S. 10(d). (1968) 1 Mad LJ 455 : 22 STC 17 (DB).

(17) Where purchasing dealer applies for amendment of registration certificate, it is the date on which he makes the application for amendment that should be taken as the date of effectiveness of the amendment, if it is allowed. AIR 1969 Madh Pra 53 (55) : 1969 Jab LJ 20 (DB).

(18) In writ petition by a Company against the order of Sales Tax Officer under S. 8(3)(b), read with R. 13 it is not open to High Court to deal with matters not in issue or to decide that other categories of goods which Sales Tax Officer had not ordered to be deleted did not fall within the terms of Section 8(3)(b), read with R. 13. AIR 1965 SC 1310 (1312) : (1965) 1 SCR 900.

(19) Where a dealer registered under S. 7 applied before Sales Tax Authority for specification of certain goods in his certificate of registration under S. 8(3), and on registration of his application and the revision therefrom he files petition under Art. 226 of Constitution, he must accept the position that Ss. 7(3) and 8(3) under which he was seeking the relief of specification were valid. AIR 1962 Madh Pra 128 (130) : 1962 Jab LJ 349 (DB).

**7. Declaration to be furnished — Sub-section (4).**—(1) For being qualified to pay tax at lower rate under S. 8(1), a registered selling dealer must furnish to the prescribed authority a declaration duly filled and signed by him in for "C". If he fails to do so, he is liable to pay tax at higher rate mentioned in S. 8(2). AIR 1967 SC 1758 (1759, 1761) : (1967) 3 SCR 645. (Rule 10(1) of Central Sales Tax (Mad.) Rules (1957) providing that declaration shall not contain more than one transaction is invalid.)

(2) It is not open to the Sales Tax authority, under the Act, to deny to the selling dealer the benefit of concessional rate under S. 8(1) on the ground that the certificate Form "C" mentions more purposes than one for which the goods are intended to be used or that the goods are incapable of being used for the purpose for which they are declared to be purchased, or that the goods are applied for some other purpose not mentioned in the certificate in Form "C". AIR 1967 SC 234 (239, 240) : 1966 Supp SCR 198.

(3) The Phrase in the prescribed manner occurring in S. 8 (4) of the Act only confers power on the rule making authority to prescribe a rule stating what particulars are to be mentioned in the prescribed form, the nature and value of the goods sold, the parties to whom they are sold. and to which authority the form is to be furnished. But it does not authorise the rule-making authority to prescribe a time-limit within which the declaration is to be filed by the registered dealer. Thus, the third proviso to R. 6(1) of the Central Sales Tax (Kerala) Rules, 1967 is ultra vires the rule making power under S. 8(4) read with S. 13(4)(c). AIR 1967 SC 1823 (1825, 1826) : (1967) 3 SCR 518.

(4) Rule 8(2) of Central Sales Tax (U. P.) Rules prescribing time limit for submission of "C" forms is repugnant to S. 8(4) of the Act and is inconsistent with R. 5-A of the above Rules. State Government has no power, either under S. 8(4) or under S. 13(4)(e) to prescribe such time limit. AIR 1965 All 483 (485, 486) : (1965) 16 STC 21.

(5) Rule 14-A as framed by Government of Andhra Pradesh prescribing period for furnishing declaration is not ultra vires its powers and does not go beyond the scope of Sec. 8 (4). AIR 1962 Andh Pra 204 (210) : (1961) 2 Andh WR 344 (DB). (No longer good law in view of AIR 1967 SC 1823).

(6) As per decision of Supreme Court in State of Madras v. R. Nandlal and Co. (AIR 1967 SC 1758), R. 8(1) of M. P. Sales Tax (Central) Rules (1957) is unenforceable. (1968) 21 STC 360 : 1968 MPLJ 463 (DB). (Goods sent from different places — Sales however, one transaction — Submission of one "C" form is enough — Dealer held entitled to lower rate of tax.)

(7) Rule 8(2) of M. P. Sales Tax (Central) Rules (1957) providing that the declaration must be attached to the return is invalid — It has no mandatory

[a][9. **Levy and collection of tax and penalties.**—(1) The tax payable by any dealer under this Act on sales of goods effected by him in the course of inter-State trade or commerce (whether such sales fall within clause (a) or clause (b)

**Section 8 — Note 7 (contd.)**

force so as to deprive a dealer of the benefit of S. 8(1) if he omits to attach to his return the declaration but files it before assessment. AIR 1967 Madh Pra 124 (125) : 1966 Jab LJ 1063 (DB).

(8) Rule 5(1) of the Central Sales Tax (Madras) Rules, is so far as it prescribes a time-limit, is invalid as being in excess of the rule-making power of the State Government. AIR 1968 Mad 311 (314) : (1968) 1 Mad LJ 174 (DB). (AIR 1963 Mad 125 and AIR 1962 Mad 410, held no longer good law in view of AIR 1967 SC 1823.)

(9) Rules 9(2)(a) and 9-B (3)(a) of Central Sales Tax (Bihar) Rules (1957) imposing rigid time limit for filing of declaration in Form "C" and Certificates in Form "D" are ultra vires rule-making power of State Government. AIR 1969 Pat 42 (45, 46, 47) : 23 STC 142 (DB).

(10) Rule 7(2A) of the Central Sales Tax (Punjab) Rules (1957) is consistent with S. 8(4) or any provision of Central Sales Tax (Registration and Turnover) Rules (1957). (1966) 17 STC 185 : ILR (1966) 2 Punj 311 (DB).

(11) The time factor in filing the "C" forms should be understood not in the sense of a strict limitation for the purpose, but it would be necessary to file such forms within a reasonable time even though before Appellate Assistant Commissioner. (1967) 2 Mad LJ 432 : 80 Mad LW 551 (DB). * AIR 1968 Mad 311 (314, 315) : (1968) 1 Mad LJ 174 (DB). (What will be "reasonable time" in a given case will depend upon circumstances of each case.)

(12) Appellate Assistant Commissioner has power to extend time for production of E forms. (1967) 20 STC 266 : (1967) 2 Mad LJ 365 (DB).

(13) Where the assessee complains before the appellate authority that the original authority has not given him sufficient opportunity to produce form "C", in absence of proof of any laches on part of assessee appellate authority can permit assessee to produce the said form even at appellate stage. (1967) 1 Mys LJ 218 (221, 222) : 9 Law Rep 414 (DB).

(14) Non-submission of Form "does not vitiate return" AIR 1962 Mad 410 (412): 1963 Mad WN 484. (Note — Held no longer good law on another point in AIR 1968 Mad 311 in view of AIR 1967 SC 1823).

(15) When the purchasing dealer declares that the subject matter of sale is listed in his Certificate of registration in form "B" as required for that purpose and furnishes declaration in form "C" the selling dealer is not bound to enter into any examination of the matter. This is sufficient compliance with the requirement of law and the selling dealer is entitled to lower rate of taxation. (1963) 14 STC 369 (Mad) (DB).

(16) Where the columns provided for purposes set out in S. 8(3)(b) is not struck out in form C the form is not rendered objective. AIR 1962 Mad 410 (413): 1963 Mad WN 484 (DB). (Note—Held no longer good law on another point in AIR 1968 Mad 311 in view of AIR 1967 SC 1823).

(17) Form C is defective if it lacks a material particular in not mentioning therein date of registration. AIR 1962 Mad 410 (413) : 1963 Mad WN 484 (DB). (Note—Held no longer good law on another point in AIR 1968 Mad 311 in view of AIR 1967 SC 1823).

(18) Where a dealer in Calcutta placed bulk orders with assessee at Ootacamund for purchase of Gramophone needles and even though the contract was silent about instalments, delivery of goods in instalments and payment of price in instalments against separate invoices were only resorted to by the parties for their own conveniences and any mutual agreement during course of fulfilment of contract, such a contract did not give rise to as many distinct sale transactions as there were deliveries by instalments followed by corresponding invoices. In such a case there can be no inference of a severable contract involving more than one transaction, requiring separate "C" Forms. Assessee is entitled to benefit of lower rate assessment. (1964) 15 STC 809 : (1964) 2 Mad LJ 504 (DB).

(19) Where the bills submitted to the purchaser in respect of certain transactions of sale, clearly showed the F. O. B. and shipping charges separately, such charges would not form part of the sale price and their non-inclusion in the C form declaration is not a vitiating circumstance which would disentitle the assessee to claim concessional rate under S. 8(1). AIR 1964 Mad 487 (487, 488) : (1963) 2 Mad LJ 240 (DB).

**8. Power of State Government under** sub-section (5).—(1) Sec. 8 (5) provides for giving individual exemptions in public interest. Such a power is there in all taxation measures. It is to provide for unforeseen contingencies. The power in question cannot be said to be bad. If there is any misuse of that power, the same can be challenged. AIR 1969 SC 147 : (1969) 1 SCJ 318.

## SECTION 9 — SYNOPSIS

1. Scope.
2. Constitutional validity.
3. Imposition of penalty.
4. "Assess, collect and enforce payment of any tax."

of Section 3) shall be levied and collected by the Government of India in the manner provided in sub-section (3) in the State from which the movement of the goods commenced :

Provided that, in the case of a sale of goods during their movement from one State to another being a sale subsequent to the first sale in respect of the same goods, the tax shall, where such sale does not fall within sub-section (2) of Section 6, be levied and collected in the State from which the registered dealer effecting the subsequent sale obtained the form prescribed for the purposes of clause (a) of sub-section (4) of Sec. 8 in connection with the purchase of such goods.

(2) The penalty imposed upon any dealer under Sec. 10A shall be collected by the Government of India in the manner provided in sub-section (3)—

(a) in the case of an offence falling under clause (b) or clause (d) of Sec. 10, in the State in which the person purchasing the goods obtained the form prescribed for the purposes of clause (a) and of sub-section (4) of Sec. 8, in connection with the purchase of such goods;

(b) in the case of an offence falling under clause (c) of Sec. 10, in the State in which the person purchasing the goods should have registered himself if the offence had not been committed.

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**Section 9 — Synopsis (contd.)**

**5. Appropriate State.**
**6. Non-liability to taxation under State Act — Effect.**
**7. Deductibility of excise duty paid.**

**Topic Indicator.**

Object of section — See Note 1.
Prescribed authority in S. 8(4) — See Note 1.
Tax on animals and birds in captivity — See Note 2.
Sub-section (2) — See Note 3.
Sub-section (3) — See Notes 4 and 5.
Fresh assessment — See Note 4.
Appeal to Supreme Court — See note 4.

**1. Scope** — (1) In order to apply Section 9(1) it must be seen that all ingredients and requirements of the provisions are satisfied. 22 STC 285 (AP) (DB). (Consignments booked by first sellers in Mysore purchased in transit by assessee in Andhra and resold outside — 'C' form not obtained — State of Andhra can tax the assessees under Section 9 (1).

(2) Section 9(1) so far as it is concerned with the first sale under S. 3(b) has the effect of being a proviso to S. 4(2) and treating such sale or purchase inside the State from which the goods moved. AIR 1968 Mad 407 (428) : 20 STC 150 : (1967) 2 Mad LJ 552 (DB).

(3) The effect of Ss. 8(2) and 9(1) was to assimilate the provisions of the State enactments even in respect of the manner of levy and not merely the rate. AIR 1966 Mad 404 (405) : (1965) 16 STC 1067 :(1966) 1 Mad LJ 127 (DB).

(4) Liability to pay tax accrued prior to 1st October, 1958 is not wiped out. AIR 1965 Punj 62 (65): 15 STC 746 (DB).

(5) The view that S. 8(4) does not authorise rule making authority to prescribe time limit within which declaration is to be filed by registered dealer, is also supported by the "Note" to the form of declaration — Form C prescribed by R. 12 of the Central Sales Tax (Registration and Turnover) Rules, 1957. AIR 1967 SC 1823 (1824). (Rule 6(1) Third proviso of Central Sales Tax (Kerala) Rules (1957) is ultra vires of S. 8 (4) read with S. 13 (4) (c) ).

(6) The expression "to the prescribed authority" in S. 8(4) means the prescribed authority under S. 9(2) who is empowered to assess the tax. Declaration by a dealer must be submitted before the taxing authority. Submission of declaration must be before and not after the assessment if the dealer claims the benefit of S. 8(1). AIR 1967 Madh Pra 124 (125): 19 STC 46 (DB).

(7) The expression "in the prescribed manner" in S. 8(4) empowers the Government to prescribe only the mode of filing a declaration under S. 8 (4). No time limit can be fixed for filing the declaration. AIR 1967 Madh Pra 124 (125): 1966 MPLJ 1115 : 19 STC 46 (DB).

(8) Appellate authority has no power to admit declaration at appellate stage. AIR 1962 Mad 410 (411, 412) (DB).

(9) The object of S. 9(3) is the effective realisation of the tax payable under the Central Act. (1963) 14 STC 587 (Mys).

(10) Where from facts of a case there can be no inference of a severable contract involving more than one transaction requiring separate "C" Forms, the fact that the delivery of goods in instalments and the payment of price in instalments are resorted to by the parties for their own convenience though not in contract, will not deprive the assessee of concessional rate of assessment . ILR (1965) 1 Mad 506 : (1964) 15 STC 809.

(11) Central Sales Tax (Amendment) Ordinance came into effect on 9-6-1969 with retrospective effect and sought to validate past levies and collections P. T. I. Nagpur Times D/- 10-6-1969.

(3) The authorities for the time being empowered to assess, collect and enforce payment of any tax under the general sales tax law of the appropriate State shall, on behalf of the Government of India and subject to any rules made under this Act, assess, collect and enforce payment of any tax, including any penalty, payable by a dealer under this Act in the same manner as the tax on the sale or purchase of goods under the general sales tax law of the State is assessed, paid and collected; and for this purpose they may exercise all or any of the powers they have under the general sales tax law of the State; and the provisions of such law, including provisions relating to returns, appeals, reviews, revisions references, penalties and compounding of offences, shall apply accordingly :

Provided that if in any State or part thereof there is no general sales tax law in force, the Central Government may, by rules made in this behalf, make necessary provision for all or any of the matters specified in this sub-section, and such rules may provide that a breach of any rule shall be punishable with fine which may extend to five hundred rupees; and where the offence is a continuing offence, with a daily fine which may extend to fifty rupees for every day during which the offence continues.

(4) The proceeds in any financial year of any tax, including any penalty, levied and collected under this Act in any State (other than a Union territory) on behalf of the Government of India shall be assigned to that State and shall be retained and the proceeds attributable to Union territories shall form part of the Consolidated Fund of India.]

[a] Sections 9 and 9A were substituted for former Sec. 9 by the Central Sales Tax (Second Amendment) Act, 1958 (31 of 1958), S. 6 [1-10-1958].

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**Section 9 (contd.)**

**2. Constitutional validity.** — (1) Threat to recover again sales tax on same turnover on behalf of Central Government by another State is infringement of fundamental right under Art. 19(1)(g) of Constitution. Aggrieved citizen is entitled to seek relief under Art. 226 of Constitution. AIR 1961 SC 65 (68, 69, 76) : (1961) 1 SCR 379 : (1960) 11 STC 655.

(2) Section 9(4) is in accordance with Art. 269 (1) (g) as introduced by Constitution (Sixth Amendment) Act, 1956. The distribution of revenue between the Union and the States is a different matter governed by the provisions of Part 12 of the Constitution. Different financial needs of several States will not be justification of discrimination or preference under Article 303 (1). AIR 1968 Mad 407 (419) : (1967) 2 Mad LJ 552 : 20 STC 150 (DB).

(3) Section 9 (4) not violative of Article 301 or 303 (1) of Constitution. AIR 1968 Mad 407 (420): (1967) 2 Mad LJ 552: 20 STC 150 (DB). (Non-deductibility of Excise Duty Act makes no discrimination.

(4) The absence of common authority to resolve conflicting assessments does not affect the validity of S. 9 (3). Section 9 (3) is grounded on convenience and it is not open to challenge on ground of procedural restraint. AIR 1968 Mad 407 (419, 420): (1967) 2 Mad LJ 552: 20 STC 150 (DB).

(5) (Case under Section 16 of Madras Act 1 of 1959). Section 9 (3) is not unconstitutional on ground that it attracts for its purpose provisions of local sales tax law which was not existing when it was enacted. Section 9 (3) can be invoked to assess within limit escaped turnover by best judgment. AIR 1967 Mad 171 (174, 175) (DB). (1966) 2 MLJ 396: 18 STC 370 (DB).

(6) Animal and birds in captivity are movable property and therefore goods within Section 2 (d). Levy of tax on sales of such things is within competence of Parliament within Entry 97 of List 1 of Sch. 7 of Constitution. AIR 1960 Ker 360 (360).

**3. Imposition of penalty.** — (1) Even though Section 9 (3) of the Central Sales Tax Act incorporates by reference the provisions of the Madras General Sales Tax Act (IX of 1939), it cannot be said that the Central Act, enacted in 1956, has incorporated the subsequent amendment made in 1959 in the State Act prescribing levying of penalty, when, in fact, no such penalty was leviable under the Act of 1939. Thus penalty as contemplated under Section 16 (2) of Madras Act (1 of 1959) cannot be imposed by applying Section 9 (3). 22 STC 226 (Mad) (DB) * (1968) 22 STC 404 (Andh Pra) (DB) * (1967) 2 MLJ 261: 20 STC 146 (Mad) (DB).

(2) For late submission of return in Form V appended to M. P. Sales Tax (Central) Rules, penalty can be imposed under Section 17 (3) of State Act notwithstanding Rule 12 of the above Rules. AIR 1968 MP 20 (21, 22): 1967 MPLJ 347: 19 STC 377 (DB).

(3) The provisions of the general sales tax law of the State including

**Section 9 — Note 3 (contd.)**

provisions relating to penalties will be applicable to be entire process of assessment, payment, collection and recovery of the tax payable under the Central Act. That will be the true effect of the expression "shall apply accordingly." (1963) 14 STC 587: ILR (1963) Mys 561 (DB).

**4. "Assess, collect and enforce payment of any tax".** — (1) (Case under S. 13 (3) Mysore Sales Tax Act (25 of 1957) ). For purpose of assessing, collecting and enforcing payment of tax due under Central Sales Tax Act, authorities can exercise all or any of the powers which they have under general sales tax law of the State. (1965) 4 LR 444: (1965) 2 Mys LJ 712.

(2) The expression "in the same manner" as used in Section 9 (3) cannot be extended to any matter beyond the field of procedure as laid down in the general sales tax law of the concerned State and that too only to the extent as specified therein. Thus, the provision of rebate as made in Section 13 (8) of Orissa Sales Tax Act (14 of 1947) (as amended by Orissa Act 31 of 1962) is not applicable to payment of inter-State Sales Tax. ILR (1966) Cut 152: 33 Cut LT 20 (DB).

(3) Notice in connection with assessment under Central Sales Tax Act. is valid if assessee has no difficulty in understanding its purpose. 18 STC 87 (All).

(4) (Case prior to amendment in 1963). Section 9-A, Orissa Sales Tax Act also applies to Central Sales Tax collected by controlled stock-holder. ILR (1963) Cut 535.

(5) The provisions of Orissa Sales Tax Act (14 of 1947) will apply for collection of Central Sales-tax by virtue of S. 9 (3). Under normal circumstances the internal remedies provided by Statute should be exhausted in the first instance before approaching High Court under Article 226 of Constitution. ILR (1964) Cut 464 (DB).

(6) (Case prior to amendment in 1963). Sale Tax under Central Sales Tax Act received by dealer from customers while selling goods comes within definition given in Section 2 (i) of Orissa Sales Tax Act (14 of 1947). ILR (1963) Cut 535.

(7) Where a dealer in iron materials is authorised to realise tax so paid from customers and tax is credited into treasury after realisation, the dealer is entitled to deduct Central Sales Tax paid by him while making purchases of materials in returns for periods prior to amendments effected in 1958. ILR (1963) Cut 535.

(8) The question whether the original article has been converted into a commercially different article is a question essentially of fact and one which appropriately falls for consideration before the Sales Tax Officer. 18 STC 87 (All). (Case under U. P. Government Notification No. St.-1365/X-990-1956 dated 1-4-1960 specifying that turnover of glass bangles shall be liable to tax at a single point.)

(9) Fresh assessment by Sales Tax Officer as per directions of Sales Tax Appellate Tribunal which set aside the orders of assessing and revisional authorities, must be governed by Rule 33 (1) of Kerala General Sales Tax Rules (1950). (1964) 15 STC 711 (All).

(10) Coal agents who had been assessed under E. P. General Sales Tax Act (46 of 1948) and which assessment had become final could not get the benefit of decision of Supreme Court in AIR 1961 SC 1106 holding that coal agents were not "dealers" within the meaning of the Act. Previous assessments did not become without jurisdiction and such coal agents were not entitled for refund of tax paid. (1965) 67 Pun LR 1185.

(11) Bar imposed by Section 26 of Trav-Co. General Sales Tax Act (as amended in 1951) having been lifted by Sales-tax Laws Validation Act (7 of 1956), State was competent to collect all taxes in respect of sales in the course of inter-State and commerce upto 5-9-1955. AIR 1968 SC 389 (393): (1968) 1 SCR 415: 21 STC 403.

(12) An assessee who has been assessed to pay sales tax cannot go upto Supreme Court on a special leave directly against the judgment of the Assessing Authority functioning under Central Sales Tax Act, 1956 without exhausting all his remedies under that Act. AIR 1962 SC 1326 (1328, 1329): 13 STC 6: 1962 Supp (1) SCR 276.

**5. Appropriate State.** — (1) The words 'appropriate State' in Section 9 (3) means the State from which the goods moved pursuant to a sale. Central Government has to collect tax on such sales in the appropriate State. Authorities in one State must refer to their counterparts in other States to avoid conflicting orders. 21 STC 378 (Mad) (DB).

(2) Tax can be levied and collected only in State from where goods began to be moved. AIR 1965 Punj 62 (64): 66 Punj LR 978: 15 STC 746 (DB).

(3) (Case before amendment in 1958). Where assessee, paddy and rice merchant in Madras, transfers documents of title to the goods to the intending purchaser and the latter gets the documents on payment of money and subsequently takes delivery of goods, all these incidents having taken place in Kerala State it is the Kerala State which is appropriate State entitled to levy and collect the tax. 14 STC 856: (1963) 2 Mad LJ 517 (DB).

[9A. **Collection of tax to be only by registered dealers.**—No person who is not a registered dealer shall collect in respect of any sale by him of goods in the course of inter-State trade or commerce any amount by way of tax under this Act, and no registered dealer shall make any such collection except in accordance with this Act and the rules made thereunder.]

[a] See remark (a) under Section 9.

**10. Penalties.**—If any person—

(a) fails to get himself registered as required by S. 7; or

(b) being a registered dealer, falsely represents when purchasing any class of goods that goods of such class are covered by his certificate of registration; or

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**Section 9 — Note 5 (contd.)**

(4) Where an assessee purchased certain goods from certain registered dealers in Rajasthan, where the goods are exempt from sales-tax, and the goods were despatched by rail and during its transit the assessee transferred the documents of title to certain purchasers (who were also registered dealers) in the Madras State, the entire turnover will fall within the ambit of Section 9 (1) of the Central Sales Tax Act and the Madras State will be entitled to tax the subsequent sale. (1967) 2 MLJ 315 (DB).

**6. Non-liability to taxation under State Act — Effect.** — (1) Expression 'levied' in Section 9 (1) refers to 'levied' in Section 5 (3) (a) of Mysore Sales Tax Act (25 of 1957). Sales of powerloom cloth not taxable under State Act because of not being first sales, are also not taxable under Central Act. AIR 1965 SC 1510 (1514): (1965) 2 SCR 129: 16 STC 231 * (1966) 1 SCWR 466: (1966) 17 STC 309 * (1966) 1 SCWR 465: (1966) 17 STC (SC) 311.

(2) The non-liability to taxation under the State Act if the sales were in intra-State trade postulates a non-liability to taxation under the Central Act. AIR 1966 Ker 60 (62): 1965 Ker LT 862: 1965 Ker LJ 720: (1965) 16 STC 794 (DB). (Intra-State sale exempted by notification under Section 6, (Kerala) General Sales Tax Act (11 of 1125).)

(3) The phrase "in the same manner" occurring in Section 9 (3) cannot therefore, take in all exemptions and deductions contemplated under the local sales-tax law: AIR 1962 Mad 290 (294): (1962) 2 MLJ 302: 75 Mad LW 783: (1962) 13 STC 371 (DB).

(4) Transactions which are not taxable at the sale point under the State Sales Tax Act if can be taxed under the Central Sales Tax Act. (Quaere). 22 STC 285: (1969) 1 Andh LT 161 (DB).

(5) (Case under Section 5 (3) (b) of Mysore Sales Tax Act (25 of 1957) ). Though Section 8 referring merely to calculation due to amendment underwent many alterations, Section 9 relating to levy and collection of tax, in substance, remained unchanged. Under Section 9, sales could not have been taxed, as assessee would not have been liable to same under State Act had sales been intra-State sales. (1968) 16 LR 714: (1969) 1 Mys LJ 46. (Assessment of inter-State sales of "areca" under Central Act for assessment year 1959-60 and subsequent years — Held, Sections 8 and 9 as amended applied — Assessee held entitled to refund.)

(6) The expression "levied" in Section 9 (1) comprehends the point at which the tax is attracted under the State Act. Turnover representing purchases, not last purchases cannot be taxed under Central Act. AIR 1966 Mad 404 (405, 406): (1965) 16 STC 1067: (1966) 1 Mad LJ 127 (DB). (AIR 1962 Mad 457 Held Overruled by AIR 1965 SC 1510.) * (1966) 17 STC 396 (Mad).

**7. Deductibility of excise duty paid.** — (1) A dealer is not entitled to deduct the excise duty paid by him in respect of goods sold by him in determining the turnover liable to assessment under Central Sales Tax Act. AIR 1964 Mys 212 (213, 214): 15 STC 176: ILR (1965) Mys 1149 (DB) * (1966) 1 Mad LJ 541: ILR (1967) 1 Mad 709 (DB).

(2) Turnover represented by excise duty payable is to be deducted. Discount claimed under Rule 7 (a) of General Sales Tax Rules (1950) is also to be deducted. 1967 Ker LT 657: 1966 Ker LJ 1085 (DB). ( (1962) 13 STC 371, (1962) 13 STC 927 and (1964) 15 STC 176, held impliedly overruled by (1965) 16 STC 231 (SC).)

(3) The words "in same manner" in Section 9 (3) will not attract Rule 7 (1) of (Ker) General Sales Tax Rules (1950). Thus, excise duty collected by seller from his customers forms part of assessable turnover. Such duty is not an allowable deduction. 1962 Ker LT 710 (DB).

**Section 9-A — Note 1**

(1) Section 9-A Orissa Sales Tax Act also applies to Central Sales Tax collected by controlled stock-holder. ILR (1963) Cut 535.

**Section 10 — Note 1**

(1) Mens rea is an essential ingredient for the offence under Section 10 (b). Representation must have been made

(c) not being a registered dealer, falsely represents when purchasing goods in the course of inter-State trade or commerce that he is a registered dealer; or

(d) after purchasing any goods for any of the purposes specified in Cl. (b) of sub-section (3) of Sec. 8 fails, without any reasonable excuse, to make use of the goods for any such purpose;

(e) has in his possession any form prescribed for the purpose of sub-section (4) of Section 8 which has not been obtained by him or by his principal or by his agent in accordance with the provisions of this Act or any rules made thereunder;

[a][(f) collects any amount by way of tax in contravention of the provisions contained in Sec. 9A;]

he shall be punishable with simple imprisonment which may extend to six months, or with fine, or with both; and when the offence is a continuing offence; with a daily fine which may extend to fifty rupees for every day during which the offence continues.

[a] Inserted by the Central Sales Tax (Second Amendment) Act, 1958 (31 of 1958), S. 7 [1-10-1958].

[a][**10A. Imposition of penalty in lieu of prosecution.**—If any person purchasing goods is guilty of an offence under clause (b) or clause (c) or clause (d) of Section 10, the authority who granted to him or, as the case may be, is competent to grant to him a certificate of registration under this Act may, after giving him a reasonable opportunity of being heard, by order in writing, impose upon him by way of penalty a sum not exceeding one-and-a-half times the tax which would

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**Section 10 — Note 1 (contd.)**

without any belief of its truth. AIR 1965 Ker 212 (213, 214): (1965) 16 STC 323: 1964 Ker LJ 1160.

(2) The liability to penalty under Section 10 (d) is not an absolute one. It is only where after purchase of any goods statedly for any of the purposes specified in Section 8 (3) (b), the purchaser fails, without any reasonable excuse, to make use of the goods for any such purpose that he will be liable to penalty. (1968) 1 Mad LJ 455: 22 STC 17 (DB).

(3) The analogous provisions to Section 10 (d) and Section 10-A of the Central Sales Tax Act in the Madras General Sales Tax Act are Sections 23 and 45 (2) (e). Therefore the levy of penalty under the Central Sales Tax Act is an appealable order in view of Section 31 of latter Act. (1965) 16 STC 125: ILR (1965) 2 Mad 263: AIR 1965 Mad 407 (409) (DB).

(4) Where during period relevant for assessment years 1958-59 and 1959-60 assessee firm undertook execution of electrical contracts and used some goods purchased from outside State under certificate under Section 8 (3) (b) (as prior to amendment in 1958), the use by assessee of such goods for fulfilment of contract did not contravene Section 10 (d) so as to be proceeded against under Section 10-A. (1965) 16 STC 125: ILR (1965) 2 Mad 263: AIR 1965 Mad 407 (408) (DB).

(5) Proceedings under Section 10-A for offence under Section 10 (d) are not barred by earlier proceedings against the same assessee for offence under S. 10 (b). AIR 1967 Ker 221 (222): (1967) Ker LR 209: 20 STC 6 (DB). (Facts constituting offence under Section 10 (b), if true, are not the facts for offence under Section 10 (d).)

**Section 10-A — Note 1**

(1) Dealer under Central Sales Tax Act who defaults in making payment of Central Sales Tax within prescribed time becomes liable to pay penalty under Section 13 (3) of Mysore Sales Tax Act, irrespective of whether default is or is not attributable to contumacious conduct. (1963) 14 STC 587 (Mys) (DB).

(2) Proceedings under Section 10-A for offence under Section 10 (d) not barred by earlier proceedings for offence under Section 10 (b). 1967 Ker LR 209: 20 STC 6: AIR 1967 Ker 221 (222) (DB).

(3) Where the assessee firm undertook execution of electrical contracts for a Corporation and purchased some of their goods from outside State under certificate granted to the assessee under Section 8 (3) (b) (as it stood prior to amendment in 1958), the assessee could not be proceeded against under S. 10-A for contravention of Section 10 (d) for use of electrical goods for fulfilment of his contract even after 1958. AIR 1965 Mad 407: 16 STC 125: ILR (1965) 2 Mad 263 (DB).

(4) Levy of penalty under the Act is an appealable order. AIR 1965 Mad 407 (409): ILR (1965) 2 Mad 263: 16 STC 125 (DB).

(5) The punishment provided in Section 10 (b) and Section 10-A of the Act

have been levied under this Act in respect of the sale to him of the goods if the offence had not been committed :

Provided that no prosecution for an offence under Section 10 shall be instituted in respect of the same facts on which a penalty has been imposed under this section.]

[a] Inserted by the Central Sales Tax (Second Amendment) Act, 1958 (31 of 1958), S. 8 [1-10-1958].

**11. Cognizance of offences.**—(1) No Court shall take cognizance of any offence punishable under this Act or the rules made thereunder except with the previous sanction of the Government within the local limits of whose jurisdiction the offence has been committed or of such officer of that Government as it may, by general or special order, specify in this behalf; and no Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any such offence.

(2) All offences punishable under this Act shall be cognizable and bailable.

**12. Indemnity.**—No suit, prosecution or other legal proceeding shall lie against any officer of Government for anything which is in good faith done or intended to be done under this Act or the rules made thereunder.

**13. Power to make Rules.**—(1) The Central Government may by notification in the Official Gazette, make rules[a] providing for—

(a) the manner in which applications for registration may be made under this Act, the particulars to be contained therein, the procedure for the

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Section 10A — **Note 1 (contd.)**

are only for a false representation of the contents of the certificate of Registration for which the purchaser of goods covered by the certificate cannot be held guilty. 1964 Ker LJ 70.

**Section 11 — Note 1**

(1) Although a criminal Court has no jurisdiction to go into the question as to the process of assessment and sit in judgment on the assessment made by competent authority, appointed under the Statute, a criminal Court can construe the statutory provisions in order to ascertain the guilt or the innocence of the accused and the assessment will not be affected by the decision of a criminal Court. AIR 1966 Andh Pra 77 (80) (DB). (Prosecution under Rule 16 read with Rule 14-A (7) (as introduced in 1958) of Central Sales Tax (Andhra Pradesh) Rules (1957).)

**SECTION 13 — SYNOPSIS**

1. Sub-sec. (1) (b).
2. Sub-sec. (1) (c).
3. Sub-sec. (1) (d).
4. Sub-sec. (4) (c).
5. Sub-sec. (4) (e).

**Topic Indicator**

Central Sales Tax Act (Registration and Turnover) Rules 1957 — See Notes 1 and 2.

Vires of State Rules under the section — See Notes 4 and 5.

**1. Sub-sec. (1) (b).** — (1) Central Sales Tax Act (Registration and Turnover) Rules (1957), Rule 11 (2) (as in 1957) — Rule 11 (2) read with Section 8 does prescribe determination of turnover for purposes of Section 3. AIR 1962 Mad 290 (293): (1962) 2 Mad LJ 302 (DB).

(2) Central Sales Tax (Registration and Turnover) Rules (1957) — This rule both before and after its amendment in 1962, provides for certain deductions which do not include excise duty. (1966) 1 Mad LJ 541: (1966) 17 STC 396 (DB) * AIR 1964 Mys 212 (213) (DB).

**2. Sub-sec. (1) (c).** — (1) Central Sales Tax (Registration and Turnover) Rules (1957), Rule 5 — Sales Tax Authority has no power to refuse to a selling dealer concessional rate under Section 8 (1) on the ground that certificate in Form "C" mentions more purposes than one for which the goods are intended to be used or that the goods were incapable of being used for the declared purpose or that the goods were applied for some other purposes not mentioned in Form "C". AIR 1967 SC 234 (239, 240): 18 STC 222: (1966) Supp SCR 198.

(2) Central Sales Tax (Registration and Turnover) Rules (1957), Rule 13 — Rule 13 does not justify importation of restrictions which are not clearly expressed, nor imperatively intended. Drawing and Photographic materials intended for use as equipment in process of designing cloth, humidifiers, exhaust fans and similar electrical equipment to effectually carry on manufacturing process must be regarded as goods intended for use "in the manufacture of goods". but not building materials including lime and cement which are not required for manufacture of tiles for sale. AIR 1965 SC 1310 (1312 to 1314): (1965) 1 SCR

grant of such registration, the circumstances in which registration may be refused and the form in which the certificate of registration may be given;

(b) the period of turnover, the manner in which the turnover in relation to the sale of any goods under this Act shall be determined, and the deductions which may be made in the process of such determination;

(c) the cases and circumstances in which, and the conditions subject to which, any registration granted under this Act may be cancelled;

[b][(d) the form in which and the particulars to be contained in any declaration or certificate to be given under this Act;

(e) the enumeration of goods or class of goods used in the manufacture or processing of goods for sale or in mining or in the generation or distribution of electricity or any other form of power;

(f) the matters in respect of which provision may be made under the proviso to sub-section (3) of Section 9;

(g) the fees payable in respect of applications under this Act.]

(2) All rules made by the Central Government under sub-section (1) shall be laid before both Houses of Parliament as soon as may be after they are made and shall be subject to such modifications as Parliament may make during the session in which they are so laid or the session immediately following.

(3) The State Government may make rules,[bb] not inconsistent with the provisions of this Act and the rules made under sub-section (1), to carry out the purposes of this Act.

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**Section 13 — Note 2 (contd.)**

900: 16 STC 563. ((1964) 15 STC 771, Reversed.)

(3) Central Sales Tax (Registration and Turnover), Rules (1957), Rule 13 — A dealer engaged in both mining operations and manufacturing process is entitled to specification in his registration certificate locomotives and motor vehicles, their accessories and spare parts, tyres and tubes, and cane baskets required for carrying ore and other material used in mining but not hospital equipments, stationary required for maintenance of records etc. and cane baskets for use by sanitary department. AIR 1965 SC 891 (894, 895): (1965) 2 SCJ 668: (1965) 16 STC 259.

**3. Sub-sec. (1) (d).** — (1) Central Sales Tax (Madras) Rules (1957), Rule 10 (1) — Rule 10 (1) providing that declaration shall not contain more than one transaction, is inconsistent with Rule 13 (1) (d). AIR 1967 SC 1758 (1761): (1967) 3 SCR 645: 20 STC 374.

**4. Sub-sec. (4) (c).** — (1) Central Sales Tax (Kerala) Rules (1957), Rule 6 (1), Third Proviso — The third proviso to Rule 6 (1) is ultra vires the rule making power under Section 8 (4) read with Section 13 (4) (c). Rule making authority has no power to prescribe time-limit within which declaration has to be filed by registered dealer. AIR 1967 SC 1823 (1825, 1826): 20 STC 367: (1967) 3 SCR 518.

(2) Central Sales Tax (Kerala) Rules (1957), Rule 6 (5) and (1) — Rule 6 (5) does not permit investigation being continued after the officer has finally assessed. Taxing officer has no power to reopen assessment. 1961 Ker LJ 111 (DB).

(3) Central Sales Tax (Kerala) Rules (1957), Rule 6 — For assessee's failure to produce evidence (Form C) before assessment, Appellate Tribunal has no power to condone delay and remand case to taxing authority. 1961 Ker LJ 1111.

(4) Central Sales Tax (U. P.) Rules, Rules 8 (2) and 5-A — Rule 8 (2) prescribing time limit for submission of 'C' forms is repugnant to Section 8 (4) of the Act and is inconsistent with R. 5-A. AIR 1965 All 483 (485, 486): (1965) 16 STC 21.

(5) In framing a rule like Rule 14-A with the proviso the concerned Government was well within its rights in prescribing a period for furnishing the declaration. AIR 1962 Andh Pra 204 (210): (1961) 2 Andh WR 344 (DB).

(6) Central Sales Tax (Madras) Rules (1957), R. 5 (7) — Rule 5 (7) is ultra vires Section 13 (3) and (4) in so far as it provides for limitation and determination of escaped turnover by best judgment. AIR 1967 Mad 171 (172, 173): (1966) 2 Mad LJ 396 : 18 STC 370 (DB).

(7) Central Sales Tax (Madras) Rules (1957), Rule 5 (1) — Rule is ultra vires the rule-making power of Government in so far as it fixes time limit. AIR 1968 Mad 311 (314, 315): (1968) 1 Mad LJ 174: 20 STC 388 (DB). (AIR 1963 Mad 125 and AIR 1962 Mad 410 held no longer good law in view of AIR 1967 SC 1823.)

**5. Sub-sec. (4) (e).** — (1) As per decision of Supreme Court in State of Mad-

(4) In particular and without prejudice to the powers conferred by sub-section (3) the State Government may make rules for all or any of the following purposes, namely:—

(a) the publication of lists of registered dealers, of the amendments made in such lists from time to time, and the particulars to be contained in such lists;

(b) the form and manner in which accounts relating to sales in the course of inter-State trade or commerce shall be kept by registered dealers;

(c) the furnishing of any information relating to the stocks of goods of, purchases, sales and deliveries of goods by, any dealer or any other information relating to his business as may be necessary for the purposes of this Act;

(d) the inspection of any books, accounts or documents required to be kept under this Act, the entry into any premises at all reasonable times for

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**Section 13 — Note 5 (contd.)**

ras v. R. Nandlal and Co. (AIR 1967 SC 1758), Rule 8 (1) of M. P. Sales Tax (Central) Rules (1957) as framed under Sections 13 (3) and 13 (4) (e) of the Central Sales Act, is unenforceable. (1968) 21 STC 360: 1968 MPLJ 463 (DB). (Goods sent from different places— Sales, however, one transaction — Submission of one "C" Form is enough — Dealer held entitled to lower rate of tax.)

(2) Madhya Pradesh Sales Tax (Central) Rules (1957), Rule 8 (2) — Rule 8 (2) of M. P. Sales Tax (Central) Rules, providing that the declaration must be attached to the return is invalid. It has no mandatory force as to deprive a dealer of the benefit of Section 8 (1) if he omits to attach to his return the declaration but files it before assessment. AIR 1967 Madh Pra 124 (125) (DB).

(3) Central Sales Tax (Andhra Pradesh) Rules (1957), Rule 9-A — Rule is applicable to inter-State transactions and if the declaration forms produced by selling dealer do not satisfy any of the conditions prescribed by the rule, he will not be entitled to concessional rate under Section 8 (1). (1967) 2 Andh WR 47: (1967) 19 STC 113 (DB).

(4) Central Sales Tax (Andhra Pradesh) Rules (1957), Rule 14-A (as introduced in 1958) and R. 16 — Sub-r. (7) of Rule 14-A (as introduced in 1958) for purposes of Rule 16 which makes the breach punishable in law cannot be attracted unless the breach complained of is in relation to a tax due from the month Rule 14-A came into force or subsequent thereto. AIR 1966 Andh Pra 77 (78, 79, 80). (Tax due for 1957 — Assessment in 1960 — Non-payment of tax — No offence within Rule 16.)

(5) Central Sales Tax (Punjab) Rules (1957), Rule 7 (2-A) — Rule 7 (2-A) is within the rule-making power of the State Government under Section 13 of the Central Sales Tax Act and is consistent with the Act as well as the Sales Tax (Registration and Turnover) Rules made by the Central Government under the Act. ILR (1966) 2 Punj 311: (1966) 17 STC 185 (DB).

(6) Central Sales Tax (Madras) Rules (1957), Rule 10 (1), Proviso — Even in proviso to Rule 10 (1) (prior to amendment in 1961), the term transaction of sale was equated to fulfilment of a given purchase order, even though it might have led the parties to the contract to arrange for the delivery of the goods and the payment of price in instalments. (1964) 15 STC 809 (Mad) (DB). (Each purchase order carried out in certain instalments — Separate invoices for each instalment — Payment also by instalments — Method of fulfilment adopted by parties for convenience though not in the contract — Held the contract did not involve more than one transaction of sale — Separate "C" Form for each instalment was not necessary.) * AIR 1964 Ker 131 (133) (FB).

(7) Central Sales Tax (Madras) Rules (1957), Rule 9-B (2) and (5) — Sub-r. (5) of Rule 9-B is ultra vires the rule-making power of the State Government. Production of form "C" declaration cannot be insisted upon to claim exemption under Section 6 (2). Sub-r. (2) is not mandatory. (1967) 20 STC 263: ILR (1968) 2 Mad 116 (DB).

(8) Central Sales Tax (Madras) Rules (1957), Rule 10 (1), Proviso — Where from facts of a case there can be no inference of a severable contract involving more than one transaction requiring separate "C" Form, the fact that the delivery of goods in instalment and the payment of price in instalments are resorted to by the parties for their own convenience though not in contract, will not deprive the assessee of concessional rate of assessment. ILR (1965) Mad 506: (1964) 15 STC 809 (DB).

(9) Central Sales Tax (Madras) Rules (1957), Rule 10 (1) — Rule 10 (1) applies to dealer wishing to purchase goods, but not to one wishing to sell goods. Rule has no application to purchasing dealer outside Madras State. Rule providing that declaration shall not contain more than one transaction, is inconsistent with Section 13 (1) (d). AIR 1967 SC 1758 (1761): (1967) 3 SCR 645; 20 STC 374.

the purposes of searching for any such books, accounts or documents kept or suspected to be kept in such premises and the seizure of such books, accounts or documents;

(e) [c][the authority from whom, the conditions subject to which and the fees subject to payment of which] any form of declaration prescribed under sub-section (4) of Section 8 may be obtained, the manner in which the form shall be kept in custody and records relating thereto maintained, the manner in which any such form may be used and any such declaration may be furnished;

(f) in the case of an undivided Hindu family, association, club, society, firm or company or in the case of a person who carries on business as a guardian or trustee or otherwise on behalf of another person, the furnishing of a declaration stating the name of the person who shall be deemed to be the manager in relation to the business of the dealer in the State and the form in which such declaration may be given;

(g) the time within which, the manner in which and [d][the authorities to whom] any change in the ownership of any business or in [e][the name, place or nature] of any business carried on by any dealer shall be furnished.

(5) In making any rule under this section the State Government may direct that a breach thereof shall be punishable with fine which may extend to five hundred rupees and when the offence is a continuing offence, with a daily fine which may extend to fifty rupees for every day during which the offence continues.

[a] For the Central Sales Tax (Registration and Turnover) Rules, 1957, see Gaz. of Ind., Extra., 28-2-1957, Pt. II, S. 3, p. 1039. For the Central Sales Tax (Union Territories) Rules, 1957, see S. R. O. 3784, published in the Gaz. of Ind., 30-11-1957, Pt. II, S. 3, p. 2741. By sub-rule (2) of Rule 1, these Rules shall apply to all the Union territories other than Delhi and Manipur. For Rules in Delhi U. T. see Gaz. of Ind., 29-6-1957, Pt. II, S. 3, p. 1335 and for Manipur, ibid, p. 1340. For Central Sales Tax (Pondicherry) Rules 1963, see Gaz. of Ind., 2-6-1963, Pt. II, S. 3 (i), Ext., p. 463.

[b] Substituted for clause (d) of sub-section (1) of S. 13, by the Central Sales Tax (Second Amendment) Act, 1958 (31 of 1958), S. 9 [1-10-1958].

[bb] Central Sales Tax Rules have been made by the State Governments under the rule-making power conferred by this section.

For such rules see the following State Gazettes:— (1) A. P. Gaz., 28-2-1957, Pt. II, (R. S.) p. 37; (2) Assam Gaz. 6-6-1957, Ext., p. 549; (3) Bom. Gaz., 7-3-1957, Pt. IV-A, p. 322; (4) M. P. Gaz., 10-5-1957, Pt. IV (ga), p. 297; 321; (5) Mys Gaz., 21-2-1957, Ext.; (6) Raj Gaz., 4-3-1957, Pt. IV (ga), Ext., p. 321; (7) U. P. Gaz., 28-2-1957, Ext., p. 1; (8) Cal Gaz., 1-10-1958, Pt. I, Ext., p. 117; (9) Pondi. Gaz., 4-12-1967, Ext., p. 1; (10) Gaz. of Ind., 28-10-1964, Pt. II, S. 3 (i), Ext., p. 763, for such rules in Goa, Daman and Diu.

[c] Substituted for the words "the authority from which", by Act 31 of 1958, S. 9 (ii) [1-10-1958].

[d] Substituted for the words "the authorities to which", ibid.

[e] Substituted for the words "the nature", ibid.

## CHAPTER IV
## GOODS OF SPECIAL IMPORTANCE IN INTER-STATE TRADE OR COMMERCE

**14. Certain goods to be of special importance in inter-State trade or commerce.**—It is hereby declared that the following goods are of special importance in inter-State trade or commerce:—

**Section 14 — Note 1**

(1) Section 14 deals with declared goods in respect of which by Section 8 (1) read with Section 8 (3) (a), the concessional rate of tax applies when the goods are purchased as being intended for resale. AIR 1967 SC 234 (237): (1966) Supp SCR 198: (1966) 18 STC 222.

(i) coal, including coke in all its forms;
(ii) cotton, that is to say, all kinds of cotton (indigenous or imported) in its unmanufactured state, whether ginned or unginned, baled, pressed or otherwise, but not including cotton waste;
[a][(iia) cotton fabrics, as defined in Item No. 12 of the First Schedule to the Central Excises and Salt Act, 1944;
(iib) cotton yarn, but not including cotton yarn waste;]
(iii) hides and skins, whether in a raw or dressed state;
(iv) iron and steel, that is to say,—
(a) pig iron and iron scrap;
(b) iron plates sold in the same form in which they are directly produced by the rolling mill;
(c) steel scrap, steel ingots, steel billets, steel bars and rods;
(d) (i) steel plates,
(ii) steel sheets,
(iii) sheet bars and tin bars,
(iv) rolled steel sections,
(v) tool alloy steel,
} Sold in the same form in which they are directly produced by the rolling mill;
(v) jute, that is to say, the fibre extracted from plants belonging to the species corchorus capsularis and corchorus oliorious and the fibre known as mesta or bimli extracted from plants of the species hibiscus cannapinus and hibiscus sab-dariffa-var altissima whether baled or otherwise;
(vi) oil-seeds, that is to say, seeds yielding non-volatile oils used for human consumption, or in industry, or in the manufacture of varnishes, soaps and the like, or in lubrication, and volatile oils used chiefly in medicines, perfumes, cosmetics and the like;
[b][(vii) rayon or artificial silk fabrics, as defined in Item No. 12A of the First Schedule to the Central Excises and Salt Act, 1944;

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**Section 14 — Note 1 (contd.)**

(2) The effect of Ss. 14 and 15 of Central Sales Tax Act read with Article 286 (3) of the Constitution is that it is not competent for the State to demand a tax in respect of the sale or purchase of declared goods in excess of two per cent of the sale or purchase price. AIR 1962 Mys 1 (2, 3): 39 Mys LJ 518: (1961) 12 STC 629.

(3) Section 14 enumerates the various goods which are declared to be special importance in inter-State trade or commerce. One of the items so declared, is "cotton". AIR 1967 SC 1616 (1620): (1967) 3 SCR 577: 20 STC 290. (Section 5 (1), Second Proviso and Section 5 (2) (a) (vi) of Punjab Act 46 of 1948 are opposed to Section 15 (a) of Central Act — Levy of purchase tax on cotton held not valid.)

(4) Ginned and unginned cotton are the same commodity and a person who buys unginned cotton gins it and then sells ginned cotton is dealing only in one commodity. This commodity has been declared to be one of goods of special importance in inter State trade. A person dealing in it is entitled to benefit of Section 15. ILR (1960) Punj 852 (DB). (E. P. General Sales Tax Act (46 of 1948) (as amended by Punjab Act (7 of 1958) is invalid.)

(5) Under Section 14, sugar is declared to be of "special importance in inter-State trade or commerce". Section 14 was enacted in order to enable Parliament to impose in exercise of powers conferred under Article 286 (3), restriction and conditions in regard to the system of levy, rates and other incidents of sales tax imposed on sale of sugar by a State Sales Tax Act. 1966 All LJ 815: 19 STC 241 (DB).

(6) The expression "Oil seeds" in Section 14 (vi) includes coconut and copra. AIR 1962 Mys 1 (2, 3): 39 Mys LJ 518: (1961) 12 STC 629 (DB).

(7) Gingely seeds and mustard seeds are oil seeds within the meaning of Section 14 (vi). AIR 1968 Ker 193 (196): 1967 Ker LT 731: 20 STC 470. ((1961) 12 STC 795 (Andh Pra), Dissented from.)

(8) Copra is oil seed within Section 14 (vi) and as a result Section 15 comes into operation. (1966) 18 STC 464: 1965 Ker LT 1223 (DB).

(9) Cess imposed by Market Committee under Madras Commercial Crops Market Act (20 of 1933) (as amended in 1958) is in the nature of Sales Tax and imposition is in contravention of Sections 14 and 15 of Central Sales Tax Act read with Entry 5 (a) of IVth Schedule to Mysore Sales Tax Act and Section 5 (4) thereof. 13 Law Rep 327 (DB).

(viii) sugar, as defined in Item No. 8 of the First Schedule to the Central Excises and Salt Act, 1944;

(ix) tobacco, as defined in Item No. 9 of the First Schedule to the Central Excises and Salt Act, 1944;

(x) wollen fabrics, as defined in Item No. 12B of the First Schedule to the Central Excises and Salt Act, 1944.]

°[(xi) ° ° ° °]

[a] Substituted for item (iia) by the Central Sales Tax (Second Amendment) Act, 1958 (31 of 1958), S. 10 [1-10-1958.]

[b] Inserted ibid.

[c] Item (xi) silk fabrics added by Act 14 of 1961, omitted by the Finance Act, 1968 (19 of 1968), S. 63.

**[15. Restrictions and conditions in regard to tax on sale or purchase of declared goods within a State.**—Every sales tax law of a State shall, in so far as it imposes or authorises the imposition of a tax on the sale or purchase of declared goods, be subject to the following restrictions and conditions, namely:—

(a) the tax payable under that law in respect of any sale or purchase of such goods inside the State shall not exceed [b][three per cent] of the sale or purchase price thereof, and such tax shall not be levied at more than one stage;

(b) where a tax has been levied under that law in respect of the sale or purchase inside the State of any declared goods and such goods are sold in the course of inter-State trade or commerce, the tax so levied shall be refunded to such person in such manner and subject to such conditions as may be provided in any law in force in that State.]

[a] Substituted by the Central Sales Tax (Second Amendment) Act, 1958 (31 of 1958), S. 11 (1-10-1958). Section so amended came into force on 1-10-1958—see Gazette of India, 1-10-1958, Pt. II, S. 3 (i), Ext., p. 476. Original section was enforced on 1-5-1957—see Gazette of India, 28-2-1957, Pt. II, S. 3, Ext., p. 1037.

[b] Substituted for the words "two per cent" by the Finance Act, 1966 (13 of 1966), S. 51 (b) (with effect from 1-7-1966).

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**SECTION 15 — SYNOPSIS**

**1. Scope.**
**2. Imposition of tax under State Laws.**
**3. Effect of Additional Duties of Excise (Goods of Special Importance) Act (1957).**
**4. Sale or purchase inside the State.**
**5. Claim for refund.**

**Topic Indicator**

Clause (a) — See Note 2.
Clause (b) — See Notes 4 and 5.

**1. Scope.** — (1) Article 286 (3) of Constitution only modifies charging section of State Act in accordance with S. 15 (a). The effect of Article 286 (3) is brought out by second proviso to Section 5 (1) of East Punjab General Sales Tax Act (46 of 1948). AIR 1965 SC 957 (961): (1965) 1 SCR 592: (1965) 16 STC 310.

(2) Notification issued by Central Government bringing into force Section 6, the charging section as from 1-7-1957 is not invalid in so far as it relates to declared goods until such date as relevant provisions of Section 15 are also brought into force. AIR 1963 Mad 42 (44, 45): (1962) 2 Mad LJ 327: (1962) 13 STC 425 (DB).

(3) Though Section 15 had not in fact been brought into force. when, with that knowledge, the Parliament expressly stated in Section 7 that the restriction imposed by Section 15 shall apply on 1st April, 1958, the ordinary rule of construction would be that those restrictions would apply irrespective of whether Section 15 was actually brought into force on 1st April, 1958 or not. AIR 1963 Orissa 185: 30 Cut LT 142: (1963) 14 STC 512 (DB).

(4) Section 15 contains an absolute direction that the State-law in respect of declared goods, shall make provision for levy of sales-tax at only one point. AIR 1965 Mad 360 (362): ILR (1965) 2 Mad 83: (1965) 16 STC 29 (DB).

(5) Section 15 (b) is independent of Section 15 (a) and imposes an additional condition. Section 15 (b) does not mean that the violation of any of the prohibitions, which are mandatory, shall not render the imposition ultra vires so as to enable an aggrieved assessee to seek relief from the Court to

Section 15 — **Note 1 (contd.)**
restrain the proceedings for any such assessment. AIR 1965 Cal 498 (504).

**2. Imposition of tax under State Laws.** — (1) Kerala — Gingely seeds and mustard seeds are oil seeds within the meaning of Section 14 (vi). The dealer in these goods is, therefore, entitled to exemption in respect of them if he is not the first seller of these goods in the State, and is liable to be taxed only at two per cent., if he is the first seller. AIR 1968 Ker 193 (196): 1967 Ker LT 731: 20 STC 470. ((1961) 12 STC 795 (Andh Pra) Dissented from.)

(2) Copra is an oil seed within the meaning of Section 14 (vi) and as a result Section 15 comes into operation. Thus, assessment thereon has to be made under Section 3 of Trav-Co. General Sales Tax Act (1125) read with S. 15 of the Central Act. 1965 Ker LT 1223: (1966) 18 STC 464 (DB).

(3) Madras — Though the levy may be under two different enactments both should be regarded as one for purposes of Section 15 of the Central Sales Tax Act. Subject to the requirement that the levy should be at identical point at a fixed stage in the series of transactions, there is nothing in Sec. 15 of the Central Sales Tax Act which forbids multiple levy of rates amounting to two per cent or below in the aggregate on such identical point. AIR 1968 Mad 90 (93): (1967) 2 Mad LJ 146 (DB).

(4) Cess imposed by Market Committee under Madras Commercial Crops Market Act (20 of 1933) is in the nature of Sales Tax and imposition is in contravention of Sections 14 and 15 of Central Sales Tax Act read with Entry 5 (a) of IVth Schedule to Mysore Sales Tax Act and Section 5 (4) thereof. (1968) 13 Law Rep 327.

(5) Mysore — The effect of Ss. 14 and 15 of Central Tax Act read with Article 286 (3) of the Constitution is that it is not competent for the State to demand a tax in respect of the sale or purchase of declared goods in excess of two per cent of the sale or purchase price thereof. AIR 1962 Mys 1 (2, 3): 39 Mys LJ 518: (1961) 12 STC 629 (DB). (Further impost on sales and purchase of "oil seeds" in Mysore State under Section 11, Madras Commercial Crops Markets Act is invalid.)

(6) The Fourth Schedule to Mysore Sales Tax Act (25 of 1957) imposing sales tax only at 2 per cent of the turnover relating to groundnuts does not violate Section 15 of the Central Sales Tax Act. (1962) 40 Mys LJ 631 (DB).

(7) Punjab — Provisions of Punjab General Sales Tax Act 46 of 1948 especially those of Section 5 (1), Second Proviso and Section 5 (2) (a) (vi) are invalid as being opposed to those of Central Sales Tax Act. AIR 1967 SC 1616 (1624, 1626): (1967) 3 SCR 577: 20 STC 290. (Levy of purchase tax on cotton held to be not valid.)

(8) In absence of proof that any declared goods have been subjected to a tax exceeding two per cent or that the sale or purchase tax has been levied at more than one stage, the imposition of purchase tax on goods purchased before their use in manufacture and that of manufactured goods do not offend Section 15. AIR 1963 Punj 549 (554): 65 Pun LR 515: 14 STC 559 (DB).

(9) A person, who buys unginned cotton gins it and then sells ginned cotton, is dealing only in one commodity. A person dealing in it is entitled to benefit of Section 15. In as much as under East Punjab General Sales Tax Act (46 of 1948) (as amended in 1958), he has to pay additional tax, the law imposing that tax is invalid. ILR (1960) 1 Punj 852 (DB).

(10) Dealers in oil seeds and pressing oil and dealers in non-ferrous metals do not come within the purview of S. 15. ILR (1960) 1 Punj 852 (DB).

(11) Uttar Pradesh — Imposition of tax by U. P. Government on khandsari sugar for periods 1-4-1958 to 30-9-1958 and 1-10-1958 to 28-2-1959 is legal in view of Sections 14, 15 of Central Sales Tax Act (1956), Section 7 of Addl. Duties of Excise (Goods of Special Importance) Act (1957) and definition of sugar as given in Central Excises and Salt Act (1944). 1966 All LJ 815: 19 STC 241 (DB).

(12) West Bengal — A violation of any of the conditions prescribed under Section 15 (as amended in 1958) will render the taxation of a declared goods ultra vires whether, in fact, it is sold in the course of inter-State trade or not. AIR 1965 Cal 498 (504).

(13) Sec. 15 came into force on 1-10-1958. Thus tax levied by Bengal Act of 1941 on sale of tobacco after 1-10-59 is valid but tax in excess of 2 per cent levied before 28th October 1959 is not valid. AIR 1965 Cal 498 (504).

(14) Imposition of sales tax on Cotton fabrics under Section 5 (1) of Bengal Act 6 of 1941 as it stood prior to amendment of West Bengal Act (13 of 1959) in excess of 2 per cent, laid down in Section 15 of Central Act, was ultra vires, till the time the former section was amended to conform with latter section. AIR 1965 Cal 203 (205. 206).

**3. Effect of Additional Duties of Excise (Goods of Special Importance) Act (1957).** — (1) The sale of a thing "in the course of inter-State trade or Commerce" and the intra-State sale of a thing which is of special importance to inter-State trade or commerce are not identical transactions. Central Act, 58 of 1957 does not take away power of States to levy sales tax on intra-State sales of tobacco. AIR 1965 Cal 498 (505, 506).

**16. Repeal of Act 52 of 1952.**—[Repealed by the Repealing and Amending Act, 1960 (58 of 1960), S. 2 and First Schedule.

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**Section 15 — Note 3 (contd.)**

(2) Excise duty does not amount to tax on sale or purchase of goods merely because an excise duty is intended to replace a sale or purchase tax does not convert the former into latter. (1966) 68 Punj LR 440: (1966) 18 STC 69 (DB). (Case under Section 3 Addl. Duties of Excise (Goods of Special Importance) Act, 1957.)

(3) What Section 15 of the Central Sales Tax Act (as it stands after the amendment in 1958) prohibits is the imposition of the sales tax at two stages of the same transaction and not the imposition of two different duties on two different transactions. AIR 1965 Cal 498 (505). (Levy of excise duty on tobacco and sales tax under State Act on Zarda manufactured therefrom — Section 15 (a) not infringed.)

**4. Sale or purchase inside the State.** — (1) Section 15 (a) makes it mandatory that the tax shall not be levied at more than one stage. AIR 1957 SC 1616 (1622, 1623): (1967) 3 SCR 577: 20 STC 290.

(2) The Punjab General Sales Tax Act (46 of 1948) (as amended in 1958 and 1959) in terms fixed a stage for taxation i. e. the stage of purchase by dealer for use in manufacturing goods and as such the Act is not in conflict with S. 15. AIR 1967 SC 1895 (1906): (1967) 3 SCR 557: 20 STC 430.

(3) By introducing the definition of purchase in Section 2 (ff) (as inserted in 1958 and as amended in 1959) of the Punjab General Sales Tax Act (46 of 1948), the State is not enabled to tax the same goods at the purchase point and at the sale point. Goods purchased and goods sold are not identical once Manufacture changes the identity. Therefore, the same goods are not taxed at two stages. AIR 1967 SC 1895 (1905): (1967) 3 SCR 557: 20 STC 430.

(4) Section 15 itself beyond saying that the levy can only be at one stage, does not prescribe any particular point in the series of sales or purchases. The fixation of the point in conformity with Section 15 is left to the particular State Legislature. AIR 1968 Mad 90 (93, 94): (1967) 2 Mad LJ 146 (DB). (Byelaw made by Market Committee fixing the single point in series of sales is unauthorised in view of Section 18 of Madras Act 23 of 1959.)

(5) The object of single point levy for declared goods, together with the fixation of upper limit in the rate of tax, is to ensure that the price of such goods to the manufacturer or consumer, is not unduly enhanced by the multy-point levy of tax at different stages and also at variable and high rates of assessment by different States. Last stage is reached when goods go out of State or go to manufacturer. AIR 1965 Mad 360 (362, 363): ILR (1965) 2 Mad 83: (1965) 16 STC 29 (DB).

(6) Section 15 of the Central Act is not violated where an assessee being last purchaser in assessment year is assessed on purchase turnover in his hands under Section 5 (4) of Mysore Sales Tax Act (25 of 1957). (1962) 40 Mys LJ 631 (DB).

(7) Fact that a sale is first sale does not prevent its being the last sale. Hence, if sales by assessee were the only sales in the State, they were the first sales but they were also last sales in State and could be taxed. 1966 All LJ 815: 19 STC 241 (DB).

(8) When the declared goods pursuant to inter-State sale have been delivered outside the State, but brought back into the State and then sold, that sale, in fact or in law, cannot be regarded as the first sale within the meaning of Second Schedule to the Madras General Sales Tax Act (1 of 1959). (1968) 1 Mad LJ 344: 21 STC 163 (DB).

**5. Claim for refund.**— (1) Where sales of declared goods were to be taxed only at a single point under the legislative policy of the State, the levy at the stage of inter-State sales should prevail and the levy at the earlier stage should be refunded. (1966) 1 Mad LJ 541: ILR (1967) 1 Mad 709: (1966) 17 STC 396 (DB).

(2) (Case under Section 5-A (5) of Madras General Sales Tax Act, 9 of 1939). If a transaction inside the State has attracted the levy of tax and a subsequent inter-State transaction has entitled the assessee to the refund of the State Sales Tax, he has to furnish the necessary statement as prescribed, and unless the conditions prescribed are complied with, the claim to refund has to fail. Assessee should not wait till assessment is actually made under State law. (1963) 14 STC 794 (Mad) (DB).

(3) The liability under the A. P. General Sales Tax Act (6 of 1957) Act arises the moment there is a transaction in which the assessee was the last purchaser of declared goods, and that liability is not affected by reason of the benefit of refund allowed by Section 15 (b) of the Central Sales Tax Act or proviso to Section 6 of the A. P. General Sales Tax Act. (1967) 1 Andh WR 215.

(4) Refund of State-tax paid on declared goods sold in inter-State trade is not dependent upon actual payment of the Central Sales-tax. Portion of R. 39-A (I) framed under Mysore Act (XXV of 1957) laying such additional condition and portion of Section 5 (4). (1967) 1 Mys LJ 432: 9 Law Rep 805: 20 STC 89.

# [THE] CENTRAL SILK BOARD ACT, 1948
## (ACT 61 OF 1948)

[The text of the Act printed here is as on 1-5-1969.]

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16. Bar of legal proceedings.
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## STATEMENT OF OBJECTS AND REASONS

"The Report of the Silk Panel appointed by the Government recommended—

(a) improvement of mulberry cultivation, adequate supplies of disease free seed, and improvement of rearing and reeling, and

(b) expansion of the industry's present capacity of about 2 million pounds a year to 4 million pounds a year.

To implement these recommendations it has been decided to set up a Central Silk Board. The functions of the Board would be to advise Government generally on matters relating to silk, e.g., on import, export and tariff policy; to supervise the expansion of the silk industry; and to improve the quality standards of the industry and the processing of cocoons and by-products.

The proposed Bill is designed to give effect to this decision".

—Gazette of India, 1948, Part V, page 449.

## ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Amended by Act 40 of 1949; 3 of 1951; 56 of 1952; 31 of 1953.

—Adapted by A. L. O., 1950; Andhra A. L. O., 1954; 3 A. L. O., 1956; Maha. A. L O., 1961; Guj. A. L. O., 1961.

—Extended by Act 59 of 1949; 30 of 1950.

# [THE] CENTRAL SILK BOARD ACT, 1948
## (ACT 61 OF 1948)[a]

[20th September, 1948.]

**An Act to provide for the development under Central control of the [b][°] silk industry and for that purpose to establish a Central Silk Board.**

Whereas it is expedient to provide for the development under Central control of the [b][°] silk industry and for that purpose to establish a Central Silk Board;

It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, see Gaz. of Ind., 1948, Pt. V, page 449; and for Report of Select Committee, see Gazette of India, Pt. V, page 645.

This Act has been extended to the new Provinces and Merged States by the Merged States (Laws) Act, 1949 (59 of 1949), S. 3 [1-1-1950] and to the Union Territories of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act, 1950 (30 of 1950), S. 3 [16-4-1950]. Vindhya Pradesh now forms part of the State of Madhya Pradesh—see Act 37 of 1956 S. 9(1)(e). The Act has been extended to the Union Territory of :—(i) Dadra and Nagar Haveli by Reg. 6 of 1963 [w. e. f. 1-7-1965]; (ii) Pondicherry by Reg. 7 of 1963 [w. e. f. 1-10-1963].

[b] The word "raw" was omitted by the Central Silk Board (Amendment) Act, 1953 (31 of 1953), S. 2 [25-3-1954].

**1. Short title and extent.**—(1) This Act may be called THE CENTRAL SILK BOARD ACT, 1948.

[a][(2) It extends to the whole of India [b][except the State of Jammu and Kashmir].]

[a] Substituted for old sub-section (2), by A. L. O., 1950.
[b] Substituted for the words "except the States of Hyderabad, Jammu and Kashmir, Mysore and Travancore-Cochin", by the Part B States (Laws) Act, 1951 (3 of 1951), S. 3 and Schedule, [1-4-1951].

[a][**2. Declaration as to expediency of Union control.**—It is hereby declared that it is expedient in the public interest that the Union should take under its control the silk industry.]

[a] Substituted for former S. 2 by the Central Silk Board (Amendment) Act, 1953 (31 of 1953), S. 3 [25-3-1954].

**3. Definitions.**—In this Act, unless there is anything repugnant in the subject or context,—

(a) "Board" means the Central Silk Board constituted under this Act;

(b) "charkha raw silk" means raw silk reeled from silk worm cocoons with the help of any instrument not worked by power;

(c) "filature raw silk" means raw silk reeled from silk worm cocoons with the help of any instrument worked by power;

(d) "power" means any form of energy which is mechanically transmitted and is not generated by human or animal agency, and includes electrical energy;

(e) "prescribed" means prescribed by rules made under this Act;

(f) "spun silk" means silk yarn spun from pierced or spoilt cocoons, fluff from cocoons, pieces of silk, noils, or other silk waste;

(g) "Standing Committee" means the Standing Committee of the Board constituted under sub-section (2) of Section 6.

**4. Constitution of the Board.**—(1) As soon as may be after the commencement of this Act, the Central Government shall, by notification in the Official Gazette, constitute for the purposes of this Act a Board to be called the Central Silk Board.

(2) The Board shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall by the said name sue and be sued.

[a][(3) The Board shall consist of the following members, namely :—

(a) a Chairman to be appointed by the Central Government;

(b) not more than three officials to be nominated by the Central Government :

Provided that it shall be lawful for any such official to depute in the prescribed circumstances another official to attend any meeting of the Board on his behalf;

(c) six persons to be elected by Parliament, four from the House of the People by the members of the House of the People and two from the Council of States by the members of the Council of States;

(d) [b][five persons] to be nominated by the Government of Mysore, one of whom shall represent the filature raw silk industry and two shall represent the rest of the sericulture industry;

(e) [c][one person] to be nominated by the Government of Madras;

(f) two persons to be nominated by the Governor of West Bengal;

(g) one person to be nominated by each of the Governments of [d][Andhra Pradesh,] Assam, Bihar, Bombay, [e][* *] Madhya Pradesh and Uttar Pradesh;

(h) one person to be nominated by the Government of Jammu and Kashmir;

(i) not more than three persons to be nominated by the Central Government to represent the producers of raw silk and areas other than the States specified in clauses (d) to (g) inclusive;

(j) eight persons to be nominated by the Central Government, of whom one shall represent the spun silk industry, one the silk throwing and twisting industry, one the silk weaving industry, one labour; and two of them shall be experts in sericulture.]

(4) The members of the Board shall receive from its funds such travelling and other allowances as may be prescribed.

[a] Substituted for sub-section (3) by the Central Silk Board (Amendment) Act, 1953 (31 of 1953), S. 4 [25-3-1954].
[b] Substituted for the words "four persons" by 3 A. L. O., 1956.
[c] Substituted for the words "two persons," ibid.
[d] Substituted for the word "Andhra," ibid.
[e] The words "Madhya Bharat" omitted, ibid.

## STATE ADAPTATIONS

**Gujarat**

In its application to the State of Gujarat, in clause (g) of sub-section (3) of S. 4, for "Bombay", substitute "Gujarat".—Guj. A. L. O., 1961.

**Maharashtra**

In its application to the State of Maharashtra, in Clause (g) of sub-section (3) of S. 4, for 'Bombay' substitute "Maharashtra".—Maha. A. L. O., 1961.

**5. Power of the Central Government in default of nominations.**—(1) If any Government other than the Central Government fails to make any nomination which it is entitled to make under sub-section (3) of S. 4 within the time prescribed in that behalf, the Central Government may make the nomination itself.

(2) Where a member of the Board dies, resigns, is removed, ceases to reside in India, or becomes incapable of acting, the authority or body entitled to nominate the member under sub-section (3) of Sec. 4 may nominate a person to fill the vacancy; and where such nomination is not made within the time prescribed in that behalf, the Central Government on its own initiative, may make the nomination itself.

(3) No act done by the Board shall be questioned on the ground merely of the existence of any vacancy in, or defect in the constitution of, the Board.

**6. Vice-Chairman and Standing Committee.**—(1) [a][The Central Government shall appoint from among the members of the Board] a Vice-Chairman who shall exercise such of the powers and perform such of the duties of the Chairman as may be prescribed or as may be delegated to him by the Chairman.

(2) The Board may, in its discretion, constitute a Standing Committee for the purpose of exercising such of its powers and performing such of its duties as may be delegated by it not being powers or duties the delegation of which is prohibited by rules made under this Act.

(3) The Standing Committee shall consist of the Chairman, the Vice-Chairman, and five others elected by the Board from among its members.

[a] Substituted for "The Board shall elect from among its members" by the Central Silk Board (Amendment) Act, 1952 (56 of 1952), S. 3 [9-8-1952].

**7. Secretary of the Board.**—The Central Government shall [a][° ° °] appoint a Secretary to the Board who shall, under the control and direction of the Board, exercise such powers and perform such duties as may be prescribed or as may be delegated to him by the Board or the Chairman.

[a] The words "in consultation with the Board" were omitted by the Central Silk Board (Amendment) Act, 1953 (31 of 1953), S. 5 [25-3-1954].

**8. Functions of the Board.**—(1) It shall be the duty of the Board to promote the development of the [a][°] silk industry by such measures as it thinks fit.

(2) Without prejudice to the generality of the foregoing provision, the measures referred to therein may provide for—

(a) undertaking, assisting or encouraging scientific, technological and economic research;

(b) devising means for improved methods of mulberry cultivation rearing, developing and distributing healthy silkworm seeds, reeling of silkworm cocoons, improving the quality and production of raw silk, if necessary, by making it compulsory for all raw silk to be marketed only after the same has been tested and graded in properly equipped raw silk conditioning houses;

(c) the supply of technical advice to filature charkha reelers;

(d) improving the marketing of raw silk;

(e) the collection of statistics from such persons as may be prescribed;

[b][(f) carrying out any other duties which may be vested in the Board under rules made under this Act.]

(3) It shall also be the duty of the Board—

(a) to advise the Central Government on all matters relating to the development of the raw silk industry, including the import and export of raw silk;

(b) to submit to the Central Government and such other authorities as may be prescribed half-yearly reports on its activities and the working of this Act;

(c) to prepare and furnish such other reports relating to the [a][° °] silk industry as may be required by the Central Government from time to time.

[a] The word "raw" was omitted by the Central Silk Board (Amendment) Act, 1953 (31 of 1953), S. 6 [25-3-1954].

[b] Inserted, ibid.

**9. Funds of the Board.**—(1) The Central Government shall from time to time make grants to the Board of such sums as the Central Government may consider necessary for enabling the Board to exercise its powers and discharge its duties under this Act.

(2) The funds of the Board shall be kept in such bank, or invested in such manner, as may be prescribed and shall be expended by the Board only in the performance of its functions under this Act or for meeting such expenses as are authorised by this Act or by rules made thereunder.

**10. Imposition of cess on certain kinds of silk.**—(1) With effect from such date as the Central Government may, by notification in the Official Gazette appoint, there shall be levied and collected as a cess for the purposes of this Act a duty of excise on all filature raw silk, and on all spun silk, reeled in the territories to which this Act for the time being extends at such rate as the Central Government may, by notification in the Official Gazette, from time to time fix.

(2) The said duty of excise shall be payable by the reelers of filature raw silk or spun silk and shall be paid by them to the Board within one month from the date of the receipt of the notice of demand from the Board in that behalf.

(3) The said duty of excise may be recovered as if it were an arrear of land revenue.

(4) For the purpose of enabling the Board to assess the amount of the duty of excise payable under this section by the reelers of filature raw silk or spun silk,—

(a) the Board shall, by notification in the Official Gazette, fix the period in respect of which assessments shall be made, and

(b) every reeler of filature raw silk or spun silk shall furnish to the Board within the prescribed time a return specifying the total amount of filature raw silk or spun silk reeled during such period.

(5) If any reeler of filature raw silk or spun silk fails to furnish such return within the prescribed time or furnishes a return which the Board has reason to believe to be incorrect or defective, the Board may assess the amount payable by such reeler in such manner as may be prescribed.

(6) Any reeler feeling himself aggrieved by an assessment made under this section may, within three months of the receipt of the notice under sub-section (2), apply to the District Judge or such other civil judicial officer as may be prescribed, for the cancellation or modification of the assessment; and such District Judge or judicial officer shall after giving the Board an opportunity of being heard, pass such order as he thinks proper; and such order shall be final.

[a][(7) The proceeds of the duties of excise paid to the Board shall first be credited to the Consolidated Fund of India and the Central Government may, thereafter, from time to time, pay to the Board from and out of such proceeds such sums of money as it may think fit.]

[a] Inserted by the Central Silk Board (Amendment) Act, 1953 (31 of 1953), S. 7 [25-3-1954].

**11. Control by the Central Government.**—(1) All acts of the Board shall be subject to the control of the Central Government which may cancel, suspend or modify as it thinks fit any action taken or order passed, by the Board.

(2) The records of the Board shall be open to inspection at all reasonable times by any officer authorised in this behalf by the Central Government.

**12. Accounts of the Board.**—(1) The Board shall keep such accounts, and in such manner and form, as may be prescribed, in respect of all moneys received and expended by it.

(2) The Board shall cause the accounts to be audited annually by auditors appointed by the Central Government, and the auditors shall have the power to disallow any item of expenditure which in their opinion has not been properly incurred for the purposes of this Act.

(3) The Central Government may, on the application of the Board, allow any item of expenditure disallowed by the auditors under sub-section (2).

**13. Power of Central Government to make rules.**—(1) The Central Government may, by notification in the Official Gazette, make rules[a] to carry out the purposes of this Act.

[b][(2) In particular, and without prejudice to the generality of the foregoing power, rules made under this section may provide for all or any of the following matters, namely :—

(i) the term of office of members of the Board, the circumstances in which and the authority by which members may be removed and the filling of casual vacancies in the Board;

(ii) the procedure to be followed at meetings of the Board and at the standing committee for the conduct of business and the number of members which shall form a quorum at any meeting;

(iii) the maintenance by the Board of records of business transacted by the Board and the submission of copies thereof to the Central Government;

(iv) the holding of a minimum number of meetings every year;

(v) the power of the Board, its Chairman and Standing Committe with respect to the incurring of expenditure;

(vi) the conditions subject to which the Board may incur expenditure outside India;

(vii) the preparation of budget estimates of receipts and expenditure of the Board and the authority by which the estimates are to be sanctioned;

(viii) the maintenance of the accounts of income and expenditure of the Board and the audit of such accounts;

(ix) the deposit of the funds of the Board in bank and the investment of such funds;

(x) the re-appropriation of estimated savings from one budget head to any other budget head;

(xi) the conditions subject to which the Board may borrow funds;

(xii) the conditions subject to which and the manner in which contracts may be entered into by or on behalf of the Board;

(xiii) the delegation to the Standing Committee or the Chairman or the Vice-Chairman or members or officers of the Board of any of the powers and duties of the Board under this Act;

(xiv) the staff which may be employed by the Board and the pay and allowances, leave and other conditions of service of officers and other employees of the Board;

(xv) the travelling and other allowances of members of the Board and of the Standing Committee;

(xvi) the purposes for which funds of the Board may be expended;

(xvii) the maintenance of the registers and other records of the Board and of its Standing Committee;

(xviii) the collection of any information or statistics in respect of raw silk or any product of silk;

(xix) the manner in which raw silk shall be graded and marketed;

(xx) any other matter which is to be or may be prescribed.

(3) All rules made under this section shall be laid, as soon as may be, before Parliament.]

[a] For the Central Silk Board (Election) Rules, 1949, see Gaz. of Ind., 22-1-1949, Pt. I-Sec. 1, page 91; for the Central Silk Board Rules, 1955, see Gaz. of Ind., Extra., 26-3-1955, Pt. II-Sec. 3, page 401. For Central Silk Board Employees Pension Fund Rules, 1966 and Central Silk Board (General Provident Fund) Rules, 1966 — See Gaz. of Ind., 21-7-1967, Pt. II, S. 3 (i), pp. 99 and 101 respectively.

For Art Silk (Production and Distribution) Control Order, 1962 — See Gaz. of Ind., 7-4-1962, Pt. II, S. 3 (ii), page 1111. Said Order is extended to Pondicherry—see Gaz. of Ind., 18-9-1965, Pt. II, S. 3 (ii), p. 3139.

[b] Substituted for sub-section (2) by the Central Silk Board (Amendment) Act, 1953 (31 of 1953), S. 8 [25-3-1954].

**14. Penalties.**—[a][(1)] If any person—

(a) in any return to be furnished under this Act makes any statement which is false and which he knows to be false or does not believe to be true, or

(b) obstructs any officer of the Board in the exercise of any power, conferred, or the discharge of any duty imposed, on him by or under this Act, or

(c) having the control or custody of any account book or other record, fails to produce such book or record when required so to do under this Act,

he shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

[b][(2) If the person committing any offence specified in sub-section (1) is a company, every person who, at the time the offence was committed was in charge

of, and was responsible to, the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(3) Notwithstanding anything contained in sub-section (2), where an offence under sub-section (1) has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section,—

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director" in relation to a firm means a partner in the firm.]

[a] Section 14 was re-numbered as Sec. 14 (1) by the Central Silk Board (Amendment) Act, 1953 (31 of 1953), S. 9 [25-3-1954].

[b] Inserted, ibid.

**15. Prosecution to be with consent of Central Government.**—No prosecution for any offence punishable under this Act shall be instituted except by, or with the consent of, the Central Government.

[a][**15A. Jurisdiction of Courts.**—No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence punishable under Section 14.]

[a] Inserted by the Central Silk Board (Amendment) Act, 1953 (31 of 1953), S. 10 [25-3-1954].

**16. Bar of legal proceedings.**—No suit, prosecution or other legal proceeding shall lie against the Board, or any member or officer of the Board, for anything in good faith done or intended to be done under this Act.

**17. Temporary powers of the Central Government.**—[Repealed by the Central Silk Board (Amendment) Act, 1953 (31 of 1953), S. 11 [25-3-1954].]

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## [THE] CHANDERNAGORE (MERGER) ACT, 1954
## (ACT XXXVI OF 1954)

[The text of the Act printed here is as on 1-5-1969.]

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## STATEMENT OF OBJECTS AND REASONS

On 8th June 1948, the Government of the French Republic, in agreement with the Government of India, declared that "it intends to leave to the populations of the French Establishments in India themselves the right to pronounce their future fate and future status". In the referendum held on 19th June 1949, the citizens of Chandernagore voted in favour of merger of the territory with India. On 2nd May 1950, the de facto administration of Chandernagore was transferred to the Government of India. On 2nd February 1951, the Treaty of Cession of the Territory of the Free Town of Chandernagore was signed at Paris between the Presidents of India and the French Republic. On 9th June 1952 Chandernagore was transferred de jure to the Government of India.

2. On 27th October 1949, in a Press Note about the future status of Chandernagore, the Government of India had declared:

'Any changes in the administrative set up will be carried out only, after consulting local public opinion'

3. On 19th November 1953, in exercise of the powers conferred by Section 3 of the Commission of Inquiry Act, 1952 (60 of 1952), the Central Government appointed a Commission consisting of Dr. Amarnath Jha to inquire into and ascertain the wishes of the citizens of Chandernagore in regard to its future administration. The Commission submitted its report on 18th December 1953, recommending inter alia merger of Chandernagore with the State of West Bengal. After consideration of the report and consultation with the Government of the State of West Bengal the Government of India announced their decision in Parliament on the 8th May. This has been embodied in the present Bill which provides for the merger of Chandernagore with West Bengal and consequential changes.

4. Under Article 3 of the Constitution, the Legislature of West Bengal has been consulted on this Bill and has given approval to both its provisions and its introduction in Parliament. The recommendation of the President has also been obtained — Gaz. of Ind., Extra., 15-9-1954, Pt. II-Sec. 2, page 585.

# [THE] CHANDERNAGORE (MERGER) ACT, 1954

## (ACT XXXVI OF 1954)[a]

[29th September 1954.]

**An Act to provide for the merger of Chandernagore into the State of West Bengal and for matters connected therewith .**

Be it enacted by Parliament in the Fifth Year of Republic of India as follows:

[a] For Statement of Objects and Reasons, see Gaz. of India Extra., 15-9-1954. Pt. II, Sec. 2, page 585.

**1. Short title and commencement.**—(1) This Act may be called THE CHANDERNAGORE (MERGER) ACT, 1954.

(2) It shall come into force on the 2nd day of October, 1954.

**2. Definitions.**—In this Act, unless the context otherwise requires,—

(a) "appointed day" means the 2nd day of October, 1954;

(b) "Assembly constituency", "Council constituency"" and "Parliamentary constituency" have the same meanings as in the Representation of the People Act, 1950;

(c) "Chandernagore" means the whole of the territory which immediately before the 9th day of June, 1952 was comprised in the Free Town of Chandernagore;

(d) "law" means so much of any enactment, Ordinance, Regulation, order, rule, scheme, notification, bye-law or any other instrument having the force of law as relates to matters enumerated in List I and List III in the Seventh Schedule to the Constitution;

(e) "sitting member", in relation to the House of the People or either House of the Legislature of the State of West Bengal, means a person who immediately before the appointed day is a member of the House;

(f) "State Government" means the Government of West Bengal;

(g) "Union purposes" mean the purposes of Government relatable to any of the matters mentioned in the Union List in the Schedule to the Constitution.

**3. Chandernagore to form part of West Bengal.**—(1) As from the appointed day Chandernagore shall form part of the State of West Bengal and the boundaries of that State shall be so altered as to comprise within them the territory of Chandernagore.

(2) Without prejudice to the power of the State Government to alter hereafter the extent, limits and names of districts and sub-divisions, Chandernagore shall form part of the district of Hooghly in the State of West Bengal and the State Government shall, by order in the Official Gazette, provide for the administration of Chandernagore by constituting it into a new sub-division of the said district whether with the addition of such areas of that district as may be specified in the order or without such addition.

**4. Amendment of the First Schedule to the Constitution.**—In the First Schedule to the Constitution, in Part A, in the description of the territories of States, in the last paragraph, after the words, "as if they formed part of that Province", the following shall be inserted, namely :—

"and in the case of the State of West Bengal shall also comprise the territory of Chandernagore as defined in clause (c) of Section 2 of the Chandernagore (Merger) Act, 1954,".

**5. Representation of Chandernagore in the House of the People.**—(1) Until otherwise provided by law, as from the appointed day—

(a) Chandernagore shall be included in, and become part of, the Hooghly Parliamentary constituency formed by the Delimitation of Parliamentary and Assembly Constituencies (West Bengal) Order, 1951 and that Order shall have effect subject to the following modifications, namely :—

In Table A—

(i) for the entry in column 2 relating to Serampore constituency, the following entry shall be substituted, namely :—

"Bhadreswar, Singur, Serampore, Uttarpara, Chanditala and Jangipara police stations of Hooghly District and Domjur and Bally police stations of Howrah District.";

(ii) for the entry in column 2 relating to Hooghly constituency, the following entry shall be substituted, namely :—

"Pandua, Dhaniakhali, Chinsura (excluding Ward No. 1 of Bansbaria Municipality), Polba, Haripal, Tarakeswar, Arambagh, Khanakul and Pursura police stations of Hooghly District and Chandernagore.";

(b) the sitting member of the House of the People representing the Hooghly Parliamentary constituency shall be deemed to have been elected by that constituency as modified by this Act.

(2) As soon as may be after the appointed day, the electoral roll of the Hooghly Parliamentary constituency shall be prepared in accordance with the provisions of the Representation of People Act, 1950, and the rules made thereunder and the roll so prepared shall come into force immediately upon its final publication.

**6. Representation of Chandernagore in the Legislative Assembly of West Bengal.**—Until otherwise provided by law,—

(a) there shall be an additional constituency of the Legislative Assembly of West Bengal (to be known as the Chandernagore Assembly constituency) comprising the entire area of Chandernagore, whether with the

addition of such areas of other constituencies as may be determined by the President or without such addition and the said constituency shall be represented in that Assembly by one member to be chosen by direct election;

(b) the President shall, as soon as may be after the appointed day and after consulting the Election Commission, amend by order the Delimitation of Parliamentary and Assembly Constituencies (West Bengal), Order, 1951 so as to include therein the Chandernagore Assembly constituency and the particulars relating thereto as required by Section 9 of the Representation of the People Act, 1950;

(c) the total number of seats to be filled by direct election in the Legislative Assembly of West Bengal shall be increased from 238 to 239;

(d) in the Second Schedule to the Representation of the People Act, 1950, in the part relating to Part A States for the entry in column 2 against 'West Bengal', the entry '239' shall be substituted.

**7. Electoral roll of the Chandernagore Assembly constituency.**—The electoral roll of the Chandernagore Assembly constituency shall be prepared and published in accordance with the provisions of the Representation of the People Act, 1950, and the rules made thereunder and come into force immediately upon its final publication.

**8. Election to fill the seat allotted to the Chandernagore Assembly constituency.**—As soon as may be after the delimitation of the Chandernagore Assembly constituency under the provisions of clause (b) of Section 6, there shall be held an election to fill the seat allotted to the Chandernagore Assembly constituency in the Legislative Assembly of West Bengal; and for that purpose the Election Commission shall, by notification in the Official Gazette, call upon the Chandernagore Assembly constituency to elect a person for the purpose of filling that seat before such date as may be specified in the notification and the provisions of the Representation of the People Act, 1951, and the rules and orders made thereunder shall apply, as far as may be, in relation to such election.

**9. Consequences of alteration in the extent of certain Assembly constituencies.**—If in consequence of the addition of areas to Chandernagore for the purpose of constituting the Chandernagore Assembly constituency, the extent of any existing Assembly constituency is altered, then—

(a) the electoral roll of the existing Assembly constituency as so altered shall, until it is prepared afresh in accordance with the provisions of the Representation of the People Act, 1950, and the rules made thereunder, be deemed to consist of so much of the electoral roll as relates to the areas comprised within that constituency as so altered;

(b) every sitting member of the Legislative Assembly of West Bengal representing the existing Assembly constituency shall be deemed to have been elected to that Assembly by that constituency as so altered.

**10. Representation of Chandernagore in the Legislative Council of West Bengal.**—(1) Until otherwise provided by law, as from the appointed day—

(a) Chandernagore shall be included in, and become part of, the following Council constituencies formed by the Delimitation of Council Constituencies (West Bengal) Order, 1951,[a] namely:—

(i) the West Bengal South (Graduates) constituency;

(ii) the Burdwan Division (Teachers) constituency;

(iii) the Hooghly-Howrah (Local Authorities) constituency;

(b) any reference in the said order to West Bengal, Burdwan Division or Hooghly District shall be construed as including therein Chandernagore;

(c) every sitting member of the West Bengal South (Graduates) constituency, the Burdwan Division (Teachers) constituency or the Hooghly-Howrah (Local Authorities) constituency, the extent of which is by virtue of the provisions of clause (a) altered, shall be deemed to have been elected to the said Council by that constituency as so altered.

(2) As soon as may be after the appointed day, the electoral rolls of the West Bengal South (Graduates) constituency, the Burdwan Division (Teachers) constituency and the Hooghly-Howrah (Local Authorities) constituency shall be prepared in accordance with the provisions of the Representation of the People Act, 1950, and the rules made thereunder and the rolls so prepared shall come into force immediately upon their final publication.

[a] See S.R.O. 1415, published in Gazette of India, Extraordinary, 19-9-1951, Pt. II, Sec. 3, p. 1157.

**11. Amendment of Section 9, Act LXXXI of 1952.**—In Section 9 of the Delimitation Commission Act, 1952, in sub-section (3), for the words "and the orders made under any of the said Acts", the words, brackets and figures "the Chandernagore (Merger) Act, 1954 and the orders made under any of the said Acts" shall be substituted.

**12. Conferment of Indian citizenship on French citizens domiciled in Chandernagore.**—Subject to the provisions of Article III of the Treaty of Cession of the Territory of the Free Town of Chandernagore, all French subjects and citizens of the French Union domiciled in the said Territory on the 9th day of June, 1952, shall be deemed to have become citizens of India on that day.

**13. Property and assets.**—(1) All property and assets within Chandernagore which, immediately before the appointed day, are vested in the Central Government for the purposes of the administration of Chandernagore shall, as from that day, vest in the State Government unless the purposes for which such property or assets are held immediately before that day, are Union purposes.

(2) A certificate of the Central Government signed by a Secretary to that Government shall be conclusive as to whether the purposes for which any property or assets are held immediately before the appointed day are Union purposes.

**14. Rights, liabilities and obligations.**—(1) All rights, liabilities and obligations of the Central Government arising out of, or in relation to, the administration of Chandernagore shall, as from the appointed day, be rights, liabilities and obligations of the State Government unless such rights, liabilities and obligations are relatable to Union purposes.

(2) A certificate of the Central Government signed by a Secretary to that Government shall be conclusive as to whether any rights, liabilities or obligations arising out of, or in relation to, the administration of Chandernagore are relatable to Union purposes.

**15. Subordinate Courts.**—All Courts which, immediately before the appointed day, are exercising lawful power, authority and jurisdiction in Chandernagore under the superintendence and control of the High Court at Calcutta shall, until further provision is made by a competent Legislature or authority, continue to exercise their respective powers, authority and jurisdiction in Chandernagore under the superintendence and control of that High Court.

**16. Existing authorities and officers to continue in Chandernagore.**—Without prejudice to the powers of the State Government to appoint from time to time, such officers as may be necessary for the administration of Chandernagore, the Administrator of Chandernagore, all Judges, Magistrates and other officers of Chandernagore who, immediately before the appointed day, are exercising lawful functions in Chandernagore or any part thereof, shall, until other provision is made by the State Government, continue to exercise in connection with the adminis-

tration of Chandernagore their respective functions in the same manner and to the same extent as before the appointed day.

**17. Extension of laws to Chandernagore.**—All laws which, immediately before the appointed day, extend to, or are in force in the State of West Bengal generally shall, as from that day, extend to, or, as the case may be, come into force in, Chandernagore.

**18. Repeal of corresponding laws and savings.**—(1) Any law in force in Chandernagore immediately before the appointed day (hereafter in this Act referred to as the "corresponding law") which corresponds to any law referred to in Section 17, whether such corresponding law is in force in Chandernagore by virtue of the Chandernagore (Application of Laws) Order, 1950, or by virtue of any notification issued under the Chandernagore (Administration) Regulation, 1952 or otherwise, shall, as from that day, stand repealed in Chandernagore.

(2) The repeal by sub-section (1) of any corresponding law shall not affect—

(a) the previous operation of any such law; or

(b) any right, privilege, obligation, or liability acquired, accrued or incurred under such law; or

(c) any penalty, forfeiture or punishment incurred in respect of any offence committed against any such law; or

(d) any investigation, legal proceeding or remedy in respect of such right, privilege, obligation, liability, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued, or enforced, and any such penalty, forfeiture, or punishment may be imposed as if this Act had not been passed.

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**Section 17 — Note 1**

(1) Laws contemplated by S. 17 are such laws as were applicable all over West Bengal without any exception — Neither the Calcutta Thika Tenancy Act of 1949 nor the West Bengal Non-Agricultural Tenancy Act is an Act applicable generally all over West Bengal. Both are limited in their application to parts of West Bengal though the Calcutta Thika Tenancy Act covers a much smaller area than the West Bengal Non-Agricultural Tenancy Act. In this view, the West Bengal Non-Agricultural Tenancy Act cannot be said to have been extended by reason of Section 17. ('58) 1958-1 Cal LJ 149 (156).

(2) Estate Duty Act (1953) which was in force in West Bengal State prior to the merger of Chandernagore in that State became applicable to the merged area under S. 17. Therefore where a gift was made by a resident of Chandernagore two years before his death, which occurred subsequent to the merger, property gifted became liable to tax. AIR 1962 Cal 248 (249): (1961) 43 ITR (ED) 59.

(3) Reading Sections 17 and 18 of the Chandernagore (Merger) Act together it becomes clear that West Bengal statutes were extended to Chandernagore and the existing Chandernagore corresponding laws were repealed. The West Bengal Land (Requisition and Acquisition) Act, 1948 which extends to the whole of West Bengal does answer the test of the word 'generally' used in Section 17. The Act being a general law in force in West Bengal immediately before the appointed date, viz., 2-10-1954 applies to Chandernagore on its merger with West Bengal. The argument that a statute which is not only limited in area but also limited in time is outside the purview of Section 17 and does not answer the test of the word 'generally' used there cannot be accepted.

When every district of West Bengal comes within the operation of the West Bengal Land (Requisition and Acquisition) Act, 1948 there is no rational or intelligible principle to exclude Chandernagore. AIR 1963 Cal 373 (375, 376, 377, 378).

**Section 18 — Note 1**

(1) The Calcutta Thika Tenancy Act of 1949 does not stand repealed under Section 18 (1). ('58) 1958-1 Cal LJ 149 (156).

(2) The law mentioned in Section 18 (2) does not apply to private agreements or private contracts by reason of the special definition of law contained in Section 2 (d). (1959) 63 Cal WN 947.

(3) The Chandernagore (Application of Laws) Order, 1950, made the French procedural law ineffective and inapplicable. Decret of 1887 under which Grosses copie of mortgages used to be made, bearing on the organisation of the profession of a notary, was neither repealed nor made ineffective by the said Order. The said Decret was repealed by Section 18 of the Chandernagore (Merger) Act, 1954. The right and the remedy conferred on the mortgagee, under Grosses copie of the mortgage, were expressly preserved

(3) Subject to the provisions of sub-section (2), anything done or any action taken (including any appointment or delegation made, notification, order, instruction or direction issued, rule, form, bye-law or scheme framed, certificate, patent, permit, or licence granted, or registration effected), under such corresponding law shall be deemed to have been done or taken under the corresponding provision of the law as extended to, or in force in, Chandernagore on and from the appointed day and shall continue in force accordingly unless and until superseded by anything done or any action taken under such law.

**19. Power to remove difficulties.**—(1) If any difficulty arises in relation to the transition from any corresponding law to any law by virtue of Section 17 shall, as from the appointed day, extend to, or come into force in, Chandernagore, the Central Government may, by order in the Official Gazette, make such provisions as appear to it to be necessary or expedient for removing the difficulty.

(2) If any difficulty arises in giving effect to the provisions of this Act (otherwise than in relation to the transition from any corresponding law) or in connection with the administration of Chandernagore as a part of West Bengal, the State Government may, by order in the Official Gazette, make such provisions not inconsistent with the purposes of this Act, as appear to it to be necessary or expedient for removing the difficulty.

(3) No power under sub-section (1) or sub-section (2) shall be exercised by the Central Government, or, as the case may be, the State Government after the expiry of three years from the appointed day.

(4) Any order made under sub-section (1) or sub-section (2) may be made so as to be retrospective to any date not earlier than the appointed day.

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# [THE] CHARITABLE AND RELIGIOUS TRUSTS ACT, 1920

## (ACT XIV OF 1920)

[The text of the Act printed here is as on 15-4-1969.]

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SECTIONS

1. Short title and extent.
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10. Power of Courts as to costs in certain suits against trustees of charitable and religious trusts.
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## STATEMENT OF OBJECTS AND REASONS

"The Religious Endowments Act, 1863 (XX of 1863), was the result of the decision of the Government to divest its officers of all direct superintendence and control of religious and charitable endowments in India, transferring their functions to manager or managing committees and merely making provision for intervention by the Civil Courts on application made by any person interested in a particular institution. This policy, however, did not long remain unchallenged, and since 1866

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**Section 18 — Note 1 (contd.)**

and continued under the provisions of Section 18 (2) of the Chandernagore (Merger) Act. Such right however, could no longer be enforced under the provisions of the French Civil Procedure Code but could be enforced under the corresponding provisions of the Indian Civil Procedure Code, for execution of an order having the force of a decree. (1959) 63 Cal WN 961.

(4) On reading Sections 18 and 17 together it becomes clear that West Bengal Land (Requisition and Acquisition) Act 1948 being a general law became applicable to the merged area. AIR 1963 Cal 373 (377).

**Section 19 — Note 1**

(1) Where there was no case for "removal of difficulty" with regards to application of Estate Duty Act to Chandernagore, payment of tax in the absence of removal of difficulty order under Section 19 is not illegal. AIR 1962 Cal 248 (251): (1961) 43 ITR (ED) 59.

there have been constant complaints, especially in the Madras Presidency, as to the inefficacy of the Act to prevent the squandering or misappropriation of the funds of such endowments, and suggestions for its amendment have from time to time been made to the Government of India. Mr. Ananda Charlu in 1897, Mr. Srinivasa Rao in 1903 and Dr. (now Sir) Rash Behari Ghosh in 1908, for example, promoted amending Bills, but none of them became law. More recently in 1911, a private Bill was introduced in Bombay Legislative Council by the Hon'ble Sir Ibrahim Rahimtoola, to provide for the registration of all charitable trusts exceeding a certain value and for the annual audit of the accounts of such trusts by auditors approved by Government. Endowments of a purely religious nature were not included but the contents of the Bill made it clear that the ultimate object was to press for legislation for religious as well as secular trusts. About the same time a private Bill was promoted by two non-official members of the Madras Legislative Council to provide for the regular publication of the accounts of all religious endowments above a certain value and for their audit by an officer to be appointed by the District Judge. These proposals led the Government of India to reconsider the policy in force since 1863. In March 1914, the whole subject was discussed at a mixed conference of official and non-official gentlemen representing the Hindu, Muhammadan, Sikh and Buddhist communities. The present Bill, which is the outcome of the deliberations of that conference, has as its objects the simplification and cheapening of the legal processes by which persons interested can obtain information regarding the working of both religious and charitable trusts, and the exercise of a more efficient control over the action of trustees. The Bill provides that any person interested in a trust may apply by petition to the District Judge for an order directing the trustee to furnish him with information as to the nature and objects of the trust and of the value, condition, management and application of the subject-matter of the trust, and of the income belonging thereto, or as to any of these matters, and also directing that the accounts of the trust shall be examined and audited. Failure to comply with such an order of the Court would be deemed a breach of trust. In order, however, that such applications should not lead to protracted and contentious litigation, the Court is debarred from trying any question of title between the petitioner and any person claiming title to the trust, or any question as to the existence or extent of any trust. Under the Bill, it will be left to those interested to move in the matter; the intiative will not rest with Government, nor will anything be done where no one is sufficiently interested to take action. When the Court is moved the proceedings will be simple and expeditious; they will be held in the presence of all parties, and the order passed will be a judicial order of the Court. Further, in order to meet the objection that recourse to Section 14 of the Act of 1863 or Section 92 of the Code of Civil Procedure 1908, involves expensive litigation the Court is authorised, on the application of the plaintiff and after the defendant is heard, to direct the defendant either to furnish security for the expenditure incurred or likely to be incurred in bringing and maintaining the suit or to deposit in Court an amount sufficient to meet such expenditure.

It will be observed that the draft Bill only embodies general principles. It is intended that such details as the institution of some public record of the facts regarding these trusts, the publication of audited accounts, and the relaxation of some of the conditions governing committees constituted under the Act of 1863, e. g., the tenure of the membership of such committee, should be left to Provincial Legislatures".

—Gazette of India, 1919, Part V, p. 88.

## ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Amended by Acts XLI of 1923; III of 1951.

—Adapted by A.O., 1937; A.C.A.O., 1948, A.L.O., 1950.

—Amended in Bihar by Bihar Acts VIII of 1948; I of 1951; XVI of 1954 in Bengal by Bengal Act, XIII of 1934.

—Extension: Central Act 4 of 1941; Central Act 30 of 1950; Regns. 6 of 1963; 7 of 1963; 11 of 1963; Bombay Act IV of 1950; Madras Act XXXV of 1949; Punjab Act V of 1950.

—Ceases to apply: See Central Act 29 of 1954, S. 69; Bihar Act 28 of 1950, S. 19; Bombay Acts 29 of 1950, S. 85 (2) and 6 of 1960, S. 41; Madras Act 22 of 1959, S. 5; Orissa Act I of 1962, S. 19; Rajasthan Acts 24 of 1960, S. 15, 42 of 1959, S. 81 and Schedule; Uttar Pradesh Act 10 of 1964, S. 22.

## COGNATE ACTS AND PROVISIONS

1. Charitable Endowments Act, VI of 1890.
2. Civil Procedure Code (1908), S. 92.

# [THE] CHARITABLE AND RELIGIOUS TRUSTS ACT, 1920
## (ACT XIV OF 1920)[a]

[20th March, 1920.]

**An Act to provide more effectual control over the administration of Charitable and Religious Trusts.**

WHEREAS it is expedient to provide facilities for the obtaining of information regarding trusts created for public purposes of a charitable or religious nature, and to enable the trustees of such trusts to obtain the directions of a Court on certain matters, and to make special provision for the payment of the expenditure incurred in certain suits against the trustees of such trusts; It is hereby enacted as follows:—

[a] For Report of Select Committee, see Gazette of India, 1920, Pt. V, p. 85 and for Proceedings in Council, see ibid., 1919, Pt. VI, p. 879, and ibid., 1920, Pt. VI, pp. 49 and 787.

This Act has been extended to the new Provinces and merged States by the Merged States (Laws) Act, 1949 (59 of 1949), S. 3 (1-1-1950) and to the Union Territories of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act, 1950 (30 of 1950), S. 3 (16-4-1950). Vindhya Pradesh now forms part of Madhya Pradesh—see Act 37 of 1956, S. 9 (1) (e).

The Act has been partially extended to Berar by Berar Laws Act, 1941 (4 of 1941).

It has been extended also to—

Dadra and Nagar Haveli, by Regn. 6 of 1963 (1-7-1965);
Pondicherry, by Regn. 7 of 1963 (1-10-1963); and
Goa, Daman and Diu, by Regn. 11 of 1963 (1-2-1965).

This Act applies to the States merged in the States of—
Bombay: See Bombay Act 4 of 1950;
Madras: see Madras Act 35 of 1949;
Punjab: see Punjab Act 5 of 1950.

The provisions of this Act shall not apply to any Goshala registered under :—
Bihar Goshala Act, 1950 (28 of 1950): see Bih. Act 28 of 1950, S. 19;
Orissa Goshala Act, 1962 (1 of 1962), see Orissa Act 1 of 1962, S. 19;
Rajasthan Goshala Act, 1960 (24 of 1960), see Raj. Act 24 of 1960, S. 15.
Uttar Pradesh Goshala Adhiniyam, 1964 (10 of 1964), see U. P. Act (10 of 1964), S. 22.

The Act also does not apply to Waqfs to which the Wakf Act 1954 (29 of 1954) applies; see S. 69 (4) of the Wakf Act, 1954 (29 of 1954).

On the application of the provisions of the Bombay Public Trusts Act, 1950 (29 of 1950) to any public trust or class of public trusts, the provisions of the Charitable and Religious Trusts Act, 1920, which apply to such trust or class of trusts shall cease to apply to such trust or class of trusts — See Bom. Act 29 of 1950, S. 85 (2) as amended by Bombay Public Trusts (Unification and Amendment) Act, 1960 (6 of 1960). The provisions of this Act shall not apply in the State of Rajasthan to public trusts covered by the Rajasthan Public Trusts Act, w. e. f. 1-7-1962—See Rajasthan Public Trusts Act, 1959 (Raj. Act 42 of 1959), S. 81. Said Act also does not apply to Muslim Wakfs in Rajasthan governed by the Wakfs Act, 1954 (29 of 1954)—See S. 80, ibid. [1-7-1962].

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**Preamble — Note 1**

(1) This Act is intended to provide more effectual control over the administration of charitable and religious trusts. AIR 1927 Pat 189 (190).

(2) The Charitable and Religious Trusts Act of 1920 applies only to trusts of a charitable and religious nature and not to private trusts. AIR 1943 Pat 135 (137): 21 Pat 815.

**This Act shall cease to apply to charitable institutions and Hindu religious institutions and endowments in the :—**

**(i) State of Andhra Pradesh: see Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1966 (17 of 1966), S. 110 (d), [26-1-1967];**

**(ii) State of Madras: see Madras Hindu Religious and Charitable Endowments Act, 1959 (22 of 1959), S. 5 (d) [1-1-1960].**

**1. Short title and extent.**—(1) This Act may be called THE CHARITABLE AND RELIGIOUS TRUSTS ACT, 1920.

(2) It extends[a] to °[the whole of India [b][except the State of Jammu and Kashmir]] :

**Provided that the °[Government of any State] may, by notification in the °[Official Gazette] direct that this Act, or any specified part thereof, shall not extend to °[that °[State] or any specified area therein] or to any specified trust or class of trusts.**

[a] This Act has been declared to be in force in the Khondmals District by the Khondmals Laws Regulation, 1936 (4 of 1936), S. 3 and Sch.

[b] Substituted for "except Part B States" by Part B States (Laws) Act, 1951 (3 of 1951), S. 3 and Schedule [1-4-1951].

[c] Substituted for "any specified Province or area" by A. O. 1937.

**2. Interpretation.**—In this Act, unless there is anything repugnant in the subject or context, "the Court" means the Court of the District Judge [a][or any other Court empowered in that behalf by the [b][State Government]] and includes the High Court in the exercise of its ordinary original civil jurisdiction.

[a] Inserted by the Charitable and Religious Trusts (Amendment) Act, 1923 (41 of 1923), S. 2.

[b] Substituted by A. L. O. 1950.

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**Section 1 — Note 1**

(1) "We have added a proviso to sub-clause (2) of Clause 1 which will enable any Province or part of a Province to be excluded from the operation of the Act if it is found to be unsuited to special local conditions. As it appears that there are certain trusts within the scope of the Act which are subject to a satisfactory system of management and control, we have at the same time provided that the operation of the Act may be barred in the case of any particular trust or class of trusts." — Select Committee Report.

(2) The provisions of this Act are not repealed by the Madras Religious Endowments Act (2 of 1927). AIR 1935 Mad 56 (56).

(3) The Charitable and Religious Trusts Act was passed earlier than Mussalman Wakf Act of 1923 and is applicable to persons of all creed, unlike the latter Act. The Act is not to be interpreted in the light of the Mussalman Wakf Act. AIR 1937 All 786 (789): ILR (1938) All 1.

(4) The mere fact that this Act and the Mussalman Wakf Act, 1923, contain substantial provisions overlapping each other can in no way derogate from the provisions of this Act. Nor are the two Acts mutually exclusive or superfluous. AIR 1937 All 786 (789): ILR (1938) All 1.

(5) Provisions under this Act are wider than those of the Mussalman Wakf Act, 1923. AIR 1944 Nag 190 (191): ILR (1944) Nag 775.

(6) Whereas the Mussalman Wakf Act, 1923, deals with a trust by a Muhammadan whatever its purpose, public or private or partly public and partly private, the Charitable and Religious Trusts Act, 1920, covers such trusts as are created or exist for a public purpose only. AIR 1929 Oudh 225 (228): 4 Luck 429 (FB).

(7) The Act applies to all trusts created for public purposes of a charitable or religious nature without any distinction of caste or creed of the author of the trust. The Act is one of the enactments saved by Section 12, Mussalman Wakf Act and applies to trusts by Muslims. AIR 1948 Nag 183 (185): ILR (1947) Nag 538.

**Section 2 — Note 1**

(1) Under this Act District Judge acts as a Court of law and not as a persona designata: District Judge's Court is a Court subordinate to the High Court. AIR 1929 All 581 (583): 51 All 957.

3. Power to apply to the Court in respect of trusts of a charitable or religious nature.—Save as hereinafter provided in this Act, any person having an interest in any express or constructive trust created or existing for a public purpose of a charitable or religious nature may apply by petition to the Court within the local limits of whose jurisdiction any substantial part of the subject-matter of the trust is situate to obtain an order embodying all or any of the following directions, namely :—

(1) directing the trustee to furnish the petitioner through the Court with particulars as to the nature and objects of the trust, and of the value, condition, management and application of the subject-matter of the trust, and of the income belonging thereto, or as to any of these matters, and

(2) directing that the accounts of the trust shall be examined and audited :

Provided that no person shall apply for any such direction in respect of accounts relating to a period more than three years prior to the date of the petition.

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**SECTION 3 — SYNOPSIS**

1. Appeal or revision — See Section 12.
2. Applicability and scope.
3. Essentials of trust.
4. "Examined and audited."
5. Jurisdiction of Court.
6. Nature of proceeding — See Sec. 5.
7. "Person having an interest."
8. Proper party — See Section 5.
9. Proviso.
10. "Public purpose."
11. Res judicata — See S. 5.

**Topic Indicator**

Denial of trust — Effect on jurisdiction of Court — See Note 5.
Gift benefiting only a small section of public — See Note 10.
Gift to kindreds and dependants — See Note 10.
"Gurudakshina" gift by disciple — See Note 10.
Period of account — See Note 9.
Proof of trust being public trust — See Note 2.
Trust, partly for private purposes — See Note 2.

**1. Appeal or revision.**— See Section 12.

**2. Applicability and scope.** — (1) A trust partly for public and charitable purposes and partly for private purposes falls under the Act and Section 3 can be applied to it. AIR 1936 All 411 (412) * AIR 1937 All 786 (789): ILR (1938) All 1 * AIR 1937 Cal 313 (314). (Under a wakf certain properties were dedicated for the benefit of the heirs of the wakif and others were dedicated in the name of God in order that poor relations and helpless widows in the neighbourhood may get something: Held Section 3 would apply to the wakf.)

[See however AIR 1929 Oudh 225 (229): 4 Luck 429 (FB). (The Act of 1920 applies to those cases where the benefit under the entire "wakf" or trust is allotted for public purposes.)]

(2) Trust (Wakf) partly private and partly public — Interested person can apply under Section 4, Mussalman Wakf Act, 1923, and not under Section 3, Charitable and Religious Trusts Act. AIR 1929 Oudh 225 (229): 4 Luck 429 (FB).

(3) Land given to a Mahant and his heirs as occupancy tenants under a settlement decree without a right of transfer with condition that the grant to last so long as temple would be in existence — No condition of income being devoted to expenses of the temple — Grant is not for temple but is personal — Land covered by settlement decree is not wakf property — This Act does not apply. AIR 1928 Oudh 241 (244, 246): 3 Luck 392.

(4) Remedy of a mutwalli against a person claiming adversely to trust is to sue for ejectment. He cannot apply under the Act. AIR 1944 Nag 190 (191): ILR (1944) Nag 775.

(5) A perusal of Section 3 would show that the Act though it applies to religious trusts is confined to a very limited purpose. AIR 1963 SC 853 (860): (1963) Supp 1 SCR 844.

**3. Essentials of trust.** — (1) The term "trust" as used in Section 3 must be taken in a wider sense than the strict meaning of it under English law and must be deemed to include wakfs created for public purposes of a charitable or religious nature. ('31) AIR 1931 Pat 354 (355): 10 Pat 506.

(2) The trust to which the Act applies need not be an express trust. The Act applies also to a trust which on the construction of the deed may be held to be created for a public purpose of a charitable or religious nature. ('36) AIR 1936 All 411 (412).

(3) Per Wazir Hasan J. — The essence of a trust of a public or a religious purpose lies in its characteristic of permanency. So where a tenure can come to an end on default or even on the volition of the trustee the possibility of such a trust cannot be conceived. ('28) AIR 1928 Oudh 241 (246): 3 Luck 392.

(4) To constitute a trust "created or existing for a public purpose of a charitable or religious nature" the author or

**Section 3 — Note 3 (contd.)**

authors of the trust must be ascertained, and the intention to create a trust must be indicated by words or acts with reasonable certainty. Moreover, the purpose of the trust, the trust property and the beneficiaries must be indicated so as to enable the Court to administer the trust if required. AIR 1938 PC 195 (198): 65 Ind App 252: ILR (1938) Lah 453: 32 Sind LR 821 * AIR 1935 PC 97 (102): 62 Ind App 146: 57 All 330 * AIR 1951 Pat 340 (347): 28 Pat 890 (DB).

(5) The substance of a trust must be looked into to determine its character. Therefore, where a trust is in substance a public one the fact that a part of the income has been allotted for a private purpose cannot alter its character. Similarly, where it is private the fact that a negligible portion of the income is dedicated to public purposes cannot make it a public trust. AIR 1937 All 786 (789): ILR (1938) All 1.

Proof. — (6) Before a private grant can be treated as public endowment very strong evidence is necessary to prove it. Unfettered and unrestricted user by the public must be proved. AIR 1930 Oudh 96 (106).

(7) If the public were concerned in the election of a new mahant it would be evidence that the public were intimately concerned with the trust and would suggest that the trust was for public purposes. AIR 1943 Pat 135 (141): 21 Pat 815.

(8) The public nature of a trust must not be too readily inferred from the fact that worship by the public has not been interfered with or discouraged and offerings by the public even accepted. but that is also one of the factors to be considered. AIR 1943 Pat 135 (141): 21 Pat 815.

(9) To constitute a valid public trust or endowment there must be proof of a grant with the intention that profits should be utilised for the services of the idol, and that the members of the family of the founder had not treated the property as their own personal property. AIR 1935 Oudh 96 (103, 104).

(10) There is nothing in the word 'Bishnuprit' to indicate that the property referred to as such is gifted to the idol for public purposes. AIR 1943 Pat 135 (139): 21 Pat 815 * AIR 1951 Pat 340 (347): 28 Pat 890 (DB).

(11) Performance of the ceremony known as 'prasad utsarga' betokens the relinquishment of private property rights of the founder of the endowment and the dedication of the property to the idol in whose favour the property is given up. AIR 1935 Oudh 96 (106).

(12) By mere acquisition by a mahant, a property does not lose its secular character and assume a religious character. The descent from guru to chela does not warrant the presumption that it is religious property. AIR 1943 Pat 135 (138): 21 Pat 815.

(13) The feeding of sadhus and the distribution of alms and the entertainment of guests which are inevitable in a temple are merely incidental to the worship of the deities and would not make the institution a 'public trust' of the nature contemplated by the Act. Nor would the mere fact that the property has descended from Guru to Chela warrant a presumption that it is a religious property. AIR 1951 Pat 340 (347): 28 Pat 890 (DB).

(14) It is not necessary to establish the fact of dedication or the appointment of a particular person as mutawalli by direct evidence. AIR 1948 Nag 183 (186): ILR (1947) Nag 538.

(15) A trust for charitable purpose does not become invalid, if the choice of the specific charitable objects to be benefited is left to the trustees, nor is it to be condemned as invalid or illusory if, by the language of the deed, the trustees are given an absolute discretion to apply the fund at such time as they may think fit or retain it so long as they choose. AIR 1956 Cal 164 (168) (DB).

(16) Though the origin of a trust may not be known or may have become incapable of determination yet the nature of the property and its user and mode of its management are the usual and satisfactory modes of determining whether it is the property of a public trust A garden with a well, dharmsala, and chatri of an idol used by sadhus for a long time can be held to be a public trust until the contrary is proved. AIR 1968 Raj 314 (319): 1968 Raj LW 347

**4. "Examined and audited."** — (1) Under Section 3, Clause (2), the Court is enabled to direct the examination and audit of the accounts in whosoever's hands the funds or the properties may be. AIR 1938 Pat 280 (281).

**5. Jurisdiction of Court.** — (1) The existence of a public trust is the foundation for all proceedings authorized by Section 3 of the Act. AIR 1940 PC 7 (9): 67 Ind App 1: 15 Luck 1: ILR (1940) Kar PC 25.

(2) The District Judge has jurisdiction in respect of a wakf the bulk of the income of which is devoted to public and charitable purposes. AIR 1931 Pat 354 (356): 10 Pat 506.

(3) Mere denial of trust by a non-applicant or the setting up of an adverse title cannot oust the jurisdiction of the Court. AIR 1944 Nag 190 (191): ILR (1944) Nag 775 * AIR 1948 Nag 183 (185): ILR (1947) Nag 538.

(4) The Madras Hindu Religious Endowments Act of 1927 does not oust the jurisdiction of the District Judge to

4. **Contents and verification of petition.**—(1) The petition shall show in what way the petitioner claims to be interested in the trust, and shall specify as far as may be, the particulars and the audit which he seeks to obtain.

(2) The petition shall be in writing and shall be signed and verified in the manner prescribed by the Code of Civil Procedure, 1908, for signing and verifying plaints.

**5. Procedure on petition.**—(1) If the Court on receipt of a petition under Section 3, after taking such evidence and making such inquiry, if any, as it may

**Section 3 — Note 5 (contd.)**

take action under this Act in respect of a religious endowment. The failure of the Hindu Religious Endowments Board is a good reason for his taking action. AIR 1935 Mad 56 (56).

(5) The District Judge has jurisdiction to entertain and decide an application under Section 3 of the Charitable and Religious Trusts Act for an order calling upon the trustees of a Muslim trust property to furnish accounts. AIR 1948 Nag 183 (185): ILR (1947) Nag 538.

**6. Nature of proceeding.** — See Section 5.

**7. "Person having an interest."** — (1) "We have considered a number of suggestions that the word 'interest" in this clause should be defined, but as the expression is not defined in Section 92 of the Code of Civil Procedure, 1908, to which this Bill is merely ancillary, we have decided not to attempt a definition." — Select Committee Report.

(2) The words "having an interest in trust" must in each case depend upon the nature of the trust. AIR 1928 All 758 (759): 50 All 880.

(3) Members of the general public who worship at religious institutions are interested in the public trust for purposes of the Act. AIR 1934 Lah 949 (958).

(4) Secretary or another public institution is, as such and as one entitled to stay in Dharmsala created by trust, interested in such trust. AIR 1928 All 758 (759): 50 All 880.

**8. Proper party.** — See Section 5.

**9. Proviso.** — (1) "We consider that no claim for accounts should be allowed to relate back for more than three years from the date of the presentation of the petition and have provided accordingly." — Select Committee Report.

**10. "Public purpose."** — (1) The substance of the trust and primary intention of creator must be seen. AIR 1929 Oudh 225 (228): 4 Luck 429.

(2) The Court has to look to the original grant to determine its nature and purpose; subsequent events and actions or inaction of individuals or of the community cannot change the nature and purpose of the original grant. AIR 1948 Nag 183 (188, 189): ILR (1947) Nag 538.

(3) A grant does not cease to be a public grant merely because a care-taker of the property maintains himself out of the income of the grant. AIR 1948 Nag 183 (186): ILR (1947) Nag 538.

(4) The mere fact that the mutawalli was maintaining himself out of the income of the property granted does not make the grant a private or a conditional one. AIR 1948 Nag 183 (188): ILR (1947) Nag 538.

(5) A grant which is initially a public grant by the founder cannot be turned into a private grant merely by the wrongful acts of the care-takers or mutawallies. AIR 1948 Nag 183 (188): ILR (1947) Nag 538.

(6) Benefit of specified person or class of persons such as kindreds, dependants and others is not a public purpose. AIR 1929 Oudh 225 (227): 4 Luck 429 (FB).

(7) A gift which benefits only a small section of the public may be a public trust. AIR 1943 Pat 135 (140): 21 Pat 815.

(8) Where a substantial portion of the profits of the endowed property is earmarked for the support of relations of settlor and remaining portion for public of Shia community, the wakf is not wholly for public purposes. AIR 1930 Oudh 53 (54).

(9) A trust providing for "sadabarat" and for contribution towards marriages and education of Brahmin children is a public trust though the deity to which the property was endowed may be installed in a private temple which is open to public. AIR 1929 Pat 723 (728).

(10) Dedication of property to idol is a trust of religious nature which this Act is intended to cover. AIR 1941 Nag 317 (319): ILR (1942) Nag 468.

(11) A mosque built with public subscriptions and used by Muhammdan public for offering prayers was held a "religious trust" within the meaning of Section 3. AIR 1936 Lah 695 (696): 17 Lah 768.

(12) Where a grant by the disciple is described as "Gurudakshina' and the grant is to be held by the grantee generation after generation; the gift is to the Mahant personally. AIR 1943 Pat 135 (139): 21 Pat 815.

**11. Res judicata.** — See Section 5.

**Section 5 — Note 1**

**Death of trustee.** — (1) Cause of action against trustee terminates on his death and does not survive against his widow or daughter. AIR 1944 Nag 190 (192): ILR (1944) Nag 775.

consider necessary, is of opinion that the trust to which the petition relates is a trust to which this Act applies, and that the petitioner has an interest therein, it shall fix a date for the hearing of the petition, and shall cause a copy thereof, together with notice of the date so fixed, to be served on the trustee and upon any other person to whom in its opinion notice of the petition should be given.

(2) On the date fixed for the hearing of the petition, or on any subsequent date to which the hearing may be adjourned, the Court shall proceed to hear the petitioner and the trustee, if he appears, and any other person who has appeared in consequence of the notice, or who it considers ought to be heard, and shall make such further inquiries, if any, as it thinks fit. The trustee may and, if so required by the Court, shall, at the time of the first hearing or within such time as the Court may permit, present a written statement of his case. If he does present a written statement, the statement shall be signed and verified in the manner prescribed by the Code of Civil Procedure, 1908, for signing and verifying pleadings.

(3) If any person appears at the hearing of the petition and either denies the existence of the trust or denies that it is a trust to which this Act applies, and undertakes to institute within three months a suit for a declaration to that effect and for any other appropriate relief, the Court shall order a stay of the proceedings and, if such suit is so instituted, shall continue the stay, until the suit is finally decided.

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**Section 5 — Note 1 (contd.)**

**"Further inquiries."** — (2) Before passing an order under Section 5 the Court to which an application is presented under Section 3 must determine whether there is a trust to which the Act applies and also whether the petitioner is a person interested in the trust. It cannot pass an order without enquiry. 1934 Mad WN 205 (206).

(3) Where on an application the other party objects on the ground that recourse to the Act was barred by an award in arbitration, the District Judge has jurisdiction to decide whether the trust was one to which the Act applies. AIR 1942 Oudh 387 (387).

**"If no such undertaking is given".**— (4) Where no undertaking required by Section 5 (3) is given, the District Judge himself can decide whether the trust is one to which the Act applies. AIR 1938 Oudh 262 (262, 263).

**Nature of proceeding.** — (5) The decision of the Court under this Act, a decision from which by Section 12 there is no appeal, is a decision in a summary proceeding which is not a suit nor of the same character as a suit. AIR 1940 PC 7 (9): 67 Ind App 1: 15 Luck 1: ILR (1940) Kar PC 25. (Doctrine of res judicata does not apply.) * AIR 1944 Nag 190 (191): ILR (1944) Nag 775 *· AIR 1948 Nag 183 (189): ILR (1947) Nag 538.

**Proper party.**— (6) Application under S. 3 — All the trustees of a temple should be made parties and given notice. AIR 1925 Mad 135 (136).

(7) In a suit under Section 5 (3) for a declaration that the deity and properties attached to a temple were the private properties of the plaintiff and that the entire Hindu Community represented through the defendants had no right thereto, it was necessary that the deity should be joined as a proper party to the suit. AIR 1960 SC 100 (113): (1960) 1 SCR 773.

(8) A person who has claims adverse to the trust and who is not liable under Section 3 is not proper party. AIR 1925 Cal 537 (538).

**"Question of title."** — (9) The Court while deciding the question as to the existence of the trust cannot try or determine any question of title as between the petitioner and any person claiming adverse to the trust. AIR 1934 Bom 343 (344): 58 Bom 623.

(10) The inhibition against trying or determining questions of title in S. 5 (6) is not absolute but is subject to sub-sections (3) and (4) of Section 5. A claim of title adverse to the trust is in effect a denial of the existence of the trust. The court dealing with a petition properly filed under Section 3 is charged with the duty of itself deciding that dispute, if the person setting up adverse title does not avail of sub-section (3) of Section 5 and have recourse to a separate suit. AIR 1957 Andh Pra 936 (937).

**Res judicata.** — (11) A person aggrieved with an order passed under this Act holding a trust as public can institute a separate suit to have it declared otherwise. The order passed being one in a summary proceeding does not operate as res judicata even though he was a party to the proceedings. AIR 1940 PC 7 (9): 67 Ind App 1: 15 Luck 1: ILR (1940) Kar PC 25 * AIR 1947 PC 88 (89) * AIR 1929 All 506 (508): 51 All 805. (Per Niamatullah J.) * AIR 1934 Bom 343 (345): 58 Bom 623 * AIR 1934 Lah 771 (773): 16 Lah 85 * AIR 1944 Nag

(4) If no such undertaking is given, or if after the expiry of the three months no such suit has been instituted, the Court shall itself decide the question.

(5) On completion of the inquiry provided for in sub-section (2), the Court shall either dismiss the petition or pass thereon such other order as it thinks fit:

Provided that, where a suit has been instituted in accordance with the provisions of sub-section (3), no order shall be passed by the Court which conflicts with the final decision therein.

(6) Save as provided in this section, the Court shall not try or determine any question of title between the petitioner and any person claiming title adversely to the trust.

**6. Failure of trustee to comply with order under Section 5.**—If a trustee without reasonable excuse fails to comply with an order made under sub-sec. (5) of Section 5, such trustee shall, without prejudice to any other penalty or liability which he may incur under any law for the time being in force, be deemed to have committed a breach of trust affording ground for a suit under the provisions of Section 92 of the Code of Civil Procedure, 1908; and any such suit may, so far as it is based on such failure, be instituted without the previous consent of the Advocate-General.

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**Section 5 — Note 1 (contd.)**

190 (191): ILR (1944) Nag 775 * AIR 1935 Oudh 96 (106).

**Suit for declaration.** — (12) In a suit by a trustee under Section 5 (3) of the Act that the trust is not a public trust and the Act does not apply hereto, the onus is on the party who alleges that the property is trust property held for public purpose. AIR 1943 Pat 135 (137): 21 Pat 815.

(13) In a suit for declaration that the temple, deity and plaint properties were all of private ownership the Courts below might refrain from pronouncing upon the rights of the defendants, because all that they had to do is to decide whether the property is trust of a public nature. AIR 1960 SC 100 (114, 115): (1960) 1 SCR 773.

(14) As to whether an appeal or revision lies from an order passed under this section, see Section 12.

(15) Where a fund given in charity is not exhausted for the purpose specified by the donor, and no general charitable intention on the part of the donor is disclosed, the donor must be regarded to have left the surplus undisposed, and doctrine of 'cy pres' will have no application. AIR 1967 Mad 175 (179): (1965) 2 Mad LJ 173 (DB).

**Section 6 — Note 1**

(1) Under Section 6 once the breach is committed by disobedience of orders to produce accounts a suit under S. 92, Civil P. C. can be filed without sanction from the Advocate-General. AIR 1933 Mad 854 (854, 855): 57 Mad 153.

(2) Once a breach of trust has been committed by a trustee by his refusal to produce the accounts, any person (who need not be the person who obtained permission from the Court) can institute the suit under Section 92, Civil P. C., though he may not be interested in the trust. AIR 1933 Mad 854 (854): 57 Mad 153.

(3) A suit under S. 92, Civil P. C., for a breach of trust under Section 6 of this Act, can be prosecuted by the remaining plaintiffs though some of the plaintiffs happen to drop out and even though they happen to be the persons who obtained the permission to file the suit. AIR 1933 Mad 854 (855): 57 Mad 153.

(4) In a suit under Section 92, Civil P. C., for breach of trust by virtue of Section 6, the reliefs claimed must be confined to those which arise out of the failure to produce the accounts and are connected with it. AIR 1933 Mad 854 (855): 57 Mad 153.

[See however AIR 1930 All 582 (583): 52 All 863. (The District Judge can grant any relief under Section 92 (1), Civil P. C.)]

(5) The terms of Section 6 are intended to define the consequences of the orders made by the District Judge. But the words "if a trustee without reasonable cause fails to comply" in the section cannot be read to exclude a contention in a regular suit that the plaintiff is not a trustee or to prevent a similar contention being raised by a defendant to a suit under Section 92, Civil P. C. AIR 1940 PC 7 (9): 67 Ind App 1: 15 Luck 1: ILR (1940) Kar PC 25.

(6) In a suit under Section 92, Civil P. C., instituted on the basis of S. 6 of the Act, a wholesale enquiry into the general misconduct of the defendant or his negligence cannot be made. AIR 1930 All 582 (584): 52 All 863.

(7) Suit on basis of Section 6 filed — Accounts for whole period of trusteeship can be ordered. AIR 1930 All 582 (584): 52 All 863.

**7. Powers of trustee to apply for directions.**—(1) Save as hereinafter provided in this Act, any trustee of an express or constructive trust created or existing for public purpose of a charitable or religious nature may apply by petition to the Court, within the local limits of whose jurisdiction any substantial part of the subject-matter of the trust is situate, for the opinion, advice or direction of the Court on any question affecting the management or administration of the trust property, and the Court shall give its opinion, advice or direction, as the case may be, thereon :

Provided that the Court shall not be bound to give such opinion, advice or direction on any question which it considers to be a question not proper for summary disposal.

(2) The Court on a petition under sub-section (1), may either give its opinion, advice or direction thereon forthwith, or fix a date for the hearing of the petition, and may direct a copy thereof, together with notice of the date so fixed, to be served on such of the persons interested in the trust, or to be published for information in such manner, as it thinks fit.

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**Section 7 — Note 1**

(1) A trustee can apply to the Civil Court, within whose jurisdiction a substantial part of the subject-matter of the trust is situate, for advice, opinion or direction, with respect to administration or management of the trust property. AIR 1935 All 360 (361).

(2) The Court under the section exercises its consultative jurisdiction, giving guidance to the trustee. It is not to grant sanction merely because it is applied for. The limitation is that the Court will refuse to consider the matter if in its opinion the question is one not capable of summary disposal, e. g., if it is one of detail or difficulty. In any event the Court will consider judicially the matters placed before it before disposing of the matter. AIR 1957 Ker 171 (172): ILR (1957) Ker 381 (DB).

(3) Where a case presented problems of some difficulty and great nicety touching not alone the disposal of property but the disposition of human being as well — Held that the questions could not be disposed of in a summary manner within the meaning of the proviso in Section 7 (1). Therefore, the motion did not admit of proper consideration and disposal under Section 7. AIR 1957 Ker 171 (174): ILR (1957) Ker 381 (DB).

(4) A trustee is entitled to seek advice for his own protection and if he follows that advice he is protected, but if he does not choose to follow it he cannot be compelled to do so although failure to follow will be at his own risk. AIR 1936 All 801 (802) * ('49) ILR (1949) 1 Cal 461 (469).

(5) The District Judge should not express an opinion without allowing the parties to produce evidence and without going into the points in controversy and where he does so it constitutes material irregularity in the exercise of jurisdiction. AIR 1935 All 147 (147).

(6) The only difference between Section 7 of the Act and Section 92 of Civil P. C., is that Section 92 mentions expressly the appointment of new trustees as a relief to be had while Section 7 is silent on the point. But the jurisdiction of the Court is exercisable only for the proper management of the trust. When there is no dispute which normally calls for adjudication by way of a suit, Section 7 is the more appropriate provision of law. ('57) 99 Cal LJ 161 (164).

(7) Where the trustees of a charitable trust, finding it impossible, in view of the very large aggrandisement of the trust funds and of the different schemes which were being adopted by them, to manage its affairs by five persons only and they want to increase the number of trustees, the proper procedure is to apply under Section 7 for a direction to that effect. Section 92, Civil P. C., does not apply as there is neither a dispute nor a breach of trust so as to entitle any person to file a suit. ('57) 99 Cal LJ 161 (164).

(8) When a trustee makes an application to the District Judge to obtain his advice or opinion, a case is presented before him for decision. AIR 1929 All 581 (583): 51 All 957.

[See also AIR 1917 PC 71 (74): 44 Ind App 261: 40 Mad 793. (The word 'case' cannot be confined to a litigation in which there is a plaintiff who seeks to obtain particular relief as damages or otherwise against a defendant who is before the Court. It includes an ex parte application also and the matter adjudicated upon is a case — Case under the Bengal and Madras Native Religious Endowments Act, 1863.)]

(9) Order of District Judge on an application under Section 7 cannot be treated as a decree nor can it be regarded as an appealable order. AIR 1935 All 147 (148).

(10) Against an order passed under Section 7 an approach in the High Court in revision, in proper cases, e. g., lack of jurisdiction, illegal procedure etc., is

(3) On any date fixed under sub-section (2) or on any subsequent date to which the hearing may be adjourned, the Court, before giving any opinion, advice or direction, shall afford a reasonable opportunity of being heard to all persons appearing in connection with the petition.

(4) A trustee stating in good faith the facts of any matter relating to the trust in a petition under sub-section (1), and acting upon the opinion, advice or direction of the Court given thereon, shall be deemed, as far as his own responsibility is concerned, to have discharged his duty as such trustee in the matter in respect of which the petition was made.

**8. Costs of petition under this Act.**—The costs, charges and expenses of and incidental to any petition, and all proceedings in connection therewith, under the foregoing provisions of this Act, shall be in the discretion of the Court, which may direct the whole or any part of any such costs, charges and expenses to be met from the property or income of the trust in respect of which the petition is made, or to be borne and paid in such manner and by such persons as it thinks fit:

Provided that no such order shall be made against any person (other than the petitioner) who has not received notice of the petition and had a reasonable opportunity of being heard thereon.

**9. Savings.**—No petition under the foregoing provisions of this Act in relation to any trust shall be entertained in any of the following circumstances, namely:—

(a) if a suit instituted in accordance with the provisions of Section 92 of the Code of Civil Procedure, 1908, is pending in respect of the trust in question;

(b) if the trust property is vested in the Treasurer of Charitable Endowments, the Administrator-General, the Official Trustee, or any Society registered under the Societies Registration Act, 1860; or

(c) if a scheme for the administration of the trust property has been settled or approved by any Court of competent jurisdiction, or by any other authority acting under the provisions of any enactment.

**10. Power of Courts as to costs in certain suits against trustees of charitable and religious trusts.**—(1) In any suit instituted under Section 14 of the Religious Endowments Act, 1863, or under Section 92 of the Code of Civil Procedure, 1908[a], the Court trying such suit may, if, on application of the plaintiff and after hearing the defendant and making such inquiry as it thinks fit, it is satisfied that such an order is necessary in the public interest, direct the defendant either to furnish

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**Section 7 — Note 1 (contd.)**

perfectly maintainable. AIR 1957 Ker 171 (172): ILR (1957) Ker 381 (DB).

(11) Where there has been a material irregularity in the exercise of jurisdiction and the case has been decided the High Court has powers to interfere in revision. AIR 1935 All 147 (148).

(12) An order passed by the District Judge under Section 7 approving the appointment of a person as a Sarbarkhar of a trust is a case decided within the meaning of Section 115, Civil P. C. ('57) 1957 All WR (HC) 157 (158).

(13) A District Judge passing an order under Section 7 does so as a Court subordinate to High Court against which revision lies to High Court. ('57) 1957 All WR (HC) 157 (158).

**Section 10 — Note 1**

(1) The object of Section 10 is to help the plaintiff who has no personal interest in the litigation to carry it on in the interest of the public. But for such help the interest of the public might suffer, as the relators might not have funds enough to prosecute the suit till the end. But once the suit has ended, Section 10 has no application. The proper order to be made at that time is one for costs to be embodied in the final decree by which the successful plaintiff may be allowed not merely the costs between party and party but as between solicitor and client. ('48) ILR (1948) 1 Cal 315 (319) (DB).

(2) Defendant may either furnish security or deposit money and the Court cannot specify which he is to do. AIR 1924 Lah 408 (409).

(3) An order asking defendant to deposit money in Court under Section 10 is a 'case' within Section 115, Civil P. C. AIR 1924 Lah 408 (408).

security for any expenditure incurred or likely to be incurred by the plaintiff in instituting and maintaining such suit, or to deposit from any money in his hands as trustees of the trust to which the suit relates such sum as such Court considers sufficient to meet such expenditure in whole or in part.

(2) When any money has been deposited in accordance with an order made under sub-section (1), the Court may make over to the plaintiff the whole or any part of such sum for the conduct of the suit. Before making over any sum to the plaintiff, the Court shall take security from the plaintiff for the refund of the same in the event of such refund being subsequently ordered by the Court.

[a] Sections 92 and 93 of Civil P. C. cease to apply to Hindu Religious Institutions and Endowments in Tamil Nadu (Madras) and to charitable institutions and Hindu Religious Institutions and Endowments in Andhra Pradesh — See Madras Hindu Religious and Charitable Endowments Act, 1959 (Mad. Act 22 of 1959), S. 5 (e) [1-1-1960] and Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1966 (A. P. Act 17 of 1966) S. 110 (e) [26-1-1967].

**11. Provisions of the Code of Civil Procedure to apply.**—(1) The provisions of the Code of Civil Procedure, 1908, relating to—

(a) the proof of facts by affidavit,

(b) the enforcing of the attendance of any person and his examination on oath,

(c) the enforcing of the production of documents, and

(d) the issuing of commissions,

shall apply to all proceedings under this Act, and the provisions relating to the service of summonses shall apply to the service of notices thereunder.

(2) The provisions of the said Code relating to the execution of decrees shall, so far as they are applicable, apply to the execution of orders under this Act.

**12. Barring of appeals.**—No appeal shall lie from any order passed or against any opinion, advice or direction given under this Act.

## STATE AMENDMENTS

**Bihar**

After Section 12, the following section shall be added:—

"13. The provisions of this Act shall not, so far as they are inconsistent with the provisions of the Bihar Waqfs Act, 1947, or the Bihar

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**Section 12 — Note 1**

(1) The decision of the District Judge under the Act is one from which there is no appeal. AIR 1940 PC 7 (9): 67 Ind App 1: 15 Luck 1: ILR (1940) Kar PC 25.

(2) There is nothing in the Act which either expressly or impliedly ousts the revisional jurisdiction of High Court. 1957 All WR (HC) 157 (160).

(3) Against an order passed under Section 7, Charitable and Religious Trusts Act, an approach to the High Court in revision, in proper cases, e.g. lack of jurisdiction, illegal procedure, etc. is perfectly maintainable. AIR 1957 Ker 171 (172): ILR (1957) Ker 381 (DB).

(4) Order under Section 3 is revisable. AIR 1938 Oudh 262 (262, 263) * AIR 1947 Nag 87 (88): ILR (1946) Nag 96 * AIR 1936 Lah 695 (696): 17 Lah 768.

[But see AIR 1942 Oudh 387 (387, 388). (Decision under Section 3 is a decision in a summary proceeding and is not revisable.)]

(5) Revision lies against an order passed under Section 5. AIR 1936 All 411 (411) * AIR 1929 All 581 (583, 584): 51 All 957.

(6) Where the District Judge decides under sub-section (4) of Section 5 and there is no illegality or material irregularity a revision will not lie against his order. AIR 1938 Oudh 262 (262).

(7) A decision under the Act is a decision in a summary proceeding which is not a suit and it is not made final by any provision in the Act. An aggrieved party can file a suit impeaching the order or can raise the question by way of defence in a suit filed by the opposite side. The High Court will be reluctant to interfere with such an order in revision as another remedy is open to the aggrieved party. It cannot however be laid down that in no case in revision against an order passed under the Act interference is permissible. AIR 1948 Nag 183 (189): ILR (1947) Nag 538.

Hindu Religious Trusts Act, 1950, apply to any waqf or, as the case may be, religious trust in the State of Bihar".— BIHAR ACTS 8 of 1948. S. 4 (4) and 1 of 1951, S. 4 (4) (as amended by Bihar Act 16 of 1954, S. 41.)

West Bengal

After Section 12 the following section shall be added—

"13. The provisions of this Act shall not, so far as they are inconsistent with the provisions of the Bengal Wakf Act, 1934, apply to any wakf property in West Bengal".—BENGAL ACT 13 of 1934, S. 81.

NOTE—In the light of the provision contained in sub-section (2) of Section 69 of the Muslim Wakfs Act, 1954 (29 of 1954), the Bihar Waqfs Act, 1947 (Bihar Act 8 of 1948) and the Bengal Wakf Act, 1934 (Bengal Act 13 of 1934) should be taken to have been repealed.

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# [THE] CHARITABLE ENDOWMENTS ACT, 1890
## (ACT VI OF 1890)

[The text of the Act printed here is as on 15-4-1969.]

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## STATEMENT OF OBJECTS AND REASONS

"On many occasions the want has been felt in India of an official capable of discharging the functions which are discharged in England by the Official Trustee of Charity Lands and the Official Trustees of Charitable Funds. The object of this Bill is to meet that want.

2. Much property has from time to time in different parts of India been vested by founders in public servants, such as the Collector, Director of Public Instruction, Accountant-General and Divisional Commissioner. With respect to a case in which an Accountant-General and a Divisional Commissioner had been named as trustees, the Officiating Advocate-General of Bengal and the Officiating Standing Counsel stated in a joint opinion in 1885 that persons cannot, as holders of certain posts, be appointed trustees "unless these posts are corporate ones". Neither the "office of the Accountant-General nor that of the Commissioner" they observed, "is a corporate office; and even if appointed by the designation of their office only, and not by name the trust-fund would vest in them as individuals, and they would remain trustees until they themselves appointed others to succeed them or until they died".

3. There is a difficulty in India in finding any corporation capable of acting as a trustee in such cases as this Bill is designed to meet. The Secretary of State for India in Council and the Governor-General in Council are incapable of being trustees (L. R. 15 Ch. D. 9). It has also been held that Anglican Bishops and Archdeacons in India, who have been constituted by Letters Patent to be perpetual corporations, with power to take and hold property under grant or licence from the Crown, are not capable of acting as trustees in some of the cases for which this Bill is intended to provide. To the question whether the Lord Bishop of

Calcutta in his corporate capacity might not, under the Letters Patent for the Bishopric of Calcutta, bearing date the 14th May 1814, hold land upon trust for a Dioceasan School so that, upon his ceasing to be Bishop, it would devolve without a deed upon his successor in the Bishopric, an eminent counsel in England, to whom the question was referred, has replied in the negative. "It is quite true", he remarks, "that the Bishop is a corporation sole, and in that capacity can hold the lands belonging to his See. He may, however, only hold such lands as by grant or licence from the Company (now Her Majesty) he is authorised to take, hold and enjoy. I think it is clear that the Letters Patent only refer to lands belonging to, or purchased out of moneys belonging to, the Bishopric . . . . . on the whole. I am of opinion that, if the land in question was conveyed to the Bishop as a trustee, it would pass on his death not to his successor but to his executors".

4. The Bill, it will be observed, is of a purely permissive character. The Government will be unable to make a vesting order or frame a scheme except on application for that purpose, and may, if it sees fit, refuse to act. The corporation sole in whom as Treasurer of Charitable Endowments property may be vested is, except as regards the disposal of any property by direction of the Government, to have nothing to do with the administartion of the property. He is to be a bare trustee, the object of vesting the property in him by his name of office as a corporation sole being to secure the holding of the property by some one always present, and to avoid the difficulty and expense of appointing a new trustee on the retirement or death of any incumbent of the trust".

—Gazette of India, 1889, Part V, Page 137.

## ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A. O., 1937; A. C. A. O., 1948; A. L. O., 1950.

—Amended by Acts 3 of 1951; 58 of 1960.

—Amended in—

Bihar by Bih. Acts 8 of 1948 and 1 of 1951; Uttar Pradesh by U. P. Act 37 of 1952; West Bengal by Beng. Act 13 of 1934.

—Extension : Extended by Acts 59 of 1949; 30 of 1950.

" in Bombay by Bom. Act 4 of 1950;

" in Madhya Pradesh by M. P. Acts 12 of 1950; 23 of 1958;

" in Madras by Mad. Act 35 of 1949.

" in Punjab by Punj. Act 5 of 1950.

—Ceases to apply: See Central Act 29 of 1954, S. 69; Andh Pra. Act 17 of 1966; Madras Acts 19 of 1951, S. 5; 22 of 1959; Raj. Act. 42 of 1959.

—Repealed in part and amended by Act, XXXVIII of 1920.

## COGNATE ACTS AND PROVISIONS

Charitable and Religious Trusts Act XIV of 1920.

# [THE] CHARITABLE ENDOWMENTS ACT, 1890

## (ACT VI OF 1890)[a]

[7th March, 1890.]

**An Act to provide for the Vesting and Administration of Property held in trust for charitable purposes.**

WHEREAS it is expedient to provide for the vesting and administration of property held in trust for charitable purposes; It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, see Gaz. of Ind., 1889, Pt. V, p. 137. For Report of the Select Committee, see Gaz. of Ind., 1890, p. 65; and for Proceedings in Council, see ibid., 1889, Pt. VI, pp. 117 and 190, and ibid, 1890 Pt. VI, p. 37.

This Act has been declared to be in force in the Sonthal Parganas by the Sonthal Parganas Settlement Regulation (3 of 1872), S. 3 as amended by Reg. 3 of 1899, S. 3; in the Khondmals District by the Khondmals Laws Regulation, 1936 (4 of 1936), S. 3 and Sch.

This Act has been extended to the new Provinces and Merged States by the Merged States (Laws) Act, 1949 (59 of 1949), S. 3 (1-1-1950) and to the

Union Territories of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act, 1950 (30 of 1950), S. 3 (16-4-1950). Vindhya Pradesh now forms part of the State of M. P. — See Act 37 of 1956, S. 9 (1) (e).

It has been partially extended to Berar by Act 4 of 1941.

It has been extended also to—

Dadra and Nagar Haveli: see Regulation 6 of 1963 [1-7-1965];
Goa, Daman and Diu: see Regulation 11 of 1963 [1-2-1965];
Pondicherry: see Regulation 7 of 1963; [1-10-1963];
Laccadive, Minicoy and Amindivi Islands: see Regulation 8 of 1965.

This Act applies to the States merged in the States of—

Bombay: see Bom. Act 4 of 1950;
Madhya Pradesh: see M. P. Act 12 of 1950;
Madras: see Mad. Act 35 cf 1949;
Punjab: Punjab Act 5 of 1950.

For the ceasing of the Act to apply to—

Muslim Wakfs: see Central Act 29 of 1954, S. 69 (1);
Hindu Religious Institutions and Endowments in Andhra Pradesh: see Andhra Pradesh Act 17 of 1966, S. 110 [26-1-1967]; Madras: see Mad. Act 22 of 1959, S. 5 (c) [1-1-1960]; and Rajasthan: see Raj. Act 42 of 1959, S. 81 [1-7-1962].

**1. Title, extent and commencement.**—(1) This Act may be called THE CHARITABLE ENDOWMENTS ACT, 1890.

(2) It extends to °[the whole of India ª[except the State of Jammu and Kashmir] ] and

(3) It shall come into force on the first day of October, 1890.

[a] Substituted for "except Part B States" by the Part B States (Laws) Act, 1951 (3 of 1951), S. 3 and Sch. [1-4-1951].

**2. Definition.**—In this Act "charitable purpose" includes relief of the poor education, medical relief and the advancement of any other object of general public utility, but does not include a purpose which relates exclusively to religious teaching or worship.

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**Section 1 — Note 1**

(1) In consequence of the extension of Charitable Endowments Act 1890, and Charitable and Religious Trusts Act, 1920, to Part B State of Hyderabad the Hyderabad Endowments Regulations, 1940, in so far as they apply to religious trusts cannot be deemed to have been repealed in view of Section 6 of Part B States (Laws) Act. AIR 1963 SC 853 (860): (1963) Supp 1 SCR 844.

**Section 2 — Note 1**

(1) There are four heads which can fall under the word "charitable" namely (1) religion (2) poverty (3) education and (4) other purposes beneficial to the community. But at the same time it is not every object which comes within one or other of these categories is charitable although an object to rank as charitable must either fit into one or more of the first three categories or if not must be of general public utility. 1957-1 All ER 745 (752): 1957-1 WLR 729.

(2) In determining the purpose of a trust regard must be had not only to the language in which the purpose is expressed but also to the means which are indicated for achieving that purpose. 1957-1 All ER 854 (856).

(3) The Court is not bound to be guided either by the conviction of the testator that the reform for the promotion of which he has created the trust is beneficial or by his description of the trust as charitable. 1957-1 All ER 745 (755): (1957) 1 WLR 729.

(4) A charitable trust must not have inherent in it the potentiality of individual profit for a non-charitable beneficiary. 1957-1 All ER 854 (858, 859).

(5) The word "charitable" excludes benevolent or philanthropic activities which the layman would consider to be covered by the expression. 1957-1 All ER 745 (752): 1957-1 WLR 729.

(6) Trust for political purposes, which advocate changes in law, are not considered charitable. 1957-1 All ER 745 (756): 1957-1 WLR 729.

**3. Appointment and incorporation of Treasurer of Charitable Endowments.**—[a][(1) The Central Government may appoint an officer of the Government by the name of his office to be Treasurer of Charitable Endowments for India, and the Government of any °[State] may appoint an officer of the Government by the name of his office to be Treasurer of Charitable Endowments for the °[State.]]

(2) Such Treasurer shall, for the purposes of taking, holding and transferring moveable or immoveable property under the authority of this Act, be a corporation sole by the name of the Treasurer of Charitable Endowments for [b][India or, as the case may be, the °[State]] and, as such Treasurer, shall have perpetual succession and a corporate seal, and may sue and be sued in his corporate name.

[a] Substituted by A. O., 1937, for the original sub-section (1).

[b] Substituted by A. O., 1937, for "the territories subject to the Local Government".

[a][3A. **Definition of "appropriate Government" etc.**—In the subsequent provisions of this Act "the appropriate Government" means, as respects a charitable endowment, the objects of which do not extend beyond a single °[State] and are not objects to which the executive authority of the Central Government extends, the Government of the °[State] and as respects any other charitable endowment the Central Government.]

[a] Inserted by A. O., 1937.

**4. Orders vesting property in Treasurer.**—(1) Where any property is held or is to be applied in trust for a charitable purpose, the [a][appropriate Government], if it thinks fit, may, on application made as hereinafter mentioned, and subject to the other provisions of this section, order, by notification in the Official Gazette that the property be vested in the Treasurer of Charitable Endowments on such terms as to the application of the property or the income thereof as may be agreed on between the [a][appropriate Government] and the person or persons making the application, and the property shall thereupon so vest accordingly.

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**Section 2 — Note 1 (contd.)**

(7) A College Committee formed with the object of promoting education comes within the ambit of the definition contained in the Act. AIR 1958 Andh Pra 773 (776).

(8) Education is not confined to teaching by a master in a class. A body of persons established for the purpose of raising the artistic taste of the country and established by an appropriate document which confines them to that purpose, is established for educational purposes. 1957-1 All ER 854 (857).

(9) The point that the trust is not for the promotion of music in general but for the promotion of the music of a particular individual composer, does not vitiate the charitable nature of the trust created for advancement of music. 1957-1 All ER 854 (857).

(10) Because there is an element of pleasure, inherent in music, that in itself cannot destroy the charitable character of a bequest for advancement of the music. The pleasure is not the purpose but only the by-product which is in the process of educating in music. 1957-1 All ER 854 (857).

(11) Research and propaganda which merely tend to increase public knowledge is not "education" when the element of teaching is not combined with them. 1957-1 All ER 745 (753): 1957-1 WLR 729.

(12) The object of a trust may be of public general utility but still it cannot be regarded as charitable unless it is beneficial to the public in a manner which the law will regard as charitable. 1957-1 All ER 745 (753): 1957-1 WLR 729.

(13) It is very important to distinguish motive from purpose. Motive is not relevant except in so far as it is incorporated into the purpose of the trust. 1957-1 All ER 854 (858).

**Section 4 — Note 1**

(1) "We have made it clear that a Treasurer of Charitable Endowments is not to be an administering trustee of property vested in him as such Treasurer". — Select Committee Report.

(2) The vesting contemplated by the section is for limited purpose only, namely the management of the property. It does not result in any divestment of the society and the transference of the property to the appointed trustee. AIR 1958 Andh Pra 773 (777, 778).

(3) The Act leaves the question of vesting to the subjective satisfaction of the Government. The High Court will not interfere with the Government's opinion regarding existence of necessity for the appointment of a treasurer ex-

(2) When any property has vested under this section in a Treasurer of Charitable Endowments, he is entitled to all documents of title relating thereto.

[b][° ° ° ° °]

(4) An order under this section vesting property in a Treasurer of Charitable Endowments shall not require or be deemed to require him to administer the property, or impose or be deemed to impose upon him the duty of a trustee with respect to the administration thereof.

[a] Substituted by A. O., 1937 for "Local Government".
[b] Sub-section (3) was repealed by A. O., 1937.

**5. Schemes for administration of property vested in the Treasurer.**—(1) On application made as hereinafter mentioned, and with the concurrence of the person or persons making the application, the [a][appropriate Government], if it thinks fit, may settle a scheme for the administration of any property which has been or is to be vested in the Treasurer of Charitable Endowments, and may in such scheme appoint, by name or office, a person or persons, not being or including such Treasurer, to administer the property.

(2) On application made as hereinafter mentioned, and with the concurrence of the person or persons making the application, the [a][appropriate Government] may, if it thinks fit, modify any scheme settled under this section or substitute another scheme in its stead.

(3) A scheme settled, modified or substituted under this section shall, subject to the other provisions of this section, come into operation on a day to be appointed by the [a][appropriate Government] in this behalf, and shall remain in force so long as the property to which it relates continues to be vested in the Treasurer of Charitable Endowments or until it has been modified or another such scheme has been substituted in its stead.

(4) Such a scheme, when it comes into operation, shall supersede any decree or direction relating to the subject-matter thereof in so far as such decree or direction is in any way repugnant thereto, and its validity shall not be questioned in any Court, nor shall any Court give, in contravention of the provisions of the scheme or in any way contrary or in addition thereto, a decree or direction regarding the administration of the property to which the scheme relates:

[b][Provided that nothing in this sub-section shall be construed as precluding a Court from inquiring whether the Government by which a scheme was made was the appropriate Government.]

(5) In the settlement of such a scheme effect shall be given to the wishes of the author of the trust so far as they can be ascertained, and, in the opinion of the [b][appropriate Government], effect can reasonably be given to them.

(6) Where a scheme has been settled under this section for the administration of the property not already vested in the Treasurer of Charitable Endowments. it shall not come into operation until the property has become so vested.

[a] Substituted by A.O., 1937, for "Local Government".
[b] Inserted by A.O., 1937.

## STATE AMENDMENTS

**Bihar**

To Section 5, the following Proviso shall be added—

"Provided that the powers of the State Government under this section for the settlement, modification or substitution of a scheme for the administration of any property shall, in respect of any waqf property within the

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**Section 4 — Note 1 (contd.)**

cept when the Government is shown to have been influenced by extraneous considerations or had acted mala fide in coming to the decision. AIR 1958 Andh Pra 773 (778).

(4) The appointment of a treasurer and the vesting of properties in him for the purposes specified in the Act, would not offend the fundamental rights guaranteed under Articles 19 and 31 of

meaning of the Bihar Waqfs Act, 1947, or trust property within the meaning of the Bihar Hindu Religious Trusts Act, 1950, be exercised subject to the approval of the State Government, by the Majlis established under the first mentioned Act, or, as the case may be, by the Board established under the last mentioned Act." —Bihar Acts 8 of 1948, Ss. 4 (3) and 1 of 1951, S. 4 (3) (as substituted by Bihar Act 16 of 1954, S. 41).

**West Bengal**

To Section 5 the following proviso shall be added, namely:—

"Provided that the powers of the State Government under this section for the settlement, modification or substitution of a scheme for the administration of any property shall, in respect of any wakf property in West Bengal, be exercised, subject to the approval of the State Government, by the Board of Waqfs appointed under the Bengal Wakf Act, 1934."

—Bengal Act 13 of 1934, S. 79.

Note.—In the light of the provision contained in sub-section (2) of S. 69 of the Muslim Wakfs Act, 1954 (29 of 1954), the Bihar Waqfs Act, 1948 (Bihar Act 8 of 1948) and the Bengal Wakf Act, 1934 (Bengal Act 13 of 1934), should be taken to have been repealed.

**6. Mode of applying for vesting orders and schemes.**—(1) The application referred to in the two last foregoing sections must be made,—

(a) if the property is already held in trust for a charitable purpose, then by the person acting in the administration of the trust, or, where there are more persons than one so acting, then by those persons or a majority of them; and

(b) if the property is to be applied in trust for such a purpose, then by the person or persons proposing so to apply it.

(2) For the purposes of this section the executor or administrator of a deceased trustee of property held in trust for a charitable purpose shall be deemed to be a person acting in the administration of the trust.

## STATE AMENDMENTS

**West Bengal**

After Section 6, the following sub-section shall be added, namely:—

"(3) An application for the vesting of any property of the nature specified in sub-section (3) of Section 4 may, notwithstanding anything contained in this section, be made by the Commissioner of Wakfs appointed under the Bengal Wakf Act, 1934, where such property is under the administration of an official mutawalli or of a mutawalli appointed under Sec. 40 of that Act."

—Bengal Act, 13 of 1934, S. 80.

Note.—In the light of the provision contained in sub-section (2) of Section 69 of the Muslim Wakfs Act, 1954 (29 of 1954), the Bengal Wakf Act, 1934 (Bengal Act 13 of 1934), should be taken to have been repealed.

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**Section 4 — Note 1 (contd.)**

the Constitution. AIR 1958 Andh Pra 773 (779).

(5) It is not illegal and improper to make an order for vesting on an application under Section 4 even though the application was made on Government persuasion containing a threat. AIR 1958 Andh Pra 773 (778).

**Section 5 — Note 1**

(1) "We have provided more fully here for the appointment of administering trustees, and the revision and protection of schemes settled under the section." — Select Committee Report.

(2) An application made under Section 4 and Section 5 (1) of the Act, is not irregular merely because the suggestion made by the Government to a society to apply under Section 4 is also accompanied by a threat. AIR 1958 Andh Pra 773 (778).

Section 6A
Uttar Pradesh

In its application to Uttar Pradesh, after Section 6, the following shall be inserted as Section 6A:—

"6A. (1) If the State Government is satisfied upon representation made or otherwise, that in any case, where any property has already vested in the Treasurer of Charitable Endowments under Section 4 and a scheme has been settled under Section 5 that the person or persons acting in the administration thereof are wasting or maladministering the same, it may by notice require the person or persons to show cause why the scheme settled for administration be not modified or substituted by another scheme.

(2) The notice under sub-section (1) shall be served in such manner as may be specified.

(3) Where the person or persons served with the notice fail to show cause within the time allowed or the Government is satisfied after considering their explanation, if any, and making such enquiry as it may deem necessary that the property is being wasted or maladministered, it may, notwithstanding anything contained in Section 5 or 6, modify the scheme or substitute another scheme in its place." — U. P. Act 37 of 1952, S. 2 [15-12-1952].

**7. Exercise by Governor-General in Council of powers of Local Government.** [Repealed by A.O., 1937.]

**8. Bare trusteeship of Treasurer.**—(1) Subject to the provisions of this Act, a Treasurer of Charitable Endowments shall not, as such Treasurer, act in the administration of any trust whereof any of the property is for the time being vested in him under this Act.

(2) Such Treasurer shall keep a separate account of each property for the time being so vested in so far as the property consists of securities for money, and shall apply the property or the income thereof in accordance with the provision made in that behalf in the vesting order under Section 4 or in the scheme, if any, under Section 5, or in both those documents.

(3) In the case of any property so vested other than securities for money, such Treasurer shall, subject to any special order which he may receive from the authority by whose order the property became vested in him, permit the persons acting in the administration of the trust to have the possession, management and control of the property, and the application of the income thereof, as if the property had been vested in them.

**9. Annual publication of list of properties vested in Treasurer.**—A Treasurer of Charitable Endowments shall cause to be published annually in the [a][Official Gazette], at such time as the [a][appropriate Government] may direct, a list of all properties for the time being vested in him under this Act and an abstract of all accounts kept by him under sub-section (2) of the last foregoing section.

[a] Substituted by A.O., 1937, for "Local Government".

**10. Limitation of functions and powers of Treasurer.**—(1) A Treasurer of Charitable Endowments shall always be a sole trustee, and shall not, as such

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**Section 8 — Note 1**

(1) Appointment of a treasurer under Section 4 does not divest a society of its property neither is there any transference of any property from the society to the treasurer. Appointment of a treasurer and the vesting of the property in him for the purposes specified in the Act would not offend fundamental rights of the members of a society either under Article 19 or Article 31 of the Constitution. AIR 1958 Andh Pra 773 (779): (1958) 2 Andh WR 580.

**Section 10 — Note 1**

(1) "We have provided for the vesting in administering trustees of property of which a Treasurer of Chartiable Endowments has been divested by a direction of the Government." — Select Committee Report.

(2) The vesting under the Act does not create any proprietary right over the property in favour of the trustee. AIR 1958 Andh Pra 773 (777).

Treasurer, take or hold any property otherwise than under the provisions of this Act, or subject to those provisions transfer any property vested in him except in obedience to a decree divesting him of the property, or in compliance with a direction in that behalf issuing from the authority by whose order the property became vested in him.

(2) Such a direction may require the Treasurer to sell or otherwise dispose of any property vested in him, and, with the sanction of the authority issuing the direction, to invest the proceeds of the sale or other disposal of the property in any such security for money as is [a][specified in the direction], or in the purchase of immovable property.

(3) When a Treasurer of Charitable Endowments is divested, by a direction of [b][the appropriate Government] under this section, of any property, it shall vest in the person or persons acting in the administration thereof and be held by him or them on the same trust as those on which it was held by such Treasurer.

[a] Substituted by A.O., 1937, for "mentioned in Section 4, sub-section (3), clause (a), (b), (c), (d) or (e)".

[b] Substituted by A.O., 1937, fir "the Local Government or the Governor-General in Council".

**11. Provisions for continuance of office of Treasurer in certain contingencies.**— If the office held by an officer of the Government who has been appointed to be a Treasurer of Charitable Endowments is abolished or its name is changed, the [a][appropriate Government] may appoint the same or another officer of the Government by name of his office to be such Treasurer, and thereupon the holder of the latter office shall be deemed for the purposes of this Act to be the successor-in-office of the holder of the former office.

[a] Substituted by A.O., 1937, for "Local Government" which had been substituted for "Governor-General in Council" by the Devolution Act, 1920 (38 of 1920), S. 2 and Schedule I.

[a][12. **Transfer of property from one Treasurer to another.**—If by reason of any alteration of areas or by reason of the appointment of a Treasurer of Charitable Endowments for India or for any [b][State] for which such a Treasurer has not previously been appointed or for any other reason it appears to the Central Government that any property vested in a Treasurer of Charitable Endowments should be vested in another such Treasurer, that Government may direct that the property shall be so vested and thereupon it shall vest in that other Treasurer and his successors as fully and effectually for the purposes of this Act, as if it had been originally vested in him under this Act.]

[a] Substituted by A.O., 1937, for the original Section 12.

[b] Substituted by A.L.O., 1950.

[a][13. **The power to frame forms and make rules.**—[b][ ° ° ° ]

(2) The [a][appropriate Government] may make rules consistent with this Act for,—

(a) prescribing the fees to be paid to the Government in respect of any property vested under this Act in a Treasurer of Charitable Endowments.

(b) regulating the cases and the mode in which schemes or any modification thereof are to be published before they are settled or made under Section 5;

(c) prescribing the forms in which accounts are to be kept by Treasurers of Charitable Endowments and the mode in which such accounts are to be audited; and

(d) generally carrying into effect the purposes of this Act.]

[a] Substituted by the Devolution Act, 1920 (38 of 1920), S. 2 and Schedule I, for the original section.

[b] Sub-section (1) was omitted by A.O., 1937.

[c] Substituted by A.O., 1937, for "Local Government".

**14. Indemnity to Government and Treasurer.**—No suit shall be instituted against the °[Government] in respect of anything done or purporting to be done under this Act, or in respect of any alleged neglect or omission to perform any duty devolving on the Government under this Act, or in respect of the exercise of, or the failure to exercise, any power conferred by this Act on the Government, nor shall any suit be instituted against a Treasurer of Charitable Endowments except for divesting him of property on the ground of its not being subject to a trust for a charitable purpose, or for making him chargeable with or accountable for the loss or misapplication of any property vested in him, or the income thereof, where the loss or misapplication has been occasioned by or through his wilful neglect or default.

**15. Saving with respect to Advocate-General and Official Trustee.**—Nothing in this Act shall be construed to impair the operation ª[of any enactment] for the time being in force, respecting the authority of an Advocate-General ᵇ[° ° °] to act with respect to any charity, °[or of the Official Trustees Act, 1913] respecting the vesting of property in trust for a charitable purpose in an Official Trustee.

[a] Substituted for the words and figures "of Section III of the Statute 53, George III, Chapter 155, or of any other enactment" by the Repealing and Amending Act, 1960 (58 of 1960), S. 3 and Schedule II [26-12-1960].

[b] The words "at a presidency" were omitted, ibid.

[c] Substituted for the expression "or of Sections 8, 9, 10 and 11 of Act No. XVII of 1864 (An Act to constitute an office of Official Trustee)", ibid.

**16. General controlling authority of Governor-General in Council.**—[Repealed by the Devolution Act, 1920 (XXXVIII of 1920), S. 2 and Schedule I, Pt. I.]

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# [THE] CHARTERED ACCOUNTANTS ACT, 1949

## (ACT XXXVIII of 1949)

[The text of the Act printed here is as on 15-4-1969.]

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**Section 14 — Note 1**

(1) "In settling this section we have had regard to the expression of Section 226 of the Municipal Corporations Act, 1882 (45 & 46 Vict., Ch. 50) to which, and to the cases on which that section was based, our attention was directed..." —Select Committee Report.

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## STATEMENT OF OBJECTS AND REASONS

"The accountancy profession in India is at present regulated by the Auditors Certificates Rules framed in 1932 in exercise of the powers conferred on the Government of India by Section 144 of the Indian Companies Act, 1913, and the Indian Accountancy Board advises Government in all matters relating to the profession and assists it in maintaining the standards of the professional qualifications and conduct required of the members of the profession. The majority of the Board's members are elected by Registered Accountants, members of the profession from all parts of India. These arrangements have, however, all along been intended to be only transitional, to lead up to a system in which such accountants will, in autonomous association of themselves, largely assume the responsibilities involved in the discharge of their public duties by securing maintenance of the requisite standard of professional qualifications, discipline and conduct, the control of the Central Government being confined to a very few specified matters.

2. The Bill seeks to authorise the incorporation by statute of such an autonomous professional body and embodies a scheme which is largely the result of a detailed examination of the whole position by an ad hoc expert body constituted for the purpose, after taking into account the views expressed by the various Provincial Governments and public bodies concerned".

—Gaz. of India, 11-9-1948, Pt. V, p. 709.

## ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A.L.O., 1950.
—Amended by Acts 3 of 1951; 40 of 1955; 15 of 1959; 52 of 1964; 25 of 1968.
—Extended by Acts 59 of 1949; 30 of 1950; 25 of 1968; Reg. 7 of 1963; Reg. 11 of 1963; Reg. 7 of 1963 read with Reg. 2 of 1965 and Reg. 8 of 1965.
—Repealed in part by Act 48 of 1952.

## COGNATE ACTS AND PROVISIONS

1. Public Accountants' Default Act, 1850 (12 of 1850).
2. Costs and Works Accountants Act, 1959 (23 of 1959).

# [THE] CHARTERED ACCOUNTANTS ACT, 1949
## (ACT XXXVIII OF 1949)[a]

[1st May 1949.]

**An Act to make provision for the regulation of the [b][profession of chartered accountants].**

Whereas it is expedient to make provision for the regulation of the [b][profession of chartered accountants] and for that purpose to establish an Institute of Chartered Accountants;

It is hereby enacted as follows:—

[a] For Statement of Objects and Reasons, see Gazette of India, dated 11-9-1948, Pt. V, p. 709.

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**Preamble — Note 1**

(1) The Act appears to be an extremely ill-drafted one and no proper regard seems to have been paid to the necessity of providing for grades of misconduct and graduated forms of punishment

This Act has been extended to the new Provinces and merged States by the Merged States (Laws) Act, 1949 (59 of 1949), S. 3 [1-1-1950] and to the Union Territories of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act, 1950 (30 of 1950), S. 3 [16-4-1950]. Vindhya Pradesh now forms part of the State of Madhya Pradesh—see Act 37 of 1956, S. 9 (1) (e) [1-11-1956].

It has also been extended to—

Dadra and Nagar Haveli, by Regn. 6 of 1963 as amended by Regn. 2 of 1965 [1-7-1965];

Pondicherry, by Regn. 7 of 1963 [1-10-1963];

Goa, Daman and Diu, by Regn. 11 of 1963 [1-2-1965];

Laccadive, Minicoy and Amindivi Islands, by Regn. 8 of 1965; and

Jammu and Kashmir, by Act 25 of 1968 [15-8-1968].

[b] Substituted for "profession of accountants" by the Chartered Accountants (Amendment) Act, 1959 (15 of 1959), S. 2.

## CHAPTER I

## PRELIMINARY

**1. Short title, extent and commencement.**—(1) This Act may be called THE CHARTERED ACCOUNTANTS ACT, 1949.

[a][(2) It extends to the whole of India [b][ ° ° ° ].]

(3) It shall come into force on such date[c] as the Central Government may, by notification in the Official Gazette, appoint in this behalf.

[a] Substituted for sub-section (2) by A.L.O., 1950.

[b] The words "except the State of Jammu and Kashmir" which were substituted by Part B States (Laws) Act, 1951 (3 of 1951), were omitted by Central Laws (Extension to Jammu and Kashmir) Act, 1968 (25 of 1968), S. 2 and Schedule [15-8-1968].

[c] The Act came into force on 1-7-1949—See Notification No. 10-A (4)/49 dated 1-6-1949, published in Gazette of India, dated 1-6-1949, Extraordinary, page 904.

**2. Interpretation.**—(1) In this Act, unless there is anything repugnant in the subject or context,—

(a) "associate" means an associate member of the Institute;

(b) "chartered accountant" means a person who is a member of the Institute [a][ ° ° ° ];

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**Preamble — Note 1 (contd.)**

appropriate thereto. AIR 1954 Cal 299 (300) (DB).

(2) The Chartered Accountants Act is a self-contained code of conduct of the Chartered Accountants. The aim of the Act was mainly to protect the public from unscrupulous, negligent or dishonest accountants; but for any or every unworthy or merely blameworthy conduct of a Chartered Accountant, action cannot be taken under the Act. The ends of justice require that the principles laid down and the directions given regarding complaint and prima facie opinion, charges, enquiry, quorum, report and penalty should be followed by the authorities as guide lines. AIR 1964 Cal 131 (139, 141) : 67 Cal WN 772 (DB).

**Section 1 — Note 1**

(1) As the object of the Act is not to inflict punishment on anyone but to protect the public from undesirable persons, namely unscrupulous, negligent or dishonest accountants bearing the stigma of a conviction or misconduct on their character the ordinary rule of construction in favour of the prospective applicability and against retrospective operation of a penal statute does not apply to its construction. The applicability of the Act to a misconduct proved to have been committed prior to its enactment is not therefore excluded. AIR 1957 Cal 33 (38, 39) (DB).

**Section 2 — Note 1**

(1) The words "to be in practice" have an extended meaning given to it by subsection (2) cl. (iv) the effect of which is to bring within the disciplinary jurisdiction of the council the conduct of Chartered Accountants even while they are rendering services otherwise than as

(c) "Council" means the Council of the Institute;

(d) "holder of a restricted certificate" means a person holding a permanent or temporary restricted certificate granted by °[State] Government under the Restricted Certificates Rules, 1932;

(e) "Institute" means the Institute of Chartered Accountants of India constituted under this Act;

(f) "prescribed" means prescribed by regulations made under this Act;

(g) "Register" means the Register of Members maintained under this Act;

(h) "registered accountant" means any person who has been enrolled on the Register of Accountants maintained by the Central Government under the Auditor's Certificates Rules, 1932;

(i) "year" means the period commencing on the 1st day of April of any year and ending on the 31st day of March of the succeeding year.

(2) A member of the Institute shall be deemed "to be in practice", when individually or in partnership with chartered accountants [b][in practice], he, in consideration of remuneration received or to be received,—

(i) engages himself in the practice of accountancy; or

(ii) offers to perform or performs services involving the auditing or verification of financial transactions, books, accounts, or records or the preparation, verification or certification of financial accounting and related statements or holds himself out to the public as an accountant; or

(iii) renders professional services or assistance in or about matters of principle or detail relating to accounting procedure or the recording, presentation or certification of financial facts or data; or

(iv) renders such other services as, in the opinion of the Council, are or may be rendered by a chartered accountant [b][in practice];

and the words "to be in practice" with their grammatical variations and cognate expressions shall be construed accordingly.

Explanation.—An associate or a fellow of the Institute who is a salaried employee of a chartered accountant [b][in practice] or °[a firm of such chartered accountants] [b][in practice] shall, notwithstanding such employment, be deemed to be in practice for the limited purpose of the training of articled clerks.

[a] The words "and who is in practice" were omitted by the Chartered Accountants (Amendment) Act, 1959 (15 of 1959), S. 3 (i) (w.e.f. 1-7-1959).

[b] Inserted, ibid, S. 3 (ii) (a) (w.e.f. 1-7-1959).

[c] Substituted for "a firm of chartered accountants", ibid, S. 3 (ii) (b) (with effect from 1-7-1959).

## CHAPTER II

## THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

**3. Incorporation of the Institute.**—(1) All persons whose names are entered in the Register at the commencement of this Act and all persons who may hereafter have their names entered in the Register under the provisions of this Act, so long as they continue to have their names borne on the said Register, are hereby constituted a body corporate by the name of the Institute of Chartered Accountants of India, and all such persons shall be known as members of the Institute.

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**Section 2 — Note 1 (contd.)**

a Chartered Accountants properly so called. AIR 1958 SC 72 (76, 77): 1958 SCR 371. (60 Cal WN 91, Reversed.)

(2) A Chartered Accountant who works as a liquidator under an order of the High Court must be deemed to be "in practice" in view of Reg. 78 read with sub-section (2)(iv) of this section. Therefore whatever he does as such liquidator is his conduct as a Chartered Accountant in the course of his practice. AIR 1958 SC 72 (76) : 1958 SCR 371. (60 Cal WN 91, Reversed.)

(2) The Institute shall have perpetual succession and a common seal and shall have power to acquire, hold and dispose of property, both movable and immovable, and shall by its name sue or be sued.

4. **Entry of names in the Register.**—(1) Any of the following persons shall be entitled to have his name entered in the Register, namely,—

(i) any person who is a registered accountant or a holder of a restricted certificate at the commencement of this Act;

(ii) any person who has passed such examination and completed such training as may be prescribed for members of the Institute;

(iii) any person who has passed the examination for the Government Diploma in Accountancy or an examination recognised as equivalent thereto by the rules for the award of the Government Diploma in Accountancy before the commencement of this Act, and who, although not duly qualified to be registered as an accountant under the Auditors' Certificates Rules, 1932, fulfils such conditions as the Central Government may specify in this behalf;

(iv) any person who, at the commencement of this Act, is engaged in the practice of accountancy in the °[Part B] State and who, although not possessing the requisite qualifications to be registered as an accountant under the Auditors' Certificates Rules, 1932, fulfils such conditions as the Central Government may specify in this behalf;

*[(v) any person who has passed such other examination and completed such other training without India as is recognised by the Central Government or the Council as being equivalent to the examination and training prescribed for members of the Institute:

Provided that in the case of any person who is not permanently residing in India, the Central Government or the Council, as the case may be, may impose such further conditions as it may deem fit;]

(vi) any person domiciled in India, who at the commencement of this Act is studying for any foreign examination and is at the same time undergoing training, whether within or without India or, who, having passed such foreign examination, is at the commencement of this Act undergoing training, whether within or without India:

Provided that any such examination or training was recognised before the commencement of this Act for the purpose of conferring the right to be registered as an accountant under the Auditors' Certificates Rules, 1932, and provided further that such person passes the examination or completes the training within five years after the commencement of this Act.

(2) Every person belonging to the class mentioned in clause (i) of sub-section (1) shall have his name entered in the Register without the payment of any entrance fee.

(3) Every person belonging to any of the classes mentioned in clauses (ii), (iii), (iv), (v) and (vi) of sub-section (1) shall have his name entered in the Register on application being made and granted in the prescribed manner and on payment of the prescribed fee, which shall not exceed rupees three hundred in any case.

(4) The Central Government shall take such steps as may be necessary for the purpose of having the names of all persons belonging to the class mentioned in clause (i) of sub-section (1) entered in the Register.

[a] Substituted for clause (v) of sub-section (1) by the Chartered Accountants (Amendment) Act, 1955 (40 of 1955), Sec. 2 (21-10-1955).

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**Section 4 — Note 1**

(1) The name of a person to whom S. 4(1) applies is liable to be removed if it is found that he was, when his name was registered, subject to a disability although such disability related to a period prior to the passing of the Act. AIR 1957 Cal 33 (39) (DB).

**5. Fellows and associates.**—(1) The members of the Institute shall be divided into two classes designated respectively as associates and fellows.

(2) Any person shall, on his name being entered in the Register, be deemed to have become an associate member of the Institute and be entitled to use the letters A.C.A. after his name to indicate that he is an associate member of the Institute of Chartered Accountants.

[a][(3) A member, being an associate who has been in continuous practice in India for at least five years, whether before or after the commencement of this Act, or whether partly before and partly after the commencement of this Act, and a member who has been an associate for a continuous period of not less than five years and who possesses such qualifications as the council may prescribe with a view to ensuring that he has experience equivalent to the experience normally acquired as a result of continuous practice for a period of five years as a chartered accountant shall, on payment of the prescribed entrance fee, which shall not exceed rupees two hundred in any case, and on application made and granted in the prescribed manner, be entered in the Register as a fellow of the Institute and shall be entitled to use the letters F.C.A. after his name to indicate that he is a fellow of the Institute of Chartered Accountants.]

[a] Substituted for sub-section (3) by the Chartered Accountants (Amendment) Act, 1959 (15 of 1959), S. 4 [w.e.f. 1-7-1959].

**6. Certificate of practice.**—(1) No member of the Institute shall be entitled to practice [a][whether in India or elsewhere] unless he has obtained from the Council a certificate of practice:

[b][ ° ° ° ° ].

[c][(2) Every such member shall pay such annual fee for his certificate as may be prescribed, and such fee shall be payable on or before the 1st day of April in each year.]

[a] Inserted by the Chartered Accountants (Amendment) Act, 1959 (15 of 1959), S. 5 (i).

[b] Proviso was added by the Chartered Accountants (Amendment) Ordinance, 1949 (No. XV of 1949), S. 2 [1-7-1949] which has expired. [The Proviso was to be deemed always to have been added.] The Proviso was as follows:—

"Provided that nothing contained in this sub-section shall apply to any person who immediately before the commencement of this Act, has been in practice as a registered accountant or a holder of a restricted certificate until one month has elapsed from the date of the first meeting of the Council."

[c] Substituted for sub-section (2) by Act 15 of 1959, S. 5 (ii) (w.e.f. 1-7-1959].

**7. Members to be known as Chartered Accountants.**—[a][Every member of the Institute in practice shall, and any other member may, use the designation of a chartered accountant and no member using such designation shall use any other description, whether in addition thereto or in substitution therefor]:

Provided that nothing contained in this section shall be deemed to prohibit any such person from adding any other description or letters to his name, if entitled thereto, to indicate membership of such other Institute of Accountancy, whether in India or elsewhere, as may be recognised in this behalf by the Council, or any other qualification that he may possess, or to prohibit a firm, all the partners of which are members of the Institute and in practice, from being known by its firm name as Chartered Accountants.

[a] Substituted by the Chartered Accountants (Amendment) Act, 1959 (15 of 1959), S. 6 [w.e.f. 1-7-1959].

8. **Disabilities.**—Notwithstanding anything contained in Section 4, a person shall not be entitled to have his name entered in or borne on the Register if he—

(i) has not attained the age of twenty-one years at the time of his application for the entry of his name in the Register; or

[a][(ii) is of unsound mind and stands so adjudged by a competent Court; or]

(iii) is an undischarged insolvent; or

(iv) being a discharged insolvent, has not obtained from the Court a certificate stating that his insolvency was caused by misfortune without any misconduct on his part; or

(v) has been convicted by a competent Court, whether within or without India, of an offence involving moral turpitude and punishable with transportation or imprisonment or of an offence, not of a technical nature, committed by him in his professional capacity unless in respect of the offence committed he has either been granted a pardon or, on an application made by him in this behalf, the Central Government has, by an order in writing, removed the disability; or

[b][(vi) has been removed from membership of the Institute on being found on inquiry to have been guilty of professional or other misconduct:

Provided that a person who has been removed from membership for a specified period, shall not be entitled to have his name entered in the Register until the expiry of such period.]

[a] Substituted for the original clause (ii) by the Chartered Accountants (Amendment) Act, 1959 (15 of 1959), S. 7 (i) [w.e.f. 1-7-1959].

[b] Substituted for clause (vi), ibid, S. 7 (ii) [w.e.f. 1-7-1959].

## CHAPTER III

## COUNCIL OF THE INSTITUTE

**9. Constitution of the Council of the Institute.**—(1) There shall be a Council of the Institute for the management of the affairs of the Institute and for discharging the functions assigned to it under this Act.

(2) The Council shall be composed of the following persons, namely:—

(a) [a][not more than twenty-four persons elected by members of the Institute] from amongst the fellows of the Institute chosen in such manner and from such regional constituencies as may be specified in this be-

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**Section 8 — Note 1**

(1) Section 8, sub-sections (v) and (vi) lend support to the conclusion that disciplinary jurisdiction can be exercised against a Chartered Accountant even in respect of conduct which may not fall expressly within the inclusive definition contained in S. 22. AIR 1958 SC 72 (77): 1958 SCR 371.

(2) In the case of persons who under S. 4 are intended to have their names immediately and automatically registered after the commencement of the Act without any application and without payment of fees, the disqualification prescribed by cl. (v) must necessarily be a pre-Act conviction. AIR 1957 Cal 33 (39) (DB).

(3) Clause (vi) contemplates only that the persons concerned should have been guilty of conduct. which renders him unfit to be a member of the Institute. For its purpose the consideration where the person concerned had been guilty of such conduct and when the guilt was discovered is irrelevant. The provision contains no limitation as to the time when the conduct should take place or the time when an enquiry should take place or the guilt discovered and therefore it covers pre-Act misconduct as well. AIR 1957 Cal 33 (40) (DB).

(4) Where a member's name has been ordered by the High Court to be removed from the register that member becomes disentitled to have his name borne on the register or re-entered in it unless permitted by the Court. Clause (vi) of this section and S. 20(2) have not the effect of limiting the powers of the High Court in disciplinary matters but they only prescribe the duty of the council to carry out the orders of the Court and the right of the members to be readmitted in accordance with the order of the Court. AIR 1952 Nag 393 (394) : ILR (1953) Nag 324 : 1953 Cri LJ 46.

half by the Central Government by notification in the Official Gazette; and

(b) [b][six persons] nominated by the Central Government.

[a] Substituted for "persons elected by members of the Institute" by the Chartered Accountants (Amendment) Act, 1959 (15 of 1959), S. 8 (i) [w.e.f. 1-7-1959].

[b] Substituted for "five persons", ibid, S. 8 (ii) [w. e. f. 1-7-1959].

[a][10. Mode of Election to the Council.—(1) Elections under clause (a) of sub-section (2) of Section 9 shall be conducted in the prescribed manner.

(2) Where any dispute arises regarding any such election, the matter shall be referred by the Council to a Tribunal appointed by the Central Government in this behalf and the decision of such Tribunal shall be final:

Provided that no such reference shall be made except on an application made to the Council by an aggrieved party within thirty days from the date of the declaration of the result of the election.

(3) The expenses of the Tribunal shall be borne by the Council.]

[a] Substituted for the original section 10 by the Chartered Accountants (Amendment) Act, 1959 (15 of 1959), S. 9 [w.e.f. 1-7-1959].

**11. Nomination in default of election or nomination.**—If any body of persons referred to in Section 9 fails to elect any of the members of the Council which it is empowered under that section to elect, the Central Government may nominate a person duly qualified to fill the vacancy, and any person so nominated shall be deemed to be a member of the Council as if he had been duly elected.

**12. President and Vice-President.**—(1) The Council at its first meeting shall elect two of its members to be respectively the President and Vice-President thereof, and so often as the office of the President or the Vice-President becomes vacant the Council shall choose another person to be the President or the Vice-President as the case may be:

Provided that on the first constitution of the Council a member of the Council nominated in this behalf by the Central Government shall discharge the functions of the President, until such time as a President is elected under the provisions of this sub-section.

(2) The President shall be the Chief Executive Authority of the Council.

(3) The President or the Vice-President shall hold office for a period of one year from the date on which he is chosen but so as not to extend beyond his term of office as a member of the Council, and, subject to his being a member of the Council at the relevant time, he shall be eligible for re-election.

(4) [a][On the expiration of the duration of the Council, the President of the Council at the time of such expiration] shall continue to hold office and discharge such administrative and other duties as may be prescribed until such time as a new President shall have been elected and shall have taken over charge of his duties.

[a] Substituted for the words "On the dissolution of the Council, the President of the Council at the time of such dissolution" by the Chartered Accountants (Amendment) Act, 1959 (15 of 1959), S. 10 [w.e.f. 1-7-1959].

**13. Resignation of membership and casual vacancies.**—(1) Any member of the Council may at any time resign his membership by writing under his hand addressed to the President, and the seat of such member shall become vacant when such resignation is notified in the Official Gazette.

(2) A member of the Council shall be deemed to have vacated his seat if he is declared by the Council to have been absent without sufficient excuse from three consecutive meetings of the Council, or if his name is, for any cause, removed from the Register under the provisions of Section 20.

(2) A casual vacancy in the Council shall be filled by fresh election from the constituency concerned or by nomination by the Central Government, as the case may be, and the person elected or nominated to fill the vacancy shall hold office until the dissolution of the Council:

[a][Provided that no election shall be held to fill a casual vacancy occurring within six months prior to the date of the expiration of the duration of the Council, but such a vacancy may be filled by nomination by the Central Government after consultation with the President of the Council.]

(4) No act done by the Council shall be called in question on the ground merely of the existence of any vacancy in, or defect in the constitution of, the Council.

[a] Proviso to sub-section (3) was added by the Chartered Accountants (Amendment) Act, 1959 (15 of 1959), S. 11 [w.e.f. 1-7-1959].

**14. Duration and dissolution of Council.**—[a][(1)] The duration of any Council constituted under this Act shall be three years from the date of its first meeting, on the expiry of which it shall stand dissolved and a new Council constituted in accordance with the provisions of this Act.

[b][(2) Notwithstanding the expiration of the duration of a Council (hereinafter referred to as the former Council), the former Council shall continue to exercise its functions until a new Council is constituted in accordance with the provisions of this Act, and on such constitution, the former Council shall stand dissolved.]

[a] Section 14 was renumbered as sub-section (1) thereof by the Chartered Accountants (Amendment) Act, 1959 (15 of 1959), S. 12 [1-7-1959].

[b] Inserted, ibid [1-7-1959].

**15. Functions of the Council.**—(1) The duty of carrying out the provisions of this Act shall be vested in the Council.

(2) In particular, and without prejudice to the generality of the foregoing power, the duties of the Council shall include—

(a) the examination of candidates for enrolment and the prescribing of fees therefor;

(b) the regulation of the engagement and training of [a][articled and audit clerks];

(c) the prescribing of qualifications for entry in the Register;

(d) the recognition of foreign qualifications and training for purposes of enrolment;

(e) the granting or refusal of certificates of practice under this Act;

(f) the maintenance and publication of a Register of persons qualified to practise as chartered accountants;

(g) the levy and collection of fees from [b][ ° ° ° ] members, examinees and other persons;

(h) the removal of names from the Register and the restoration to the Register of names which have been removed;

(i) the regulation and maintenance of the status and standard of professional qualifications of [c][members of the Institute];

(j) the carrying out, by financial assistance to persons other than members of the Council or in any other manner, of research in accountancy;

(k) the maintenance of a library and publication of books and periodicals relating to accountancy; and

(l) the exercise of disciplinary powers conferred by this Act.

[a] Substituted for the words "articled clerks" by the Chartered Accountants (Amendment) Act, 1959 (15 of 1959), S. 13 (i) [w.e.f. 1-7-1959].

[b] The words "chartered accountants, associates" were omitted, ibid, S. 13 (ii) [w.e.f. 1-7-1959].

[c] Substituted for the words "chartered accountants", ibid, S. 13 (iii) [w.e.f. 1-7-1959].

**16. Staff, remuneration and allowances.**—(1) For the efficient performance of its duties, the Council may—

(a) appoint a Secretary who may also, if so decided by the Council, act as Treasurer;

(b) appoint such other officers and servants as it deems necessary;

(c) require and take from the Secretary or from any other officer or servant of the Council such security for the due performance of his duties, as the Council considers necessary;

(d) fix the salaries, fees, allowances and other conditions of service of the officers and servants of the Council;

(e) with the previous sanction of the Central Government, fix the allowances of the President, Vice-President and other members of the Council [a][and members of its committees];

(2) Notwithstanding anything contained in sub-section (1), on the first constitution of the Council the Secretary shall be a person appointed by the Central Government in consultation with the Council, and he shall hold office during the pleasure of the Central Government, but so as not to exceed a period of three years from the date of his appointment.

[b][(3) The Secretary of the Council shall be entitled to participate in the meetings of the Council but shall not be entitled to vote thereat.]

[a] Inserted by the Chartered Accountants (Amendment) Act, 1959 (15 of 1959), S. 14 (i) [w. e. f. 1-7-1959].

[b] Inserted, ibid, S. 14 (ii) [w.e.f. 1-7-1959].

**17. Committees of the Council.**—(1) The Council shall constitute from amongst its members the following Standing Committees, namely :—

(i) an Executive Committee,

(ii) an Examination Committee, and

(iii) a Disciplinary Committee.

[a][(2) The Council may also form such other committees from amongst its members as it deems necessary for the purpose of carrying out the provisions of this Act, and any committee so formed may, with the sanction of the Council, co-opt such other members of the Institute not exceeding two-thirds of the members of the committee as the committee thinks fit, and any member so co-opted shall be entitled to exercise all the rights of a member of the committee.]

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**Section 17 — Note 1**

(1) The Disciplinary Committee being a business committee is validly constituted if it has a quorum of three members as required by R. 62 (b) of the Chartered Accountants Regulation. It is not necessary that all the members of the committee including the member nominated by the Government should be present. ('56) AIR 1956 Hyd 205 (207) : ILR (1956) Hyd 591 (DB).

(2) Where four members of Disciplinary Committee attended the first meeting at which the matter in dispute was taken up and those very members sat throughout the proceedings, completed the enquiry and made their report, there is no defect in the constitution of the Committee and no irregularity in its proceedings. It is not necessasy that the enquiry should be held by all the members of the Disciplinary Committee. AIR 1957 Cal 387 (389) (DB).

(3) Where the Disciplinary Committee in fact has five members but a report submitted by it is not signed by one of them it cannot be said that the report is a proper report. ('55) 59 Cal WN 969 (972) (DB).

[But see AIR 1964 Cal 131 (135, 136) : 67 Cal WN 772 (DB).]

(4) Where the enquiry was actually held by a Disciplinary Committee of a certain composition but the report was made by a committee which owing to the intervening re-constitution was of a totally different composition except as to one of its members if was held that the report was not a proper report on the basis of which the council could act. ('55) 59 Cal WN 969 (973) (DB).

(3) Each of the Standing Committees shall consist of the President and the Vice-President, ex officio, and three other members of the Council elected by the Council :

Provided that in the case of the Disciplinary Committee, out of the members to be elected, two shall be elected by the Council, and the third nominated by the Central Government from amongst the persons nominated to the Council by the Central Government.

(4) The President and the Vice-President of the Council shall be the Chairman and Vice-Chairman respectively of each of the Standing Committees.

(5) Every member of the Standing Committee other than the Chairman and the Vice-Chairman shall hold office for one year from the date of his election, but subject to being a member of the Council, he shall be eligible for re-election.

(6) The Standing Committees shall exercise such functions and be subject to such conditions in the exercise thereof as may be prescribed.

[a] Substituted for sub-section (2), by the Chartered Accountants (Amendment) Act, 1959 (15 of 1959), S. 15 [w. e. f. 1-7-1959].

18. **Finance of the Council.**—(1) There shall be established a fund under the management and control of the Council into which shall be paid all monies received by the Council and out of which shall be met all expenses and liabilities properly incurred by the Council.

(2) The Council may invest any money for the time being standing to the credit of the fund in any Government security or in any other security approved by the Central Government.

(3) The Council shall keep proper accounts of the fund distinguishing captial from revenue.

(4) The annual accounts of the Council shall be subject to audit by a chartered accountant [a][in practice] to be appointed annually by the Council :

Provided that no member of the Council or a person who is in partnership with such member shall be eligible for appointment as an auditor under this sub-section.

(5) As soon as may be practicable at the end of each year, but not later than the 30th day of September of the year next following, the Council shall cause to be published in the Gazette of India a copy of the audited accounts and the Report of the Council for that year, and copies of the said accounts and Report shall be forwarded to the Central Government and to all the members of the Institute.

(6) The Council may borrow from a scheduled bank, as defined in the Reserve Bank of India Act, 1934 (II of 1934), or from the Central Government—

(a) any money required for meeting its liabilities on capital account on the security of the fund or on the security of any other assets for the time being belonging to it, or

(b) for the purpose of meeting current liabilities pending the receipt of income by way of temporary loan or overdraft.

[a] Inserted by the Chartered Accountants (Amendment) Act, 1959 (15 of 1959), S. 16 [w. e. f. 1-7-1959].

## CHAPTER IV
## REGISTER OF MEMBERS

19. **Register.**—(1) The Council shall maintain in the prescribed manner a Register of the Members of the Institute.

(2) The Register shall include the following particulars about every member of the Institute, namely,—

(a) his full name, date of birth, domicile, residential and professional addresses;

(b) the date on which his name is entered in the Register;
(c) his qualifications;
(d) whether he holds a certificate of practice; and
(e) any other particulars which may be prescribed.

[a][(3) The Council shall cause to be published in such manner as may be prescribed, a list of members of the Institute as on the 1st day of April of each year, and shall, if requested to do so by any such member, send to him a copy of such list.]

(4) Every member of the Institute shall, on his name being entered in the Register, pay such annual membership fee [b][differing in amount according as he is an associate or a fellow of the Institute], as may be prescribed.

[a] Substituted for the old sub-section (3), by the Chartered Accountants (Amendment) Act, 1959 (15 of 1959), S. 17 (i) [w. e. f. 1-7-1959].
[b] Inserted, ibid, S. 17 (ii) [w. e. f. 1-7-1959].

[a][20. **Removal from the Register.**—(1) The Council may remove from the Register the name of any member of the Institute—

(a) who is dead; or
(b) from whom a request has been received to that effect; or
(c) who has not paid any prescribed fee required to be paid by him; or
(d) who is found to have been subject at the time when his name was entered in the Register, or who at any time thereafter has become subject, to any of the disabilities mentioned in Section 8, or who for any other reason has ceased to be entitled to have his name borne on the Register.

(2) The Council shall remove from the Register the name of any member in respect of whom an order has been passed under this Act removing him from membership of the Institute.]

[a] Substituted for the original Section 20 by the Chartered Accountants (Amendment) Act, 1959 (15 of 1959), S. 18 [w. e. f. 1-7-1959].

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**Section 20 — Note 1**

(1) Mere non-payment of subscription in the absence of an order by the council is not sufficient to bring about removal of member's name from list of members. ('54) 58 Cal WN 950 (951) (DB).

(2) If the Chartered Accountant was under a disability contemplated by S. 8 at the time of his registration his name can be removed from the register irrespective of the fact that the disability occurred before the commencement of the Act. AIR 1957 Cal 33 (39) (DB).

(3) Section 20 (1) (c) read with item (vi) of S. 8 clearly shows that the Act is not limited to post-Act conduct alone but to the misconduct committed before or after the Act. AIR 1957 Cal 33 (40) (DB).

(4) The words "found by the High Court to have been guilty of conduct which renders him unfit to be a member of the institute" in sub-section (2) refers to the actual order made by the High Court in exercise of its discretion on its own view of the fitness of the Chartered Accountant to remain a member of the institute and not to any finding by it of the Accountant's guilt in regard to some act or omission carrying with it a liability for removal from membership under the provisions of the Act. AIR 1956 Cal 414 (425) (DB).

(5) Sub-section (2) must be read subject to the powers of the High Court under S. 21(3). It does not limit the powers of the High Court to passing only an order for removal and not for any lesser punishment whatever may be degree of the gravity of the misconduct. ('52) 1952-22 Com Cas 303 (305) (DB) (Mad) * AIR 1954 Cal 299 (301) (DB) * AIR 1953 Mad 310 (312, 313) : ILR (1953) Mad 357 (DB) * AIR 1952 Nag 393 (394, 395) : ILR (1953) Nag 324 : 1953 Cri LJ 46 (DB) * 1952 22 Com Cas 130 (135) (DB) (Bom) * AIR 1964 Cal 178 : (1963) 6 Fac LR 273 (DB).

(6) Where the auditor fails in his duty to check and verify the accounts and gives a clean certificate to the balance sheet without calling for an inquiry in doubtful cases, the removal of the auditor from the membership of the Institute of Chartered Accountants would not ordinarily be an inappropriate punishment. AIR 1963 Mad 99 (101, 102) : 1963 (1) Cri LJ 302 : (1963) 2 Mad LJ 42 (DB).

## [a][CHAPTER V
## MISCONDUCT

**21. Procedure in inquiries relating to misconduct of members of Institute.—** (1) Where on receipt of information by, or of a complaint made to, it, the Council is prima facie of opinion that any member of the Institute has been guilty of any professional or other misconduct, the Council shall refer the case to the Disciplinary Committee, and the Disciplinary Committee shall thereupon hold such inquiry and in such manner as may be prescribed, and shall report the result of its inquiry to the Council.

(2) If on receipt of such report the Council finds that the member of the Institute is not guilty of any professional or other misconduct, it shall record its finding accordingly and direct that the proceedings shall be filed or the complaint shall be dismissed, as the case may be.

(3) If on receipt of such report the Council finds that the member of the Institute is guilty of any professional or other misconduct, it shall record a finding accordingly and shall proceed in the manner laid down in the succeeding sub-sections.

(4) Where the finding is that a member of the Institute has been guilty of a professional misconduct specified in the First Schedule, the Council shall afford to the member an opportunity of being heard before orders are passed against him on the case, and may thereafter make any of the following orders, namely :—

(a) reprimand the member;

(b) remove the name of the member from the Register for such period, not exceeding five years, as the Council thinks fit :

Provided that where it appears to the Council that the case is one in which the name of the member ought to be removed from the Register for a period

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**SECTION 21 — SYNOPSIS**

1. **"Cause an enquiry to be held."**
2. **Proceedings of disciplinary committee.**
3. **Findings of the Council.**
4. **Powers of the High Court.**
5. **Orders that High Court can pass.**
6. **Mitigating circumstances.**
7. **Appeal against order of High Court.**

**Topic Indicator**

Professional misconduct — See S. 22 and Sch. I.
Scope of enquiry — See Note 1.
New charge by Disciplinary Committee — See Note 2.
"Final order" under sub-section (3) of the section, as it stood before amendment by Act 15 of 1959 — See Note 5.
Sub-section (6) — See Note 5.

**1. "Cause an enquiry to be held". —** (1) The object of the proceedings contemplated by the Act is to test the fitness of the person to continue in the profession when allegations have been made against his conduct. AIR 1957 Cal 33 (44) (DB).

(2) In view of S. 61 (3) of the Income-tax Act the Chartered Accountant representing an assessee before the Income-tax Tribunal functions as a Chartered Accountant and, therefore, can be proceeded against under this Act for any misconduct connected with such work. AIR 1957 Cal 449 (457) (DB).

(3) A Chartered Accountant has a statutory right to an enquiry by the Council if he is charged with misconduct. ('52) 1952-22 Com Cas 130 (134) (DB) (Bom).

(4) The power of the Institute to enquire with regard to misconduct is not limited to the instances and circumstances mentioned in the schedule but extends to any conduct which in its opinion renders a member unfit to continue as such. ('52) 1952-22 Com Cas 130 (134) (DB) (Bom) * AIR 1956 Hyd 205 (207) : ILR (1956) Hyd 591 (DB) * AIR 1968 Delhi 283 (290) (DB) * (1967) 2 Mad LW 450 (451) : 80 Mad LW 608 (DB). (The definition of professional misconduct under S. 22 is not an exhaustive one and acts of omission and commission specified in the schedule are only illustrative).

(5) An enquiry may be held by the Council both when it thinks that a member has been guilty of such conduct as, if proved, will render him unfit to be a member and when it thinks that a member has been guilty of a lesser degree of misconduct. AIR 1954 Cal 299 (300) (DB).

(6) The Council as a condition precedent to directing an enquiry has to form only an opinion that the allegation if proved would amount to a miscnduct

exceeding five years or permanently, it shall not make any order referred to in clause (a) or clause (b), but shall forward the case to the High Court with its recommendations thereon.

(5) Where the misconduct in respect of which the Council has found any member of the Institute guilty is misconduct other than any such misconduct as is referred to in sub-section (4), it shall forward the case to the High Court with its recommendations thereon.

(6) On receipt of any case under sub-section (4) or sub-section (5), the High Court shall fix a date for the hearing of the case and shall cause notice of the date so fixed to be given to the member of the Institute concerned, the Council and to the Central Government, and shall afford such member, the Council and the Central Government an opportunity of being heard, and may thereafter make any of the following orders, namely :—

(a) direct that the proceedings be filed, or dismiss the complaint, as the case may be;

(b) reprimand the member;

(c) remove him from membership of the Institute either permanently or for such period as the High Court thinks fit;

(d) refer the case to the Council for further inquiry and report.

(7) Where it appears to the High Court that the transfer of any case pending before it to another High Court, will promote the ends of justice or tend to the general convenience of the parties, it may so transfer the case, subject to such conditions, if any, as it thinks fit to impose, and the High Court to which such case is transferred shall deal with it as if the case had been forwarded to it by the Council.

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**Section 21 — Note 1 (contd.)**

and not as to the guilt of the Accountant as to the misconduct itself. AIR 1956 Cal 414 (424) (DB) * AIR 1965 Punj 295 (303) : ILR (1965) 1 Punj 220.

(7) In an enquiry commenced upon information before Reg. 11A was added all that was necessary was to observe the principles of natural justice. Therefore, where the Accountant had notice of the charges and also a proper hearing there was sufficient compliance with law and the proceedings are not vitiated by the failure to give 14 days time for filing written statement as required by Reg. 11 which applies only to inquiries started on complaints. AIR 1953 Mad 310 (311) : ILR (1953) Mad 357 (DB).

(8) The withdrawal of an allegation against a chartered accountant is not always a reason for not pursuing the enquiry started against him. AIR 1957 Cal 33 (44) (DB) * AIR 1966 Cal 468 (472) : (1965) 11 Fac LR 167 (DB).

(9) The Institute can start enquiry against an Accountant for the conduct done before the passing of the Chartered Accountants Act, if such conduct if proved, would amount to misconduct under the law in force even before the passing of the Act. AIR 1957 Cal 33 (44) (DB).

(10) Proceedings under the section can be initiated against a past member also because what is essential is the membership of the person at the time of the commission of the misconduct and not at the time when proceedings are taken. ('54) 58 Cal WN 950 (951, 952) (DB).

(11) Council has jurisdiction to call for written statement of the Chartered Accountant concerned before referring case to Disciplinary Committee for purpose of forming prima facie opinion as contemplated by S. 21(1). Formation of prima facie opinion is implicit in decision of Council to refer the case for enquiry to Disciplinary Committee. AIR 1964 Cal 131 (134) : 67 Cal WN 772.

**2. Proceedings of Disciplinary Committee.**—(1) An inquiry made by the Disciplinary Committee with the proper quorum prescribed by the Regulations is not vitiated by the absence of the member nominated by the Government. AIR 1956 Hyd 205 (207) : ILR (1956) Hyd 591 (DB).

(2) A finding given by a disciplinary committee of a different composition from the one which held the enquiry and heard the witnesses is not a proper finding. (1955) 59 Cal WN 969 (973, 974) (DB).

(3) Procedure in inquiries relating to misconduct of members — Duties and functions of Council and Disciplinary Committee — Principles fully indicated AIR 1964 Cal 134 (139, 140, 141): 67 Cal WN 772 (DB) * AIR 1964 Mad 398 (400, 401): 77 Mad LW 207.

(4) A misconduct for which a disciplinary committee investigates must be basically a misconduct. It is not necessary nor it is proper to attempt to make any rigid distinction of the word 'misconduct' under the Act and the First and Second Schedules given thereunder.

Explanation I.—In this section "High Court" means the highest civil Court of appeal, not including the Supreme Court, exercising jurisdiction in the area in which the person whose conduct is being inquired into carries on business, or has his principal place of business at the commencement of the inquiry:

Provided that where the cases relating to two or more members of the Institute have to be forwarded by the Council to different High Courts, the Central Government shall, having regard to the ends of justice and the general convenience of the parties, determine which of the High Courts to the exclusion of others shall hear the cases against all the members.

Explanation II.—For the purposes of this section "member of the Institute" includes a person who was a member of the Institute on the date of the alleged misconduct although he has ceased to be a member of the Institute at the time of the inquiry.

(8) For the purposes of any inquiry under this section, the Council and the Disciplinary Committee shall have the same powers as are vested in a civil Court under the Code of Civil Procedure, 1908, in respect of the following matters, namely :—

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) the discovery and production of any document; and

(c) receiving evidence on affidavit.]

[a] Substituted for the original Chapter V containing Sections 21 and 22, by the Chartered Accountants (Amendment) Act, 1959 (15 of 1959), S. 19 [w. e. f. 1-7-1959].

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**Section 21 — Note 2 (contd.)**

(1962-63) 67 Cal WN 475 (480): (1963) 6 Fac LR 153.

(5) If there is no charge, against Chartered Accountant then it is not for the Disciplinary Committee to make general or roving investigation on some other points and hold him guilty on that ground. (1962-63) 67 Cal WN 475: (1963) 6 Fac LR 153.

(6) Disciplinary Committee can add new charges only on basis of material referred to it by Council and they must be clear and specific. AIR 1965 Punj 295 (303): ILR (1965) 1 Punj 220 (DB).

(7) Reference made by Council to Disciplinary Committee should be made part of record. AIR 1965 Punj 295 (300, 302): ILR (1965) 1 Punj 220 (DB).

**3. Findings of the Council.** — (1) In giving finding the Council must determine which of the specific varieties of misconduct as stated in the Act, a member has been guilty of. ('57) 1957-27 Com Cas 59 (63) (DB) (Cal).

(2) A bald statement that the Accountant is guilty of misconduct within the meaning of S. 22 without specifying the type and variety of the misconduct with reference to the clauses of the Schedule or the items added to it by the Council is not a complete finding. AIR 1957 Cal 387 (389) (DB) * AIR 1957 Cal 449 (453) (DB).

(3) Where the Council is unable to accept the view of the Disciplinary Committee and comes to a different conclusion to the High Court to give its own reasons for taking a different view. AIR 1957 Cal 33 (44) (DB).

(4) The charge of professional misconduct must be clearly proved and should not be inferred from mere ground for suspiction however reasonable, or what may be mere error or indiscretion the enquiry in a serious cases of professional misconduct should proceed on formulated charges not only in fairness to the person charged but in order that evidence may relatively bear on the particular issue and the evidence should be carefully taken and judged according to the ordinary standard of proof. AIR 1968 Delhi 283 (290, 291) (DB).

**4. Powers of the High Court.** — (1) Unless, there is a gross violation or disregard of the provisions of Chartered Accountants Act or the Regulations made thereunder or a gross and utter disregard of certain well-known principles of natural justice and fairness or obvious disregard of essential considerations of law or fact, the High Court should not be too eager to interfere with the findings of professional bodies like the Council of the Chartered Accountants of India and its Disciplinary Committee. AIR 1964 Cal 178 (181) : (1963) 6 Fac LR 273 (DB).

(2) The powers of the High Court under Section 21, sub-section (3) (as it stood before amendment by Act 15 of 1959) are wide enough to enable the High Court to adopt any course which in its opinion will enable the High Court to do complete justice between the par-

**Section 21 — Note 4 (contd.)**
ties. AIR 1958 SC 72 (77, 78): 1958 SCR 371.

(3) The section does not curtail or take away any right which an Accountant had under the Auditor's Certificate Rules. On the other hand, it has enhanced those rights by prescribing a judicial enquiry with a statutory right to be heard before final orders are passed in place of the mere administrative enquiry provided by the Rules. ('52) 1952-22 Com Cas 130 (134, 135) (DB) (Bom).

(3) The High Court under Section 21, sub-section (3) can take action against a member who is guilty of conduct which renders him unfit to be a member of the Institute, even though such conduct may not attract any provisions of the schedule. AIR 1958 SC 72 (77): 1958 SCR 371.

(5) A Chartered Accountant can be removed by the High Court in respect of a misconduct committed before the passing of the Act. The Accountant has no vested right for a trial by the Central Government under the Auditors' Certificate Rules which was in force at the time of the commission of the misconduct. ('52) 1952-22 Com Cas 130 (135) (DB) (Bom).

(6) Chartered Accountant misappropriating funds of company in liquidation. — Proper forum for action is normally the High Court under Companies Act and not Disciplinary Committee under Chartered Accountants Act. AIR 1966 Cal 468 (469): (1965) 11 Fac LR 167.

(7) Misconduct while working as a liquidator will amount to professional misconduct on the part of the Chartered Accountant even in the narrow and restricted sense and he can be dealt with on that basis and the High Court can pass order under Section 21, sub-s. (3). ('58) AIR 1958 SC 72 (76): 1968 SCR 371 * (1961) 31 Com Cas 271 (273) (Punj).

(8) Where the specific misconduct alleged is not established and in respect of a different type of misconduct there is neither a charge nor was there an enquiry by the council the Accountant cannot be found guilty of the misconduct not alleged even if on the facts found such a misconduct could be established. AIR 1957 Cal 33 (44) (DB).

(9) The fresh plea, that the Accountant appeared before the Income-tax Tribunal not in the capacity of an Accountant but in the capacity of an Income-tax practitioner, which plea was not raised before the Institute or Disciplinary Committee cannot be allowed in the enquiry before a High Court, in a reference under Section 21 (1). AIR 1957 Cal 449 (457) (DB).

(10) Council of Institute of Chartered Accountants or its Disciplinary Committee should be allowed to appear and given a hearing. AIR 1964 Cal 131 (134): 67 Cal WN 772 (DB).

**5. Orders that High Court can pass.** — (1) Under the section as it stood before its amendment by Act 15 of 1959, it was open to the High Court on a reference under Section 21 to pass such order as appears to the Court to be fit and proper having regard to the circumstances of the case. It was not bound whenever it found an accountant guilty of misconduct, to order his removal. S. 20 (2) of the Act must be read subject to the powers of the High Courts under Section 21 (3) of the Act. ('52) 1952-22 Com Cas 303 (305) (DB) (Mad) * AIR 1956 Hyd 205 (208): ILR (1956) Hyd 591 (DB) * ('52) 1952-22 Com Cas 130 (135) (DB) (Bom) * AIR 1960 Mad 122 (123, 124): 1960 Cri LJ 356: (1959) 2 Mad LJ 542 (DB).

(2) The High Court is entitled to impose penalties less severe than removal from the membership register in cases where the misconduct is not of a sufficient gravity so as to entail such removal. AIR 1954 Cal 299 (300) (DB) * (1960) 2 Orissa JD 122 : ILR (1960) Cut 217. (The High Court is competent to pass orders appropriate to the circumstances of the case without directing the permanent removal of the name of the respondent from the register of the Institute.)

(3) The power of the High Court under sub-section (3) (before amendment by Act 15 of 1957) can be exercised to award punishment by way of censure, reprimand, suspension or removal of a member. AIR 1952 Nag 393 (394, 395): ILR (1953) Nag 324: 1953 Cri LJ 46 (DB) * AIR 1953 Mad 310 (312): ILR (1953) Mad 357 (DB) * ('52) 1952-22 Com Cas 130 (135) (DB) (Bom).

(4) The power of the High Court to impose lesser penalty can be exercised even in cases in which the misconduct is of the kind enumerated in the schedule as meriting removal. AIR 1956 Cal 414 (425) (DB) * AIR 1968 SC 1104: (1968) 2 SCJ 785. (AIR 1964 Cal 131, Reversed.) * AIR 1963 Mad 99: 1963 (1) Cri LJ 302: (1963) 2 Mad LJ 42 (DB).

(5) The temporary removal of an accountant who has not only made a false statement but without contrition persisted in defending the statement as true is justified. AIR 1952 Punj 259 (261) (DB).

(6) An order imposing a lesser punishment can be taken as a finding by the High Court of its view on the question of the fitness of the Chartered Accountant to be a member rather than as a finding of his liability in regard to some act or omission which carries with it under the Act the consequence of removal. AIR 1956 Cal 414 (424) (DB).

[a][22. **Professional misconduct defined.**—For the purposes of this Act, the expression "professional misconduct" shall be deemed to include any act or omission specified in any of the Schedules, but nothing in this section shall be construed to limit or abridge in any way the power conferred or duty cast on the Council under sub-section (1) of Section 21 to inquire into the conduct of any member of the Institute under any other circumstances.]

[a] See foot-note [a] under S. 21.

**Section 21 — Note 5 (contd.)**

(7) Section 20 (2) when read with Section 21 (3) (as it stood before amendment by Act 15 of 1959) only prescribe the duty of the Council to carry out the order of the High Court and the right of a member to be readmitted in accordance with the order of the High Court. AIR 1952 Nag 393 (394): ILR (1953) Nag 324: 1953 Cri LJ 46 (DB).

(8) The word 'final' in Section 21 (3) (as it stood before amendment by Act 15 of 1959) and the procedure mentioned in (a), (b) and (c) of Section 20 (1) suggest that there should be no undue or unreasonable delay by the office of the High Court in disposing of references made under Section 21. AIR 1964 Cal 178 (181): (1963) 6 Fac LR 273 (DB).

(9) Complaint alleging contravention of Section 27 — Report of Disciplinary Committee that charges were not proved — On reference to High Court under Section 21 none present on behalf of Government on date of hearing — Finding of Committee accepted and charges held not proved. (1955) Madh BLR (Civ) 633: 1956 Madh BLJ 61.

**6. Mitigating circumstances.** — (1) The ends of justice require that some penalty should be inflicted upon a person for professional misconduct, but at the same time it may be satisfied by the infliction of a moderate punishment. AIR 1957 Cal 449 (458) (DB).

(2) The young age of the accountant that he had been aided and abetted by the complainant himself and that if a severe punishment were imposed it would altogether blast the career of the accountant are considerations which the Count can take into account in favour of the accountant. AIR 1957 Cal 449 (458) (DB).

(3) Where the facts showed that there had been only an error of judgment which amounted to a technical misconduct and that the record of the accountant was blemishless and there had been no mercenary consideration it was held that a mere warning was sufficient to meet the necessities of the case. AIR 1953 Mad 310 (313): ILR (1953) Mad 357 (DB).

(4) That the act amounting to misconduct was not induced by monetary consideration and further had been done by inexperienced accountant within a very short time after the application of the Act to Hyderabad were taken into consideration to let off the accountant with a warning. AIR 1956 Hyd 205 (208): ILR (1956) Hyd 591 (DB).

(5) Where a person signed a certificate as an accountant even before his enrolment impelled by a desire to oblige a relative and not for enriching himself it was held that his case could be viewed leniently. AIR 1955 Punj 244 (245) (DB).

(6) That the irregularity not detected is not likely to result in serious consequences and that the auditor in default has an unblemished record are sufficient justification for viewing his lapse leniently. AIR 1957 Cal 387 (393) (DB).

(7) Where an accountant does something which is improper and contrary to the traditions of the profession motivated by mercenary considerations the facts that he is long in practice and that it is his first misconduct and that his carrer will be blasted are not sufficient to take a lenient view. ('52) 1952-22 Com Cas 130 (137, 138) (DB) (Bom).

(8) When an accountant has proved himself to be capable of such infamous conduct by which he will be a constant danger to the public as also to young men aspiring to enter the profession of accounts, the Court cannot let him go with anything less than the maximum punishment of removing his name from the Register and debarr him permanently from practising. ('57) 1957-27 Com Cas 59 (64) (Cal).

(9) A mere warning is not sufficient for a Chartered Accountant who is capable of making misstatement to his own Institute in regard to the discharge of his professional duties in the interest of a friend or a protege but an order of suspension is precisely the kind of penalty which would meet the ends of justice in such a case. AIR 1954 Cal 299 (301) (DB).

**7. Appeal against order of High Court.** — (1) An order passed by the High Court upon a reference under this section is not open to appeal to the Supreme Court. AIR 1953 Mad 79 (80): ILR (1953) Mad 862 (DB).

**Section 22 — Note 1**

(1) The section contemplates by the use of the word "include" also cases of misconduct consisting of acts and omissions which are not covered by the clauses of the Schedule. ('56) AIR 1956 Cal 414 (424) (DB) * ('53) AIR 1953 Mad 310 (311, 312): ILR (1953) Mad 357 (DB) * ('52) 1952-22 Com Cas 130 (134) (DB) (Bom) * (1967) 2 Mad LJ 450 (451): 80 Mad LW 608 (DB). (Receipt of amount other than premium by Chartered Accountant as consideration

**Section 22 — Note 1 (contd.)**

for entertaining articled clerk amounts to professional misconduct.) * AIR 1964 Cal 178 (181, 182, 183): (1963) 6 Fac LR 273 (DB) * (1961) 2 Mad L J 551 (554): (1961) 31 Com Cas 567. (An accountant who does not personally look into the accounts but merely delegates them to his assistants cannot be said to be acting with due skill and care and is guilty of gross negligence.) * 1963 Ker LT 695 (696): (1963) 2 Com LJ 142. (A Chartered Accountant who has completely abdicated his duty in having failed to verify the basis of the transfer of a large sum from one account to another and has not cared to ascertain the effect it would have on the recovery of the debt is guilty of gross negligence.)

(2) In respect of matters which are not specified in the schedule, it will be for the Council and ultimately for the Court to decide whether the acts or omissions complained of are such as to render a delinquent unfit to be a member of the Institute. AIR 1953 Mad 310 (311, 312): ILR (1953) Mad 357 (DB) * AIR 1956 Hyd 205 (207): ILR (1956) Hyd 591 (DB) * ('52) 1952-22 Com Cas 130 (134) (DB) (Bom).

(3) The larger powers and jurisdiction conferred by Section 21 (1) can be invoked by the Council to hold enquiries into the conduct of the Accountant even when the conduct may not fall expressly within the inclusive definition contained in the earlier part of this section. AIR 1958 SC 72 (77): 1958 SCR 371.

(4) The condition that some one or other should have a relief against the auditor for a breach of duty owed to him is not a sine qua non of actions amounting to professional misconduct under Section 22, Chartered Accountants Act. AIR 1956 Hyd 205 (207, 208): ILR (1956) Hyd 591 (DB).

(5) A failure to do the duty, partial or entire, is not professional misconduct unless there was also a failure to act honestly and reasonably. AIR 1957 Cal 33 (43) (DB) * AIR 1968 Delhi 283 (290) (DB).

(6) A failure to do something which he should have done in the course of his audit work is not absolved by the chartered accountant informing the share-holders of the omission. ('56) AIR 1956 Cal 414 (421) (DB).

(7) Where a Chartered Accountant accepts without obtaining the permission of the Government a private engagement with the Directors and Managing Agents of the companies into whose very conduct he was appointed by the Government to investigate, he must be held guilty of misconduct. ('55) AIR 1955 Mad 71 (72) (DB).

(8) A Chartered Accountant who knowingly signs an incorrect balance sheet and further antedates his signature he commits serious misconduct in respect of both his acts. ('52) 1952-22 Com Cas 168 (172, 173) (DB) (Bom). * AIR 1968 SC 1104 (1107, 1108): (1968) 2 SCJ 785.

(9) An accountant has a duty to take as an articled clerk one who is not engaged in any business and further not to permit him to engage in business during the period of service. A breach in this duty is conduct which renders him unfit to be a member of the institute. ('53) AIR 1953 Mad 310 (312): ILR (1953) Mad 357 (DB).

(10) A Chartered Accountant who on the termination of his appointment as liquidator by Court is unable to return the securities and cash and therefore to gain time employs delaying tactics is guilty of grossly improper and unworthy conduct. ('58) AIR 1958 SC 72 (78): 1958 SCR 371. (60 Cal WN 91, Reversed.)

(11) Where a person signed a certificate as chartered accountant before he was enrolled but that was not done for any profit but only to oblige a relative it was held that there was misconduct although not so serious as to render him unfit to be a member of the profession. ('55) AIR 1955 Punj 244 (245) (DB).

(12) A Chartered Accountant representing an assessee does not cease to be an Accountant but remains answerable to the Council for any misconduct which he may commit in connection with Income-tax proceedings. ('57) AIR 1957 Cal 449 (457) (DB).

(13) A Chartered Accountant representing an Income-tax assessee is under an obligation only to the assessee to audit his account and prepare statements with due skill and diligence. His failure to investigate into the correctness of the account is no misconduct because that is the lookout of the Income-tax Authorities to whom he owes no duty. ('53) AIR 1953 Mad 152 (153, 154): ILR (1953) Mad 534 (DB).

(14) Perjury by a Chartered Accountant while in the witness box not in his capacity as such accountant is not professional misconduct. ('52) 1952-22 Com Cas 168 (169) (DB) (Bom).

(15) A Chartered Accountant who solicits professional work by personal communication is guilty of professional misconduct even though the contents in the communication may not directly relate to it. (1960) 2 Orissa JD 122: ILR (1960) Cut 217.

(16) Notification issued by the President of the Institute of Chartered Accountants of India in exercise of powers conferred by Clause 2 of Part II of the Schedule II, declaring the issuing of manifestoes or Circulars, canvassing votes by visiting places of business or residences of the voters or in any other manner and organising parties to entertain voters as misconduct held was, completely valid. AIR 1967 SC 1257 (1259, 1260): (1967) 2 SCR 256. (AIR 1965 Mys 112, Partly reversed.)

[a][22A. Appeals.—(1) Any member of the Institute aggrieved by any order of the Council imposing on him any of the penalties referred to in sub-section (4) of Section 21, may, within thirty days of the date on which the order is communicated to him, prefer an appeal to the High Court:

Provided that the High Court may entertain any such appeal after the expiry of the said period of thirty days, if it is satisfied that the member was prevented by sufficient cause from filing the appeal in time.

(2) The High Court may, on its own motion or otherwise, after calling for the records of any case, revise any order made by the Council under sub-section (2) or sub-section (4) of section 21 and may—

(a) confirm, modify or set aside the order;

(b) impose any penalty or set aside, reduce, confirm, or enhance the penalty imposed by the order;

(c) remit the case to the Council for such further inquiry as the High Court considers proper in the circumstances of the case; or

(d) pass such other order as the High Court thinks fit :

Provided that no order of the Council shall be modified or set aside unless the Council has been given an opportunity of being heard and no order imposing or enhancing a penalty shall be passed unless the person concerned has also been given an opportunity of being heard.

Explanation.—In this section "High Court" and "member of the Institute" have the same meanings as in Section 21.]

[a] See foot-note [a] under S. 21.

## CHAPTER VI

## REGIONAL COUNCILS

**23. Constitution and functions of Regional Councils.**—(1) [a][For the purpose of advising and assisting it on matters concerning its functions, the Council may constitute such Regional Councils] as and when it deems fit for one or more of the regional constituencies that may be specified by the Central Government under clause (a) of sub-section (2) of S. 9.

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**Section 22 — Note 1 (contd.)**

(17) Accountant accepting statement of management and certifying correctness of balance-sheet and profit and loss account without tnquiring into circumstances exciting suspicion is guilty of gross negligence. AIR 1963 Mad 99 (102): 1963 (1) Cri LJ 302: (1963) 2 Mad LJ 42 (DB) * AIR 1960 Mys 252 (254, 255): 38 Mys LJ 356. (Failure of a Chartered Accountant to insist on the production of the certificates from other banks in order to verify the balances constitutes gross negligence in the discharge of his professional duties and he is guilty of misconduct under Clauses (Q) and (R) of the Schedule to Section 22.)

(18) A Chartered Accountant who signs the usual auditor's report without any remark on an apparently sound balance-sheet would be blamed if the bank afterwards discovered to be insolvent. AIR 1960 Ker 309 (311): 1960 Ker LJ 347 (DB).

(19) Auditor owes no duty to disclose irregular transaction to subscribers of Fund — He is not guilty of misconduct on account of his failure to state it in statement of account. AIR 1964 Cal 131 (137): 67 Cal WN 772 (DB).

(20) A Chartered Accountant who falsely represents that a vacancy of articles clerk exists, when in fact it does not and accepts a premium for admission to such vacancy, is guilty of misconduct. (1956) 26 Com Cas 275 (278) (Cal).

**Section 22-A — Note 1**

(1) Misconduct — Auditor — Duties of — Failure to check renewal of managing agents agency agreement at the time of the audit was considered as gross negligence by Disciplinary Committee — Council of the Institute dissented from that finding — On revision, the High Court held that Auditor was not grossly negligent in his duties. AIR 1964 Mad 398 (401): 77 Mad WN 207.

(2) The Regional Councils shall be constituted in such manner and exercise such fuctions as may be prescribed.

[a] Substituted for the words "The Council may constitute such Regional Councils," by the Chartered Accountants (Amendment) Act, 1959 (15 of 1959), S. 20 [w. e. f. 1-7-1959].

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## CHAPTER VII
## PENALTIES

**24. Penalty for falsely claiming to be a member, etc.**—Any person who,—

(i) not being a member of the Institute,—

(a) represents that he is a member of the Institute; or

(b) uses the designation Chartered Accountant, or

(ii) being a member of the Institute, but not having a certificate of practice, represents that he is in practice or practices as a chartered accountant,

shall be punishable on first conviction with fine which may extend to one thousand rupees, and on any subsequent conviction with imprisonment which may extend to six months or with fine which may extend to five thousand rupees, or with both.

[a][**24A. Penalty for using name of the Council, awarding degrees of chartered accountancy, etc.**—(1) Save as otherwise provided in this Act, no person shall—

(i) use a name or a common seal which is identical with the name or the common seal of the Institute or so nearly resembles it as to deceive or as is likely to deceive the public;

(ii) award any degree, diploma or certificate or bestow any designation which indicates or purports to indicate the position or attainment of any qualification or competence similar to that of a member of the Institute; or

(iii) seek to regulate in any manner whatsoever the profession of chartered accountants.

(2) Any person contravening the provisions of sub-section (1) shall, without prejudice to any other proceedings which may be taken against him, be punishable with fine which may extend on first conviction to one thousand rupees, and on any subsequent conviction with imprisonment which may extend to six months, or with fine which may extend to five thousand rupees, or with both.

(3) Nothing contained in this section shall apply to any University established by law or to any Body affiliated to the Institute.]

[a] Inserted by the Chartered Accountants (Amendment) Act, 1959 (15 of 1959), S. 21 [w. e. f. 1-7-1959].

**25. Companies not to engage in accountancy.**—(1) No company, whether incorporated in India or elsewhere, shall practice as chartered accountants.

(2) If any company contravenes the provisions of sub-section (1), then, without prejudice to any other proceedings which may be taken against the company, every director, manager, secretary and any other officer thereof who is knowingly a party to such contravention shall be punishable with fine which may extend on first conviction to one thousand rupees, and on any subsequent conviction to five thousand rupees.

**26. Unqualified persons not to sign documents.**—(1) No person other than a member of the Institute shall sign any document on behalf of a [a][chartered accountant in practice] or a [b][firm of such chartered accountants] in his or its professional capacity.

(2) Any person contravening the provisions of sub-section (1) shall, without prejudice to any other proceedings which may be taken against him, be punishable with fine which may extend on first conviction to one thousand rupees and on any subsequent conviction with imprisonment which may extend to six months or with fine which may extend to five thousand rupees or with both.

[a] Substituted for "chartered accountant" by the Chartered Accountants (Amendment) Act, 1959 (15 of 1959), S. 22 [w. e. f. 1-7-1959].

[b] Substituted for "firm of chartered accountants," ibid [w. e. f. 1-7-1959].

**27. Maintenance of branch offices.**—(1) Where a [a][chartered accountant in practice] or a [b][firm of such chartered accountants] has more than one office in India, each one of such offices shall be in the separate charge of a member of the Institute :

Provided that the Council may in suitable cases exempt any [a][chartered accountant in practice] or a [b][firm of such chartered accountants] from the operation of this sub-section.

(2) Every [a][chartered accountant in practice] or a [b][firm of such chartered accountants] maintaining more than one office shall send to the Council a list of offices and the persons in charge thereof and shall keep the Council informed of any changes in relation thereto.

[a] Substituted for "chartered accountant," by the Chartered Accountants (Amendment) Act, 1959 (15 of 1959), S. 22 [w. e. f. 1-7-1959].

[b] Substituted for "firm of chartered accountants," ibid [w. e. f. 1-7-1959].

**28. Sanction to prosecute.**—No person shall be prosecuted under this Act except on a complaint made by or under the order of the Council or of the Central Government.

## CHAPTER VIII

## MISCELLANEOUS

**29. Reciprocity.**—(1) Where any country, specified by the Central Government in this behalf by notification in the official Gazette, prevents persons of Indian domicile from becoming members of any institution similar to the Institute of Chartered Accountants of India or from practising the profession of accountancy or subjects them to unfair discrimination in that country, no subject of any such country shall be entitled to become a member of the Institute or practise the profession of accountancy in India.

(2) Subject to the provisions of sub-section (1), the Council may prescribe the conditions, if any, subject to which foreign qualifications relating to accountancy shall be recognised for the purposes of entry in the Register.

**30. Power to make regulations.**—(1) The Council may, by notification in the Gazette of India, make regulations[a] for the purpose of carrying out the objects of this Act, and a copy of such regulations shall be sent to each member of the Institute.

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**Section 27 — Note 1**

(1) Complaint alleging contravention of Section 27 — Report of Disciplinary Committee that charges were not proved —On reference to High Court under Section 21, none present on behalf of Government on date of hearing — Finding of Committee accepted and charges held not proved. 1955 Madh BLR (Civ) 633.

**Section 30 — Note 1**

(1) Clause (J) of sub-section (2) does not by itself create a right in the Chartered Accountants to charge premia from articled clerks but only provides the council with the power, if a provision is otherwise made for charging premia or even if a practice of charging such premia grows up, to regulate the premia that may become chargeable by fixing its upper and lower limits. Therefore, in the absence of any right conferred by the Act itself it cannot be said that a regulation which provides for the refund of the premia is one contrary to the provisions of Clause (J) of Sub-section (2).

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters :—

(a) the standard and conduct of examinations under this Act;

(b) the qualifications for the entry of the name of any person in the Register as a member of the Institute;

(c) the conditions under which any examination or training may be treated as equivalent to the examination and training prescribed for members of the Institute;

(d) the conditions under which any foreign qualification may be recognised;

(e) the manner in which and the conditions subject to which applications for entry in the Register may be made;

(f) the fees payable for membership of the Institute and the annual fees payable by associates and fellows of the Institute in respect of their certificates;

(g) the manner in which elections to the Council and the Regional Councils may be held;

(h) the particulars to be entered in the Register;

(i) the functions of Regional Councils;

[b][(j) the training of articled and audit clerks, the fixations of limits within which premia may be charged from articled clerks and the cancellation of articles and termination of audit service for misconduct or for any other sufficient cause];

(k) the regulation and maintenance of the status and standard of professional qualifications of members of the Institute;

(l) the carrying out of research in accountancy;

(m) the maintenance of a library and publication of books and periodicals on accountancy;

(n) the management of the property of the Council and the maintenance and audit of its accounts;

(o) the summoning and holding of meetings of the Council, the times and places of such meetings, the conduct of business thereat and the number of members necessary to form a quorum;

(p) the powers, duties and functions of the President and the Vice-President of the Council;

(q) the functions of the Standing and other committees and the conditions subject to which such functions shall be discharged;

(r) the terms of office, and the powers, duties and functions of the Secretary and other officers and servants of the Council;

(s) the exercise of disciplinary powers conferred by this Act, and

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**Section 30 — Note 1 (contd.)**

AIR 1954 Cal 513 (516, 517) (DB). (AIR 1952 Cal 189, Reversed.)

(2) Regulations 62-A and 62-B providing for service of notice on every member and fixing a quorum for a meeting of a Standing Committee in so far as they apply to the Disciplinary Committee is not in excess of the rule-making power of the Council under sub-s. (2) (q). AIR 1957 Cal 387 (389) (DB) * AIR 1964 Cal 131 (135): 67 Cal WN 772.

(3) Regulation 78 which is one of the Regulations originally framed by the Central Government and therefore must be deemed to have been made by the Council with its last clause added by the Council's notification makes it clear that a Chartered Accountant acting as a liquidator under an order of the Calcutta High Court renders professional work. ('58) AIR 1958 SC 72 (75, 76): 1958 SCR 371.

(4) The Council may under Section 30 of the Act by notification make regulations in connection with the conduct of elections. The Regulations enumerated different heads for disciplinary action in connection with the conduct of the election; but they did not, either expressly or by necessary implication prohibit the Council from adding additional heads of disciplinary action. AIR 1967 SC 1257 (1260): (1968) 1 SCJ 319.

(t) any other matter which is required to be or may be prescribed under this Act.

(3) All regulations made by the Council under this Act shall be subject to the condition of previous publication and to the approval of the Central Government.

(4) Notwithstanding anything contained in sub-sections (1) and (2) the Central Government may frame the first regulations for the purposes mentioned in this section, and such regulations shall be deemed to have been made by the Council, and shall remain in force from the date of the coming into force of this Act, until they are amended, altered or revoked by the Council.

[a] For the Chartered Accountants Regulations 1949, see Gazette of India, dated 25th June 1949, Part I, page 796.

[b] Substituted for clause (j) of sub-section (2), by the Chartered Accountants (Amendment) Act, 1959 (15 of 1959), S. 23 [w. e. f. 1-7-1959].

[a][30A. **Powers of Central Government to direct regulations to be made or to make or amend regulations.**—(1) Where the Central Government considers it expedient so to do, it may, by order in writing, direct the Council to make any regulations or to amend or revoke any regulations already made within such period as it may specify in this behalf.

(2) If the Council fails or neglects to comply with such order within the specified period, the Central Government may make the regulations or amend or revoke the regulations made by the Council, as the case may be, either in the form specified in the order or with such modifications thereof as the Central Government thinks fit.]

[a] Inserted by the Chartered Accountants (Amendment) Act, 1959 (15 of 1959), S. 24 [w. e. f. 1-7-1959].

[a][31. **Construction of references.**—Any reference to a chartered accountant or a registered accountant or a certified or qualified auditor in any other law or in any document whatsoever shall be construed as a reference to a chartered accountant in practice within the meaning of this Act.]

[a] Substituted for old Section 31, by the Chartered Accountants (Amendment) Act, 1959 (15 of 1959), S. 25 [w. e. f. 1-7-1959].

**32. Act not to affect right of accountants to practise as such in Part B States.**—Nothing contained in this Act shall affect the right of any person who, at the commencement of this Act, is entitled to engage himself in the practice of accountancy in any [a][Part B State] under any law in force in that State, to continue to engage himself in the practice of accountancy in that State after the commencement of this Act.

[a] Substituted for "Acceding State," by A. L. O., 1950.

NOTE.—Immediately before the 1st of November, 1956 the following were the Part B States in India: Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Pepsu, Rajasthan, Saurashtra and Travancore-Cochin. Of these, Jammu and Kashmir, Rajasthan and Travancore-Cochin (now known as Kerala) are full-fledged States; Mysore with addition of territories from Bombay and Hyderabad is now known as State of Mysore; Hyderabad is now part of Andhra Pradesh, Madhya Bharat that of Madhya Pradesh, Pepsu of Punjab and Saurasthra of Gujarat.

**33. Amendment of Section 144, Indian Companies Act, 1913.**—[Repealed by the Repealing and Amending Act, 1952 (48 of 1952), S. 2 and Sch. I [2-8-1952].]

## [a][THE FIRST SCHEDULE

(See Sections 21 (4) and 22)

### PART I

### PROFESSIONAL MISCONDUCT IN RELATION TO CHARTERED ACCOUNTANTS IN PRACTICE

A chartered accountant in practise shall be deemed to be guilty of professional misconduct, if he—

(1) allows any person to practise in his name as a chartered accountant unless such person is also a chartered accountant in practice and is in partnership with or employed by himself;

(2) pays or allows or agrees to pay or allow, directly or indirectly, any share, commission or brokerage in the fees or profits of his professional business, to any person other than a member of the Institute or a partner or a retired partner or the legal representative of a deceased partner;

Explanation.—In this item "partner" includes a person residing outside India with whom a chartered accountant in practice has entered into partnership which is not in contravention of Item (4) of this Part.

(3) accepts or agrees to accept any part of the profits of the professional work of a lawyer, auctioneer, broker or other agent who is not a member of the institute;

(4) enters into partnership with any person other than a chartered accountant in practice or a person resident without India who but for his residence abroad would be entitled to be registered as a member under clause (v) of sub-section (1) of Section 4 or whose qualifications are recognised by the Central Government or the Council for the purpose of permitting such partnerships, provided that the chartered accountant shares in the fees or profits of the business of the partnership both within and without India;

(5) secures, either through the services of a person not qualified to be his partner or by means which are not open to a chartered accountant, any professional business;

(6) solicits clients or professional work either directly or indirectly, by circular, advertisement, personal communication or interview or by any other means;

(7) advertises his professional attainments or services, or uses any designation or expressions other than chartered accountant on professional documents, visiting cards, letter heads or sign boards, unless it be a degree of a University established by law in India or recognised by the Central Government or a title indicating membership of the Institute of Chartered Accountants or of any other institution that has been recognised by the Central Government or may be recognised by the Council;

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**SCHEDULE I**

[Note:— The case law given below is under the old Schedule as it stood before its amendment by Act 15 of 1959.]

**Sch. I, Part I, Cl. (3) — Note 1**

(1) Chartered Accountant is not guilty of misconduct under Clause (c) (of old Schedule) by entrusting the conduct of the Income-tax cases of his clients to an employee who is in his pay. The mere fact that the employee is described in the authorisation to appear as Income-tax practitioner for the purpose of Section 61, Income-tax Act does not make him a lawyer looking to the assessee for fees. Hence neither in fact nor in law can there be any agreement between him and his master for sharing of the fees. ('53) AIR 1953 Mad 346 (347).

(8) accepts a position as auditor previously held by another chartered accountant or a restricted State auditor without first communicating with him in writing;

(9) accepts an appointment as auditor of a company without first ascertaining from it whether the requirements of Section [a][225] of the Companies Act, 1956, in respect of such appointment have been duly complied with;

(10) charges or offers to charge, accepts or offers to accept in respect of any professional employment fees which are based on a percentage of profits or which are contingent upon the findings or results of such employment, except in cases which are permitted under any regulations made under this Act;

(11) engages in any business or occupation other than the profession of chartered accountants unless permitted by the Council so to engage:

Provided that nothing containing herein shall disentitle a chartered accountant from being a director of a company, unless he or any of his partners is interested in such company as an auditor;

(12) accepts a position as auditor previously held by some other chartered accountant or a restricted State auditor in such conditions as to constitute under-cutting;

(13) allows a person not being a member of the Institute or a member not being his partner to sign on his behalf or on behalf of his firm, any balance-sheet, profit and loss account report or financial statements.

[a] Substituted for the Figures 226 by the Repealing and Amending Act 1964 (52 of 1964), S. 3 and Sch. II [28-12-1964].

## PART II

## PROFESSIONAL MISCONDUCT IN RELATION TO MEMBERS OF THE INSTITUTE IN SERVICE

A member of the Institute (other than a member in practice) shall be deemed to be guilty of professional misconduct, if he being an employee of any company, firm or person—

(a) pays or allows or agrees to pay directly or indirectly to any person any share in the emoluments of the employment undertaken by the member;

(b) accepts or agrees to accept any part of fees, profits or gains from a lawyer, a chartered accountant or broker engaged by such company, firm or person or agent or customer of such company, firm or person by way of commission or gratification;

(c) discloses confidential information acquired in the course of his employment except as and when required by law or except as permitted by the employer.

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**Sch. I, Part I, Cl. (8) — Note 1**

(1) Clause (h) (of old Schedule) is not confined only to the acceptance without notice of the position of the auditor before the expiry of the year of office of another auditor but extends also to such acceptance after the expiry of the year for a subsequent year. As the words "position as auditor" are of general character it cannot be said that each year's tenure is independant of the office during other years. ('52) 1952-22 Com Cas 303 (305) (DB) (Mad).

**Sch. I, Part I, Cl. (10) — Note 1**

(1) An agreement that the accountant would be paid ten percent of the amount obtained as relief in a pending Income-tax appeal, even on the assumption that it includes the fee payable to the Counsel, offends Cl. (m) inasmucb as the fees payable to him after deducting the Counsel's fee will be an amount computed on a percentage basis. AIR 1957 Cal 449 (456) (DB).

## PART III

## PROFESSIONAL MISCONDUCT IN RELATION TO MEMBERS OF THE INSTITUTE GENERALLY

A member of the Institute, whether in practice or not, shall be deemed to be guilty of professional misconduct, if he—

(1) includes in any statement return or form to be submitted to the Council any particulars knowing them to be false;

(2) not being a fellow styles himself as a fellow;

(3) does not supply the information called for, or does not comply with the requirements asked for, by the Council or any of its Committees.

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# THE SECOND SCHEDULE

(See Sections 21 (5) and 22)

## PART I

## PROFESSIONAL MISCONDUCT IN RELATION TO CHARTERED ACCOUNTANTS IN PRACTICE REQUIRING ACTION BY A HIGH COURT.

A chartered accountant in practice shall be deemed to be guilty of professional misconduct, if he—

(1) discloses information acquired in the course of his professional engagement to any person other than his client, without the consent of his client or otherwise than as required by any law for the time being in force;

(2) certifies or submits in his name or in the name of his firm a report of an examination of financial statements unless the examination of such statements and the related records has been made by him or by a partner or an employee in his firm or by another chartered accountant in practice ;

(3) permits his name or the name of his firm to be used in connection with an estimate of earnings contingent upon future transactions in a manner which may lead to the belief that he vouches for the accuracy of the forecast;

(4) expresses his opinion on financial statements of any business or any enterprise in which he, his firm or a partner in his firm has a substantial interest, unless he discloses the interest also in his report;

(5) fails to disclose a material fact known to him which is not disclosed in a financial statement, but disclosure of which is necessary to make the financial statement not misleading;

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**Sch. I, Part III, Cl. (1) — Note 1**

(1) A chartered accountant giving wrong particulars in his application for inclusion in the list of accountants to train articled clerks and for the fellowship of the Institute, knowing them to be false is guilty of misconduct falling within Clause (u) (of old Schedule). ('52) AIR 1952 1952 Pun 259 (261) (DB).

**Sch. II, Part I, Cl. (2) — Note 1**

(1) Auditor appointed by company basing his report filed under Section 227, Companies Act, on work done by internal auditor of the Company who was a Chartered Accountant in practice — Auditor also mentioning that fact in his report — Charge of professional misconduct under Cls. (2) and (8) — Disciplinary Committee exonerating him of charge under Cl. (2) and first part of Cl. (8) — Held, there was no professional misconduct in respect of second part of Clause (8) also. AIR 1964 Punj 452 (454): 66 Punj LR 906 (DB).

**Sch. II, Part I, Cl. (5) — Note 1**

(1) It is the duty of an auditor to mention that there is non-compliance with the statutory direction in the Companies Act regarding the deposit of call money on the shares in scheduled banks He fails in his duty in accepting the explanation given by the managing director and omitting to make a mention of non-compliance. ('54) AIR 1954 Mad 1080 (1082): 1954 Cri LJ 1634 (DB).

(2) Whether an auditor of a Company's account conveys all material information in his public report or in a

(6) fails to report a material mis-statement known to him to appear in a financial statement with which he is concerned in a professional capacity;

(7) is grossly negligent in the conduct of his professional duties;

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**Sch. II, Part I, Cl. (5) — Note 1 (contd.)**

confidential report his duty is to make full, careful and truthful report in default of which he fails in discharge of his obligation. AIR 1956 Cal 414 (421) (DB).

(3) Chartered accountant appointed by Company to audit accounts of employee's Provident Fund — Trustees of fund advancing loan to company in contravention of Rules of fund — Company issuing cheques to fund for showing paper adjustment of repayment of loan in account in year — Cheques not cashed and ultimately returned to Company — Statement of account not showing true financial position passed as correct by Chartered Accountant knowing all these facts — Amounts to misconduct under Cl. (o) of Schedule. AIR 1968 SC 1104 (1108, 1109): (1968) 2 SCJ 785.

(4) Banking company — Omissions in certificate by accountant on profit and loss account sheet — Failure to state bank's reserve for bad debts — Certificate silent as to cancelled shares being partly paid and what were the amounts of such paid-up capital — Silence about paid-up capital, on the advice of accountant, being treated as special reserve and liable to be set-off towards capital expenditure over loss — No statement by accountant that aforesaid paid amount being treated as reserve for bad debts to be within the power of the bank— Auditor's conduct held covered by Item (o) (of old Schedule) and financial statement misleading. AIR 1960 Ker 309 (311, 312): 1960 Ker LJ 347.

**Sch. II, Part I, Cl. (7) — Note 1**

(1) In auditing the accounts of a Joint Stock Company the Accountant has a duty to investigate whether the accounts are correct, as in such a case the audit is intended for the protection of share-holders. AIR 1953 Mad 152 (163, 164): ILR (1953) Mad 534 (DB) * AIR 1956 Cal 414 (419, 420) (DB).

(2) An Accountant if he does not take reasonable care and skill before he comes to believe that what he cretifies is true must be held to have been negligent. AIR 1956 Cal 414 (420) (DB).

(3) What is reasonable care and skill must depend on the circumstances of each case. AIR 1956 Cal 414 (420) (DB).

(4) An accountant even when he generally displays highest degree of care and skill but falls short of the strict duty even in one instance he is guilty of negligence. AIR 1956 Cal 414 (420) (DB).

(5) In judging whether a Chartered Accountant auditing a company's accounts exercised reasonable care and skill, matters which have subsequently transpired are not relevant. All that has to be seen is how the matters appeared or ought to have appeared to a man of reasonable care and skill at the time the accounts were audited by him. ('56) AIR 1956 Cal 414 (420) (DB).

(6) Reasonable skill and care in the case of a company auditor do not require him to begin with suspicion and proceed to detect fraud or lie unless some information has reached him exciting his suspicion or which ought to excite his suspicion as a professional man of reasonable competence. ('56) AIR 1956 Cal 414 (419) (DB) * ('54) AIR 1954 Mad 1080 (1083, 1084): 1954 Cri LJ 1634 (DB).

(7) The Auditor is guilty of gross negligence in the conduct of his professional duties when he does not make enquiries although there is enough appearing on the face of the accounts to provoke suspicion. AIR 1954 Mad 1080 (1084): 1954 Cri LJ 1634 (DB).

(8) An accountant auditing a company's account fails to exercise skill or care of any kind where he without scrutiny of the books of the company passes the accounts, accepting the statements of the management for them. AIR 1957 Cal 387 (393) (DB) * AIR 1963 Mad 99 (102): 1963 (1) Cri LJ 302: (1963) 2 Mad LJ 42 (DB) * AIR 1960 Mad 122 (123): 1960 Cri LJ 356: (1959) 2 MLJ 542 (DB). (Auditor himself to verify assets of Company and not to rely on verification done by special examiners appointed by Company.)

(9) If the subject-matter is not capable of direct verification and to verify properly the result presented in the balance sheet of a company would require investigation rather than checking and there is nothing to excite the suspicion of the accountant auditing the accounts he can rely upon the statements of the management. If in doing so he is himself deceived he cannot be held to have failed in his duty. AIR 1956 Cal 414 (420) (DB).

(10) Where the auditor, after feeling the necessity of confirmation of cash balance and asking for it, from the branches of a bank hurried to certify the balance sheet before the confirmation was received, the auditor is guilty of negligence. AIR 1956 Cal 414 (423) (DB).

(11) An accountant auditing a company's accounts is at least guilty of negligence when, to inform the share-holders of suspicious facts, he employs an ambiguous language not capable of conveying definite information. AIR 1956 Cal 414 (422) (DB).

(12) The duty that an accountant owes is to all who might act upon the strength of his statement and whom he should have in his contemplation when

(8) fails to obtain sufficient information to warrant the expression of an opinion or his exceptions are sufficiently material to negate the expression of an opinion;

(9) fails to invite attention to any material departure from the generally accepted procedure of audit applicable to the circumstances;

(10) fails to keep moneys of his client in a separate banking account or to use such moneys for purposes for which they are intended.

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**Sch. II, Part I, Cl. (7) — Note 1 (contd.)**

he makes his statement. Therefore when he certifies the sales of a newspaper without checking up the facts with reference to the accounts to boost up the sales of his client he is guilty of gross negligence. AIR 1956 Hyd 205 (207): ILR (1956) Hyd 591 (DB).

(13) Where a matter is outside the province of accountancy and an auditor acting with reasonable care would have asked for information and explanation and would have sought legal opinion, the failure to do so betrays negligence. AIR 1957 Cal 33 (42) (DB).

(14) An auditor representing an assessee owes no duty to the Income-tax department and therefore is not guilty of any negligence in not investigating himself into the correctness of the accounts produced by the assessee. AIR 1953 Mad 152 (153, 154): ILR (1953) Mad 534 (DB).

(15) An accountant under an engagement to appear in an Income-tax case is guilty of negligence if he fails to appear and makes no other arrangement for appearance in the case. No such result follows where he has been thrown over by the assessee himself. AIR 1957 Cal 449 (454) (DB).

(16) The business of a Chartered Accountant as an auditor includes the work before the Income-tax Tribunals. Therefore such work is within the scope of the duties of an articled clerk under him and so the Accountant cannot be said to have violated either Rule 44 or Reg. 38 in engaging the articled clerk to conduct the proceedings in Income-tax cases. AIR 1953 Mad 346 (348) (DB).

(17) Misconduct implies failure to act honestly and reasonably either according to the ordinary and natural standard or according to the standards of a particular profession, but error or misinterpretation of law and specially holding one view or another over a debatable construction cannot be a ground for the allegation of professional misconduct. (1963) 67 Cal WN 475.

(18) Remuneration paid to Managing Director — Practice of Company to include it in establishment charges — No concealment to share-holders that remuneration was being paid to the Managing Director — Failure of Chartered Accountant to show, such remuneration in balance sheet separately — Chartered Accountant held could not be said to be guilty of any misconduct within meaning of schedule. (1963) 67 Cal WN 475.

**Sch. II, Part I, Cl. (8) — Note 1**

(1) An auditor before certifying a balance sheet has to verify its substantial accuracy in accordance with the particulars specified in the Articles of Association and not merely its arithmetical accuracy on the basis of a tally made with the figures in the books of account. AIR 1954 Mad 1080 (1083, 1084): 1954 Cri LJ 1634 (DB).

(2) When the accounts on the face of it provoke suspicion the auditor is bound to make enquiries. AIR 1954 Mad 1080 (1084): 1954 Cri LJ 1634 (DB).

(3) An auditor who certifies an account accepting the statement of the management even in regard to matters which are capable of direct verification commits a flagrant breach of duties. AIR 1957 Cal 387 (390).

(4) Failure to verify the cash balance as stated in the balance sheet on material dates, and also subsequent omission at the time of next inspection, to examine the intermediate transactions, is misconduct within the meaning of Clause (r) (of old Schedule). AIR 1954 Mad 1080 (1082): 1954 Cri LJ 1634 (DB).

(5) Although duties of an auditor auditing a banking company are to verify cash balance, ascertain the bank balance with reference to pass books etc. and to confirm the existence of securities, assets, still he can rely upon the certificate of the trustworthy custodian, where such securities are within the custodian, consistent with the commerce practices. AIR 1956 Cal 414 (419, 420, 421, 423) (DB).

(6) Auditor appointed by company basing his report filed under Section 227, Companies Act on work done by internal auditor of the Company who was a Chartered Accountant in practice — Auditor also mentioning that fact in his report — Chargé of professional misconduct under Clauses (2) and (8) — Disciplinary Committee exonerating him of charge under Cl. (2) and first part of Cl. (8) —Held, there was no professional misconduct in respect of second part of Clause (8) also. AIR 1964 Punj 452 (454); 66 Punj LR 906 (DB).

**Sch. II, Part 1 Cl. (10) — Note 1**

(1) Company in liquidation is not client of liquidator appointed by Court. AIR 1966 Cal 468 (471) : (1965) 11 Fac LR 167.

## PART II

## PROFESSIONAL MISCONDUCT IN RELATION TO MEMBERS OF THE INSTITUTE GENERALLY REQUIRING ACTION BY A HIGH COURT.

A member of the Institute, whether in practice or not, shall be deemed to be guilty of professional misconduct, if he—

(i) contravenes any of the provisions of this Act or the regulations made thereunder;

(ii) is guilty of such other act or omission as may be specified by the Council in this behalf, by notification in the Gazette of India.]

[a] The old Schedule was substituted by Schedules I and II, by the Chartered Accountants (Amendment) Act, 1959 (15 of 1959), S. 26.

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# [THE] CHILD MARRIAGE RESTRAINT ACT, 1929

## (ACT XIX OF 1929)

[The text of the Act printed here is as on 1-5-1969.]

## CONTENTS

SECTIONS

1. Short title, extent and commencement.
2. Definitions.
3. Punishment for male adult below twenty-one years of age marrying a child.
4. Punishment for male adult above twenty-one years of age marrying a child.
5. Punishment for solemnising a child marriage.
6. Punishment for parent or guardian concerned in a child marriage.
7. [Repealed.]
8. Jurisdiction under this Act.
9. Mode of taking cognizance of offences.
10. Preliminary inquiries into offences.
11. [Repealed.]
12. Power to issue injunction prohibiting marriage in contravention of this Act.

## ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A. C. A. O. 1948; A. L. O. 1950.

—Amended by Acts 8 of 1930; 7 of 1938; 19 of 1938; 41 of 1949; 3 of 1951; 26 of 1968; in Gujarat by Guj. Act 11 of 1964; in Punjab by Punj. Act 25 of 1964.

—Extended by Acts 59 of 1949; 30 of 1950; 26 of 1968. Regs. 6 of 1963; 11 of 1963 and 8 of 1965; in Bombay by Bom. Act 4 of 1950.

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**Sch. II, Part II, Cl. (i) — Note 1**

(1) Receipt of amount other than premium by Chartered Accountant as consideration for entertaining articled clerk, amounts to professional misconduct. See (1967) 2 Mad LJ 450 : 80 Mad LW 608.

**Schedule II Part II Cl. (ii) — Note 1**

(1) Cl. (v) (of old Schedule) is general in terms since it provides for cases where the accountant is guilty of such other act or omission which may be specified by the council by notification in the Gazette. AIR 1958 SC 72 (77) : 1958 SCR 371.

(2) Clause (v) (of old Schedule) merely sets up a machinery whereby the schedule could be further expanded. It does not indicate that the schedule is exhaustive. ('52) 1952-22 Com Cas 130 (134) (DB) (Bom).

(3) A notification under clause (v) (of old Schedule) making a particular act a misconduct is not a condition precedent for taking disciplinary action in respect of that act. AIR 1953 Mad 310 (311) : ILR (1953) Mad 357 (DB).

(4) If the council, in the best interest of the purity of the elections and ultimately in the interest of the profession itself issues a notification prohibiting canvassing of votes and issue of manifestoes and circulars at the election it cannot be said that in doing so the council acted unreasonably. Consequently, a member who contravenes the said notification shall be guilty of professional misconduct under cl. (ii), Part II of second Schedule. AIR 1967 SC 1257 (1260): (1967) 2 SCR 256.

# [THE] CHILD MARRIAGE RESTRAINT ACT, 1929
## (ACT XIX OF 1929)[a]

[1st October, 1929.]

**An Act to restrain the solemnisation of child marriages.**

WHEREAS it is expedient to restrain the solemnisation of child marriages; It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, see Gazette of India, 1927, Pt. V, p. 28; for Reports of Select Committees, see ibid., 1928, Pt. V, pp. 111 and 165.

This Act has been extended to the new Provinces and Merged States by the Merged States (Laws) Act, 1949 (59 of 1949), S. 3 [1-1-1950] and to the Union Territories of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act, 1950 (30 of 1950), S. 3 [16-4-1950]. Vindhya Pradesh now forms part of the State of Madhya Pradesh — See Act 37 of 1956, S. 9 (1) (e).

This Act has been extended to States Merged in the State of Bombay: see Bom. Act 4 of 1950.

The Act now extends to the Union territories of—

(1) Goa, Daman and Diu — See Reg. 11 of 1963 [w. e. f. 1-2-1965];
(2) Dadra and Nagar Haveli — See Reg. 6 of 1963 [w. e. f. 1-7-1965];
(3) Laccadive, Minicoy and Amindivi Islands — See Reg. 8 of 1965 [w.e.f. 1-10-1967];
(4) Pondicherry—Act 26 of 1968 [w. e. f. 15-8-1968].

**1. Short title, extent and commencement.**—(1) This Act may be called THE CHILD MARRIAGE RESTRAINT ACT, [a][1929].

[b][(2) It extends to the whole of India [c][except the State of Jammu and Kashmir]; and it applies also to all citizens of India without and beyond India.]

[d][Provided that nothing contained in the Act shall apply to the Renoncants of the Union Territory of Pondicherry.]

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**Preamble — Note 1**

(1) This Act aims at the restraint of performance of certain marriages. The question of validity of the marriages is beyond the scopse of this Act. AIR 1936 All 11 (12) : 36 Cri LJ 1483 : 58 All 402* AIR 1939 All 340 (340) * AIR 1936 All 852 (853) : 38 Cri LJ 301 * AIR 1962 Mad 400 (401): 75 Mad LW 161.

(2) Husband's obtaining possession of wife below 14 years is against policy of this Act. His right to possession may be enforced by recourse to the Court but not by use of force. AIR 1935 All 916 (917) : 37 Cri LJ 35.

(3) There is no rule of Hindu Law sanctioning early marriage. Sanction by usage also is disapproved by the Act. (1937) ILR (1937) 2 Cal 764 (766).

(4) Where mother of a Rajput girl of seven, bridegroom and priest were convicted under Ss. 6, 4 and 5, respectively and in revision it was urged that this Act was ultra vires as previous sanction of the Governor-General in Council was not given to the Bill as passed, it was held that the contracting parties being Hindus came within the scope of the original Bill; and that changes made by the Select Committee did not render inadequate the "previous sanction" accorded. AIR 1933 Pat 471 (472) : 35 Cri LJ 20.

(5) In a case under this Act the Court should not apply strictly the principles with regard to setting aside of acquittals. It should derogate from the usual practice of not setting aside acquittals except in exceptional cases. AIR 1935 Pat 474 (476): 37 Cri LJ 227.

(6) Money borrowed for celebrating marriage of minor daughter — Creditor suing for recovery cannot be non-suited unless he is shown to have had knowledge that the loan which he was advancing was for purpose of celebrating marriage in contravention of provisions of Act. AIR 1967 Andh Pra 83 (85, 86) : (1966) 1 Andh WR 209.

**Section 1 — Note 1**

(1) Clauses (a) and (b) were added to sub-section (2) by Act 7 of 1938. This addition has the effect of making this Act applicable to the persons mentioned therein irrespective of the place where marriage is celebrated. There was a conflict of decisions as to the applicability of this Act in such a case prior to the above amendment for which see the following cases. AIR 1937 Mad 273 (274): 38 Cri LJ 587. (Act applies to marriages celebrated outside British India.) * AIR 1938 Nag 235 (237) : 39 Cri LJ 651 : ILR (1939) Nag 241. (Solemnization of child marriage outside British India is not an

(3) It shall come into froce on the 1st day of April, 1930.

[a] Substituted by the Repealing and Amending Act, 1930 (8 of 1930), S. 2 and Sch. I, for "1928".
[b] Substituted for sub-section (2), by A. L. O., 1950.
[c] Substituted for the words "except Part B States" by the Part B States (Laws) Act, 1951 (3 of 1951), S. 3 and Sch., [1-4-1951].
[d] Proviso inserted by the Pondicherry (Extension of Laws) Act, 1968 (26 of 1968) S. 3 (1) and Sch., Pt. I [15-8-1968].

**2. Definitions.**—In this Act, unless there is anything repugnant in the subject or context,—

(a) "child" means a person who, if a male, is under eighteen years of age, and if a female, is under [a][fifteen] years of age;

(b) "child marriage" means a marriage to which either of the contracting parties is a child;

(c) "contracting party" to a marriage means either of the parties whose marriage is [b][or is about to be] thereby solemnised; and

(d) "minor" means a person of either sex who is under eighteen years of age.

[a] Substituted for "fourteen" by the Child Marriage Restraint (Amendment) Act, 1949 (41 of 1949), S. 2 [15-7-1949].
[b] Inserted by the Child Marriage Restraint (Second Amendment) Act, 1938 (19 of 1938), S. 2 [9-4-1938].

**3. Punishment for male adult below twenty-one years of age marrying a child.**—Whoever, being a male above eighteen years of age and below twenty-one, contracts a child marriage [a][shall be punishable with simple imprisonment which may extend to fifteen days, or with fine which may extend to one thousand rupees, or with both].

[a] Substituted for the words "shall be punishable with fine which may extend to one thousand rupees", by the Child Marriage Restraint (Amendment) Act, 1949 (41 of 1949), S. 3 [15-7-1949].

**4. Punishment for male adult above twenty-one years of age marrying a child.**—Whoever, being a male above twenty-one years of age, contracts a child

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**Section 1 — Note 1 (contd.)**

offence.) * AIR 1935 Bom 437 (438) : 37 Cri LJ 211 : 59 Bom 745. (Marriage of a minor contracted outside British India does not give rise to an offence.)

(2) In a case of complaint under Ss. 3, 5 and 6 it was held the presumption was that the accused were British subjects and that as the place of birth was within their special knowledge, it was for them to rebut the presumption. AIR 1940 Nag 245 (246) : 41 Cri LJ 645.

(3) Minor's estate in hands of receiver — Marriage in contravention of Act performed at place where it is not prohibited — Court cannot sanction expenditure. AIR 1937 Cal 257 (258, 259) : 63 Cal 1153.

(4) An application in an administration suit for liberty to spend certain sum for a marriage in contravention of this Act but outside India; where it is not prohibited, cannot be granted. AIR 1941 Cal 244 (245).

(5) Mortgage effected by a manager of a joint Hindu family for the performance of the marriage of a minor in contravention of the provisions of this Act cannot be said to be for a necessary purpose and hence is not binding on the minor. ('41) 1941 Nag LJ 282 (283).

**Section 2 — Note 1**

(1) Certificate of birth of a person is conclusive evidence of his age so long as it is not disproved by evidence of the party denying its correctness. AIR 1935 Pat 474 (476) : 37 Cri LJ 227.

**Section 3 — Note 1**

(1) A Court sentencing an offender under S. 3 cannot direct that, in default of payment of the fine imposed, he shall undergo any term of imprisonment. See S. 7.

(2) The Act does not affect the validity of the marriage even though it may be in contravention of the Act. In spite of the marriage being valid, the legislature disapproves of such marriages and makes the performance of such marriage punishable under the law. AIR 1961 Orissa 104 (105) : 26 Cut LT 431.

marriage shall be punishable with [a][simple imprisonment which may extend to three months and shall also be liable to fine.]

[a] Substituted for the words "simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both" occurring in Sections 4, 5 and 6 by the Child Marriage Restraint (Amendment) Act, 1949 (41 of 1949), S. 4 [15-7-1949].

**5. Punishment for solemnising a child marriage.**—Whoever performs, conducts or directs any child marriage shall be punishable with [a][simple imprisonment which may extend to three months and shall also be liable to fine], unless he proves that he had reason to believe that the marriage was not a child marriage.

[a] See Foot-note [a] under Section 4.

## SECTION 5 — SYNOPSIS

**1. Scope.**
**2. "Perform, conduct or direct."**
**3. Sentence.**
**4. Practice and Procedure.**

### Topic Indicator

Applicability to foreigners — See Note 1.
Liability of guardian — See Note 1 and Section 6.
Enquiry before performing marriage — See Note 1.
Duty of trying magistrate — See Note 1.
Liability of guest attending child marriage — See Note 2.
Summary trial — See Note 4.
Punishment for parents or guardian — See Section 6.
"Reason to believe" — See Note 1.
Marriage — See Note 2.
Kanyadan whether offence — See Note 2.
Advancing money for performance of child marriage — See Note 2.

**1. Scope.**—(1) This Act is a penal statute and is applicable to all crimes committed under it in British India. The fact that the accused are, foreigners makes no difference even if such an act is not an offence in the foreign place. ('36) 37 Cri LJ 757 (757) (Cal).

(2) Consummation or Gauna is not part of marriage ceremony. The marriage being complete before the consummation, a person may be convicted under this Act though consummation has not taken place. AIR 1936 All 11 (11, 12) : 36 Cri LJ 1483 : 58 All 402.

(3) Section 5 applies only to solemnisation of marriage by others than parents and hence S. 6 alone applies to parents who participate in child marriage. AIR 1937 Mad 490 (491) : 38 Cri LJ 594 : ILR (1937) Mad 854 * AIR 1932 Nag 174 (177) : 28 Nag LR 302 : 34 Cri LJ 311 * ILR (1962) Cut 825 : 29 Cut LT 71. (Groom not shown to be child—Father cannot be convicted either under S. 5 or Section 6.)
[But see AIR 1936 All 11 (12): 58 All 402: 36 Cri LJ 1483.]

(4) A Hindu parent or guardian taking part in a child marriage is liable to punishment only under S. 6 and not for two offences under Ss. 5 and 6 respectively. AIR 1932 Nag 174 (177) : 28 Nag LR 302 : 34 Cri LJ 311.

(5) Section 5 contemplates that purohit who solemnises marriage must make some reasonable enquiry as to the ages and satisfy himself that neither of the participants is a child. AIR 1937 Mad 490 (492) : ILR (1937) Mad 854 : 38 Cri LJ 594.

(6) Where the person conducting the marriage of a minor has acted upon the certificate about the age from a person of qualifications lower than that of Civil Surgeon, it cannot be said that the person has acted in good faith. AIR 1934 All 331 (332) : 35 Cri LJ 677.

(7) In the case of complaint under Ss. 5 and 6 it is essential that the trying Magistrate should find definitely that either or both of the contracting parties to the marriage were infants, that is, the bridegroom was under the age of 18 or that the bride was under the age of 14. AIR 1939 Cal 288 (288) : 40 Cri LJ 605.

(8) Raising money for minor's marriage is not necessary purpose because it is against provision of statute law, viz., Child Marriage Restraint Act, 1929. 1967 Cri LJ 303 : 69 Punj LR 293.

**2. "Perform, conduct or direct."** — (1) The words 'perform, conduct or direct' mean completing union and indicate solemnization of marriage. AIR 1940 Bom 363 (364) : 42 Cri LJ 62 : ILR (1940) Bom 709 * (1965) 1 Mad LJ 172 : 1965 (2) Cri LJ 167. (Woman attending child marriage as guest, escorting bride to marriage spot and reminding women present to raise customary chorus — She cannot be said to perform, conduct or direct marriage.)

(2) Negotiation, preparation or any other preliminary acts do not come within the mischief of section. AIR 1938 Nag 235 (236) : 39 Cri LJ 651 : ILR (1939) Nag 241.

(3) Mere participation by parent by Kanyadan is not an offence under the Act. AIR 1940 Bom 363 (364) : 42 Cri LJ 62 : ILR (1940) Bom 709.

(4) Merely applying for permission for conducting festivities on occasion of marriage does not amount to 'performing, conducting or directing a child marriage" and clearly is no offence under

**6. Punishment for parent or guardian concerned in a child marriage.**—(1) Where a minor contracts a chlid marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnised, or negligently fails to prevent it from being solemnised, shall be punishable with [a][simple imprisonment which may extend to three months and shall also be liable to fine]:

Provided that no woman shall be punishable with imprisonment.

(2) For the purposes of this section, it shall be presumed, unless and until the contrary is proved, that where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnised.

[a] See Foot-note [a] under Section 4.

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**Section 5 — Note 2 (contd.)**

S. 5. AIR 1936 Oudh 311 (312) : 37 Cri LJ 616 : 12 Luck 263. (Permission asked was for holding nach with music and fire-works.)

(5) Merely advancing money to enable infant to marry in violation of the Act is not by itself punishable either under this section or S. 6. (1937) ILR (1937) 2 Cal 764 (767).

**3. Sentence.**—(1) Sentence upon the priest or other celebrant should be deterrent. AIR 1933 Pat 471 (472) : 33 Cri LJ 20.

(2) That the person solemnising the marriage acted on a certificate of age from a doctor of the rank lower than that of a civil surgeon may be taken into consideration in fixing the punishment although that is insufficient to excuse him from liability. AIR 1934 All 331 (332) : 35 Cri LJ 677.

(3) The fact that the accused are foreigners and that the act which is an offence under this Act, is not an offence in the foreign country can be considered in mitigation of punishment. (1936) 37 Cri LJ 757 (757) (Cal).

**4. Practice and procedure.**— (1) A case under S. 5 of the Child Marriage Restraint Act can be tried summarily. AIR 1956 Andhra 51 (52) : 1956 Cri LJ 196.

**Section 6 — Note 1**

(1) Section 6 can come into play only where a child marriage has been performed and not before. ('57) AIR 1957 Raj 359 (359) : ILR (1957) 7 Raj 567 : 1957 Cri LJ 1317.

(2) Section 6 alone applies to parents who promote child marriage or permit it or negligently fail to prevent it. AIR 1937 Mad 490 (491) : ILR (1937) Mad 854 : 38 Cri LJ 594.

(3) Section 6 has reference only to promotion of prohibited marriage referred to in Ss. 4 and 5. AIR 1938 Mad 235 (237) : 39 Cri LJ 651 : ILR (1939) Nag 241.

(4) When the marriage is not penal, under the preceding sections permitting such a marriage is not punishable. AIR 1935 Bom 437 (438) : 59 Bom 745 : 37 Cri LJ 211.

(5) The parent or guardian will be liable for the marriage of the minor even if the minor child has not directly entered into the agreement for the marriage and the agreement and arrangement had been made by some other person. AIR 1945 All 306 (306) : ILR (1945) All 272 : 47 Cri LJ 43.

(6) Minors are incapable of entering into any valid contract and marriage under Hindu Law is no contract. So the words "where a minor contracts a child marriage" in S. 6(1) ought not to be literally interpreted but ought to be understood meaning "where a child marraige" takes place or where a minor enters into a child marriage. AIR 1956 Andhra 51 (52) : 1956 Cri LJ 196.

(7) Expression "when a minor contracts a child marriage" in S. 6 is wide enough to cover a case of marriage to which both parties are minors as well as to one to which one party is minor. AIR 1932 Nag 174 (177) : 34 Cri LJ 311 : 28 Nag LR 302.

(8) Parents of bridegroom cannot be convicted under the section merely because the bride was under 14 years of age. AIR 1937 Mad 490 (491) : ILR (1937) Sind 854 : 38 Cri LJ 594 * ('62) ILR (1962) Cut 825 : 29 Cut LT 71.

(9) When the father is alive and is in charge of minor daughter, the grandfather cannot be convicted for her marriage. AIR 1945 All 306 (307) : ILR (1945) All 272 : 47 Cri LJ 43.

(10) The mother of a minor bridegroom not in actual charge of the minor and not able to prevent the marriage commits no offence by mere participation. AIR 1937 Mad 490 (492) : ILR (1937) Mad 854 : 38 Cri LJ 594.

(11) An intention to give a child in marriage in contravention of this Act is an "unlawful purpose" within the meaning of Section 361, Penal Code. AIR 1933 Rang 98 (100) : 11 Rang 213 : 34 Cri LJ 696 (FB).

(12) This Act does not mention the offence of abetting but under the Penal Code there may be a prosecution for the abetment of an offence under this Act. A person may be convicted of abetting an accused who is not the father of a minor who is married, so long as the other party to the marriage is a minor. AIR 1935 Pat 474 (475) : 37 Cri LJ 227.

**7. Imprisonment not to be awarded for offences under Section 3.**—[Repealed by the Child Marriage Restraint (Amendment) Act, 1949 (41 of 1949), S. 5, [15-7-1949].]

STATE AMENDMENT

**Gujarat**

In its application to the State of Gujarat, after S. 6, insert S. 7 as follows :—

"7. Offences to be cognisable—

Nothwithstanding anything contained in the Code of Criminal Procedure, 1898, an offence punishable under this Act shall be deemed to be a cognisable offence within the meaning of that Code".—Guj. Act 11 of 1964, S. 3 [15-7-1964].

**8. Jurisdiction under this Act.**—Notwithstanding anything contained in Section 190 of the Code of Criminal Procedure, 1898, no Court other than that of a Presidency Magistrate or a [a][Magistrate of the first class] shall take cognizance of, or try, any offence under this Act.

[a] These words were substituted for the words "District Magistrate" by the Child Marriage Restraint (Second Amendment) Act, 1938 (19 of 1938), S. 3 [9-4-1938].

STATE AMENDMENTS

**Punjab**

In its application to the State of Punjab, in S. 8, for the words 'a Magistrate' substitute the words "a Judicial Magistrate" — Punj. Act 25 of 1964, S. 2 and Sch. Pt. II [2-10-1964].

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**Section 6 — Note 1 (contd.)**

(13) A report by Magistrate conducting local investigation, recommending prosecution of complainant also under S. 6, constitutes a complaint under S. 4 (1) (h), Criminal P. C. AIR 1933 Pat 87 (88) : 34 Cri LJ 237.

(14) A case under the section can be tried summarily. AIR 1956 Andhra 51 (52) : 1956 Cri LJ 196.

(15) See also Section 5 Note 1.

**Money lent for marriage of minor.**—(16) The lending of money to a guardian for the marriage of her minor child is for the purpose not only prohibited by law but is made an offence under Ss. 5 and 6, Child Marriage Restraint Act and hence the purpose of borrowing is unlawful and against the public policy. AIR 1952 Mad 579 (582)*('56) AIR 1956 Bom 250 (251).

[See also AIR 1949 East Punj 354 (355).]

(17) A creditor who lends money without being aware of the purpose for which the debt is contracted is not affected by the illegality. AIR 1958 Andh Pra 145 (146) (DB).

(18) Where the High Court under Section 439 (1), Criminal Procedure Code is called upon to deal with a reduction of sentence effected by the Court of appeal, in reaching the conclusion as to whether it should exercise its powers of interference, the High Court must take into consideration the reasons given by the Sessions Judge in appeal for reducing the sentence. An offence under the Act may be committed for an altogether sordid motive such as love or lucre or it may have been committed under a superstitious belief that the marriage confers religious merit upon the parent. The prosecution for an offence too might be tainted by an indirect and unworthy motive. The Court would not be wrong when deciding upon the sentence to be imposed in a particular case in taking such factors into consideration. AIR 1960 Andh Pra 302 (305) : 1960 Cri LJ 784 : (1960) 1 Andh WR 167.

(19) Complaint under Child Marriage Restraint Act — Acquittal on ground of failure to prove marriage — Conclusion based solely on absence of evidence as to vivah hom and kanyadan — Case held fit for grant of special leave to appeal under S. 417 (3) of Criminal P. C. AIR 1963 Madh Pra 126 (127): 1963 (1) Cri LJ 444.

**Section 8 — Note 1**

(1) The words "Magistrate" of the first class" as inserted in S. 8 by the Amending Act (19 of 1938) continue to be effective notwithstanding the repeal of the Amending Act by the Repealing Act (25 of 1942) by virtue of the saving clause in S. 4 of the latter Act. AIR 1947 Nag 79 (80) : ILR (1947) Nag 80 : 47 Cri LJ 794.

(2) Additional District Magistrate with powers of District Magistrate is empowered to try case under the Act. AIR 1937 Mad 637 (638) : 38 Cri LJ 664 : ILR (1937) Mad 1034. (Case before amendment of section in 1938).

(3) For fixing up the place of trial for the offence under S. 5 it is immaterial where the tilak ceremony took place. It is the place where the marriage cremony was solemnized that fixes the place of trial. AIR 1934 All 829 (829) : 57 All 83: 35 Cri LJ 1175.

(4) A trial under this Act may be summary. The fact that the offences are to be tried only by the Magistrate mention-

**Haryana**

Same as in Punjab — Ibid and Haryana A.L.O., 1968.

**Union Territory (Chandigarh)**

Same as in Punjab — Punj. Act 25 of 1964 and Act 31 of 1966, S. 88 [1-11-1966].

**Union Territory (Himachal Pradesh)**

Added territories: Same as in Punjab—see Act 31 of 1966, Ss. 5 and 88 [1-11-1966].

[a][9. **Mode of taking cognizance of offences.**—No Court shall take cognizance of any offence under this Act after the expiry of one year from the date on which the offence is alleged to have been committed.]

[a] Section 9 was substituted for the original section by the Child Marriage Restraint (Second Amendment) Act, 1938 (19 of 1938), S. 4 [9-4-1938].

[a][10. **Preliminary inquiries into offences.**—Any Court, on receipt of a complaint of an offence of which it is authorised to take cognizance, shall, unless it dismisses the complaint under Section 203 of the Code of Criminal Procedure, 1898 (V of 1898), either itself make an inquiry under Section 202 of that Code or direct a Magistrate subordinate to it to make such inquiry.]

[a] Substituted for former Section 10, by the Child Marriage Restraint (Amendment) Act, 1949 (41 of 1949), S. 6 [15-7-1949].

**STATE AMENDMENT**

**Gujarat**

In its application to the State of Gujarat, S. 10 is deleted — Guj. Act 11 of 1964, S. 3 [15-7-1964].

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**Section 8 — Note 1 (contd.)**

ed therein does not bar a summary trial. AIR 1934 All 331 (332): 35 Cri LJ 677 * AIR 1956 Andhra 51 (52) : 1956 Cri LJ 196.

**Section 9 — Note 1**

(1) Offence under S. 5 is not cognizable. So when such a case is forwarded to an Assistant Superintendent of Police for investigation a letter from him to the District Magistrate is a "Police report" and not a "complaint". AIR 1938 Rang 257 (258) : 39 Cri LJ 776 : 1938 Rang LR 150.

(2) The limitation prescribed in S. 9 being incorporated in the original Act by the Amending Act (19 of 1938) continues to be effective notwithstanding the repeal of the Amending Act by the Repealing Act 25 of 1942, by virtue of the saving clause contained in S. 4 of the Repealing Act. AIR 1947 Nag 79 (80) : ILR (1947) Nag 80 : 47 Cri LJ 794.

(3) Where a complaint to one Court is made prior to the expiry of one year from the date of the marriage and another complaint is made to a different Court after the expiry of the period of one year the latter complaint is barred by time. Section 14, Limitation Act, which applies to civil proceedings only, cannot validate the latter complaint on the strength of the former complaint made in time. AIR 1939 Mad 512 (513) : 40 Cri LJ 816.

(4) Section 10 compels a preliminary enquiry. Even when a Magistrate upon receiving a complaint under the Act does not dismiss the complaint but decides upon the necessary preliminary enquiry, he is taking recognizance of the offence complained against and it cannot be said that he takes cognizance, only when he directs the issue of process to the accused. (1939) 1 Mad LJ 900, Diss from. AIR 1960 Andh Pra 302 (304) : 1960 Cri LJ 784 : (1960) 1 Andh WR 167 (DB).

**Section 10 — Note 1**

(1) Section 10 comes into play only when a Court takes cognizance of an offence under the Act and not where merely an application has been made to prevent a child marriage from being performed under S. 12. ('57) AIR 1957 Raj 359 (359, 360) : ILR (1957) 7 Raj 567 : 1957 Cri LJ 1317.

(2) A preliminary inquiry under this Section is absolutely essential before the Court can take cognizance of an offence under this Act. ('39) AIR 1939 Mad 530 (531) : 40 Cri LJ 818 * ('34) AIR 1934 Lah 155 (155): 15 Lah 63: 35 Cri LJ 1436 * ('31) AIR 1931 Lah 56 (56) : 32 Cri LJ 616 : 12 Lah 383.

[See also ('39) AIR 1939 Mad 294 (295): 40 Cri LJ 514 (2). (Transfer of a case under S. 10 to a Sub-Divisional Magistrate without an inquiry under S. 202, Criminal P. C. is illegal.)]

[But see AIR 1960 Andh Pra 302 (304): 1960 Cri LJ 784 : (1960) 1 Andh WR 167 (DB). (Even when a Magistrate upon receiving a complaint under the Act does not dismiss the complaint but

**11. Power to take security from complainant.**—[Repealed by the Child Marriage Restraint (Amendment) Act, 1949 (41 of 1949), S. 7 [15-7-1949].]

[a][12. **Power to issue injunction prohibiting marriage in contravention of this Act.**—(1) Notwithstanding anything to the contrary contained in this Act, the Court may, if satisfied from information laid before it through a complaint or otherwise that a child marriage in contravention of this Act has been arranged or is about to be solemnised, issue an injunction against any of the persons mentioned in Sections 3, 4, 5 and 6 of this Act prohibiting such marriage.

(2) No injunction under sub-section (1) shall be issued against any person unless the Court has previously given notice to such person, and has afforded him an opportunity to show cause against the issue of the injunction.

**Section 10 — Note 1 (contd.)**

decides upon the preliminary enquiry, he is taking cognizance of the offence complained against and it cannot be said that he takes cognizance only when he directs the issue of process to accused. AIR 1939 Mad 530, Diss. from.) ]

(3) Making of a preliminary enquiry under S. 10 is mandatory and non-compliance thereof makes the trial illegal from its inception. ('53) 6 Sau LR 252 (253) (DB).

(4) Omission to hold preliminary inquiry under S. 202, Criminal P. C., vitiates later proceedings. ('40) AIR 1940 Sind 213 (214): ILR (1940) Kar 442 : 42 Cri LJ 83 * ('37) 20 Nag LJ 115 (116). (Section 537, Criminal P. C., does not cure the defect.) * ILR (1962) Cut 825 : 29 Cut LT 71.

(5) Object of the preliminary enquiry is to inquire whether there is a prima facie case or not. If the accused objects to his trial without an inquiry and the Magistrate proceeds in disregard of the objection of the accused, his order would be set aside. But where the accused makes no objection to the trial, he cannot raise it subsequently if there was a substantive case against him. AIR 1939 Pat 525 (525, 526) : 40 Cri LJ 887.

(6) It is proper in revision to send a case back for correction of illegality such as omission to hold preliminary enquiry provided under S. 10, when that can be done before the case is tried, but after judgment, the case should not be remanded, unless there is a failure of justice. Where the Court had decided the case without objection, mere omission to comply with S. 10 is irregularity curable under S. 537, Criminal P. C. High Court will not in such a case interfere under S. 439, Criminal P. C. ('40) AIR 1940 Nag 375 (377) : 42 Cri LJ 37 : ILR (1940) Nag 488 * ILR (1962) Cut 825 : 29 Cut LT 71.

[But see (1966) ILR (1966) Guj 815: (1966) 7 Guj LR 936. (AIR 1940 Nag 375, Dissent. from.)]

(7) An order of dismissal of a complaint under the Act without holding a preliminary enquiry under S. 202, Criminal P. C. is illegal and the dismissal must be set aside. ('54) AIR 1954 Mad 889 (889) : 1954 Cri LJ 1344.

**Section 11 — Note 1**

(1) A complainant should not be exempted from giving a security bond except for reasons to be recorded in writing. Giving security bond without assigning reasons is an irregularity which cannot be cured by S. 537, Criminal P. C. ('37) 20 Nag LJ 115 (116) * AIR 1933 Cal 433 (433) : 34 Cri LJ 554.

(2) If complaint is by Judicial Officer, omission to record reasons for not requiring him to execute bond cannot vitiate proceedings. AIR 1933 Pat 87 (88) : 34 Cri LJ 237 * AIR 1936 Oudh 311 (312): 12 Luck 263 : 37 Cri LJ 616.

(3) The mere fact that the security bond furnished by the complainant was defective will not vitiate the trial. AIR 1936 Oudh 311 (312) : 12 Luck 263 : 37 Cri LJ 616.

(4) In a prosecution under this Act the prosecution has to prove that the marriage was of a minor. But for compensation under S. 250, Criminal P. C., the position is the reverse. It must be proved that the complainant's allegation regarding the minority was false. Where there is merely lack of evidence as regards the age of the party alleged to be a minor, it does not necessarily follow that the allegation was false. AIR 1936 All 363 (364) : 37 Cri LJ 424 (2).

**Section 12 — Note 1**

(1) Section 12 is a self-contained provision and its main object is prevention, that is, to prevent child marriages from being performed. ('57) AIR 1957 Raj 359 (359) : ILR (1957) 7 Raj 567 : 1957 Cri LJ 1317.

(2) In a proceeding under S. 12 of the Child Marriage Restraint Act, the Magistrate cannot compel the person complained against to put in his personal appearance as he is allowed to appear either personally or by a pleader. AIR 1957 Raj 359 (360) : ILR (1957) 7 Raj 567 : 1957 Cri LJ 1317.

(3) Where a father gives his minor daughter in marriage after an injunction of the Court against him was passed, he is entitled to an opportunity to show that he had no notice of the injunction before he is punished. AIR 1932 Cal 719 (720).

(4) Section 12 (2) does not contemplate injunction prohibiting child mar-

(3) The Court may either on its own motion or on the application of any person aggrieved rescind or alter any order made under sub-section (1).

(4) Where such an application is received, the Court shall afford the applicant an early opportunity of appearing before it either in person or by pleader; and if the Court rejects the application wholly or in part, it shall record in writing its reasons for so doing.

(5) Whoever knowing that an injunction has been issued against him under sub-section (1) of this section disobeys such injunction shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both:

Provided that no woman shall be punishable with imprisonment.]

[a] This section was inserted after S. 11 by the Child Marriage Restraint (Second Amendment) Act, 1938 (19 of 1938), S. 6 [9-4-1938].

## STATE AMENDMENT

**Sections 13 and 14**

**Gujarat**

In its application to the State of Gujarat, after Section 12, the following sections shall be added, namely:—

"**13. Child Marriage Prevention Officers.**—(1) The State Government may, by notification in the Official Gazette, appoint for the whole State or for such part thereof as may be specified in that notification, an officer to be known as Child Marriage Prevention Officer.

(2) It shall be the duty of the Child Marriage Prevention Officer—

(i) to prevent marriages being performed in contravention of the provisions of this Act by taking such action under this Act as he deems fit;

(ii) to collect evidence for the effective prosecutions of persons contravening provisions of this Act; and

(iii) to discharge such other functions as may be assigned to him by the State Government.

(3) The State Government may, by notification in the Official Gazette, invest the Child Marriage Prevention Officer with such powers of a Police Officer as may be specified in the notification and the Child Marriage Prevention Officer shall exercise his powers subject to such limitations and conditions as may be specified in the notification.

(4) The State Government may associate with each Child Marriage Prevention Officer a non-official advisory body consisting of not more than five social welfare workers, of whom at least two shall be women workers known in the area within the jurisdiction of the officer for the purposes of advising and assisting him in the performance of his functions under this Act.

(5) The terms and conditions of appointment of persons on the advisory body shall be such as may be prescribed by rules.

**14. Power to make rules.**—(1) The State Government may, by notification in the Official Gazette, make rules, for the purposes of carrying out the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing provision, such rules may provide for all matters expressly required or allowed by this Act to be prescribed by rules.

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**Section 12 — Note 1 (contd.)**

riage generally irrespective of such marriages being under contemplation or not. Once a child marriage is prohibited under S. 12(1) and is not celebrated in pursuance of an injunction the matter only ends there. If subsequently again a child marriage is arranged or is about to be solemnized a fresh cause of action arises and the Court is competent to issue a fresh injunction prohibiting such a marriage. The Act does not envisage the issue of an injunction generally to prohibit any marriage at any time.

Thus a Court while issuing an injunction prohibiting a child marriage cannot issue a direction that the marriage of the child shall not be brought about within six to eight years in future. 1964 Raj LW 616 : 1965 (2) Cri LJ 836.

(3) The power to make rules conferred by this section is subject to the condition of the rules being made after previous publication.

(4) All rules made under this section shall be laid for not less than thirty days before the State Legislature as soon as possible after they are made, and shall be subject to rescission by the State Legislature or to such modifications as the State Legislature may make during the session in which they are so laid or the session immediately following.

(5) Any rescission or modification so made by the State Legislature shall be published in the Official Gazette and shall thereupon take effect."

—Gujarat Act 11 of 1964, Section 4 [15-7-1964].

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# [THE] CHILDREN ACT, 1960
## (ACT LX OF 1960)

[The text of the Act printed here is as on 1-5-1969.]

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## STATEMENT OF OBJECTS AND REASONS

"Children are the most vulnerable group in any population and in need of the greatest social care. On account of their vulnerability and dependence they can be exploited, ill-treated and directed into undesirable channels by anti-social elements in the community. The State has the duty of according proper care and protection to children at all times, as it is on their physical and mental well being that the future of the nation depends. With increased industrialisation and urbanisation, the State needs to be even more alert and vigilant in this respect. This Bill provides for the care, protection, maintenance, welfare, training, education and rehabilitation of neglected or delinquent children and for the trial of delinquent children in the Union Territories for which the Central Government has direct responsibility.

It should also be remembered that the children often become delinquent by force of circumstances and not by choice. By improving the unfavourable environment and giving suitable training, it is possible to reform his anti-social attitudes and to mould him into a responsible citizen. Measures for juvenile delinquents should, therefore, aim at rehabilitation rather than punishment. The programmes propose to be undertaken under this Bill are meant to be of a positive character.

At present the Bombay Children Act, 1924, is in force in Delhi. It was considered whether a replacement of this outmoded Act by the Bombay Children Act, 1948 would not achieve the aims and objects referred to above. It was found that the Bombay Children Act 1948 or any other State Act for that matter would not fully meet the needs of the Union Territories. As such the present Bill which takes into account the Special needs of the Union Territories has been prepared". —Gaz. of Ind., 1959, Ext., Pt. II-Sec. 2, p. 1487.

## COGNATE ACTS AND PROVISIONS

1. Reformatory Schools Act of 8 of 1897.
2. Bihar Borstal Schools Act (Bih. Act 11 of 1962);
3. Bombay Borstal Schools Act (Bom. Act 18 of 1929);
4. Kerala Borstal Schools Act (Ker. Act 31 of 1961);
5. M. P. Borstal Schools Act (M. P. Act 9 of 1928);
6. Madras Borstal Schools Act, 1925 (Madras Act 5 of 1926);
7. Punjab Borstal Schools Act (Punj. Act 11 of 1926);
8. U. P. Borstal Schools Act, 1938 (U. P. Act 7 of 1938);
9. Bengal Borstal Schools Act (Bengal Act 1 of 1928).
10. Women's and Children's Institutions (Licensing) Act (105 of 1956).

# [THE] CHILDREN ACT, 1960
## (ACT LX OF 1960)[a]

[26th December, 1960.]

**An Act to provide for the care, protection, maintenance, welfare, training, education and rehabilitation of neglected or delinquent children and for the trial of delinquent children in the Union Territories.**

Be it enacted by Parliament in the Eleventh Year of the Republic of India as follows:—

[a] For Statement of Objects and Reasons, see Gazette of India, 1959, Extra., Pt. II, Sec. 2, p. 1487; for Report of the Joint Committee, see Gazette of India, 1960, Extra., Pt. II, Sec. 2, p. 571.

## CHAPTER I

### PRELIMINARY

**1. Short title, extent and commencement.**—(1) This Act may be called THE CHILDREN ACT, 1960.

(2) It extends[a] to all the Union Territories.

(3) It shall come into force in any Union Territory[c] on such date[b] as the Administrator may, by notification in the Official Gazette, appoint and different dates may be appointed for different areas thereof.

[a] The Act has been extended to—

Goa, Daman and Diu: see Regn. 12 of 1962 (w.e.f. 1-1-1964).

Dadra and Nagar Haveli: see Regn. 6 of 1963 as amended by Regn. 2 of 1965 (1-7-1965).

Pondicherry: see Regn. 7 of 1963 (1-10-1963).

[b] The Act was enforced in Himachal Pradesh by Notifn. No. 9-21/60-Wel (with effect from 2-10-1962): See Himachal Pradesh Gazette, 29-9-1962, Pt. I, p. 565.

[c] The following are the Union Territories:—

Delhi, Manipur, Tripura, Andaman and Nicobar Islands; Laccadive, Minicoy and Amindivi Islands; Goa, Daman and Diu; Dadra and Nagar Haveli; Pondicherry, Himachal Pradesh and Chandigarh.

**2. Definitions.**—In this Act, unless the context otherwise requires,—

(a) "Administrator" means the administrator of a Union Territory, whether called a Lieutenant Governor, a Chief Commissioner or by any other name;

(b) "begging" means—

(i) soliciting or receiving alms in a public place or entering on any private premises for the purpose of soliciting or receiving alms, whether under the pretence of singing, dancing, fortune-telling, performing tricks or selling articles or otherwise;

(ii) exposing or exhibiting with the object of obtaining or extorting alms any sore, wound, injury, deformity or disease, whether of himself or of any other person or of an animal;

(iii) allowing oneself to be used as an exhibit for the purpose of soliciting or receiving alms;

(c) "Board" means a Child Welfare Board constituted under Section 4;

(d) "brothel", "prostitute", "prostitution" and "public place" shall have the meaning respectively assigned to them in the Suppression of Immoral Traffic in Women and Girls Act, 1956;

(e)"child" means a boy who has not attained the age of sixteen years or a girl who has not attained the age of eighteen years;

(f) "children's court" means a court constituted under Section 5 ;

(g) "children's home" means an institution established or certified by the Administrator under Section 9 as a children's home;

(h) "competent authority" means, in relation to neglected children, a Board constituted under Section 4 and, in relation to delinquent children a children's court constituted under Section 5, and where no such Board or children's court has been constituted, includes any court empowered under sub-section (2) of Section 7 to exercise the powers conferred on a Board or children's court;

(i) "dangerous drug" shall have the meaning assigned to it in the Dangerous Drugs Act, 1930;

(j) "delinquent child" means a child who has been found to have committed an offence;

(k) "guardian" in relation to a child, includes any person who, in the opinion of the competent authority having cognizance of any proceedings in relation to a child, has, for the time being, the actual charge of, or control over, that child;

(l) "neglected child" means a child who—

(i) is found begging; or

(ii) is found without having any home or settled place of abode or any ostensible means of subsistence or is found destitute, whether he is an orphan or not; or

(iii) has a parent or guardian who is unfit to exercise or does not exercise proper care and control over the child; or

(iv) lives in a brothel or with a prostitute or frequently goes to any place used for the purpose of prostitution, or is found to associate with any prostitute or any other person who leads an immoral, drunken or depraved life;

(m) "observation home" means any institution or place established or recognised by the Administrator under Section 11 as an observation home;

(n) "offence" means an offence punishable under any law for the time being in force;

(o) "prescribed" means prescribed by rules made under this Act;

(p) "Probation Officer" means an officer appointed as a Probation Officer under this Act or under the Probation of Offenders Act, 1958;

(q) "special school" means an institution established or certified by the Administrator under Section 10;

(r) "supervision", in relation to a child placed under the care of any parent, guardian or other fit person under this Act, means the supervision of that child by a Probation Officer for the purpose of ensuring that the child is properly looked after and that the conditions imposed by the competent authority are complied with;

(s) all words and expressions used but not defined in this Act and defined in the Code of Criminal Procedure, 1898, shall have the meanings assigned to them in that Code.

**3. Continuation of inquiry in respect of child who had ceased to be child.**—Where an inquiry has been initiated against a child and during the course of such inquiry the child ceases to be such, then, notwithstanding anything contained in this Act or in any other law for the time being in force, the inquiry may be continued and orders may be made in respect of such person as if such person had continued to be a child.

## CHAPTER II

## COMPETENT AUTHORITIES AND INSTITUTIONS FOR CHILDREN

**4. Child Welfare Boards.**—(1) The Administrator may, by notification in the Official Gazette, constitute for any area specified in the notification, one or more Child Welfare Boards for exercising the powers and discharging the duties conferred or imposed on such Board in relation to neglected children under this Act.

(2) A Board shall consist of a Chairman and such other members as the Administrator thinks fit to appoint, of whom not less than one shall be a woman; and every such member shall be vested with the powers of a Magistrate under the Code of Criminal Procedure, 1898.

(3) The Board shall function as a Bench of Magistrates and shall have the powers conferred by the Code of Criminal Procedure, 1898, on a Magistrate of the first class.

OBJECTS AND REASONS

"Under the existing provisions of the Bill, all children, whether they are delinquent or neglected, are to be dealt with by children's courts though the procedure for dealing with them is different. The Committee, however, are of opinion that there should be two entirely different machineries for dealing with neglected and delinquent children. The Committee feel that Child Welfare Boards should be set up for dealing with neglected children while children's courts may continue to deal with delinquent children. They further feel that there should be at least one woman member in every Child Welfare Board. This clause has, accordingly, been inserted to provide for the constitution, functions and duties of Child Welfare Boards."—J.C.R.

**5. Children's Courts.**—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1898, the Administrator may, by notification in the Official Gazette, constitute for any area specified in the notification, one or more children's Courts for exercising the powers and discharging the duties conferred or imposed on such Court in relation to delinquent children under this Act.

(2) A children's Court shall consist of such number of magistrates forming a Bench as the Administrator thinks fit to appoint, of whom one shall be designated as the senior magistrate and not less than one shall be a woman; and every such Bench shall have the powers conferred by the Code of Criminal Procedure, 1898, on a magistrate of the first class.

**6. Procedure, etc., in relation to Boards and Children's Courts.**—(1) In the event of any difference of opinion among the members of a Board or among the magistrates of a Children's Court, the opinion of the majority shall prevail, but where there is no such majority, the opinion of the chairman or of the senior magistrate, as the case may be, shall prevail.

(2) A Board or Children's Court may act notwithstanding the absence of any member of the Board or, as the case may be, any magistrate of the Children's Court, and no order made by the Board or Children's Court shall be invalid by reason only of the absence of any member or magistrate, as the case may be, during any stage of the proceeding.

(3) No person shall be appointed as a member of the Board or as a magistrate in the Children's Court unless he has, in the opinion of the Administrator, special knowledge of child psychology and child welfare.

**7. Power of Board and Children's Court.**—(1) Where a Board or a Children's Court has been constituted for any area, such Board or Court shall, notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in this Act, have power to deal exclusively with all proceedings under this Act relating to neglected children or delinquent children, as the case may be.

(2) Where no Board or Children's Court has been constituted for any area, the powers conferred on the Board or the Children's Court by or under this Act shall be exercised in that area, only by the following, namely:—

(a) the district magistrate; or

(b) the sub-divisional magistrate; or

(c) any magistrate of the first class.

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**Section 5 — Note 1**

(1) Court under it is criminal Court — Sessions Judge can transfer case pending in Children's Court under S. 528 (1-C) (as inserted by Act 26 of 1956), Cr. P. Code (1898). (1965) 67 Pun LR 149.

**Section 6 — Note 1**

(1) Order under S. 14, by President of Board — To pass valid order under Act it is not necessary that all members of Board be present. AIR 1965 Punj 384 (385) : 1965 (2) Cri LJ 407.

(3) The powers conferred on the Board or Children's Court by or under this Act may also be exercised by the High Court and the Court of Session, when the proceeding comes before them in appeal, revision or otherwise.

**8. Procedure to be followed by a magistrate not empowered under the Act.**—(1) When any magistrate not empowered to exercise the powers of a Board or a Children's Court under this Act is of opinion that a person brought before him under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a child, he shall record such opinion and forward the child and the record of the proceeding to the competent authority having jurisdiction over the proceeding.

(2) The competent authority to which the proceeding is forwarded under sub-section (1) shall hold the inquiry as if the child had originally been brought before it.

**9. Children's homes.**—(1) The Administrator may establish and maintain as many children's homes as may be necessary for the reception of neglected children under this Act.

(2) Where the Administrator is of opinion that any institution other than an institution established under sub-section (1) is fit for the reception of the neglected children to be sent there under this Act, he may certify such institution as a children's home for the purposes of this Act.

(3) Every children's home to which a neglected child is sent under this Act shall not only provide the child with accommodation, maintenance and facilities for education, but also provide him with facilities for the development of his character and abilities and give him necessary training for protecting himself against moral danger or exploitation and shall also perform such other functions as may be prescribed.

(4) The Administrator may, by rules made under this Act, provide for the management of children's homes and the circumstances under which, and the manner in which, the certificate of a children's home may be granted or withdrawn.

**10. Special schools.**—(1) The Administrator may establish and maintain as many special schools as may be necessary for the reception of delinquent children under this Act.

(2) Where the Administrator is of opinion that any institution other than an institution established under sub-section (1) is fit for the reception of the delinquent children to be sent there under this Act, he may certify such institution as a special school for the purposes of this Act.

(3) Every special school to which a delinquent child is sent under this Act shall not only provide the child with accommodation, maintenance and facilities for education but also provide him with facilities for the development of his character and abilities and give him necessary training for his reformation and shall also perform such other functions as may be prescribed.

(4) The Administrator may, by rules made under this Act, provide for the management of special schools and the circumstances under which, and the manner in which, the certificate of a special school may be granted or withdrawn.

**11. Observation homes.**—(1) The Administrator may establish and maintain as many observation homes as may be necessary for the temporary reception of children during the pendency of any inquiry regarding them under this Act.

(2) Where the Administrator is of opinion that any institution other than an institution established under sub-section (1) is fit for the temporary reception of children during the pendency of any inquiry regarding them under this Act, he may recognise such institution as an observation home for the purposes of this Act.

(3) Every observation home to which a child is sent under this Act shall not only provide the child with accommodation, maintenance and facilities for medical examination and treatment, but also provide him with facilities for useful occupation.

(4) The Administrator may, by rules made under this Act, provide for the management of observation homes and the circumstances under which, and the manner in which, an institution may be recognised as an observation home or the recognition may be withdrawn.

OBJECTS AND REASONS

Sub-section (3).—"The Committee are of the opinion that every observation home to which a child is sent should not only provide the child with accommodation, maintenance and facilities for medical examination and treatment but also provide him with facilities for useful occupation. Sub-clause (3) makes provision in this behalf."—J.C.R.

**12. After-care organisations.**—(1) The Administrator may, by rules made under this Act, provide for the establishment or recognition of after-care organisations and may vest them with such powers as may be necessary for effectively carrying out their functions under this Act.

(2) Every such organisation shall take care of the children when they leave children's homes or special schools and shall, for the purpose of enabling them to lead an honest, industrious and useful life, take all such measures as it may deem necessary or as may be prescribed.

## CHAPTER III

## NEGLECTED CHILDREN

**13. Production of neglected children before Boards.**—(1) If any police officer or any other person authorised by the Administrator in this behalf, by general or special order, is of opinion that a person is apparently a neglected child, such police officer or other person may take charge of that person for bringing him before a Board.

(2) When information is given to an officer-in-charge of the police station about any neglected child found within the limits of such station, he shall enter in a book to be kept for the purpose the substance of such information and take such action thereon as he deems fit and if such officer does not propose to take charge of the child, he shall forward a copy of the entry made to the Board.

(3) Every child taken charge of under sub-section (1) shall be brought before the Board within a period of twenty-four hours of such charge taken excluding the time necessary for the journey from the place where the child had been taken charge of to the Board.

(4) Every child taken charge of under sub-section (1) shall, unless he is kept with his parent or guardian, be sent to an observation home (but not to a police station or jail) until he can be brought before a Board.

**14. Special procedure to be followed when neglected child has parent.**—(1) If a person, who, in the opinion of the police officer or the authorised person, is a neglected child, has a parent or guardian who has the actual charge of, or control over, the child, the police officer or the authorised person may, instead of

**Section 14 — Note 1**

(1) Application to Board by police officer — Subjective satisfaction of police officer that child is neglected child requiring protection is sufficient. Thereafter it is for Board to call child's parents to show cause and examine evidence, if necessary. AIR 1965 Punj 384 (385, 386) : 1965 (2) Cri LJ 407.

(2) Order under S. 14 by President of Board — To pass valid order under Act it is not necessary that all members of Board be present. AIR 1965 Punj 384 (385) : 1965 (2) Cri LJ 407.

(3) Report under by police officer — Board summoning parents of child under S. 14(2) — Names of prosecution witnesses not supplied by police officer to

taking charge of the child, make a report to the Board for initiating an inquiry regarding that child.

(2) On receipt of a report under sub-section (1), the Board may call upon the parent or guardian to produce the child before it and to show cause why the child should not be dealt with as a neglected child under the provisions of this Act and if it appears to the Board that the child is likely to be removed from its jurisdiction or to be concealed, it may immediately order his removal (if necessary by issuing a search warrant for the immediate production of the child) to an observation home.

**15. Inquiry by Board regarding neglected children.**—(1) When a person alleged to be a neglected child is produced before a Board, it shall examine the police officer or the authorised person who brought the child or made the report and record the substance of such examination and hold the inquiry in the prescribed manner and may make such orders in relation to the child as it may deem fit.

(2) Where a Board is satisfied on inquiry that a child is a neglected child and that it is expedient so to deal with him, the Board may make an order directing the child to be sent to a children's home for the period until he ceases to be a child:

Provided that the Board may, for reasons to be recorded, extend the period of such stay, but in no case the period of stay shall extend beyond the time when the child attains the age of eighteen years, in the case of a boy, or twenty years, in the case of a girl:

Provided further that the Board may, if it is satisfied that having regard to the circumstances of the case it is expedient so to do, for reasons to be recorded, reduce the period of stay to such period as it thinks fit.

(3) During the pendency of any inquiry regarding a child, the child shall, unless he is kept with his parent or guardian, be sent to an observation home for such period as may be specified in the order of the Board:

Provided that no child shall be kept with his parent or guardian if, in the opinion of the Board, such parent or guardian is unfit to exercise or does not exercise proper care and control over the child.

## OBJECTS AND REASONS

Sub-section (3).—"The Committee feel that during the pendency of an inquiry regarding a neglected child, such a child should not be kept with parents or guardians if in the opinion of the Board such parent or guardian is unfit to exercise or does not exercise proper care and control over the child. A Proviso to that effect has been added."—J.C.R.

**16. Power to commit neglected child to suitable custody.**—(1) If the Board so thinks fit, it may, instead of making an order under sub-section (2) of Section 15 for sending the child to a children's home, make an order placing the child under the care of a parent, guardian or other fit person, on such parent, guardian or fit person executing a bond with or without surety to be responsible for the good behaviour and well-being of the child and for the observance of such conditions as the Board may think fit to impose.

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**Section 14 — Note 1 (contd.)**

parents. Validity of summons challenged by revision application under S. 561-A, Cr. P. Code — Case where there is legal evidence which on its appreciation may or may not support accusation — High Court would not use inherent power to embark upon inquiry as to whether evidence is reliable or not. AIR 1960 SC 866, **Rel. on. AIR 1965 Punj 384 (386) : 1965 (2) Cri LJ 407.**

**Section 15 — Note 1**

(1) Application to Board by police officer — Subjective satisfaction of police officer that child is neglected child requiring protection is sufficient — Thereafter it is for Board to call child's parents to show cause and examine evidence if necessary. AIR 1965 Punj 384 (385, 386): 1965 (2) Cri LJ 407.

(2) At the time of making an order under sub-section (1) or at any time subsequently, the Board may, in addition, make an order that the child be placed under supervision for any period not exceeding three years in the first instance.

(3) Notwithstanding anything contained in sub-section (1) or sub-section (2), if at any time it appears to the Board, on receiving a report from the probation officer or otherwise, that there has been a breach of any of the conditions imposed by it in respect of the child, it may, after making such inquiry as it deems fit, order the child to be sent to a children's home.

**17. Uncontrollable children.**—Where a parent or guardian of a child complains to the Board that he is not able to exercise proper care and control over the child and the Board is satisfied on inquiry that proceedings under this Act should be initiated regarding the child, it may send the child to an observation home and make such further inquiry as it may deem fit and the provisions of Section 15 and Section 16 shall, as far as may be, apply to such proceedings.

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## CHAPTER IV

## DELINQUENT CHILDREN

**18. Bail and custody of children.**—(1) When any person accused of a bailable or non-bailable offence and apparently a child is arrested or detained or appears or is brought before a Children's Court, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1898, or in any other law for the time being in force, be released on bail with or without surety but he shall not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any reputed criminal or expose him to moral danger or that his release would defeat the ends of justice.

(2) When such person having been arrested is not released on bail under sub-section (1) by the officer-in-charge of the police station, such officer shall cause him to be kept in an observation home in the prescribed manner (but not in a police station or jail) until he can be brought before Children's Court.

(3) When such person is not released on bail under sub-section (1) by the Children's Court, it shall, instead of committing him to prison, make an order sending him to an observation home for such period during the pendency of the inquiry regarding him as may be specified in the order.

**19. Information to parent or guardian or probation officer.**—Where a child is arrested, the officer-in-charge of the police station to which the child is brought shall, as soon as may be after the arrest, inform—

(a) the parent or guardian of the child, if he can be found, of such arrest and direct him to be present at the Children's Court before which the child will appear; and

(b) the probation officer of such arrest in order to enable him to obtain information regarding the antecedents and family history of the child and other material circumstances likely to be of assistance to the Children's Court for making the inquiry.

**20. Inquiry by Children's Court regarding delinquent children.**—Where a child having been charged with an offence appears or, is produced before a Children's Court, the Children's Court shall hold the inquiry in accordance with the provisions of Section 39 and may, subject to the provision of this Act, make such order in relation to the child as it deems fit.

**21. Orders that may be passed regarding delinquent children.**—(1) Where a Children's Court is satisfied on inquiry that a child has committed an offence,

then, notwithstanding anything to the contrary contained in any other law for the time being in force, the Children's Court may, if it so thinks fit,—

(a) allow the child to go home after advice or admonition;

(b) direct the child to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person on such parent, guardian or other fit person executing a bond, with or without surety as that Court may require for the good behaviour and well-being of the child for any period not exceeding three years;

(c) make an order directing the child to be sent to a special school,—

(i) in the case of a boy over fourteen years of age or of a girl over sixteen years of age, for a period of not less than three years;

(ii) in the case of any other child, for the period until he ceases to be a child:

Provided that the Children's Court may, if it is satisfied that having regard to the nature of the offence and the circumstances of the case it is expedient so to do, for reasons to be recorded, reduce the period of stay to such period as it thinks fit:

Provided further that the Children's Court may, for reasons to be recorded extend the period of such stay, but in no case the period of stay shall extend beyond the time when the child attains the age of eighteen years, in the case of a boy, or twenty years, in the case of a girl;

(d) order the child to pay a fine if he is over fourteen years of age and earns money;

(2) Where an order under clause (b) or clause (d) of sub-section (1) is made, the Children's Court may, if it is of opinion that in the interests of the child and of the public it is expedient so to do, in addition make an order that the delinquent child shall remain under the supervision of a probation officer named in the order during such period not exceeding three years as may be specified therein, and may in such supervision order impose such conditions as it deems necessary for the due supervision of the delinquent child:

Provided that if at any time afterwards it appears to the Children's Court on receiving a report from the probation officer or otherwise, that the delinquent child has not been of good behaviour during the period of supervision, it may, after making such inquiry as it deems fit, order the delinquent child to be sent to a special school.

(3) The Children's Court making a supervision order under sub-section (2) shall explain to the child and the parent, guardian or other fit person, as the case may be, under whose care the child has been placed, the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to the child, the parent, guardian or other fit person, as the case may be, the sureties, if any, and the probation officer.

(4) In determining the special school, or any person to whose custody a child is to be committed or entrusted under this Act, the Court shall pay due regard to the religious denomination of the child to ensure that religious instruction contrary to the religious persuasion of the child is not imparted to him.

**22. Orders that may not be passed against delinquent children.**—(1) Notwithstanding anything to the contrary contained in any other law for the time being in force, no delinquent child shall be sentenced to death or imprisonment or committed to prison in default of payment of fine, or in default of furnishing security:

Provided that where a child who has attained the age of fourteen years has committed an offence and the children's Court is satisfied that the offence committed is of so serious a nature or that his conduct and behaviour have been such that it would not be in his interest or in the interest of other children in a special school to send him to such special school and that none of the other measures

provided under this Act is suitable or sufficient, the children's Court may order the delinquent child to be kept in safe custody in such place and manner as it thinks fit and shall report the case for the orders of the Administrator.

(2) On receipt of a report from a children's Court under sub-section (1), the Administrator may make such arrangement in respect of the child as he deems proper and may order such delinquent child to be detained at such place and on such conditions as he thinks fit :

Provided that the period of detention so ordered shall not exceed the maximum period of imprisonment to which the child could have been sentenced for the offence committed.

**23. Proceeding under Chapter VIII of the Criminal Procedure Code not competent against child.**—Notwithstanding anything to the contrary contained in the Code of Criminal Procedure, 1898, no proceeding shall be instituted and no order shall be passed against a child under Chapter VIII of the said Code.

**24. No joint trial of child and person not a child.**—(1) Notwithstanding anything contained in Section 239 of the Code of Criminal Procedure, 1898 or in any other law for the time being in force, no child shall be charged with or tried for, any offence together with a person who is not a child.

(2) If a child is accused of an offence for which under Section 239 of the Code of Criminal Procedure, 1898, or any other law for the time being in force, such child and any person who is not a child would, but for the prohibition contained in sub-section (1), have been charged and tried together, the Court taking cognizance of that offence shall direct separate trials of the child and the other person.

**25. Removal of disqualification attaching to conviction.**—Notwithstanding anything contained in any other law, a child who has committed an offence and has been dealt with under the provisions of this Act shall not suffer disqualification, if any, attaching to a conviction of an offence under such law.

**26. Special provision in respect of pending cases.**—Notwithstanding anything contained in this Act, all proceedings in respect of a child pending in any Court in any area on the date on which this Act comes into force in that area, shall be continued in that Court as if this Act had not been passed and if the Court finds that the child has committed an offence, it shall record such finding and, instead of passing any sentence in respect of the child, forward the child to the children's Court which shall pass orders in respect of that child in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that the child has committed the offence.

## CHAPTER V

## PROCEDURE OF COMPETENT AUTHORITIES GENERALLY AND APPEALS AND REVISION FROM ORDERS OF SUCH COURTS

**27. Sittings etc., of Boards and children's Courts.**—(1) A Board or a children's Court shall hold its sittings at such place, on such day and in such manner as may be prescribed.

(2) A Magistrate empowered to exercise the powers of a Board or, as the case may be, a children's Court under sub-section (2) of Section 7 shall, while holding any inquiry regarding a child under this Act, as far as practicable, sit in a building or room different from that in which the ordinary sittings of civil and criminal Courts are held, or on different days or at times different from those at which the ordinary sittings of such Courts are held.

**28. Persons who may be present before competent authority.**—(1) Save as provided in this Act, no person shall be present at any sitting of a competent authority, except—

(a) any officer of the competent authority, or

(b) the parties to the inquiry before the competent authority, the parent or guardian of the child and other persons directly concerned in the inquiry including police officers, and

(c) such other persons as the competent authority may permit to be present.

(2) Notwithstanding anything contained in sub-section (1), if at any stage during an inquiry, a competent authority considers it to be expedient in the interest of the child or on grounds of decency or morality that any person including the police officers, legal practitioners, the parent, guardian or the child himself should withdraw, the competent authority may give such direction, and if any person refuses to comply with such direction, the competent authority may have him removed and may, for this purpose, cause to be used such force as may be necessary.

(3) No legal practitioner shall be entitled to appear before a competent authority in any case or proceeding before it, except with the special permission of that authority.

**29. Attendance of parent or guardian of child.**—Any competent authority before which a child is brought under any of the provisions of this Act may, whenever it so thinks fit, require any parent or guardian having the actual charge of, or control over, the child to be present at any proceeding in respect of the child.

**30. Dispensing with attendance of child.**—If, at any stage during the course of an inquiry, a competent authority is satisfied that the attendance of the child is not essential for the purpose of the inquiry, the competent authority may dispense with his attendance and proceed with the inquiry in the absence of the child.

**31. Committal to approved place of child suffering from dangerous disease and its future disposal.**—(1) When a child who has been brought before a competent authority under this Act is found to be suffering from a disease requiring prolonged medical treatment or physical or mental complaint that will respond to treatment, the competent authority may send the child to any place recognised to be an approved place in accordance with the rules made under this Act for such period as it may think necessary for the required treatment.

(2) Where a child is found to be suffering from leprosy or is of unsound mind, he shall be dealt with under the provisions of the Lepers Act, 1898, or the Indian Lunacy Act, 1912, as the case may be.

(3) Where a competent authority has taken action under sub-section (1) in the case of a child suffering from an infectious or contagious disease, the competent authority before restoring the said child to his partner in marriage, if there has been such, or to the guardian, as the case may be, shall where it is satisfied that such action will be in the interest of the said child call upon his partner in marriage or the guardian, as the case may be, to satisfy the Court by submitting to medical examination that such partner or guardian will not re-infect the child in respect of whom the order has been passed.

**32. Presumption and determination of age.**—(1) Where it appears to a competent authority that a person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a child, the competent authority shall make due inquiry as to the age of that person and for that purpose shall take such evidence as may be necessary and shall record a finding whether the person is a child or not, stating his age as nearly as may be.

(2) No order of a competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order has been made is not a child, and the age recorded by the competent authority to be the age of the person so brought before it shall, for the purposes of this Act, be deemed to be the true age of that person.

**33. Circumstances to be taken into consideration in making orders under the Act.**—In making any order in respect of a child under this Act, a competent authority shall take into consideration the following circumstances, namely :—

(a) the age of the child;

(b) the circumstances in which the child is living;

(c) the reports made by the probation officer;

(d) the religious persuasion of the child;

(e) such other circumstances as may, in the opinion of the competent authority, require to be taken into consideration in the interests of the child:

Provided that in the case of a delinquent child, the above circumstances shall be taken into consideration after the children's Court has recorded a finding against the child that he has committed the offence :

Provided further that if no report of the probation officer is received within ten weeks of his being informed under Section 19, it shall be open to the children's Court to proceed without it.

**34. Sending a child outside jurisdiction.**—In the case of a neglected or delinquent child whose ordinary place of residence lies outside the jurisdiction of the competent authority before which he is brought, the competent authority may, if satisfied after due inquiry that it is expedient so to do, send the child back to a relative or other person who is fit and willing to receive him at his ordinary place of residence and exercise proper care and control over him, notwithstanding that such place of residence is outside the jurisdiction of the competent authority; and the competent authority exercising jurisdiction over the place to which the child is sent shall in respect of any matter arising subsequently have the same powers in relation to the child as if the original order had been passed by itself.

**35. Reports to be treated as confidential.**—The report of the probation officer or any circumstance considered by the competent authority under Section 33 shall be treated as confidential :

Provided that the competent authority may, if it so thinks fit communicate the substance thereof to the child or his parent or guardian and may give such child, parent or guardian an opportunity of producing such evidence as may be relevant to the matter stated in the report.

**36. Prohibition of publication of names, etc., of children involved in any proceeding under the Act.**—(1) No report in any newspaper, magazine or news sheet of any inquiry regarding a child under this Act shall disclose the name, address or school or any other particulars calculated to lead to the identification of the child, nor shall any picture of any such child be published :

Provided that for reasons to be recorded in writing, the authority holding the inquiry may permit such disclosure if in its opinion such disclosure is in the interest of the child.

(2) Any person contravening the provisions of sub-section (1) shall be punishable with fine which may extend to one thousand rupees.

**37. Appeals.**—(1) Subject to the provisions of this section any person aggrieved by an order made by a competent authority under this Act may, within thirty days from the date of such order prefer an appeal to the Court of Session:

Provided that the Court of Session may entertain the appeal after the expiry of the said period of thirty days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(2) No appeal shall lie from—

(a) any order of acquittal by the children's Court in respect of a child alleged to have committed an offence; or

(b) any order made by a Board in respect of a finding that a person is not a neglected child.

(3) No second appeal shall lie from any order of the Court of Session passed in appeal under this section.

**38. Revision.**—The High Court may, at any time, either of its own motion or on an application received in this behalf, call for the record of any proceeding in which any competent authority or Court of Session has passed an order for the purpose of satisfying itself as to the legality or propriety of any such order and may pass such order in relation thereto as it thinks fit:

Provided that the High Court shall not pass an order under this section prejudicial to any person without giving him a reasonable opportunity of being heard.

**39. Procedure in inquiries, appeals and revision proceedings.**—(1) Save as otherwise expressly provided by this Act, a competent authority while holding any inquiry under any of the provisions of this Act, shall follow such procedure as may be prescribed and subject thereto, shall follow, as far as may be, the procedure laid down in the Code of Criminal Procedure, 1898, for trials in summons cases.

(2) Save as otherwise expressly provided by or under this Act, the procedure to be followed in hearing appeals or revision proceedings under this Act shall be, as far as practicable, in accordance with the provisions of the Code of Criminal Procedure, 1898.

**40. Power to amend orders.**—(1) Without prejudice to the provisions for appeal and revision under this Act, any competent authority may, either on its own motion or on an application received in this behalf, amend any order as to the institution to which a child is to be sent or as to the person under whose care or supervision a child is to be placed under this Act.

(2) Clerical mistakes in orders passed by a competent authority or errors arising therein from any accidental slip or omission may, at any time, be corrected by the competent authority either on its own motion or on an application received in this behalf.

## CHAPTER VI

## SPECIAL OFFENCES IN RESPECT OF CHILDREN

**41. Punishment for cruelty to child.**—(1) Whoever, having the actual charge of, or control over, a child, assaults, abandons, exposes or wilfully neglects the child or causes or procures him to be assaulted, abandoned, expressed, or neglected in a manner likely to cause such child unnecessary mental and physical suffering shall be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.

(2) No Court shall take cognizance of an offence punishable under sub-section (1) unless the complaint is filed with the previous sanction of the Administrator or an officer authorised by him in this behalf.

**42. Employment of children for begging.**—(1) Whoever employs or uses any child for the purposes of begging or causes any child to beg shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

(2) Whoever, having the actual charge of, or control over, a child, abets the commission of the offence punishable under sub-section (1), shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

(3) The offence punishable under this section shall be cognizable.

**43. Penalty for giving intoxicating liquor or dangerous drug to a child.**—Whoever gives, or causes to be given to any child any intoxicating liquor in a public place or any dangerous drug except upon the order of a duly qualified medical practitioner or in case of sickness or other urgent cause, shall be punishable with fine which may extend to two hundred rupees.

**44. Exploitation of child employees.**—Whoever ostensibly procures a child for the purpose of any employment and withholds the earnings of the child or uses such earnings for his own purposes shall be punishable with fine which may extend to one thousand rupees.

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## CHAPTER VII
## MISCELLANEOUS

**45. Power of Administrator to discharge and transfer children.**—(1) The Administrator may, notwithstanding anything contained in this Act, at any time, order a neglected or delinquent child to be discharged from the children's home or special school, either absolutely or on such conditions as he may think fit to impose.

(2) The Administrator may, notwithstanding anything contained in this Act, order—

(a) a neglected child to be transferred from one children's home to another;

(b) a delinquent child to be transferred from one special school to another or from a special school to a borstal school where such school exists or from a special school to a children's home;

(c) a child who has been released on licence which has been revoked or forfeited, to be sent to the special school or children's home from which he was released or to any other children's home or special school or borstal school:

Provided that the total period of the stay of the child in a children's home or a special school shall not be increased by such transfer.

(3) The Administrator may, notwithstanding anything contained in this Act, at any time, discharge a child from the care of any person under whom he was placed under this Act either absolutely or on such conditions as the Administrator may think fit to impose.

**46. Transfers between children's homes, etc., under the Act, and children's homes, etc., of like nature in different parts of India.**—(1) The Administrator of a Union territory may direct any neglected child or delinquent child to be transferred from any children's home or special school within the Union territory to any other children's home, special school or institution of a like nature in any other State with the consent of the Government of that State.

(2) The Administrator of a Union territory may, by general or special order, provide for the reception in a children's home or special school within the Union Territory of a neglected child or delinquent child detained in a children's home or special school or institution of a like nature in any other State where the Government of that State makes an order for such transfer, and upon such transfer the provisions of this Act shall apply to such child as if he had been originally ordered to be sent to such children's home or special school under this Act.

**47. Transfer of children of unsound mind or suffering from leprosy.**—(1) Where it appears to the Administrator that any child kept in a special school or children's home in pursuance of this Act is suffering from leprosy or is of unsound mind, the Administrator may order his removal to a leper asylum or mental hospital or other place of safe custody for being kept there for the remainder of the term for which he has to be kept in custody under the orders of the competent auth-

ority or for such further period as may be certified by a medical officer to be necessary for the proper treatment of the child.

(2) Where it appears to the Administrator that the child is cured of leprosy or of unsoundness of mind, he may, if the child is still liable to be kept in custody, order the person having charge of the child to send him to the special school or children's home from which he was removed or, if the child is no longer liable to be kept in custody, order him to be discharged.

**48. Placing out on licence.**—(1) When a child is kept in a children's home or special school, the Administrator may, if he so thinks fit, release the child from the children's home or special school and grant him a written licence for such period and on such conditions as may be specified in the licence permitting him to live with, or under the supervision of, any responsible person named in the licence willing to receive and take charge of him with a view to educate him and train him for some useful trade or calling.

(2) Any licence so granted under sub-section (1) shall be in force for the period specified in the licence or until revoked or forfeited by the breach of any of the conditions on which it was granted.

(3) The Administrator may, at any time, by order in writing revoke any such licence and order the child to return to the children's home or special school from which he was released or to any other children's home or special school, and shall do so at the desire of the person with whom or under whose supervision the child has been permitted to live in accordance with a licence granted under sub-section (1).

(4) When a licence has been revoked or forfeited and the child refuses or fails to return to the special school or children's home to which he was directed so to return, the Administrator may, if necessary, cause him to be taken charge of and to be taken back to the special school or children's home.

(5) The time during which a child is absent from a special school or children's home in pursuance of a licence granted under this section shall be deemed to be part of the time for which he is liable to be kept in custody in the special school or children's home:

Provided that when a child has failed to return to the special school or children's home on the licence being revoked or forteited, the time which elapses after his failure so to return shall be excluded in computing the time during which he is liable to be kept in custody.

**49. Provision in respect of escaped children.**—Notwithstanding anything to the contrary contained in any other law for the time being in force, any police officer may take charge without warrant of a child who has escaped from a special school or a children's home or from the care of a person under whom he was placed under this Act and shall send the child back to the special school or the children's home or that person, as the case may be; and no proceeding shall be instituted in respect of the child by reason of such escape but the special school, children's home or the person may, after giving the information to the competent authority which passed the order in respect of the child, take such steps against the child as may be deemed necessary.

**50. Contribution by parents.**—(1) The competent authority which makes an order for sending a neglected child or a delinquent child to a children's home, or a special school or placing the child under the care of a fit person may make an order requiring the parent or other person liable to maintain the child to contribute to his maintenance, if able to do so, in the prescribed manner.

(2) The competent authority before making any order under sub-section (1) shall inquire into the circumstances of the parent or other person liable to maintain the child and shall record evidence, if any, in the presence of the parent or such other person, as the case may be.

(3) The person liable to maintain a child shall, for the purposes of sub-section (1), include in the case of illegitimacy, his putative father :

Provided that where the child is illegitimate and an order for his maintenance has been made under Section 488 of the Code of Criminal Procedure, 1898, the competent authority shall not ordinarily make an order for contribution against the putative father, but may order the whole or any part of the sums accruing due under the said order for maintenance to be paid to such person as may be named by the competent authority and such sum shall be paid by him towards the maintenance of the child.

(4) Any order made under this section may be enforced in the same manner as an order under Section 488 of the Code of Criminal Procedure, 1898.

**51. Control of custodian over child.**—Any person in whose custody a child is placed in pursuance of this Act shall, while the order is in force, have the like control over the child as he would have if he were his parent and shall be responsible for his maintenance, and the child shall continue in his custody for the period stated by the competent authority, notwithstanding that he is claimed by his parent or any other person :

Provided that no child while in such custody shall be married except with the permission of the competent authority.

**52. Delinquent child undergoing sentence at commencement of the Act.**—In any area in which this Act is brought into force, the Administrator may direct that a delinquent child who is undergoing any sentence of imprisonment at the commencement of this Act shall, in lieu of undergoing such sentence, be sent to a special school or be kept in safe custody in such place and manner as the Administrator thinks fit for the remainder of the period of the sentence, and the provisions of this Act shall apply to the child as if he had been ordered by a children's Court to be sent to such special school or, as the case may be, ordered to be detained under sub-section (2) of Section 22.

**53. Appointment of officers.**—(1) The Administrator may appoint as many probation officers, officers for the inspection of special schools, children's homes, observation homes or after-care organisations and such other officers as he may deem necessary for carrying out the purposes of this Act.

(2) It shall be the duty of the probation officer—

(a) to inquire, in accordance with the direction of a competent authority, into the antecedents and family history of any child accused of an offence with a view to assist the authority in making the inquiry;

(b) to visit neglected and delinquent children at such intervals as the probation officer may think fit;

(c) to report to the competent authority as to the behaviour of any neglected or delinquent child;

(d) to advise and assist neglected or delinquent children and, if necessary, endeavour to find them suitable employment;

(e) where a neglected or delinquent child is placed under the care of any person on certain conditions, to see whether such conditions are being complied with; and

(f) to perform such other duties as may be prescribed.

(3) Any officer empowered in this behalf by the Administrator may enter any special school, children's home, observation home or after-care organisation and make a complete inspection thereof in all its departments and of all papers, registers and accounts relating thereto and shall submit the report of such inspection to the Administrator.

**54. Officers appointed under the Act to be public servants.**—Probation officers and other officers appointed in pursuance of this Act shall be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code.

**55. Procedure in respect of bonds.**—The provisions of Chapter XLII of the Code of Criminal Procedure, 1898, shall, as far as may be, apply to bonds taken under this Act.

**56. Delegation of powers.**—The Administrator may, by general or special order, direct that any power exercisable by him under this Act shall, in such circumstances and under such conditions, if any, as may be specified in the order, be exercisable also by an officer subordinate to the Administrator.

**57. Protection of action taken in good faith.**—No suit or other legal proceeding shall lie against the Administrator or any probation officer or other officer appointed under this Act in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules or orders made thereunder.

**58. Act VIII of 1897 and certain provisions of Act V of 1898 not to apply.**—(1) The Reformatory Schools Act, 1897, and Section 29-B and Section 399 of the Code of Criminal Procedure, 1898, shall cease to apply to any area in which this Act has been brought into force.

(2) The Women's and Children's Institutions (Licensing) Act, 1956 shall not apply to any children's home, special school or observation home established and maintained under this Act.

**59. Power to make rules[a].**—(1) The Administrator may, by notification in the Official Gazette, make rules to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :—

(a) the places at which, the days on which, the time at which, and the manner in which, a competent authority may hold its sittings;

(b) the procedure to be followed by a competent authority in holding inquiries under this Act; and the mode of dealing with children suffering from dangerous diseases or mental complaints;

(c) the circumstances in which, and the conditions subject to which, an institution may be certified as a special school or a children's home or recognised as an observation home, and the certification or recognition withdrawn;

(d) the internal management of special schools, children's home and observation homes;

(e) the functions and responsibilities of special schools, children's homes and observation homes;

(f) the inspection of special schools, children's homes, observation homes and after-care organisations;

(g) the establishment, management and functions of after-care organisations; the circumstances in which, and the conditions subject to which, an institution may be recognised as an after-care organisation;

(h) the qualifications and duties of probation officers;

(i) the recruitment and training of persons appointed to carry out the purposes of this Act and the terms and conditions of their service;

(j) the conditions subject to which a girl who is a neglected or delinquent child may be escorted from one place to another and the manner in which a child may be sent outside the jurisdiction of a competent authority;

(k) the manner in which contribution for the maintenance of a child may be ordered to be paid by a parent or guardian;

(l) the conditions under which a child may be placed out on licence and the form and conditions of such licence;

(m) the conditions subject to which children may be placed under the care of any parent, guardian or other fit person under this Act and the obligations of such persons towards the children so placed;

(n) any other matter which has to be, or may be, prescribed.

(3) Every rule made under this section shall be laid as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

[a] For Pondicherry Children Rules, 1966—See Pondi. Gaz., Ext., D/-3-12-1966, For Manipur Children Rules 1962—See Manipur Gaz., Ext., D/-22-6-1962.

**60. Repeal and savings.**—If, immediately before the date on which this Act comes into force in any area, there is in force in that area, any law corresponding to this Act, that law shall stand repealed on the said date :

Provided that the repeal shall not affect—

(a) the previous operation of any law so repealed or anything duly done or suffered thereunder; or

(b) any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or

(c) any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or

(d) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed, as if this Act had not been passed.

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## [THE] CHILDREN (PLEDGING OF LABOUR) ACT, 1933

## (ACT II OF 1933)

[The text of the Act printed here is as on 1-5-1969.]

### STATEMENT OF OBJECTS AND REASONS

"The Royal Commission of Labour found evidence in such widely separated areas as Amritsar, Ahmedabad and Madras of the practice of pledging child labour, that is, the taking of advances by parents or guardians on agreements, written or oral, pledging the labour of their children. In some cases, the children so pledged were subjected to particularly unsatisfactory working conditions. The Commission considered that the State would be justified in adopting strong measures to eradicate the evil, and the Bill seeks to do so by imposing penalties on parents by agreements pledging the labour of children and on person knowingly employing children whose labour has been pledged".

—Gazette of India, 1932, Part V, page 195.

### ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adopted by A. C. A. O., 1948; A. L. O., 1950;

—Amended by Act 3 of 1951;

—Extended by Acts 59 of 1949; 30 of 1950; Regs. 6 of 1963; 7 of 1963.
" Bom. Act 4 of 1950;
" Punj. Act 5 of 1950.

## COGNATE ACTS AND PROVISIONS

(1) Employment of Children Act, 26 of 1938;
(2) Apprentices Act, 52 of 1961, Ch. II;
(3) Children Act, 60 of 1960.

# [THE] CHILDREN (PLEDGING OF LABOUR) ACT, 1933
## (ACT II OF 1933)[a]

[24th February, 1933.]

**An Act to prohibit the pledging of the labour of children.**

WHEREAS it is expedient to prohibit the making of agreements to pledge the labour of children, and the employment of children whose labour has been pledged; It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons: see Gaz. of Ind., 1932, Pt. V, p. 195.

This Act has been extended to the new Provinces and Merged States by the Merged States (Laws) Act, 1949 (59 of 1949), S. 3 [1-1-1950] and to the Union Territories of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act, 1950 (30 of 1950), S. 3 [16-4-1950]. Vindhya Pradesh now forms part of the State of Madhya Pradesh — See Act 37 of 1956, S. 9 (1) (e) [1-11-1956].

This Act has been extended to States Merged in the States of—
Bombay : see Bombay Act 4 of 1950.
Punjab : see Punjab Act 5 of 1950.

It has now been extended to the Union Territories of—
(1) Dadra and Nagar Haveli by Reg. 6 of 1963 [w. e. f. 1-7-1965];
(2) Pondicherry by Reg. 7 of 1963 [w. e. f. 1-10-1963].

**1. Short title, extent and commencement.**—(1) This Act may be called THE CHILDREN (PLEDGING OF LABOUR) ACT, 1933.

[a][(2) It extends to the whole of India [b][except the State of Jammu and Kashmir].]

(3) This section and Sections 2 and 3 shall come into force at once, and the remaining sections of this Act shall come into force on the first day of July, 1933.

[a] Substituted for sub-section (2) by A. L. O. 1950.
[b] Substituted for the words "except Part B States," by the Part B States (Laws) Act, 1951 (3 of 1951), S. 3 and Sch. [1-4-1951].

**2. Definitions.**—In this Act, unless there is anything repugnant in the subject or context,—

"an agreement to pledge the labour of a child" means an agreement, written or oral, express or implied, whereby the parent or guardian of a child, in return for any payment or benefit received or to be received by him, undertakes to cause or allow the services of the child to be utilised in any employment :

Provided that an agreement made without detriment to a child, and not made in consideration of any benefit other than reasonable wages to be paid for the child's services, and terminable at not more than a week's notice, is not an agreement within the meaning of this definition;

"child" means a person who is under the age of fifteen years; and

"guardian" includes any person having legal custody of or control over a child.

**3. Agreements contrary to the Act to be void.**—An agreement to pledge the labour of a child shall be void.

**4. Penalty for parent or guardian making agreement to pledge the labour of a child.**—Whoever, being the parent or guardian of a child, makes an agreement to pledge the labour of that child, shall be punished with fine which may extend to fifty rupees.

**5. Penalty for making with a parent or guardian an agreement to pledge the labour of a child.**—Whoever makes with the parent or guardian of a child an agreement whereby such parent or guardian pledges the labour of the child shall be punished with fine which may extend to two hundred rupees.

**6. Penalty for employing a child whose labour has been pledged.**—Whoever, knowing or having reason to believe that an agreement has been made to pledge the labour of a child, in furtherance of such agreement employs such child, or permits such child to be employed in any premises or place under his control, shall be punished with fine which may extend to two hundred rupees.

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# [THE INDIAN] CHRISTIAN MARRIAGE ACT, 1872
## (ACT XV OF 1872)

[The text of the Act printed here is as on 1-5-1969.]

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**MARRIAGES SOLEMNIZED BY MINISTERS OF RELIGION LICENSED UNDER THIS ACT**

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PART V

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Effect of protest.
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Procedure on petition.
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Procedure on petition.
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52. When marriage not had within two months after notice, new notice required.
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63. Searches in register-book and copies of entries.
64. Books in which marriages of Indian Christians under Part I or III are registered.
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PART VII

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66. False oath, declaration, notice or certificate for procuring marriage.
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68. Solemnizing marriage without due authority.
69. Solemnizing marriage out of proper time, or without witnesses.
Saving of marriages solemnized under special licence.
70. Solemnizing, without notice or within fourteen days after notice, marriage with minor.
71. Issuing certificate, or marrying without publication of notice; marrying after expiry of notice; solemnizing marriage with minor within fourteen days without authority of Court, or without sending copy of notice; issuing certificate against authorized prohibition.
72. Issuing certificate after expiry of notice or, in case of minor, within fourteen days after notice, or against authorized prohibition.
73. Persons authorized to solemnize marriage (other than Clergy of Churches of England, Scotland or Rome); issuing certificate, or marrying, without publishing notice, or after expiry of certificate; issuing certificate for, or solemnizing, marriage with minor within fourteen days after notice; issuing certificate authorizedly forbidden; solemnizing marriage authorizedly forbidden.
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MISCELLANEOUS

77. What matters need not be proved in respect of marriage in accordance with Act.
78. Correction of errors.
79. Searches and copies of entries.
80. Certified copy of entry in marriage register, etc., to be evidence.
81. Certificates of certain marriages to be sent to Central Government.
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83. Power to make rules.
84. [Repealed.]
85. Power to declare who shall be District Judge.
86. [Repealed.]
87. Saving of Consular Marriages.
88. Non-validation of marriages within prohibited degrees.

SCHEDULE I. — Notice of Marriage.
SCHEDULE II. — Certificate of Receipt of Notice.
SCHEDULE III. — Form of Register of Marriages.
SCHEDULE IV. — Marriage Register-book. Certificate of Marriage.
SCHEDULE V. — [Repealed.]

## STATEMENTS OF OBJECTS AND REASONS

"The law relating to solemnization in India of marriages of persons professing the Christian religion is at present distributed over two English Acts of Parliament and three Acts of the Indian Legislature.

The object of this Bill is to reduce into a smaller compass and simplify the existing law on this subject by the consolidation of the different enactments referred to, and at the same time to amend the law in those matters in which it has been shown to be defective.

For example, by Act V of 1865 it is provided that marriages between Native Christians shall be valid where the ages of the contracting parties are not less than sixteen and thirteen years, respectively, and where they do not stand in relation to each other within the prohibited degrees of consanguinity or affinity.

It has been very forcibly represented by the President and several members of the Bengal Christian Association that this provision of the law works injuriously by freeing the children of Native Christian parents from the control which all other parents can legally exercise over their sons and daughters ere the latter have attained their majority.

The Bill requires the consent of the parents or guardians of Native Christians to a marriage between them, where the age of either of the parties about to contract such marriage is less than eighteen years, except in cases in which the minors have been altogether separated from their parents or natural guardians, and by reason of such separation are not properly subject to their control.

There is also some ambiguity in regard to the provisions of the law respecting the submission of returns, and the disposal of the records of the registration of marriages solemnized between Native Christians.

The Bill lays down distinctly how such marriages are to be recorded in all cases, and provides for the disposal of the record. It also substitutes for the fixed rates of fees in respect of marriage solemnized by or before Marriage Registrars, a power to the Local Government to regulate such fees and their remission; and lastly, extends the Marriage law to all places within the territories of Native Princes in alliance with Her Majesty, in respect of marriages between British subjects professing the Christian religion".

—Gazette of India, 1871, Part V, page 473.

## ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A. O., 1937; A. C. A. O., 1948; A. L. O., 1950; 2 A. L. O; 1956.

—Amended by Acts VI of 1886; II of 1891; I of 1903; XIII of 1911; XXXVIII of 1920; XVIII of 1928; 3 of 1951; XLVIII of 1952.

—Amended in Mysore by Mysore Acts XX of 1956; 13 of 1965.

—Extended by Acts LIX of 1949; XXX of 1950; XXVI of 1968; Reg. VI of 1963; Bom. Act IV of 1950.

—Repealed in part by Acts XVI of 1874; I of 1938.

—Repealed in part and amended by Act XII of 1891.

## COGNATE ACTS AND PROVISIONS

1. Foreign Marriage Act, XIV of 1903.
2. Marriages Validation Act, II of 1892.

# [THE INDIAN] CHRISTIAN MARRIAGE ACT, 1872
## (ACT XV OF 1872)[a]

[18th July, 1872.]

**An Act to consolidate and amend the law relating to the solemnization in India of the marriages of Christians.**

**Preamble**

WHEREAS it is expedient to consolidate and amend the law relating to the solemnization in India of the marriages of persons professing the Chirstian religion; It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, see Gaz. of India, 1871, Pt. V, p. 473. For Proceedings in Council, see Gazette of India, 1870. Supplement, p. 1077, ibid. 1871, Supplement, pp. 1426, 1643, ibid. 1872, Supplement, pp. 257, 728, 742, 805, 813 and 858.

This Act is based on 14 and 15 Vict., C. 40 and 58 Geo. III. C. 84 (both Statutes relate to marriages in India and are now no longer in force), and Acts 5 of 1852 and 5 of 1865; the last two Acts were repealed by this Act.

This Act has been extended to the new Provinces and Merged States by the Merged States (Laws) Act, 1949 (59 of 1949), S. 3 [1-1-1950] and to the States of Tripura and Vindyha Pradesh by the Union Territories (Laws) Act, 1950 (30 of 1950), S. 3 [16-4-1950]. Vindhya Pradesh now forms part of M. P. State. It does not extend to the State of Manipur; see Foot-note (a) to S. 1.

This Act has been extended to States Merged in the State of Bombay : see Bom. Act 4 of 1950. The Bombay Registration of Marriages Act (Bom. Act 5 of 1954) does not apply to marriages contracted under this Act : see S. 14 of that Act.

The Act has been extended to the Union Territories of Dadra and Nagar Haveli by Regn. 6 of 1963 (w. e. f. 1-7-1965) and Pondicherry by Act 26 of 1968, S. 3 and Sch. Pt. I.

## PRELIMINARY

**1. Short title.**—This Act may be called THE INDIAN CHRISTIAN MARRIAGE ACT, 1872.

**Extent**

[a][It extends to the whole of India [b][except [c][the territories which, immediately before the 1st November, 1956, were comprised in the States] of Travancore-Cochin, Manipur and Jammu and Kashmir].]

**Commencement**

[d][* * * *]

[a] Substituted by A.L.O., 1950, for the second paragraph as amended by A.O., 1937 and A.O., 1948.

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**Preamble — Note 1**

(1) The Act is not only an amending but a consolidating Act and provides a Code in itself. The enactments which it repeals viz., 14 and 15 Vict C. 40 and Act 5 of 1865 were similar Codes. AIR 1951 All 529 (533): ILR (1951) 2 All 439 (DB).

(2) The object of this Act is not to prevent people from marrying as they wish but to enable them to protect themselves and their posterity by a lawful and binding marriage if they wish to be married as Christians. AIR 1918 All 168 (172): 40 All 393: 19 Cri LJ 615.

(3) This Act has to be so construed that no case is made to fall within its scope which does not fall both within the reasonable meaning of its terms and within the scope and spirit of the Act. Care must be taken to see that no case is brought under it which is not within its express language. AIR 1918 All 168 (169, 170): 40 All 393: 19 Cri LJ 615.

(4) There is nothing in this Act as regards the age of consent. The age of consent for a Christian marriage is determined according to the law in England at the time of the marriage. AIR 1933 All 135 (136): 55 All 243.

[b] Substituted for the words "except Part B States" by Part B States (Laws) Act, 1951 (3 of 1951), S. 3 and Schedule [1-4-1951].
[c] Substituted for the words "the States" by 2 A.L.O., 1956.
[d] The commencement clause was repealed by the Repealing Act, 1874 (16 of 1874), S. 1 and Schedule.

**Modification**

In its application to Union Territory of Pondicherry, in S. 1 insert, at the end the following :—

"Provided that nothing contained in this Act shall apply to the Renoncant of the Union Territory of Pondicherry." — Act 26 of 1968, S. 3 and Sch., Pt. I.

**2. Enactments repealed.**—[Repealed by the Repealing Act, 1938 (1 of 1938), S. 2 and Schedule.]

**3. Interpretation clause.**—In this Act, unless there is something repugnant in the subject or context,—

"Church of England" and "Anglican" mean and apply to the Church of England as by law established;

"Church of Scotland" means the Church of Scotland as by law established;

"Church of Rome" and "Roman Catholic" mean and apply to the Church which regards the Pope of Rome as its spiritual head.

"Church" includes any chapel or other building generally used for public Christian worship;

[a]["India" means the [b][territories] to which this Act extends.]

"Minor" means a person who has not completed the age of twenty-one years and who is not a widower or a widow;

[c][ • • • • ]

the expression "Christians" means persons professing the Christian religion;

[d][and the expression "Indian Christians" includes the Christian descendants of natives of India converted to Christianity, as well as such converts];

[e]["Registrar-General of Births, Deaths and Marriages" means a Registrar-General of Births, Deaths and Marriages appointed under the Births, Deaths and Marriages Registration Act, 1886.]

[a] The definition of "India" was inserted by the Part B States (Laws) Act, 1951 (3 of 1951), S. 3 and Schedule [1-4-1951].
[b] Substituted for the words "territory comprised in the States" by 2 A.L.O., 1956.
[c] The definition of "Native State" which read "Native State" means the territories of any Native Prince or State in alliance with Her Majesty" was repealed by A.O., 1937.
[d] Substituted for the original definition by A.L.O., 1950.
[e] Inserted by the Births, Deaths and Marriages Registration Act, 1886 (6 of 1886), S. 30.

**Section 3 — Note 1**

(1) The word "means" used in the definition of "Christians" is an inclusive term. ('18) AIR 1918 All 168 (170): 40 All 393: 19 Cri LJ 615. (See notes on Section 68.)

(2) Any person professing the Christian religion although he has not been baptised is a Christian for the purpose of the Act. ('53) AIR 1953 Orissa 10 (13): ILR (1952) Cut 511: 1953 Cri LJ 260.

(3) The words "person who professes the Christian religion" mean not only adults who profess that religion but also their children, who are presumed in law to follow their father's religion; and where the evidence is that the married child in question was baptized this Act would apply. ('94) 18 Mad 230 (232).

(4) A child in India is presumed to have its father's religion. AIR 1916 Lah 438 (439).

(5) Per Knox J. — Mere baptism as infant or attendance in a Christian school or dressing as a Christian is not sufficient to treat a person as one professing the Christian religion. One who performs Devi ka puja at the time of his marriage cannot be said to be a person professing the Christian religion. AIR 1918 All 168 (171): 19 Cri LJ 615: 40 All 393.

## STATE AMENDMENT

Mysore

For the definition of "Registrar-General of Births, Deaths and Marriages", substitute the following:—

" 'Registrar-General of Births, Deaths and Marriages' means 'the Registrar-General of Births, Deaths and Marriages appointed under the Mysore Registrar-General of Births, Deaths and Marriages Act, 1956'."—Mysore Act 20 of 1956. S. 10 [29-10-1956].

## PART I

### THE PERSONS BY WHOM MARRIAGES MAY BE SOLEMNIZED

**4. Marriages to be solemnized according to Act.**—Every marriage between persons, one or both of whom is [a][or are] a Christian or Christians, shall be solemnized in accordance with the provisions of the next following section; and any such marriage solemnized otherwise than in accordance with such provisions shall be void.

[a] Inserted by the Amending Act, 1891 (12 of 1891), S. 2 and Sch. II.

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**Section 3 — Note 1 (contd.)**

(6) Per Walsh J. — A person, who on the eve of his marriage resists all persuasion and pressure to be married as a Christian, by the Christian ceremony and who having by birth and connexion other religious associations deliberately decides to marry a sweeper according to the sweeper rites and publicly worships Hindu Gods is not "a person professing the Christian religion." AIR 1918 All 168 (172): 40 All 393: 19 Cri LJ 615.

**Section 4 — Note 1**

(1) The High Court has jurisdiction to decide whether there has been a valid marriage under this Act. Section 4 of the Divorce Act does not stand in the way of this jurisdiction. AIR 1933 All 122 (123, 124): 55 All 185.

(2) This Act is intended to apply to the marriages of all Christians in India, including the marriages where one of the parties is a Christian. AIR 1918 Mad 601 (603): 18 Cri LJ 840: 40 Mad 1030 (FB).

(3) No valid marriage can be contracted between parties who are Christians according to Hindu rites. AIR 1955 Trav-Co 182 (182).

(4) The District Court has jurisdiction to entertain a petition praying for a decree of nullity of marriage on the ground that it is void under Section 4 of the Act. 9 Guj LR 511: ILR (1967) Guj 1003.

(5) Admissions of either of the spouses of the fact of marriage, evidence of eye witnesses to the marriage, subsequent conduct of the couple living as husband and wife and opinion expressed by conduct of others who had special means of knowledge can also be received in evidence to prove a marriage among Indian Christians as they can be in other cases. ('53) AIR 1953 Orissa 10 (11): ILR (1952) Cut 511: 1953 Cri LJ 260.

(6) In the teeth of the admissions of parties who are Roman Catholic Christians that the alleged marriage did not take place in a Church and no priest officiated at the ceremony a lawful marriage between them cannot be presumed because they lived together as husband and wife until the male died. AIR 1955 Trav-Co 182 (183).

(7) In regard to marriage among Indian Christians marriage performed according to the law of the land governing the parties will make the marriage valid and the offspring legitimate.

Though under the canon law a marriage performed by a Schismatic priest where the parties to the marriage are Roman Catholics will not be recognised as valid by the Catholic Church and the offspring will be described as illegitimate such marriage would be perfectly valid under Sections 4 and 5 of the Christian Marriage Act and the progeny perfectly legitimate.

Even if such a marriage is regarded as putative or invalid according to canon law, where at least one of the parties was in good faith, the offspring of such a marriage would be regarded as legitimate, entitled to succeed to the properties of the father. AIR 1960 Mad 430 (433, 434, 435): 1960 Mad WN 481.

(8) The Act requires a marriage to be performed in a particular form and a register of marriage to be maintained. Person setting up existence of valid marriage must establish such factum of marriage by producing such register. (1964) 2 Andh WR 136.

(9) As to when certain irregularities shall not render void a marriage solemnized in accordance with this section see Section 77.

**5. Persons by whom marriages may be solemnized.**—Marriages may be solemnized in [a][India]—

(1) by any person who has received episcopal ordination, provided that the marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of which he is a Minister;

(2) by any Clergyman of the Church of Scotland, provided that such marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of Scotland;

(3) by any Minister of Religion licensed under this Act to solemnize marriages;

(4) by, or in the presence of, a Marriage Registrar appointed under this Act;

(5) by any person licensed under this Act to grant certificates of marriage between [b][Indian Christians].

[a] Substituted for the words "Part A States and Part C States" by the Part B States (Laws) Act, 1951 (3 of 1951), S. 3 and Schedule [1-4-1951].

[b] Substituted for "Native Christians" by A.L.O., 1950.

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**Section 5 — Note 1**

(1) "Solemnized" in Section 5 means "celebrated" and refers to ceremonies only. ('18) AIR 1918 Low Bur 83 (85).

(2) Section 5 lays down certain classes of persons who can solemnize marriage between Indian Christians, but the Act nowhere provides that the marriage amongst the Indian Christians can be proved only in the manner as stated in Section 5 of the Act. The Evidence Act also does not lay down any special proof of a Christian Marriage. Hence the admission by either of the spouses of the fact of marriage and the subsequent conduct of the couple in living as husband and wife are some of the recognised modes of proof of marriage. Where the plaintiff files a suit for declaration that his marriage with the defendant was invalid, doubtless, the onus lies on him to prove that the marriage was not solemnized by any of the authorised persons prescribed in Section 5.

It may not be necessary to sign the marriage register under the Christian Marriage Act, if the marriage is held at the house of the defendant's (wife's) mother. AIR 1960 Orissa 164 (165): (1959) 1 Orissa JD 522.

(3) Section 5 deals only with the necessary preliminaries to the ceremony, the ceremony itstlf, and the person who performs it. It has nothing to do with Canon law. ('33) AIR 1933 All 122 (128): 55 All 185.

(4) Where during the lifetime of his lawfully wedded wife a Chiristian enters into a second marriage with another woman, the relationship between him and that woman is one of mere concubinage and the children born of that union are illegitimate. AIR 1953 Trav-Co 61 (62): 1952 Ker LT 595.

(5) Section 5 deals only with ceremony and the person who may perform it and not with the capacity of persons on whom it is performed or with the capacity of the person who performs it, save that he should have received episcopal ordination. ('18) AIR 1918 Low Bur 83 (85, 86).

(6) Personal law relating to christian in Travancore does not make a father legally liable to maintain his children whether they be legitimate or illegitimate. AIR 1953 Trav-Co 61 (62): 1952 Ker LT 595. (32 Cal 479, Diss.)

(7) If the Church lays down that the non-observance of some of its rules will not render the marriage void, there is nothing in Section 5 which invalidates a marriage in which such rules have not been observed. ('34) AIR 1934 All 273 (277): 56 All 428.

(8) According to personal law of Christians in Travancore-Cochin the husband has a legal obligation to maintain his wife. The wife can claim separate maintenance if there is justifiable cause for her refusal to live with him. AIR 1955 Trav-Co 255 (259): 1955 Ker LT 429 (FB). (Desertion by husband and habitual cruelty held justifiable causes.)

(9) A marriage between a Hindu and Christian performed before a Marriage Registrar under the Act would not be invalid merely because the rites and ceremonies prescribed by Hindu law have not been performed. AIR 1951 All 529 (534): ILR (1951) 2 All 439 (DB).

(10) As to when certain irregularities shall not render void a marriage solemnized in accordance with Section 5 see Section 77. As to registration of marriages between Native Christians by such persons are mentioned in clauses (1), (2) or (3) of this section, see Section 37; and for punishment for solemnizing marriage without due authority, see Section 68.

[a][6. **Grant and revocation if licences to solemnize marriages.**—The °[State] Government, so far as regards the territories under its administration [b][° ° °], may, by notification in the °[Official Gazette] [c][° ° °], grant licences to Ministers of Religion to solemnize marriages within such territories [d][° ° ° °] and may, by a like notification, revoke such licences.]

[a] Substituted for original S. 6 by the Indian Christian Marriage Act (1872), Amendment Act, 1891 (2 of 1891), S. 1.

[b] The words "and the Central Government, so far as regards any Indian State" were repealed by A.L.O., 1950.

[c] The words "or in the Gazette of India, as the case may be," were repealed by A.O., 1937.

[d] The words "and State respectively" were omitted by A.L.O., 1950.

**7. Marriage Registrars.**—The °[State] Government may appoint one or more Christians, either by name or as holding any office for the time being, to be the Marriage Registrar or Marriage Registrars for any District subject to its administration.

**Senior Marriage Registrar.**—Where there are more Marriage Registrars than one in any district, the °[State] Government shall appoint one of them to be the Senior Marriage Registrar.

**Magistrate when to be Marriage Registrar.**— When there is only one Marriage Registrar in a district, and such Registrar is absent from such district, or ill, or when his office is temporarily vacant, the Magistrate of the district shall act as, and be, Marriage Registrar thereof during such absence, illness or temporary vacancy.

**STATE AMENDMENT**

**Mysore**

Substitute the words "District Magistrate" for the words "Magistrate of the district".—Code of Criminal Procedure (Mysore Amendment) Act (13 of 1965), S. 66 and Schedule [1-10-1965].

**8. Marriage Registrars in Indian States.**—[Omitted by A.L.O., 1950.]

**9. Licensing of persons to grant certificates of marriage between Indian Christians.**—The °[State] Government [a][° °] may grant a licence to any Chris-

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**Section 6 — Note 1**

(1) Section 2 of the Secunderabad Marriage Validating Ordinance, 1945 (No. 30 of 1945), (1-9-1945), runs as follows :—

**"2. Validation of a certain irregular marriage and the records thereof. —** (1) The marriage solemnized in St. Andrew's Church at Secunderabad on the 20th day of April 1944 between persons being Christian but not Indian Christian, subjects of His Majesty by the Reverend Harold William Sibree Page, a Minister of the Methodist Church, shall be, and shall be deemed to have been with effect on and from the said date, as good and valid in law as if it had been solemnized under a licence granted under Section 6 of the Indian Christian Marriage Act, 1872, authorising the solemnization of marriages between persons being Christian, but not necessarily Indian Christian, subjects of His Majesty in the Hyderabad State.

(2) Certificates of the marriage declared by sub-section (1) to be good and valid in law, and register books and certified copies of true and duly authenticated extracts therefrom, deposited in compliance with the provisions of the Indian Christian Marriage Act, 1872, in so far as the register-books and extracts relate to the said marriage, shall be received as evidence of the marriage as if it had been duly solemnized under Part I of the said Act."

**Section 8 — Note 1**

(1) As to the powers and functions exercisable by the Central Government as regards the Indian States, see S. 86.

**Section 9 — Note 1**

(1) The presence of a person licensed under this section is one of the conditions that has to be fulfilled for the validity of the marriage between Native Christians: See Section 60. As to the duties of a person licensed under this section with respect to the marriages solemnized under Part VI, see Ss. 61 and 62.

(2) For penalty for solemnizing an irregular marriage by a person licensed under this section, see Marriage Validation Act, 1892, S. 6.

tian, either by name or as holding any office for the time being, authorizing him to grant certificate of marriage between [b][Indian] Christians.

Any such licence may be revoked by the authority by which it was granted, and every such grant or revocation shall be notified in the Official Gazette.

[a] The words "or so far as regards any Indian State, the Central Government" were omitted by A.L.O., 1950.

[b] Substituted for "Native Christians", ibid.

## PART II

## TIME AND PLACE AT WHICH MARRIAGES MAY BE SOLEMNIZED

**10. Time for solemnizing marriage.**—Every marriage under this Act shall be solemnized between the hours of six in the morning and seven in the evening:

**Exceptions**

Provided that nothing in this section shall apply to—

(1) a Clergyman of the Church of England solemnizing a marriage under a special licence permitting him to do so at any hour other than between six in the morning and seven in the evening, under the hand and seal of the Anglican Bishop of the Diocese or his Commissary, or

(2) a Clergyman of the Church of Rome solemnizing a marriage between the hours of seven in the evening and six in the morning, when he has received a general or special licence in that behalf from the Roman Catholic Bishop of the Diocese or Vicariate in which such marriage is so solemnized, or from such person as the same Bishop has authorized to grant such licence, [a][or

(3) a Clergyman of the Church of Scotland solemnizing a marriage according to the rules, rites, ceremonies and customs of the Church of Scotland].

[a] Inserted by the Indian Christian Marriage Act (1872), Amendment Act, 1891 (2 of 1891), S. 2.

**11. Place for solemnizing marriage.**—No Clergyman of the Church of England shall solemnize a marriage in any place other than a church [a][where worship is generally held according to the forms of the Church of England],

unless there is no [a][such] church within five miles distance by the shortest road from such place, or

unless he has received a special licence authorizing him to do so under the hand and seal of the Anglican Bishop of the Diocese or his Commissary.

Fee for special licence.—For such special licence, the Registrar of the Diocese may charge such additional fee as the said Bishop from time to time authorizes.

[a] Inserted by the Indian Christian Marriage Act (1872), Amendment Act, 1891 (2 of 1891), Sec. 3.

## PART III

## MARRIAGES SOLEMNIZED BY MINISTERS OF RELIGION LICENSED UNDER THIS ACT

**12. Notice of intended marriage.**—Whenever a marriage is intended to be solemnized by a Minister of Religion licensed to solemnize marriages under this Act—

one of the persons intending marriage shall give notice in writing according to the form contained in the First Schedule hereto annexed, or to the like effect,

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**Section 10 — Note 1**

(1) As to what persons solemnizing marriage under the provisions of this section are exempt from punishment for solemnizing marriage out of proper time or without witnesses, see S. 69.

**Section 12 — Note 1**

(1) Part III of this Act applies only

to the Minister of Religion whom he or she desires to solemnize the marriage, and shall state therein—

(a) the name and surname, and the profession or condition, of each of the persons intending marriage.
(b) the dwelling place of each of them,
(c) the time during which each has dwelt there, and
(d) the church or private dwelling in which the marriage is to be solemnized:

Provided that, if either of such persons has dwelt in the place mentioned in the notice during more than one month, it may be stated therein that he or she has dwelt there one month and upwards.

**13. Publication of such notice.**—If the persons intending marriage desire it to be solemnized in a particular church, and if the Minister of Religion to whom such notice has been delivered be entitled to officiate therein, he shall cause the notice to be affixed in some conspicuous part of such church.

**Return or transfer of notice.**—But if he is not entitled to officiate as a Minister in such church, he shall, at his option, either return the notice to the person who delivered it to him, or deliver it to some other Minister entitled to officiate therein, who shall thereupon cause the notice to be affixd as aforesaid.

**14. Notice of intended marriage in private dwelling.**—If it be intended that the marriage shall be solemnized in a private dwelling, the Minister of Religion, on receiving the notice prescribed in Section 12, shall forward it to the Marriage Registrar of the district, who shall affix the same to some conspicuous place in his own office.

**15. Sending copy of notice to Marriage Registrar when one party is a minor.**—When one of the persons intending marriage is a minor, every Minister receiving such notice shall, unless within twenty-four hours after its receipt he returns the same under the provisions of Section 13, send by the post or otherwise a copy of such notice to the Marriage Registrar of the district, or, if there be more than one Registrar of such district, to the Senior Marriage Registrar.

**16. Procedure on receipt of notice.**—The Marriage Registrar or Senior Marriage Registrar, as the case may be, on receiving any such notice, shall affix it to some conspicuous place in his own office, and the latter shall further cause a copy of the said notice to be sent to each of the other Marriage Registrars in the same district, who shall likewise publish the same in the manner above directed.

**17. Issue of certificate of notice given and declaration made.**—Any Minister of Religion consenting or intending to solemnize any such marriage as aforesaid, shall, on being required so to do by or on behalf of the person by whom the notice was given, and upon one of the persons intending marriage making the declaration hereinafter required, issue under his hand a certificate of such notice having been given and of such declaration having been made:

**Proviso.**

Provided—

(1) that no such certificate shall be issued until the expiration of four days after the date of the receipt of the notice by such Minister;
(2) that no lawful impediment be shown to his satisfaction why such certificate should not issue; and
(3) that the issue of such certificate has not been forbidden, in manner hereinafter mentioned, by any person authorized in that behalf.

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**Section 12 — Note 1 (contd.)**

to Ministers of religion licensed under this Act and not to be episcopally ordained persons. Hence the provisions with respect to notice of marriages or their publication would not apply in their case. (1896) 19 Mad 273 (281).

(2) As to notice of intended marriage in a private dwelling, see S. 14.

**18. Declaration before issue of certificate.**—The certificate mentioned in Section 17 shall not be issued until one of the persons intending marriage has appeared personally before the Minister and made a solemn declaration—

(a) that he or she believes that there is not any impediment of kindred or affinity or other lawful hindrance, to the said marriage.

and, when either or both of the parties is or are a minor or minors,

(b) that the consent or consents required by law has or have been obtained thereto, or that there is no person resident in India having authority to give such consent, as the case may be.

**19. Consent of father, or guardian, or mother.**—The father, if living, of any minor, or, if the father be dead, the guardian of the person of such minor, and, in case there be no such guardian, then the mother of such minor, may give consent to the minor's marriage, and such consent is hereby required for the same marriage, unless no person authorized to give such consent be resident in India.

**20. Power to prohibit by notice issue of certificate.**—Every person whose consent to a marriage is required under Section 19 is hereby authorized to prohibit the issue of the certificate by any Minister, at any time before the issue of the same, by notice in writing to such Minister, subscribed by the person so authorized with his or her name and place of abode and position with respect to either of the persons intending marriage, by reason of which he or she is so authorized as aforesaid.

**21. Procedure on receipt of notice.**—If any such notice be received by such Minister, he shall not issue his certificate and shall not solemnize the said marriage until he has examined into the matter of the said prohibition, and is satisfied that the person prohibiting the marriage has no lawful authority for such prohibition, or until the said notice is withdrawn by the person who gave it.

**22. Issue of certificate in case of minority.**—When either of the persons intending marriage is a minor, and the Minister is not satisfied that the consent of the person whose consent to such marriage is required by Section 19 has been obtained, such Minister shall not issue such certificate until the expiration of fourteen days after the receipt by him of the notice of marriage.

**23. Issue of certificates to [a][Indian] Christians.**—When any [a][Indian] Christian about to be married takes a notice of marriage to a Minister of Religion, or applies for a certificate from such Minister under Section 17, such Minister shall, before issuing the certificate, ascertain whether such [a][Indian] Christian is cognizant of the purport and effect of the said notice or certificate, as the case may be, and, if not, shall translate or cause to be translated the notice or certificate to such [a][Indian] Christian into some language which he understands.

[a] Substituted for "Native Christian" by A.L.O., 1950.

**24. Form of certificate.**—The certificate to be issued by such Minister shall be in the form contained in the second schedule thereto annexed, or to the like effect.

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**Section 18 — Note 1**

(1) Section 18 imposes a declaration of belief only. It is sufficient if the declarer believes that there is no impediment though there may be one under the law. The maxim ignorantia juris non excusat is inapplicable in such cases. ('94) 16 All 212 (216).

**Section 19 — Note 1**

(1) It is doubtful whether the marriage of a minor girl whose father is dead could be validly solemnised, when there is no consent from an undoubted guardian, in the absence of her mother's consent. AIR 1952 Punj 277 (279).

(2) It is only when any person answering any of the three categories mentioned in the section is in existence and happens to be "not resident" in India that the latter part of Section 19 comes into operation and the consent of such guardian is dispensed with. It does not follow that if any of the persons answering any of the three categories mentioned is not in existence, a guardian has to be appointed for the purpose of giving such consent to the marriage of the minor. There is no provision in the Act for the appointment of such guardian. AIR 1946 Bom 129 (131).

**25. Solemnization of marriage.**—After the issue of the certificate by the Minister, marriage may be solemnized between the persons therein described according to such form or ceremony as the Minister thinks fit to adopt:

Provided that the marriage be solemnized in the presence of at least two witnesses besides the Minister.

**26. Certificate void if marriage not solemnized within two months.**—Whenever a marriage is not solemnized within two months after the date of the certificate issued by such Minister as aforesaid, such certificate and all proceedings (if any) thereon shall be void,

and no person shall proceed to solemnize the said marriage until new notice has been given, and a certificate thereof issued in manner aforesaid.

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## PART IV

## REGISTRATION OF MARRIAGES SOLEMNIZED BY MINISTERS OF RELIGION

**27. Marriages when to be registered.**—All marriages hereafter solemnized in [a][India] between persons one or both of whom professes or profess the Christian religion, except marriages solemnized under Part V or Part VI of this Act, shall be registered[b] in manner hereinafter prescribed.

[a] Substituted for the words "a Part A State or a Part B State," by the Part B States (Laws) Act, 1951 (3 of 1951), S. 3 and Schedule [1-4-1951].

[b] As to the establishment of general registry offices of birth, deaths and marriages, see the Births, Deaths and Marriages Registration Act, 1886 (6 of 1886), Chapter II.

**28. Registration of marriages solemnized by Clergymen of Church of England.**—Every Clergyman of the Church of England shall keep a register of marriages and shall register therein, according to the tabular form set forth in the Third Schedule hereto annexed, every marriage which he solemnizes under this Act.

**29. Quarterly returns to Archdeaconry.**—Every Clergyman of the Church of England shall send four times in every year returns in duplicate, authenticated by his signature, of the entries in the register of marriages solemnized at any place where he has any spiritual charge, to the Registrar of the Archdeaconry to which he is subject, or within the limits of which such place is situate.

**Contents of returns.**—Such quarterly returns shall contain all the entries of marriages contained in the said register from the first day of January to the thirty-first day of March, from the first day of April to the thirtieth day of June, from the first day of July to the thirtieth day of September, and from the first day of October to the thirty-first day of December, of each year respectively, and shall be sent by such Clergyman within two weeks from the expiration of each of the quarters above specified.

The said Registrar upon receiving the said returns shall send one copy thereof to the [a][Registrar-General of Births, Deaths and Marriages].

[a] Substituted by the Births, Deaths and Marriages Registration Act, 1886 (6 of 1886), S. 30 (b), for "Secretary to the Local Government".

**30. Registration and returns of marriages solemnized by Clergymen of Church of Rome.**—Every marriage solemnized by a Clergyman of the Church of Rome shall be registered by the person and according to the form directed in that behalf by the Roman Catholic Bishop of the Diocese or Vicariate in which such marriage is solemnized,

and such person shall forward quarterly to the [a][Registrar-General of Births, Deaths and Marriages] returns of the entries of all marriages registered by him during the three months next preceding.

[a] Substituted by the Births, Deaths and Marriages Registration Act, 1886 (6 of 1886), S. 30 (b), for the words "Secretary to the Local Government".

**31. Registration and returns of marriages solemnized by Clergymen of Church of Scotland.**—Every Clergyman of the Church of Scotland shall keep a register of marriages, and shall register therein, according to the tabular form set forth in the Third Schedule hereto annexed, every marriage which he solemnizes under this Act, and shall forward quarterly to the [a][Registrar-General of Births, Deaths and Marriages], through the Senior Chaplain of the Church of Scotland, returns, similar to those prescribed in Section 29, of all such marriages.

[a] Substituted by the Births, Deaths and Marriages Registration Act, 1886 (6 of 1886), S. 30 (b), for the words "Secretary to the Local Government".

**32. Certain marriages to be registered in duplicate.**—Every marriage solemnized by any person who has received episcopal ordination, but who is not a Clergyman of the Church of England, or of the Church of Rome, or by any Minister of Religion licensed under this Act to solemnize marriages, shall immediately after the solemnization thereof, be registered in duplicate by the person solemnizing the same; (that is to say) in a marriage-register book to be kept by him for that purpose, according to the form contained in the fourth schedule hereto annexed, and also in a certificate attached to the marriage-register book as a counterfoil.

**33. Entries of such marriages to be signed and attested.**—The entry of such marriage in both the certificate and marriage-register book shall be signed by the person solemnizing the marriage, and also by the persons married, and shall be attested by two credible witnesses, other than the person solemnizing the marriage, present at its solemnization.

Every such entry shall be made in order from the beginning to the end of the book, and the number of the certificate shall correspond with that of the entry in the marriage register book.

**34. Certificate to be forwarded to Marriage Registrar, copied and sent to Registrar-General.**—The person solemnizing the marriage shall forthwith separate the certificate from the marriage register book and send it, within one month from the time of the solemnization, to the Marriage Registrar of the District in which the marriage was solemnized, or, if there be more Marriage Registrars than one, to the Senior Marriage Registrar, who shall cause such certificate to be copied into a book to be kept by him for that purpose, and shall send all the certificates which he has received during the month, with such number and signature or initials added thereto as are hereinafter required, to the [a][Registrar-General of Births, Deaths and Marriages].

[a] Substituted by the Births, Deaths and Marriages Registration Act, 1886 (6 of 1886), S. 30 (b), for the words "Secretary to the Local Government".

**35. Copies of certificates to be entered and numbered.**—Such copies shall be entered in order from the beginning to the end of the said book, and shall bear both the number of the certificate as copied, and also a number to be entered by the Marriage Registrar, indicating the number of the entry of the said copy in the said book, according to the order in which he receives each certificate.

**36. Registrar to add number of entry to certificate, and send to Registrar-General.**—The Marriage Registrar shall also add such last-mentioned number of the entry of the copy in the book to the certificate, with his signature or initials, and shall, at the end of every month, send the same to the [a][Registrar-General of Births, Deaths and Marriages].

[a] Substituted by S. 30 (b) of the Births, Deaths and Marriages Registration Act, 1886 (6 of 1886), for the words "Secretary to the Local Government".

**37. Registration of marriages between Indian Christians by persons referred to in clauses (1), (2) and (3) of Section 5.**—When any marriage between [a][Indian] Christians is solemnized [b][by any such person, Clergyman or Minister of Religion as is referred to in clause (1), clause (2) or clause (3) of S. 5], the person solemnizing the same shall, instead of proceeding in the manner provided by Sections 28 to 36, both inclusive, register the marriage in a separate register-book, and shall keep it safely until it is filled, or, if he leaves the district in which he solemnized the marriage before the said book is filled, shall make over the same to the person succeeding to his duties in the said district.

**Custody and disposal of register-book.**—Whoever has the control of the book at the time when it is filled, shall send it to the Marriage Registrar of the District, or, if there be more Marriage Registrars than one, to the Senior Marriage Registrar, who shall send it to the [c][Registrar-General of Births, Deaths and Marriages] to be kept by him with the records of his office.

[a] Substituted for the word "Native Christians" by A.L.O., 1950.

[b] Substituted by the Repealing and Amending Act, 1928 (18 of 1928), S. 2 and Sch. I, for "under Part I or Part III of this Act".

[c] Substituted by the Births, Deaths and Marriages Registration Act, 1886 (6 of 1886), S. 30 (b), for "Secretary to the Local Government".

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## PART V

## MARRIAGES SOLEMNIZED BY, OR IN THE PRESENCE OF, A MARRIAGE REGISTRAR

**38. Notice of intended marriage before Marriage Registrar.**—When a marriage is intended to be solemnized by, or in the presence of, a Marriage Registrar, one of the parties to such marriage shall give notice in writing, in the form contained in the First Schedule hereto annexed, or to the like effect, to any Marriage Registrar of the District within which the parties have dwelt;

or, if the parties dwell in different districts, shall give the like notice to a Marriage Registrar of each district,

and shall state therein the name and surname, and the profession or condition, of each of the parties intending marriage, the dwelling-place of each of them, the time during which each has dwelt therein and the place at which the marriage is to be solemnized:

Provided that, if either party has dwelt in the place stated in the notice for more than one month, it may be stated therein that he or she has dwelt there one month and upwards.

**39. Publication of notice.**—Every Marriage Registrar shall, on receiving any such notice, cause a copy thereof to be affixed in some conspicuous place in his office.

When one of the parties intending marriage is a minor, every Marriage Registrar shall, within twenty-four hours after the receipt by him of the notice of such marriage, send, by post or otherwise, a copy of such notice to each of the

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**Section 37 — Note 1**

(1) The registration of marriages between Native Christians is to be in conformity with the rules laid down by this section so far as they are applicable: see Section 59. As to the books in which marriages of Native Christians are to be registered, see S. 64.

**Section 38 — Note 1**

(1) Section 38 governs the schedule and the space left for age need not be filled because no such provision is made in the section. AIR 1935 Cal 678 (678): 36 Cri LJ 1462.

other Marriage Registrars (if any) in the same district, who shall likewise affix the copy in some conspicuous place in his own office.

**40. Notice to be filed and copy entered in Marriage Notice Book.**—The Marriage Registrar shall file all such notices and keep them with the records of his office,

and shall also forthwith enter a true copy of all such notices in a book to be furnished to him for that purpose by the °[State] Government and to be called the "Marriage Notice Book", and the Marriage Notice Book shall be open at all reasonable times, without fee, to all persons desirous of inspecting the same.

**41. Certificate of notice given and oath made.**—If the party by whom the notice was given requests the Marriage Registrar to issue the certificate next hereinafter mentioned, and if one of the parties intending marriage has made oath as hereinafter required, the Marriage Registrar shall issue under his hand a certificate of such notice having been given and of such oath having been made:

**Proviso.**

Provided—

that no lawful impediment be shown to his satisfaction why such certificate should not issue;

that the issue of such certificate has not been forbidden, in manner hereinafter mentioned, by any person authorized in that behalf by this Act;

that four days after the receipt of the notice have expired; and further,

that where, by such oath, it appears that one of the parties intending marriage is a minor, fourteen days after the entry of such notice have expired.

**42. Oath before issue of certificate.**—The certificate mentioned in Section 41 shall not be issued by any Marriage Registrar, until one of the parties intending marriage appears personally before such Marriage Registrar, and makes oath[a]—

(a) that he or she believes that there is not any impediment of kindred or affinity, or other lawful hindrance, to the said marriage, and

(b) that both the parties have, or (where they have dwelt in the districts of different Marriage Registrars) that the party making such oath has, had their, his or her usual place of abode within the district of such Marriage Registrar,

and, where either or each of the parties is a minor,—

(c) that the consent or consents to such marriage required by law has or have been obtained thereto, or that there is no person resident in India authorized to give such consent, as the case may be.

[a] As to meaning of "oath", see the General Clauses Act, 1897 (10 of 1897), S. 3 (37) and Section 4.

**43. Petition to High Court to order certificate in less than fourteen days.**—When one of the parties intending marriage is a minor, and both such parties are at the time resident in any of the towns of Calcutta, Madras and Bombay, and are desirous of being married in less than fourteen days after the entry of such notice as aforesaid, they may apply by petition to a Judge of the High Court, for an order upon the Marriage Registrar to whom the notice of marriage has been

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**Section 40 — Note 1**

(1) As to the effect of not solemnising the marriage within two months of the notice required by this section, see Section 52; and as to the punishment for solemnising a marriage after the expiration of two months, see S. 71.

**Section 42 — Note 1**

(1) False declaration by the bridegroom as to the age and residence of the bride does not make the marriage void under Section 4. ('37) AIR 1937 Mad 895 (897): ILR (1938) Mad 113.

(2) No question of consent being dispensed with arises in a case where the persons specified in Section 19 are not in existence at all. In such cases it is not necessary to appoint a guardian nor can the registrar insist on such appointment for the purpose of giving consent to the marriage. The Act has no provision for the appointment of such a guardian at all. AIR 1946 Bom 129 (131).

given, directing him to issue his certificate before the expiration of the said fourteen days required by Section 41.

**Order on petition.**—And, on sufficient cause being shown, the said Judge may, in his discretion, make an order upon such Marriage Registrar, directing him to issue his certificate at any time to be mentioned in the said order before the expiration of the fourteen days so required.

And the said Marriage Registrar, on receipt of the said order, shall issue his certificate in accordance therewith.

**44. Consent of father or guardian.**—The provisions of Section 19 apply to every marriage under this Part, either of the parties to which is a minor;

**Protest against issue of certificate.**—and any person whose consent to such marriage would be required thereunder may enter a protest against the issue of the Marriage Registrar's certificate, by writing, at any time before the issue of such certificate, the word "forbidden" opposite to the entry of the notice of such intended marriage in the Marriage Notice Book, and by subscribing thereto his or her name and place of abode, and his or her position with respect to either of the parties, by reason of which he or she is so authorized.

**Effect of protest.**—When such protest has been entered, no certificate shall issue until the Marriage Registrar has examined into matter of the protest, and is satisfied that it ought not to obstruct the issue of the certificate for the said marriage, or until the protest be withdrawn by the person who entered it.

**45. Petition where person whose consent is necessary is insane.**—If any person whose consent is necessary to any marriage under this Part is of unsound mind,

or unjustly withholds consent;—or if any such person (other than the father) without just cause withholds his consent to the marriage,

the parties intending marriage may apply by petition, where the person whose consent is necessary is resident within any of the towns of Calcutta, Madras and Bombay, to a Judge of the High Court, or if he is not resident within any of the said towns, then to the District Judge:

**Procedure on petition.**—And the said Judge of the High Court, or District Judge, as the case may be, may examine the allegations of the petition in a summary way:

And, if upon examination such marriage appears proper, such Judge of the High Court or District Judge, as the case may be, shall declare the marriage to be a proper marriage.

Such declaration shall be as effectual as if the person whose consent was needed had consented to the marriage;

and if he has forbidden the issue of the Marriage Registrar's certificate, such certificate shall be issued and the like proceedings may be had under this Part in relation to the marriage as if the issue of such certificate had not been forbidden.

**46. Petition when Marriage Registrar refuses certificate.**—Whenever a Marriage Registrar refuses to issue a certificate under this Part, either of the parties intending marriage may apply by petition, where the district of such Registrar is within any of the towns of Calcutta, Madras and Bombay, to a Judge of the High Court, or if such district is not within any of the said towns, then to the District Judge.

**Procedure on petition.**—The said Judge of the High Court, or District Judge, as the case may be, may examine the allegations of the petition in a summary way, and shall decide thereon.

The decision of such Judge of the High Court or District Judge, as the case may be, shall be final, and the Marriage Registrar to whom the application for the issue of a certificate was originally made shall proceed in accordance therewith.

**47. Petition when Marriage Registrar in Indian State refuses certificate.**—[Omitted by A. L. O., 1950.]

**48. Petition when Registrar doubts authority of person forbidding.**—Whenever a Marriage Registrar, acting under the provisions of Section 44, is not satisfied that the person forbidding the issue of the certificate is authorized by law so to do, the said Marriage Registrar shall apply by petition, where his district is within any of the towns of Calcutta, Madras and Bombay, to a Judge of the High Court, or, if such district be not within any of the said towns, then to the District Judge.

**Procedure on petition.**—The said petition shall state all the circumstances of the case, and pray for the order and direction of the Court concerning the same,

and the said Judge of the High Court or District Judge, as the case may be, shall examine into the allegations of the petition and the circumstances of the case;

and if, upon such examination, it appears, that the person forbidding the issue of such certificate is not authorized by law so to do, such Judge of the High Court or District Judge, as the case may be, shall declare that the person forbidding the issue of such certificate is not authorized as atoresaid,

and thereupon such certificate shall be issued, and the like proceedings may be had in relation to such marriage as if the issue had not been forbidden.

[a][° ° ° ° °].

[a] The last three paras, beginning with the words "whenever a Marriage Registrar" and ending with the words "had not been forbidden" were omitted by A. L. O., 1950.

**49. Liability for frivolous protest against issue of certificate.**—Every person entering a protest with the Marriage Registrar, under this Part, against the issue of any certificate, on grounds which such Marriage Registrar, under Section 44, or a Judge of the High Court or the District Judge, under Section 45 or 46, declares to be frivolous and such as ought not to obstruct the issue of the certificate, shall be liable for the costs of all proceedings in relation thereto and for damages, to be recovered by suit by the person against whose marriage such protest was entered.

**50. Form of certificate.**—The certificate to be issued by the Marriage Registrar under the provisions of Section 41 shall be in the form contained in the Second Schedule to this Act annexed or to the like effect,

and the [a][State] Government shall furnish to every Marriage Registrar a sufficient number of forms of certificate.

[a] Substituted by A. L. O., 1950.

**51. Solemnization of marriage after issue of certificate.**—After the issue of the certificate of the Marriage Registrar,

or, where notice is required to be given under this Act to the Marriage Registrars for different districts, after the issue of the certificates of the Marriage Registrars for such districts,

marriage may, if there be no lawful impediment to the marriage of the parties described in such certificate or certificates, be solemnized between them, according to such form and ceremony as they think fit to adopt.

But every such marriage shall be solemnized in the presence of some Marriage Registrar (to whom shall be delivered such certificate or certificates as aforesaid), and of two or more credible witnesses besides the Marriage Registrar.

And in some part of the ceremony each of the parties shall declare as follows, or to the like effect :—

"I do solemnly declare that I know not of any lawful impediment why I, A. B., may not be joined in matrimony to C. D."

And each of the parties shall say to the other as follows or to the like effect — "I call upon these persons here present to witness that I, A. B., do take thee, C. D., to be my lawful wedded wife [or husband]."

**52. When marriage not had within two months after notice, new notice required.**—Whenever a marriage is not solemnized within two months after a copy of the notice has been entered by the Marriage Registrar, as required by Sec. 40, the notice and the certificate, if any, issued thereupon, and all other proceedings thereupon, shall be void;

and no person shall proceed to solemnize the marriage, nor shall any Marriage Registrar enter the same, until new notice has been given, and entry made, and certificate thereof given, at the time and in the manner aforesaid.

**53. Marriage Registrar may ask for particulars to be registered.**—A Marriage Registrar before whom any marriage is solemnized under this Part may ask of the persons to be married the several particulars required to be registered touching such marriage.

**54. Registration of marriages solemnized under Part V.**—After the solemnization of any marriage under this Part, the Marriage Registrar present at such solemnization shall forthwith register the marriage in duplicate; that is to say, in a marriage-register book, according to the form of the fourth schedule hereto annexed, and also in a certificate attached to the marriage register book as a counterfoil.

The entry of such marriage in both the certificate and the marriage-register book shall be signed by the person by or before whom the marriage has been solemnized, if there be any such person, and by the Marriage Registrar present at such marriage, whether or not it is solemnized by him, and also by the parties married, and attested by two credible witnesses other than the Marriage Registrar and person solemnizing the marriage.

Every such entry shall be made in order from the beginning to the end of the book, and the number of the certificate shall correspond with that of the entry in the marriage-register book.

**55. Certificates to be sent monthly to Registrar General.**—The Marriage Registrar shall forthwith separate the certificate from the marriage-register book and send it, at the end of every month, to the [a][Registrar General of Births, Deaths and Marriages].

**Custody of register-book.**—The Marriage Registrar shall keep safely the said register-book until it is filled, and shall then send it to the [a][Registrar General of Births, Deaths and Marriages], to be kept by him with the records of his office.

[a] Substituted by the Births, Deaths and Marriages Registration Act, 1886 (6 of 1886), S. 30 (b), for the words "Secretary to the Local Government".

**56. Officers to whom Registrars in Indian States shall send certificates.**—[Omitted by A. L. O., 1950].

**57. Registrars to ascertain that notice and certificate are understood by Indian Christians.**—When any [a][Indian] Chirstian about to be married gives a notice of marriage, or applies for a certificate from a Marriage Registrar, such Marriage Registrar shall ascertain whether the said [a][Indian] Christian understands the English language, and, if he does not, the Marriage Registrar shall translate, or cause to be translated, such notice or certificate, or both of them, as the case may be, to such [a][Indian] Christian into a language which he understands;

or the Marriage Registrar shall otherwise ascertain whether the [a][Indian] Christian is cognizant of the purport and effect of the said notice and certificate.

[a] Substituted for "Native", by A.L.O., 1950.

**58. Indian Christians to be made to understand declarations.**—When any [a][Indian] Christian is married under the provisions of this Part, the person solemnizing the marriage shall ascertain whether such [a][Indian] Christian understands the English language, and, if he does not, the person solemnizing the marriage shall, at the time of the solemnization, translate, or cause to be translated, to such [a][Indian] Christian, into a language which he understands, the declarations made at such marriage in accordance with the provisions of this Act.

[a] Substituted for "Native" by A.L.O., 1950.

**59. Registration of marriages between Indian Christians.**—The registration of marriages between [a][Indian] Christians under this Part shall be made in conformity with the rules laid down in Section 37 (so far as they are applicable), and not otherwise.

[a] Substituted for "Native", by A.L.O., 1950.

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## PART VI[a]

## MARRIAGE OF [b][INDIAN] CHRISTIANS

**60. On what conditions marriages of Indian Christians may be certified.**—Every marriage between [b][Indian] Christians applying for a certificate, shall, without the preliminary notice required under Part III, be certified under this Part, if the following conditions be fulfilled, and not otherwise :—

(1) the age of the man intending to be married [c][shall not be under eighteen years], and the age of the woman intending to be married [d][shall not be under fifteen years];

(2) neither of the persons intending to be married shall have a wife or husband still living;

(3) in the presence of a person licensed under Section 9, and of at least two credible witnesses other than such person, each of the parties shall say to the other—

"I call upon these persons here present to witness that I, A. B., in the presence of Almighty God, and in the name of our Lord Jesus Christ, do take thee C. D., to be my lawful wedded wife [or husband]" or words to the like effect :

Provided that no marriage shall be certified under this Part when either of the parties intending to be married has not completed his or her eighteenth year, unless such consent as is mentioned in Section 19 has been given to the intended marriage, or unless it appears that there is no person living authorized to give such consent.

[a] As to validation of past marriages solemnized under Part VI, between persons of whom one only was an Indian Christian, and penalty for solemnizing such

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**Section 56 — Note 1**

**(1) As to the forwarding of certificates of certain marriages for transmission to England, see S. 81.**

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marriages under Part VI in future, see the Marriage Validation Act, 1892 (2 of 1892).

[b] Substituted for "Native" by A.L.O., 1950.

[c] Substituted for the words "shall exceed sixteen years", by the Repealing and Amending Act, 1952 (48 of 1952), S. 3 and Schedule II, [2-8-1952].

[d] Substituted for the words "shall exceed thirteen years", ibid.

**61. Grant of certificate.**—When, in respect to any marriage solemnized under this Part, the conditions prescribed in Section 60 have been fulfilled, the person licensed as aforesaid, in whose presence the said declaration has been made, shall, on the application of either of the parties to such marriage, and on the payment of a fee of four annas, grant a certificate of the marriage.

The certificate shall be signed by such licensed person, and shall be received in any suit touching the validity of such marriage as conclusive proof of its having been performed.

[a][**62. Keeping of register-book and deposit of extracts therefrom with Registrar General.**—(1) Every person licensed under Section 9 shall keep in English, or in the vernacular language in ordinary use in the district or State in which the marriage was solemnized, and in such form as the [aa][State] Government by which he was licensed may from time to time prescribe,[b] a register-book of all marriages solemnized under this Part in his presence, and shall deposit in the office of the Registrar General of Births, Deaths and Marriages for the territories under the administration of the said [aa][State] Government in such form and at such intervals as that Government may prescribe, true and duly authenticated extracts from his register-book of all entries made therein since the last of those intervals.

[c][° ° °.]]

[a] Substituted by the Indian Christian Marriage Act (1872), Amendment Act, 1891 (2 of 1891), S. 4, for the original S. 62.

[aa] Substituted by A.L.O., 1950.

[b] For notifications issued by different Governments, see the different Local Rules and orders.

[c] Sub-section (2) of Section 62, was omitted by A. L. O., 1950.

**63. Searches in register-book and copies of entries.**—Every person licensed under this Act to grant certificates of marriage, and keeping a marriage register-book under Section 62, shall, at all reasonable times, allow search to be made in such book, and shall, on payment of the proper fee, give a copy, certified under his hand, or any entry therein.

**64. Books in which marriages of Indian Christians under Part I or Part III are registered.**—The provisions of Sections 62 and 63, as to the form of the register-book, depositing extracts therefrom, allowing searches thereof, and giving copies of the entries therein, shall, mutatis mutandis, apply to the books kept under Section 37.

**65. Part VI not to apply to Roman Catholics.**—This Part of this Act, except so much of Sections 62 and 63 as are referred to in Section 64, shall not apply to marriages between Roman Catholics.

Saving of certain marriages—But nothing herein contained shall invalidate any marriage celebrated between Roman Catholics under the provisions of Part V of Act No. 25 of 1864,[a] previous to the twenty-third day of February, 1865.

[a] Act 25 of 1864 was repealed by Act 5 of 1865 which was repealed by this Act.

## PART VII
## PENALTIES

[a][66. **False oath, declaration notice or certificate for procuring marriage.**—Whoever, for the purpose of procuring a marriage or licence of marriage, intentionally,—

(a) where an oath or declaration is required by this Act, or by any rule or custom of a Church according to the rites and ceremonies of which a marriage is intended to be solemnized, such Church being the Church of England or of Scotland or of Rome, makes a false oath or declaration, or,

(b) where a notice or certificate is required by this Act, signs a false notice or certificate,

shall be deemed to have committed the offence punishable under Section 193 of the Indian Penal Code with imprisonment of either description for a term which may extend to three years and, at the discretion of the Court, with fine.]

[a] Substituted by the Indian Christian Marriage Act (1872) Amendment Act, 1891 (2 of 1891), S. 5 for original Section 66.

**67. Forbidding, by false personation, issue of certificate by Marriage Registrar.**—Whoever forbids the issue, by a Marriage Registrar, of a certificate, by falsely representing himself to be a person whose consent to the marriage is required by law, knowing or believing such representation to be false, or not having reason to believe it to be true, shall be deemed guilty of the offence described in Section 205 of the Indian Penal Code.

[a][68. **Solemnizing marriage without due authority.**—Whoever, not being authorized by Section 5 of this Act to solemnize marriages, solemnizes or professes to solemnize in the absence of a Marriage Registrar of the district in which the ceremony takes place, a marriage between persons one or both of whom is or are a Christian or Christians, shall be punished with imprisonment which may extend to ten years, or (in lieu of a sentence of imprisonment for seven years or upwards) with transportation for a term of not less than seven years, and not exceeding ten years,

[b][* * *]

and shall also be liable to fine.]

[a] Substituted by the Indian Christian Marriage Act (1872), Amendment Act, 1891 (2 of 1891), S. 6 for the original Section 68.

[b] The second para of Sec. 68 was omitted by A. L. O., 1950.

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**Part VII — Note 1**

(1) Sections 66 to 76 apply to all persons, who are not authorized to do so, solemnizing a marriage between Christians and do not apply simply to marriages that take place before the Marriage Registrar. ('71) 14 Mad 342 (351).

**Section 66 — Note 1**

(1) The making of a false oath under Section 66 must be intentional. Hence when a declaration is made under Section 18 that the deponent believed that there was no impediment, it must be satisfactorily proved that the deponent was conscious that he was making a false declaration. ('91) 16 All 212 (216).

**Section 68 — Note 1**

(1) The word "means" in Section 3 is an inclusive term and hence no person except one who professes Christian religion comes within the purview of Section 68. AIR 1918 All 168 (170): 40 All 393: 19 Cri LJ 615.

(2) There is no express prohibition preventing a person professing Christianity from marrying a non-Christian, by non-Christian ceremony, Section 68 does not make it penal for a professing Christian to marry by a ceremony which is void under Section 4. It refers to a class of persons who solemnize or profess to solemnize a Christian marriage under the Act not being authorized by Section 5 to do so. AIR 1918 All 168 (171): 19 Cri LJ 615: 40 All 393.

(3) A Hindu performing a marriage according to the Hindu rites between two persons one of whom is a Christian is guilty under Section 68. ('18) AIR 1918 Mad 601 (603): 18 Cri LJ 840: 40 Mad 1030 (FB). (20 Mad 12,, 6 Mad HCR (App) 20 and 17 Mad 391, Approved.)

(4) The presence of the Registrar at a marriage must be in his capacity of a Registrar and not in his private capacity. ('91) 14 Mad 342 (351).

(5) The present section was substituted by Act 2 of 1891 for the old section under which the words "knowingly solemnizes" were used. In the present section the word "knowingly" has been dropped. ('91) 14 Mad 342 (355).

69. Solemnizing marriage out of proper time, without witnesses.—Whoever knowingly and wilfully solemnizes a marriage between persons one or both of whom is or are a Christian or Christians, at any time other than between the hours of six in the morning and seven in the evening, or in the absence of at least two credible witnesses other than the person solemnizing the marriage, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

**Saving of marriages solemnized under special licence.**—This section does not apply to marriages solemnized under special licences granted by the Anglican Bishop of the Diocese or by his Commissary, nor to marriages performed between the hours of seven in the evening and six in the morning by a Clergyman of the Church of Rome, when he has received the general or special licence in that behalf mentioned in Section 10.

[a][Nor does this section apply to marriages solemnized by a Clergyman of the Church of Scotland according to the rules, rites, ceremonies and customs of the Church of Scotland.]

[a] Inserted by the Indian Christian Marriage Act (1872) Amendment Act, 1891 (2 of 1891), S. 7.

70. Solemnizing, without notice or within fourteen days after notice, marriage with minor.—Any Minister of Religion licensed to solemnize marriages under this Act, who, without a notice in writing, or, when one of the parties to the marriage is a minor and the required consent of the parents or guardians to such marriage has not been obtained, within fourteen days after the receipt by him of notice of such marriage, knowingly and wilfully solemnizes a marriage under Part III, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

71. Issuing certificate, or marrying without publication of notice.—A marriage Registrar under this Act, who commits any of the following offences :—

(1) knowingly and wilfully issues any certificate for marriage, or solemnizes any marriage, without publishing the notice of such marriage as directed by this Act;

marrying after expiry of notice;—[a][(2) after expiration of two months after the copy of the notice has been entered as required by Section 40 in respect of any marriage, solemnizes such marriage;]

solemnizing marriage with minor within fourteen days, without authority of Court, or without sending copy of notice;—(3) solemnizes, without an order of a competent Court authorizing him to do so, any marriage, when one of the parties is a minor, before the expiration of fourteen days after the receipt of the notice of such marriage, or without sending, by the post or otherwise, a copy of such notice to the Senior Marriage Registrar of the district if there be more Marriage Registrar of the district than one, and if he himself be not the Senior Marriage Registrar;

issuing certificate against authorized prohibition;—(4) issues any certificate the issue of wihch has been prohibited, as in this Act provided, by any person authorized to prohibit the issue thereof,

shall be punished with imprisonment for a term which may extend to five years, and shall also be liable to fine.

[a] Substituted by the Indian Christian Marriage Act (1872), Amendment Act 1891 (2 of 1891), S. 8 (1) for the original Cl. (2).

**72. Issuing certificate after expiry of notice, or, in case of minor, within fourteen days after notice, or against authorized prohibition.**—Any Marriage Registrar knowingly and wilfully issuing any certificate for marriage after the expiration of [a][two months] after the notice has been entered by him as aforesaid,

or knowingly and wilfully issuing, without the order of a competent Court authorizing him so to do, any certificate for marriage, where one of the parties intending marriage is a minor, before the expiration of fourteen days after the entry of such notice, or any certificate the issue of which has been forbidden as aforesaid by any person authorized in this behalf,

shall be deemed to have committed an offence under Section 166 of the Indian Penal Code.

[a] Substituted by the Indian Christian Marriage Act (1872), Amendment Act, 1891 (2 of 1891), S. 8 (2) for "three months".

**73. Persons authorized to solemnize marriage (other than Clergy of Churches of England, Scotland or Rome).**—Whoever, being authorized under this Act to solemnize a marriage,

and not being a Clergyman of the Church of England solemnizing a marriage after due publication of banns, or under a licence from the Anglican Bishop of the Diocese or a Surrogate duly authorized in that behalf,

or, not being a Clergyman of the Church of Scotland, solemnizing a marriage according to the rules, rites, ceremonies and customs of that Church,

or, not being a Clergyman of the Church of Rome, solemnizing a marriage according to the rites, rules, ceremonies and customs of that Church,

**issuing certificate, or marrying, without publishing notice, or after expiry of certificates;**—knowingly and wilfully issues any certificate for marriage under this Act, or solemnizes any marriage between such persons as aforesaid, without publishing or causing to be affixed, the notice of such marriage as directed in Part III of this Act, or after the expiration of two months after the certificate has been issued by him;

**issuing certificate for, or solemnizing marriage with minor, within fourteen days after notice;**—or knowingly and wilfully issues any certificate for marriage or solemnizes a marriage between such persons when one of the persons intending marriage is a minor, before the expiration of fourteen days after the receipt of notice of such marriage, or without sending, by the post or otherwise, a copy of such notice to the Marriage Registrar or, if there be more Marriage Registrars than one, to the Senior Marriage Registrar of the district;

**issuing certificate authorizedly forbidden;**—or knowingly and wilfully issues any certificate the issue of which has been forbidden, under this Act, by any person authorized to forbid the issue;

**solemnizing marriage authorizedly forbidden**—or knowingly and wilfully solemnizes any marriage forbidden by any person authorized to forbid the same;

shall be punished with imprisonment for a term which may extend to four years, and shall also be liable to fine.

**74. Unlicensed person granting certificate pretending to be licensed.**—Whoever, not being licensed to grant a certificate of marriage under Part VI of this Act, grants such certificate intending thereby to make it appear that he is so licensed, shall be punished with imprisonment for a term which may extend to five years, and shall also be liable to fine.

[a][Whoever, being licensed to grant certificates of marriage under Part VI of this Act, without just cause refuses, or wilfully neglects or omits, to perform any of the duties imposed upon him by that Part shall be punished with fine which may extend to one hundred rupees.]

[a] Inserted by the Indian Christian Marriage Act (1872), Amendment Act, 1891 (2 of 1891), S. 9.

**75. Destroying or falsifying register-books.**—Whoever, by himself or another, wilfully destroys or injures any register-book or the counterfoil certificates thereof, or any part thereof, or any authenticated extract therefrom,

or falsely makes or counterfeits any part of such register-book or counterfoil certificates,

or wilfully inserts any false entry in any such register-book or counterfoil certificate or authenticated extract,

shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

**76. Limitation of prosecutions under Act.**—The prosecution for every offence punishable under this Act shall be commenced within two years after the offence is committed.

## PART VIII

## MISCELLANEOUS

**77. What matters need not be proved in respect of marriage in accordance with Act.**—Whenever any marriage has been solemnized in accordance with the provisions of Sections 4 and 5, it shall not be void merely on account of any irregularity in respect of any of the following matters, namely :—

(1) any statement made in regard to the dwelling of the persons married, or to the consent of any person whose consent to such marriage is required by law:

(2) the notice of the marriage:

(3) the certificate or translation thereof;

(4) the time and place at which the marriage has been solemnized:

(5) the registration of the marriage.

**78. Corrections of errors.**—Every person charged with the duty of registering any marriage, who discovers any error in the form or substance of any such entry, may, within one month next after the discovery of such error, in the presence of the persons married, or, in case of their death or absence, in the presence of two other credible witnesses, correct the error by entry in the margin, without any alteration of the original entry, and shall sign the marginal entry, and add thereto the date of such correction, and such person shall make the like marginal entry in the certificate thereof.

And every entry made under this section shall be attested by the witnesses in whose presence it was made.

And in case such certificate has been already sent to the [a][Registrar General of Births, Deaths and Marriages], such person shall make and send in like manner a separate certificate of the original erroneous entry, and of the marginal correction therein made.

[a] Substituted by the Births, Deaths and Marriages Registration Act, 1886 (6 of 1886), S. 30 (b), for the words "Secretary to the Local Government".

**79. Searches and copies of entries.**—Every person solemnizing a marriage under this Act, and hereby required to register the same,

and every Marriage Registrar or [a][Registrar General of Births, Deaths and Marriages] having the custody for the time being of any register of marriages, or of any certificate, or duplicate or copies of certificate, under this Act,

shall, on payment of the proper fees, at all reasonable times, allow searches to be made in such register, or for such certificate, or duplicate or copies, and give a copy under his hand of any entry in the same.

[a] Substituted by the Births, Deaths and Marriages Registration Act, 1886 (6 of 1886), S. 30 (b), for the words "Secretary to the Local Government".

**80. Certified copy of entry in marriage-register, &c. to be evidence.**—Every certified copy, purporting to be signed by the person entrusted under this Act with the custody of any marriage-register or certificate, or duplicate required to be kept or delivered under this Act, of any entry of a marriage in such register, or of any such certificate or duplicate, shall be received as evidence of the marriage purporting to be so entered, or of the facts purporting to be so certified therein, without further proof of such register or certificate, or duplicate, or of any entry therein, respectively, or of such copy.

[*][81. Certificates of certain marriages to be sent to Central Government.—The Registrar General of Births, Deaths and Marriages [b][° ° °] shall, at the end of every quarter in each year, select from the certificates of marriages forwarded to [c][him], during such quarter, the certificates of the marriages of which [d][the Government by whom he was appointed] may desire that evidence shall be transmitted to England, and shall send the same certificates, signed by [c][him], to the [*][Central Government].]

[a] Substituted for original Section 81, by the Indian Christian Marriage (Amendment) Act, 1911 (13 of 1911), S. 2.

[b] The words "and the officers appointed under Section 56" were omitted by the Repealing and Amending Act, 1952 (48 of 1952), S. 3 and Sch. II, [2-8-1952].

[c] Substituted for the words "them, respectively," ibid.

[d] Substituted for "the Governor-General in Council," by A. O. 1937.

[e] Substituted "Secretary of State for India" by A.O., 1948.

**82. State Government to prescribe fees.**—Fees shall be chargeable under this Act for—

receiving and publishing notices of marriages;

issuing [a][Certificates for marriage] by Marriage Registrars, and registering marriages by the same;

entering protests against, or prohibitions of, the issue of [b][certificates for marriage] by the said Registrars;

searching register-books or certificates, or duplicates of copies thereof;

giving copies of entries in the same under Ss. 63 and 79.

The [c][State] Government shall fix the amount of such fees respectively, and may from time to time vary or remit them either generally or in special cases, as to it may seem fit.

[a] Substituted by the Repealing and Amending Act, 1903 (1 of 1903), S. 3 and Sch. II for "certificate of marriages".

[b] Substituted for "marriage certificates," ibid.

[c] Substituted by A. L. O., 1950.

**83. Power to make rules.**—The [a][State] Government may make rules[b] in regard to the disposal of the fees mentioned in Sec. 82, the supply of register-books, and the preparation and submission of returns of marriages solemnized under this Act.

[a] Substituted by A. L. O., 1950.

[b] For rules made under Sec. 83 by different Governments, see the different Local Rules and Orders.

**84. Power to prescribe fees and rules for Indian States.**—[Omitted by A.L.O., 1950.]

**85. Power to declare who shall be District Judge.**—The [a][State] Government may, by notification in the Official Gazette, declare who shall in any place to which this Act applies, be deemed to be the District Judge.

[a] Substituted by A. L. O., 1950.

**86. Powers and functions exercisable as regards Indian States.**—[Omitted by A. L. O., 1950.]

**87. Saving of Consular marriages.**—Nothing in this Act applies to any marriage performed by any Minister, Consul, or Consular Agent between subjects of the State which he represents and according to the laws of such State.

**88. Non-validation of marriages within prohibited degrees.**—Nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into.

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**Section 88 — Note 1**

(1) Section 88 does not validate a marriage which would be invalid elsewhere as being against the personal law. AIR 1937 Mad 565 (567, 568).

(2) The words "the personal law applicable to either parties" refer to the personal law of the religious community to which either of the parties belong. AIR 1930 Bom 105 (110): 54 Bom 288.

(3) The prohibitions of personal law referred to by the section are prohibitions which render the marriage inherently bad and not mere impediments which may be remedied at the will of the parties. AIR 1951 All 529 (539): ILR (1951) 2 All 439 (DB) * AIR 1951 Cal 293 (293): ILR (1950) 1 Cal 409 (DB) * AIR 1945 Mad 516 (519): ILR (1946) Mad 367: 47 Cri LJ 421.

(4) By the use of the word "forbid" the section connotes marriages against which there is specific injunction and not those marriages which are merely recognised" by the personal law. AIR 1951 All 529 (539): ILR (1951) 2 All 439 (DB).

(5) An impediment or incapacity which is dependent upon the fact that the marriage is a sacrament or on the form of marriage under the personal law is not what is referred to by the section. AIR 1951 Cal 293 (293): ILR (1950) 1 Cal 409 (DB) * AIR 1930 Bom 105 (111): 54 Bom 288.

(6) The prohibitions contemplated by the section are impediments such as prohibited degrees of consanguinity or affinity which would render the marriage a nullity. AIR 1945 Mad 516 (519): ILR (1946) Mad 367: 47 Cri LJ 421.

(7) A marriage between a Hindu male and a Christian woman performed under the Act is a valid and binding marriage there being nothing in Hindu Law absolutely forbidding such a marriage. AIR 1951 All 529 (539): ILR (1951) 2 All 439 (DB).

(8) A marriage between a Roman Catholic husband and a Jewish wife is not prohibited according to the personal law of the parties. AIR 1951 Cal 293 (293): ILR (1950) 1 Cal 409 (DB).

(9) The canon law which is the personal law of the Roman Catholics does not forbid a marriage between a Catholic and a protestant in the sense that such a marriage would be a nullity and therefore a marriage between them solemnised according to this Act is not a nullity. AIR 1945 Mad 516 (518, 519): ILR (1946) Mad 367: 47 Cri LJ 421.

(10) Divorced Jewes can marry a Christian. ('12) 15 Ind Cas 398 (399) (Cal).

(11) The personal law of a woman belonging to the Roman Catholic Church forbids her to enter into a contract of marriage with a Jew in India who is of the Sephardim and the marriage ceremony undergone by them under the provisions of this Act does not effect a valid marriage. AIR 1949 Cal 563 (565): ILR (1945) 2 Cal 462 .

## SCHEDULE I.

(See Sections 12 and 38.)

## NOTICE OF MARRIAGE.

To a Minister [or Registrar] of

I hereby give you notice that a marriage is intended to be had, within three calender months from the date hereof, between me and the other party herein named and described (that is to say):

| Names. | Condition. | Rank or profession. | Age. | Dwelling place. | Length of residence. | Church, Chapel, or place of worship in which the marriage is to be solemnized. | District in which the other party resides, when the parties dwell in different districts. |
|---|---|---|---|---|---|---|---|
| [James Smith.] | [Widower.] | [Carpenter.] | [Of full age.] | [16, Clive Street.] | [23 days.] | [Free Church of Scotland Church, Calcutta.] | |
| [Martha Green.] | [Spinster.] | ..... | [Minor.] | [20, Hastings Street.] | [More than a month.] | | |

Witness my hand, this day of [seventy-two.]

[Signed] JAMES SMITH.

[The italics [here in bracketed] in this schedule are to be filled up, as the case may be, and the blank division thereof is only to be filled up when one of the parties lives in another district.]

## SCHEDULE II.

(See Sections 24 and 50)

### CERTIFICATE OF RECEIPT OF NOTICE.

I,
do hereby certify that, on the day of , notice was duly entered in my Marriage Notice Book of the marriage intended between the parties therein named and described, delivered under the hand of one of the parties (that is to say):—

| Names. | Condition. | Rank or profession. | Age. | Dwelling place. | Length of residence. | Church, Chapel or place of worship in which the marriage is to be solemnized. | District in which the other party resides, when the parties dwell in different districts. |
|---|---|---|---|---|---|---|---|
| [James Smith.] | [Widower.] | [Carpenter.] | [Of full age.] | [16, Clive Street.] | [23 days.] | [Free Church of Scotland Church, Calcutta.] | |
| [Martha Green.] | [Spinster.] | ..... | [Minor.] | [20, Hastings Street.] | [More than a month.] | | |

and that the declaration [a][or oath] required by section 17 or 41 of the Indian Christian Marriage Act, 1872, has been duly made by the said [James Smith].

Date of notice entered
Date of certificate given } The issue of this certificate has not been prohibited by any person authorised to forbid the issue thereof,

Witness my hand, this day of [seventy-two.]

[Signed]

This certificate will be void, unless the marriage is solemnised on or before the day o

[The italics [here in bracketed.] in the schedule are to be filled up, as the case may be, and the blank division thereof is only to be filled up when one of the parties lives in another district.]

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[a] Inserted by the Repealing and Amending Act (1 of 1903), S. 3.

## SCHEDULE III.

(See Sections 28 and 31).[a]

FORM OF REGISTER OF MARRIAGES.

Quarterly Returns

of

MARRIAGES.

for

The Archdeaconry of ... {Calcutta. / Madras. / Bombay.}

I, , Registrar of the Archdeaconry of {Calcutta, / Madras, / Bombay,} do hereby certify that the annexed are correct copies of the originals and Official Quarterly Returns of Marriage within the Archdeaconry of {Calcutta, / Madras, / Bombay,} as made and transmitted to me for the quarter commencing the day of ending the day of in the year of Our Lord.

[Signature of Registrar.]

Registrar of the Archdeaconry of {Calcutta. / Madras. / Bombay.}

MARRIAGES solemnized at {Allahabad, / Barrackpore, / Bareilly, / Calcutta, &c., &c.}

| WHEN MARRIED. | | | NAMES OF PARTIES. | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Year. | Month. | Day. | Christian. | Surname. | Age. | Condition. | Rank or profession. | Residence at the time of marriage. | Father's name and surname. | By banns or licence. | Signatures of the parties. | Signatures of two or more witnesses present. | Signatures of the person solemnizing the marriage. |
| | | | | | | | | | | | | | |

[a] Substituted by the Amending Act, 1891 (12 of 1891), Sch. II for the original reference.

## SCHEDULE IV.

(See sections 32 and 54.)

MARRIAGE REGISTER BOOK.

| Number. | WHEN MARRIED. | | | NAMES OF PARTIES. | | Age. | Condition. | Rank or profession. | Residence at the time of marriage. | Father's name and Surname. |
|---|---|---|---|---|---|---|---|---|---|---|
| | Day. | Month | Year | Christian name. | Surname. | | | | | |
| 1 | ... | ... | ... | James..... | White... | 26 years. | Widower. | Carpenter. | Agra ... | William White. |
| | | | | Martha.. | Duncan. | 17 years. | Spinster | ... | Agra ... | John Duncan |

Married in the

This marriage was solemnized between us { James White. / Martha Duncan. } in the presence of us { John Smith. / John Green. }

CERTIFICATE OF MARRIAGE.

| Number. | WHEN MARRIED. | | | NAME OF PARTIES. | | Age. | Condition. | Rank or profession. | Residence at the time of marriage. | Father's name anp Surname. |
|---|---|---|---|---|---|---|---|---|---|---|
| | Day. | Month | Year. | Christian name. | Surname. | | | | | |
| 1 | ... | ... | ... | James..... | White... | 26 years. | Widower. | Carponter. | Agra ... | William White. |
| | | | | Martha... | Duncan. | 17 years | Spinster... | ... | Agra ... | John Duncan. |

Married in the

This marriage was solemnized between us { James White. / Martha Duncan. } in the presence of us { John Smith. / John Green. }

## SCHEDULE V.

Enactments Repealed. [Repealed by the Repealing Act, 1938 (1 of 1938), S. 2 and Schedule.]

# [THE] CHURCH OF SCOTLAND KIRK SESSIONS ACT, 1899
## (ACT XXIII OF 1899)[a]

[The text of the Act printed here is as on 1-5-1969.]

[27th September, 1899]

**An Act to provide for the Incorporation of Kirk Sessions of the Church of Scotland in [b][India].**

Whereas there are in [b][India] Kirk of Sessions of the Church of Scotland which have been duly constituted to be Church Courts for ecclesiastical purposes in pursuance of Acts of the General Assembly of the Church of Scotland;

And whereas it is expedient that such Kirk Sessions and any others which may hereafter be so constituted, should be incorporated with the powers hereinafter provided;

It is hereby enacted as follows:—

[a] For Statement of Objects and Reasons, see Gazette of India, 1899, Pt. V, p. 79.

[b] Substituted for "the Provinces" by A.L.O., 1950 [26-1-1950].

**1. Short title and extent.**—(1) This Act may be called THE CHURCH OF SCOTLAND KIRK SESSIONS ACT, 1899;

(2) It extends to the whole of India except [a][the territories which, immediately before the 1st November, 1956, were comprised in Part B States] [b][° °].

[b][(3) ° ° °]

[a] Substituted for the "Part B States" by 2 A.L.O., 1956 [1-11-1956]. Immediately before the 1st November, 1956, the following were Part B States in India:—

Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Pepsu, Rajasthan, Saurashtra and Travancore-Cochin. Of these Part B States, Jammu and Kashmir, Mysore, Rajasthan and Travancore-Cochin, now known as Kerala, with some territories added to them, have become full-fledged States, while Hyderabad, Madhya Bharat, Pepsu and Saurashtra are now parts of the States of Andhra Pradesh, Madhya Pradesh, Punjab and Gujarat, respectively.

[b] The word "and" and sub-sec. (3) were repealed by the Repealing and Amending Act, 1914 (X of 1914), S. 3 and Sch. II.

**2. Scotch Kirk Sessions to be bodies corporate.**—(1) Every Kirk Sessions which has been, or may hereafter be, duly constituted to be a Church Court for ecclesiastical purposes in pursuance of an Act of the General Assembly of the Church of Scotland, is hereby declared to be, and the same shall be, a body corporate having perpetual succession and a common seal.

(2) A notification by the Central Government in the Official Gazette that a Kirk Session has been duly constituted[a] in pursuance of an Act of the General Assembly of the Church of Scotland shall be conclusive proof that it has been so constituted.

[a] For notification declaring the Kirk Sessions at Calcutta, Madras, Bombay and Allahabad to be duly constituted, see Gazette of India, 1900, Pt. I, p. 484; for similar notifications in respect of the Kirk Session at Simla and the Kirk Session at Poona and Kotagiri, see ibid, 1904, Pt. I, p. 831, ibid, 1905, Pt. I, p. 706 and ibid, 1928, Pt. I, p. 632, respectively.

**3. Power to hold and dispose of property.**—(1) Every Kirk Session constituted as aforesaid shall, as a body corporate, have power to acquire and hold any property which has been, or may hereafter be, vested in it for the purposes of the Congregation for which it has been, or may hereafter be, constituted, or of any trust which may have been, or may hereafter be, accepted by it, to transfer the same to contract and to do all other things necessary for, or incidental to, the purposes of its constitution or of any such trust as aforesaid.

(2) The signature of the Moderator and Treasurer or Session-clerk for the time being of a Kirk Session constituted as aforesaid shall, if affixed on behalf and by order of the Kirk Session, be sufficient for all purposes for which the signature of the Kirk Session is required.

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# [THE] CINEMATOGRAPH ACT, 1918

## (ACT II OF 1918)

[The text of the Act printed here is as on 1-5-1969.]

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## STATEMENT OF OBJECTS AND REASONS

"The Bill is designed to ensure proper control of cinematograph exhibitions with particular regard to the safety of those attending them; and to prevent the presentation to the public of improper or objectionable films. The existing law of the country contains certain scattered provisions, affecting such exhibitions and certain local enactments also bear on the subject; but the rapid growth in the popularity of cinematograph and increasing number of such exhibitions in India have rendered these provisions inadequate for the protection of the public from indecent or otherwise objectionable representations. Further, the special danger from fire which attends cinematograph exhibitions, as has been illustrated by terrible catastrophes due to this cause in other countries, rendered it important to secure, in the interest of safety of spectators, a proper regard to the structural conditions of the premises utilised.

The Bill accordingly provides that no exhibition shall be given except in accordance with the conditions of a license granted by the prescribed authority. The license is intended to ensure that the intentions of the Act are complied with and that adequate precautions are taken for the safety of persons attending the exhibition which it covers. The Bill also provides for the constitution of an authority which will be required to pass all films intended for exhibition in this country and which will have power to refuse the necessary certificate in the case of any film, the production of which in public is open to objection for the reasons already given. The Bill includes the ordinary rule-making provision and enables the Local Governments to exempt any cinematograph exhibition or class of cinematograph exhibitions from any provisions of law. Finally it makes provision for the punishment of offences against the Act or the rules made thereunder."

—Gazette of India, 1917, Part V, page 74.

## ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Amended by Acts 23 of 1919; 38 of 1920; 39 of 1949; 62 of 1949; 3 of 1951.
—Amended in U.P. by U.P. Act 7 of 1942.
—Adapted by A.O., 1937; A.C.A.O., 1948; A.L.O., 1950.
—Extended by Acts 59 of 1949; 30 of 1950
—in Bombay by Bom. Act 4 of 1950;
—in Madhya Pradesh by M.P. Act 12 of 1950;
—in Madras by Mad. Act 35 of 1949;
—Repealed in its application to Union Territories by Act 37 of 1952.
—Repealed in part by Acts 38 of 1920; 37 of 1952;
—in Andhra Pradesh by President's Act 4 of 1955 as amended by Andhra Pradesh Act 23 of 1958;
—in Assam by Assam Act 14 of 1953;
—in Bihar by Bihar Act 15 of 1954;

—in Bombay (i.e., Maharashtra and Gujarat) by Bombay Act 11 of 1953; Bombay Act 11 of 1953 read with Gujarat Act 40 of 1961;
—in Madhya Pradesh by M.P. Act 17 of 1952;
—in Madras by Madras Act 9 of 1955;
—in Orissa by Orissa Act 2 of 1954;
—in Punjab (i.e., Haryana, Punjab and Union Territory of Chandigarh and Added Territories in Himachal Pradesh) by Punjab Act 11 of 1952;
—in Uttar Pradesh by U.P. Act 3 of 1956;
—in West Bengal by West Bengal Act 39 of 1954.

## COGNATE ACTS AND PROVISIONS

1. Cinematograph Act, 37 of 1952.
2. Petroleum Act, 30 of 1934.

# [THE] CINEMATOGRAPH ACT, 1918 (ACT II OF 1918)[a]

[6th March, 1918.]

**An Act to make provision for regulating exhibitions by means of Cinematographs.**

Whereas it is expedient to make provision for regulating exhibitions by means of cinematographs; It is hereby enacted as follows:—

[a] For Report of Select Committee, see Gazette of India, 1918, Pt. V, p. 11; and for Proceedings in Council, see ibid, 1917, Pt. VI, p. 703, and ibid, 1918, Pt. VI, pp. 38, 94 and 275.

This Act has been extended to the new Provinces and merged States by the Merged States (Laws) Act, 1949 (59 of 1949), S. 3 (1-1-1950) and to the Union territories of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act, 1950 (30 of 1950), S. 3 (16-4-1950). Vindhya Pradesh now forms part of the State of Madhya Pradesh—see Act 37 of 1956, S. 9 (1) (e).

This Act is extended to the States merged in the States of—
Bombay: see Bombay Act 4 of 1950;
Madhya Pradesh: see Madhya Pradesh Act 12 of 1950;
Tamil Nadu: see Madras Act 36 of 1949.

This Act is repealed by S. 18 of the Cinematograph Act, 1952 (37 of 1952): "Provided that in relation to Part A States and Part B States the repeal shall have effect only in so far as the said Act relates to the sanctioning of the cinematograph films for exhibition."

This Act, however, is applicable to the Union Territories only.

This Act, in so far as it relates to the regulation of exhibition by means of cinematograph (including licensing of places in which cinematograph films are exhibited) is repealed in its application to the State of—

Andhra Pradesh: see President's Act 4 of 1955 (as amended by Andhra Pradesh Act 23 of 1958), S. 13;
Assam: See Assam Act 14 of 1953, S. 12;
Bihar: see Bihar Act 15 of 1954, S. 11;
Gujarat: see Bombay Act 11 of 1953, S. 11 and Gujarat Act 40 of 1961;
Madhya Pradesh: see M.P. Act 17 of 1952, S. 11;
Madras: see Madras Act 9 of 1955, S. 12;
Maharashtra: See Bombay Act 11 of 1953, S. 11;
Orissa: See Orissa Act 2 of 1954, S. 11.
Punjab: See Punjab Act 11 of 1952, S. 11;

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**Preamble — Note 1**

**(1) The Act, strictly speaking, is not a criminal statute but is designed to regulate exhibition by means of cinematograph and the purpose is largely recreative or educational. AIR 1955 Cal 609 (611): 1955 Cri LJ 1579.**

Haryana: see Act 31 of 1966, S. 88;
Uttar Pradesh: see Uttar Pradesh Act 3 of 1956, S. 12;
West Bengal: see West Bengal Act 39 of 1954, S. 13;
Union Territory of Chandigarh: see Act 31 of 1966, S. 88.
Union Territory of Himachal Pradesh—Added Territories—See Act 31 of 1966, Ss. 5 and 88.

**1. Short title, extent and commencement.**—(1) This Act may be called THE CINEMATOGRAPH ACT, 1918.

[a][(2) It extends to all Part A States and Part C States, and also to every Part B State,[b] other than [c][° °] Jammu and Kashmir, in so far as it relates to sanctioning of cinematograph films for exhibition.[d]]

[a] Substituted for former sub-sections (2) and (3) by the Cinematograph (Second Amendment) Act, 1949 (62 of 1949), S. 2, as adapted by A.L.O., 1950.

[b] Immediately before the 1st of November, 1956, the following were the States in India:—

Part A States—Andhra, Assam, Bihar, Bombay, Madhya Pradesh, Madras, Orissa, Punjab, Uttar Pradesh and West Bengal; (Bombay has now been split up into two States, Maharashtra and Gujarat; whereas Punjab State now stands divided into two States of Punjab and Haryana and the Union Territory of Chandigarh; two districts of Lahaul and Spiti and few other areas have been transferred to the Union Territory of Himachal Pradesh).

Part B States—Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Pepsu, Rajasthan, Saurashtra and Travancore and Cochin; of these Jammu and Kashmir, Mysore, Rajasthan and Travancore-Cochin (Kerala) are full-fledged States now while Pepsu is merged in Punjab, Madhya Bharat in Madhya Pradesh, Saurashtra with Gujarat and Hyderabad in Andhra Pradesh.

Part C States—Ajmer, Bhopal, Bilaspur, Coorg, Delhi, Himachal Pradesh, Kutch, Manipur, Tripura and Vindhya Pradesh. The Part C States are Union Territories now. Only Himachal Pradesh, Manipur, Delhi and Tripura are as such now, Bhopal and Vindhya Pradesh having gone to Madhya Pradesh State, Ajmer to Rajasthan, Coorg to Mysore, Kutch to Gujarat and Bilaspur has merged with Himachal Pradesh.

[c] The words "Hyderabad and" were omitted by the Part B States (Laws) Act, 1951 (3 of 1951), S. 3 and Schedule.

[d] For the State law relating to licensing and regulation of cinemas (a State subject under the Constitution of India), see the State Acts indicated in foot-note [a] under the Preamble of this Act.

**2. Definitions.**—In this Act, unless there is anything repugnant in the subject or context,—

[a]["adult" means a person who has completed his eighteenth year;]

[b]["Authority" means the Authority constituted by the Central Government under Section 6;]

"cinematograph" includes any apparatus for the representation of moving pictures or series of pictures;

"place" includes also a house, building, [c][tent or any description of transport, whether by sea, land or air;] and

"prescribed" means prescribed by rules made under this Act.

[a] Inserted by the Cinematograph (Amendment) Act, 1949 (39 of 1949), S. 2 [1-9-1949].

[b] Inserted by the Cinematograph (Second Amendment) Act, 1949 (62 of 1949), S. 3 (i) [15-1-1951].

[c] Substituted for "tent or vessel", ibid, S. 3 (ii).

[a][2A. **Rule of construction in the application of Act to Part B States**[c].—In the application of this Act to any [c][Part B State], unless there is anything repugnant in the subject or context,—

[b][(a) ° ° ° ° ]

(b) references to the District Magistrate shall be construed as references to the corresponding authority in the [c][Part B State]; and

[b][(c) ° ° ° ° ] ].

[a] Inserted by the Cinematograph (Second Amendment) Act, 1949 (62 of 1949), S. 4 (15-1-1951).

[b] Clauses (a) and (c) were omitted by A.L.O., 1950.

[c] There are no such States now.

**3. Cinematograph exhibitions to be licensed.**—Save as otherwise provided in this Act, no person shall give an exhibition by means of a cinematograph elsewhere than in a place licensed under this Act or otherwise than in compliance with any conditions and restrictions imposed by such licence.

**4. Licensing authority.**—The authority having power to grant licences under this Act (hereinafter referred to as the "licensing authority") shall be the District Magistrate, or, in a presidency town [a]° ° °, the Commissioner of Police:

Provided that the [b][State Government] may, by notification in the °[Official Gazette], constitute for the whole or any part of a °[State] such other authority as it may specify in the notification to be the licensing authority for the purposes of this Act.

[a] The words "or in the town of Rangoon" were repealed by A.O., 1937.

[b] Substituted by A.L.O., 1950.

**5. Restrictions on powers of licensing authority.**—(1) The licensing authority shall not grant a licence under this Act, unless it is satisfied that—

(a) the rules made under the Act have been substantially complied with; and

(b) adequate precautions have been taken in the place in respect of which the licence is to be given to provide for the safety of persons attending exhibitions therein.

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**Section 3 — Note 1**

(1) The prohibition in Section 3 that no person shall give an exhibition by means of cinematograph at any place other than a place licensed under this Act seems to be absolute and imperative and no one can be heard to say that although he did not have the necessary licence still he did not have the guilty mind when he gave or permitted the shows without a licence. AIR 1955 Cal 609 (611): 1955 Cri LJ 1579.

(2) The mere fact that a person was a licensee in respect of the talkie house or the fact that he had before the expiry of the last licence applied for its renewal or even the fact that somebody else as his lessee was in actual management of the show cannot be a valid defence or a plea in bar of a prosecution for contravention of the provisions of Section 3. AIR 1955 Cal 609 (611): 1955 Cri LJ 1579.

**SECTION 5 — SYNOPSIS**

**1. "Subject to the control of the State Government."**

**2. Grant and cancellation of licenses.**

**1. "Subject to the control of the State Government."** — (1) Section 5 (3) circumscribes the power of the licensing authority, and clearly lays down that such power is subject to the provisions of the section and the control of the State Government. The control of the "State Government" must have reference to the grant of the licences. AIR 1952 Mad 120 (121): ILR (1953) Mad 636 (DB).

(2) The power of control of the State Government extends over the whole range of the power to grant licences and the word "control" has a very wide connotation. The Statute does not in any way delimit the ambit of controlling power. AIR 1957 Andh Pra 513 (514): ILR (1956) Andh Pra 413 (DB).

(3) The word 'control' is not confined to mere regulation. It is more comprehensive and includes domination or command over an inferior. The 'control' envisaged in the section is not confined to the issuing of mere general directions; it includes an interference on the part of the State Government with the individual decision of a particular case by the District Magistrate. AIR 1956 All 99 (100): ILR (1956) 1 All 682 (DB).

(4) Anything ancillary to what has to be done by the licensing authority is

[a][(2) The grant of every licence shall be subject to the conditions that the licensee will not exhibit or permit to be exhibied, in such place—

(a) any film other than a film which has been certified by the Authority as suitable for unrestricted public exhibition or for public exhibition restricted to adults, and which, when exhibited, displays the prescribed mark of that Authority, and has not been altered or tampered with in any way since such mark was affixed thereto;

(b) any film which has been certified by the Authority as suitable for public exhibition restricted to adults to any person who is not an adult;

(c) any film contrary to any directions that may be issued from time to time in this behalf by the Central Government under sub-section (2A);

and such conditions shall be deemed to be inserted in every licence.

(2A) The Central Government may from time to time issue directions to licensees generally, or to any licensee, in particular, for the purpose of regulating the exhibition of any film or class of films so that scientific films, films intended for educational purposes, films dealing with news and current events, documentary films or indigenous films secure an adequate opportunity of being exhibited.]

(3) Subject to the foregoing provisions of this section, and to the control of the [b][State Government], the licensing authority may grant licences under this Act to

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**Section 5 — Note 1 (contd.)**

also within the scope of the control vested in the Government by Section 5 (3). AIR 1957 Mad 684 (686): 1957 Cri LJ 737. (The instructions given by the Government in their memorandum, dated 27-6-1950 were intra vires.)

(5) The words in Section 5 (3), "to such persons as it thinks fit" and "such terms and conditions and . . . . . such restrictions as it may determine" do not necessarily detract from the power of the State Government to give directions to the licensing authority in regard either to the "persons" or to the "terms, conditions and restrictions." AIR 1957 Andh Pra 513 (514): ILR (1956) Andh 413 (DB).

(6) The expression "subject to the control of the State Government" is wide enough to empower the Government to issue appropriate instructions to the licencing authority. But it is not within the competence of the State Government to issue an executive instruction which if it were issued as a statutory rule, would be beyond their rule-making power contained in S. 9(3). AIR 1955 Andh 123 (126, 127). (The executive instruction and R. 11-A in G. O. Ms. No. 734, dated 12th July, 1954, being integral parts of the same Order it was very difficult to separate the instruction from the rule and as the rule itself was ultra vires it could not operate as a valid instruction purporting to have been issued under S. 5(3).)

(7) Section 5(3) gives to the State Government a power to interfere after the District Magistrate has himself exercised his discretion. AIR 1956 All 99 (100) : ILR (1956) 1 All 682 (DB).

(8) The power of the licencing authority to issue licences under S. 5(3) being subject to the control of the State Government the latter has the power to direct the licensing authority to grant a licence to a particular individual. It may set aside the orders of the licencing authority and issue any directions in this respect which it may consider to be fit and proper. AIR 1955 All 82 (84, 85) : ILR (1955) 2 All 37.

(9) There is nothing which prevents the Government from issuing directions at variance with their own prior orders, when such orders do not constitute rules or regulations made under statutory authority. AIR 1957 Andh Pra 513 (515) : ILR (1956) Andh 413 (DB).

(10) The Act does not bind the State Government to issue notices to the parties before it exercises its control. The directions issued by the State Government are neither judicial nor quasi-judicial. They are purely administrative directions and unless the Statute required that it should exercise those powers after giving notice to the parties concerned it cannot be held that the action of the State Government was illegal or unauthorised. AIR 1956 All 99 (100) : ILR (1956) 1 All 682 (DB).

(11) Instructions issued by Government to licencing authorities to restrict number of touring cinemas in places where there were permanent cinemas in order to prevent unhealthy competition and to ensure public safety, held did not contravene Article 19 of the Constitution. AIR 1952 Mad 528 (529) (DB).

(12) An order directing that the cinema house should be closed at 12-30 A. M. and no show should be run beyond that hour does not amount to an unreasonable restriction on the right of the cinema exhibitor to carry on his business. ('55) 21 Cut LT 468 (469) (DB).

(13) An order relating to compulsory exhibition of approved films of a certain minimum length constitutes a seri-

such persons as it thinks fit, and on such terms and conditions and subject to such restrictions as it may determine.

[a] Substituted for sub-secs. (2) and (2A) by the Cinematograph (Second Amendment) Act, 1949 (62 of 1949), S. 5 [15-1-1951].

[b] Substituted by A.L.O., 1950.

[a][6. **Certification of films.**—(1) The Central Government may, by notification in the official Gazette, constitute an Authority in the prescribed manner for the purpose of examining and certifying films as suitable for unrestricted public exhibition or for public exhibition restricted to adults, and prescribe the manner in which the Authority shall exercise the powers conferred on it by this Act.

(2) If the Authority after examination considers that a film is suitable for unrestricted public exhibition or that, although not suitable for such exhibition, it is suitable for public exhibition restricted to adults, it shall grant to the person applying for a certificate in respect of the film a "U" certificate in the former case and an "A" certificate in the latter case, and shall in either case cause the film to be so marked in the prescribed manner, and any such certificate shall, save as hereinafter provided, be valid throughout the territories to which this Act extends.

(3) If the Authority is of opinion that a film is neither suitable for unrestricted public exhibition nor for public exhibition restricted to adults, it shall inform the person applying for the certificate of its decision.

(4) Any person applying for a certificate, who is aggrieved by the decision of the Authority refusing to grant a certificate or to grant only an "A" certificate, may, within thirty days from the date of such decision, appeal to the Central Government, and the Central Government may, after such inquiry as it considers necessary, pass such orders thereon as it thinks fit.

(5) If the Central Government rejects an appeal on the ground that a film is neither suitable for unrestricted public exhibition nor for public exhibition restrict-

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**Section 5 — Note 1 (contd.)**

ous encroachment on the right of the exhibitor of cinema to carry on his business. ('55) 21 Cut LT 468 (469) (DB).

(14) Section 5 of the Act generally corresponds with Section 5 of the Punjab Cinemas (Regulation) Act (11 of 1952). Under the provision it is the licensing authority that has to consider the applications for licenses and either to accept them or to reject them. State Government is only an appellate authority and has no jurisdiction to decide applications directly. AIR 1966 SC 1081 (1084).

(15) Section 5 of the Act corresponds with Section 5 of the Rajasthan Cinema Regulations Act (3 of 1952). State Government can direct grant of a licence in a specific case and it is obligatory on the licensing authority to carry out the order. ILR (1962) 12 Raj 44 (49).

**2. Grant and cancellation of licences.**—(1) In cases where a license is granted under the instructions of the State Government, it matters very little as to who signed the order or the actual license. The authority granting the license in such a case is really the State Government and the function of the licensing authority becomes merely a ministerial function. AIR 1955 All 82 (85): ILR (1955) 2 All 37.

(2) There is no statutory provision for a notice before the grant of a licence to a new entrant. There is also no reason why the State Government or the District Magistrate cannot exercise the power to grant a license to a new entrant without notice to the other licensees. AIR 1957 Andh Pra 513 (514): ILR (1956) Andhra 413 (DB).

(3) The order of the Government granting license is executive. It is not incumbent on State Government to hear persons who want licenses for running cinema houses. AIR 1955 All 82 (86): ILR (1955) 2 All 37.

(4) If a person has no right to obtain a license in his favour it is not for him to question whether the license actually issued to another person is valid or invalid. AIR 1956 All 99 (100): ILR (1956) 1 All 682 (DB).

(5) If there is an irregularity in the issuing of the license that can be cured at any time by the District Magistrate appending his signature thereto. AIR 1956 All 99 (100): ILR (1956) 1 All 682 (DB).

(6) A license, validly issued to the petitioners under S. 5 (3) by licensing authority when there was no rule or executive instruction or order of the nature contained in G. O. Ms. No. 734, dated 12th July, 1954, could not be cancelled because of the fact that the Government chose to issue instructions at a later date. ('55) AIR 1955 Andhra 123 (127).

ed to adults, it shall, by notification in the official Gazette, direct that the film shall be deemed to be an uncertified film in the whole of the territories to which this Act extends.

(6) For the purpose of disposing of any appeal under this section, the Central Government may demand the exhibition of any film before any authority specified in this behalf.

(7) Notwithstanding anything contained in this Act, the Central Government may, of its own motion, by notification in the official Gazette, direct that—

(a) a certified film shall be deemed to be an uncertified film in the whole or any part of the territories to which this Act extends, or

(b) a film in respect of which a "U" certificate has been granted shall be deemed to be a film in respect of which an "A" certificate has been granted.

Explanation.—The grant of an "A" certificate in respect of any film shall not be deemed to prohibit the exhibition thereof to children below the age of three].

[a] Sections 6 to 11 were substituted by the Cinematograph (Second Amendment) Act, 1949 (62 of 1949), S. 6 (15-1-1951).

[a][**7. Power of [b][State] Government or local authority to suspend exhibition of films in certain cases.**—(1) The [b][State] Government, in respect of the whole [b][State] or any part thereof, and the District Magistrate or the Commissioner of Police, in respect of the district or town within his jurisdiction, may, if it or he is of opinion that any film, which is being publicly exhibited, is likely to cause a breach of the peace, by order suspend the exhibition of any film, and during such suspension the film shall be deemed to be an uncertified film in the [b][State] or the district or town, as the case may be.

(2) Where an order under sub-section (1) has been issued by a District Magistrate or a Commissioner of Police, a copy thereof, together with a statement of reasons therefor, shall forthwith be forwarded by the person making the same to the [b][State] Government and the [b][State] Government may either confirm or discharge the order.

(3) No order made under this section shall remain in force for more than two months, but the [b][State] Government may, if it is of opinion that any such order should continue in force for a further period, refer the matter to the Central Government for decision.

(4) On receipt of any reference under sub-section (3), the Central Government may, by notification in the official Gazette, direct that the period of suspension shall be extended by such further period as it thinks fit or that the film shall be deemed to be an uncertified film in the whole or any part of the territories to which this Act extends].

[a] See foot-note [a] under Section 6.

[b] Substituted by A.L.O., 1950.

[a][**8. Penalties.**—(1) If the owner or person in charge of a cinematograph uses the same or allows it to be used, or if the owner or occupier of any place permits that

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**Section 7 — Note 1**

(1) No conditional order is contemplated by the section. Only an unqualified and absolute order of suspension of censor certificate can be passed by the Commissioner of Police. ('52) AIR 1952 Cal 653 (654).

**Section 8 — Note 1**

(1) If the owner suffered the shows to be held and did not take steps to prevent such shows he must be held to have permitted them within the meaning of Section 8; and the shows having been held at a place which was not licensed under Section 3 of the Act, the owner cannot possibly escape the consequence by pleading circumstances in exoneration which might suggest absence of guilty mind. The mere fact that somebody else was in actual charge or management of the shows cannot be pleaded in exoneration of the charge. ('55) AIR 1955 Cal 609 (612): 1955 Cri LJ 1579.

(2) Where a term of the licence for running a talkie is that it should not be assigned or transferred or sub-let, a partnership entered into with reference

place to be used, in contravention of the provisions of this Act or the rules made thereunder, or of the conditions and restrictions upon, or subject to, which any licence has been granted under this Act, he shall be punishable with fine which may extend to one thousand rupees, and, in the case of a continuing offence, with a further fine which may extend to one hundred rupees for each day during which the offence continues, and his licence, if any, shall be liable to be revoked by the licensing authority.

(2) The exhibition of a film contrary to any order or direction under sub-section (5) or sub-section (7) of Section 6 or Section 7 shall, in the area to which such order or direction relates, be deemed to be a contravention of the conditions mentioned in sub-section (2) of Section 5 and shall be punishable as provided in this section.

(3) If any person is convicted of an offence punishable under this Act committed by him in respect of any film, the convicting Court may further direct that the film shall be forfeited to the Government.]

[a] See foot-note [a] under Section 6.

[a][9. **Power to make rules.**—(1) The Central Government may make rules[b] for the purpose of carrying into effect the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, rules made under this section may provide for—

(a) the manner in which the Authority shall be constituted;

(b) the delegation of any of the powers of the Authority to such person or persons as the Authority may nominate in this behalf;

(c) the procedure of the Authority for examining and certifying films as suitable for public exhibition, and all matters ancillary thereto and the fees to be levied by such Authority;

(d) the appointment of officers subordinate to the Authority and the regulation of the powers and duties of such officers;

(e) the conditions subject to which any certificate may be granted under this Act or the circumstances in which any certificate shall be refused;

(f) the manner in which any appeal under this Act may be preferred;

(g) any other matter which by this Act is to be prescribed.

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**Section 8 — Note 1 (contd.)**

to the subject-matter of the license is illegal by reason of such term even though it may not be punishable under Section 8. ('55) AIR 1955 Mad 536 (539): ILR (1954) Mad 1013 (DB).

(3) Where a licence for showing cinema films was revoked on the ground of breach of conditions of license but the conditions of which breach was complained were not stated nor was there any indication as to how the officer was satisfied that the breach had been committed and the licensee was not given any opportunity to be heard and there were also subsequent interpolations and additions in the license — Held, that the order revoking the license was unjust, illegal and without jurisdiction. AIR 1957 Assam 47 (49) (DB).

**Section 9 — Note 1**

(1) The conditions that the licensee should exhibit at each performance one or more approved films of such length and for such length of times as the Provincial Government or the Central Government may, by general or special order direct or the licensee should exhibit at the commencement of each performance not less than 2,000 ft. of one or more approved films do not amount to reasonable restrictions within the meaning of Article 19 (6) and are, therefore, void. AIR 1954 SC 747 (749): 1955 SCR 686. (AIR 1952 Mad 120, Reversed.)

(2) Even though Section 11, Bihar Cinemas (Regulation) Act, 1954, has repealed the Cinematograph Act, 1918 in its application to the State of Bihar, still the rules made by the State Government in exercise of the power conferred by Section 8 (2) (a) and (c) of the Cinematograph Act, 1918, (corresponding to Section 9) continue to have legal existence and validity because of the provisions of Section 27 of the Bihar and Orissa General Clauses Act. Hence it is open to the State Government to direct the District Magistrate under Rule 43 made under Section 8 (2) (a) and (c) of the Act of 1918 to grant a renewal to the petitioner of his licence beyond the period exceeding six months. AIR 1957 Pat 665 (666) (DB).

(3) The [c][State] Government may make rules to provide for the regulation of cinematograph exhibitions for securing the public safety.

(4) All rules made under this Act shall be published in the official Gazette, and on such publication shall have effect as if enacted in this Act.

(5) All rules made by the Central Government under this Act shall be laid before [d][Parliament] as soon as may be after they are made.]

[a] See foot-note [a] under Section 6.

[b] For the Cinematograph (Censorship) Rules, 1951, see Gazette of India, 1951, Extra., Pt. II, Sec. 3, p. 1. See also the Cinematograph Film Rules, 1948, made under the power conferred by Sections 4 (1) and 29 of the Petroleum Act, 1934 and published in Gazette of India, 1948, Pt. I, p. 384.

[c] Substituted by A.L.O., 1950.

[d] Substituted for "the Dominion Legislature" by A. L. O., 1950.

[a][**10. Power to give directions.**—The Central Government may give directions to any [b][State] Government as to the carrying into execution in the [b][State] of any of the provisions contained in this Act or of any rules or orders made thereunder.]

[a] See foot-note [a] under Section 6.

[b] Substituted by A.L.O., 1950.

[a][**11. Power to exempt.**—The Central Government may, by order in writing, exempt,[b] subject to such conditions and restrictions as it may impose, any cinematograph exhibition or class of cinematograph exhibitions from any of the provisions of this Act or of any rule made thereunder.]

[a] See foot-note [a] under Section 6.

[b] For general exemptions, see Gazette of India, 1952, Pt. II, Sec. 3, pp. 1578, 1580.

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# [THE] CINEMATOGRAPH ACT, 1952
## (ACT XXXVII OF 1952)

[The text of the Act printed here is as on 1-5-1969.]

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(3) Instructions issued by the Government to licensing authorities to restrict number of touring cinemas do not amount to rules framed under Section 8 (corresponding to Section 9) and so the question whether they go beyond the rule-making power contained in S. 8 does not arise. AIR 1952 Mad 528 (529) (DB).

(4) The words "representation" "hearing" and "examine" in Rule 10 (3) make it clear that the duty of the Board is to determine and adjudge right of parties upon an examination of the facts and circumstances and upon hearing the parties affected. AIR 1952 Cal 653 (656).

(5) Rule 11-A is neither within the intendment of Section 9 (3), Cinematograph Act nor within the object of the Act as stated in the preamble. The rule is ultra vires the powers of the State Government and has not been validly made. Since the rule is bad as a statutory rule there can be no question of either its prospective or retrospective operation. AIR 1955 Andhra 123 (126).

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## STATEMENT OF OBJECTS AND REASONS

"The Cinematograph Act, 1918 as it stands, is of mixed content, dealing with two separate matters, namely (a) examination and certification of films as suitable for public exhibition and (b) regulation of cinemas including their licensing. In the Seventh Schedule of the Constitution, "Sanctioning of cinematograph films for exhibition" has been included in Entry 60 of the Union List and "Cinemas, subject to the provisions of Entry 60 of List I" in Entry 33 of the State List. Some of the sections of the Cinematograph Act, therefore, concern the Central Government, some the State Governments and others both the Central and State Governments. Some sections of the Act were amended in 1949, but only for the introduction of "A" and "U" certificates and centralisation of censorship. In the absence of a clear demarcation of the respective provisions of the Act with which the Central and State Governments are concerned, various difficulties are arising in the administration of the Act. The purpose of the present Bill is to resolve the confusion by re-enacting the provisions of the Act of 1918, as amended in 1949, separating the provisions relating to the sanctioning of films for exhibition (a Union subject) from the provisions relating to licensing and regulation of cinemas (a State subject)".

—Gaz. Ind., 1951, Pt. II-S. 2, page 220.

## ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted in Bombay by A.O., 1957.
—Amended by Acts 19 of 1953; 36 of 1957; 3 of 1959; 58 of 1960.
—Repealed in part by Gujarat Act 40 of 1961.

# [THE] CINEMATOGRAPH ACT, 1952
## (ACT XXXVII OF 1952)[a]

[21st March, 1952.]

**An Act to make provision for the certification of cinematograph films for exhibition and for regulating exhibitions by means of cinematographs.**

Be it enacted by Parliament as follows:—

[a] For Statement of Objects and Reasons, see Gazette of India, 1951, Pt. II, Sec. 2, p. 220.

## PART I
## PRELIMINARY

**1. Short title, extent and commencement.**—(1) This Act may be called THE CINEMATOGRAPH ACT, 1952.

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**Preamble — Note 1**

(1) The Act is for regulating exhibitions by means of cinematographs. Permanent cinema-owner and touring cinema-owner are two distinct classes and in regulating them by two distinct sets of rules there can be no discrimination. A touring cinema owner cannot claim equality in all respects with a permanent cinema owner. However, prohibiting a touring cinema on the ground that there is a permanent cinema in the place, is extremely unreasonable and thwarts the provisions of the Act. AIR 1967 Punj 219 (223, 224).

**Section 1 — Note 1**

(1) Section 1 (2) shows that as far as granting of licenses is concerned this Act does not apply to U. P. which is Part A

(2) Parts I, II and IV extend to the whole of India except the State of Jammu and Kashmir and Part III extends[a] to [b][the Union territories] only.

(3) This Act shall come into force on such date[c] as the Central Government may, by notification in the official Gazette, appoint.

[a] The Act has been extended to the Union territories of Dadra and Nagar Haveli by Reg. 6 of 1963 (w.e.f. 1-7-1965) and to that of Goa, Daman and Diu, by Reg. 11 of 1963 (w.e.f. 10-7-1964).

[b] Substituted for "Part C States" by Act 3 of 1959, S. 2 (12-3-1959).

[c] The date so appointed is 28-7-1952; see S.R.O. 1066 published in Gazette of India, 1952, Pt. II, Sec. 3, p. 945.

[Note.—Sub-section (2) of Sec. 1 and Secs. 11, 12, 13, 16 and 17 were amended by Bombay A.L.O., 1957, so as to make Part III applicable to 'Kutch area' of that State. After Bombay Reorganisation, Kutch area had gone to the State of Gujarat. By Gujarat Act 40 of 1961 Bombay Cinema (Regulation) Act, 1953 (Bom. Act 11 of 1953), has been extended to the whole State of Gujarat and while doing so Part III of this Act which was made applicable to Kutch area by Bombay A.L.O., 1957, has been repealed from the date of extension of that Act, i.e., with effect from 10-12-1962. Similarly, Part III of the Act as extended to Coorg District which was merged with the State of Mysore has been repealed by the Mysore Act 23 of 1964, Section 23.]

**2. Definitions.**—In this Act, unless the context otherwise requires,—

(a) "adult" means a person who has completed his eighteenth year;

(b) "board" means the Board of Film Censors constituted by the Central Government under Section 3;

(c) "cinematograph" includes any apparatus for the representation of moving pictures or series of pictures;

(d) "district magistrate", in relation to a presidency-town, means the commissioner of police;

[a][(dd) "film" means a cinematograph film;]

(e) "place" includes a house, building, tent and any description of transport, whether by sea, land or air;

(f) "prescribed" means prescribed by rules made under this Act.

[a] Inserted by the Cinematograph (Amendment) Act, 1959 (3 of 1959), S. 3 [12-3-1959].

## PART II

## CERTIFICATION OF FILMS FOR PUBLIC EXHIBITION

[a][**3. Board of Film Censors.**—(1) For the purpose of sanctioning films for public exhibition, the Central Government may, by notification in the Official Gazette, constitute a Board to be called the Board of Film Censors which shall consist of a Chairman and not more than nine other members appointed by the Central Government.

(2) The Chairman of the Board shall receive such salary and allowances as may be determined by the Central Government, and the other members shall receive such allowances or fees for attending the meetings of the Board as may be prescribed.

(3) The other terms and conditions of service of the members of the Board shall be such as may be prescribed.]

[a] Substituted for Ss. 3, 4, 5 and 6 by the Cinematograph (Amendment) Act, 1959 (3 of 1959), S. 4 (12-3-1959).

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**Section 1 — Note 1 (contd.)**

State. The scheme of the Act of 1952 shows that as far as the subject of the grant of the licenses to exhibit cinema shows is concerned the provisions of the old Act of 1918 are still in force in Part A and Part B States. The other provisions concerning the censorship of the films have been altered by the Act of 1952 and this alteration applies to the whole of India. AIR 1955 All 82 (85): ILR (1955) 2 All 37.

[a][4. **Examination of films.**—(1) Any person desiring to exhibit any film shall in the prescribed manner make an application to the Board for a certificate in respect thereof, and the Board may, after examining or having the film examined in the prescribed manner,—

(i) sanction the film for unrestricted public exhibition; or

(ii) sanction the film for public exhibition restricted to adults; or

(iii) direct the applicant to carry out such excisions or modifications in the film as it thinks necessary before sanctioning the film for unrestricted public exhibition or for public exhibition restricted to adults, as the case may be; or

(iv) refuse to sanction the film for public exhibition.

(2) No action under clause (ii), clause (iii) or clause (iv) of sub-section (1) shall be taken by the Board except after giving an opportunity to the applicant for representing his views in the matter.]

[a] See foot-note [a] under Section 3.

[a][5. **Advisory panels.**—(1) For the purpose of enabling the Board to efficiently discharge its functions under this Act, the Central Government may establish at such regional centres as it thinks fit, advisory panels each of which shall consist of such number of persons, being persons qualified in the opinion of the Central Government to judge the effect of films on the public, as the Central Government may think fit to appoint thereto.

(2) At each regional centre there shall be as many regional officers as the Central Government may think fit to appoint, and rules made in this behalf may provide for the association of regional officers in the examination of films.

(3) The Board may consult in such manner as may be prescribed any advisory panel in respect of any film for which an application for a certificate has been made.

(4) It shall be the duty of every such advisory panel, whether acting as a body or in committees as may be provided in the rules made in this behalf, to examine the film and to make such recommendations to the Board as it thinks fit.

(5) The members of the advisory panel shall not be entitled to any salary but shall receive such fees or allowances as may be prescribed.]

[a] See Foot-note [a] under Section 3.

[a][5A. **Certification of films.**—(1) If, after examining a film or having it examined in the manner provided in this Act, the Board considers that the film is suitable for unrestricted public exhibition or that, although not suitable for such exhibition, it is suitable for public exhibition restricted to adults, it shall grant to the person applying for a certificate in respect of a film a "U" certificate in the former case and an "A" certificate in the latter case, and shall in either case cause the film to be so marked in the prescribed manner.

(2) A certificate granted or an order refusing to grant a certificate in respect of any film shall be published in the Gazette of India.

(3) Subject to the other provisions contained in this Act, a certificate granted by the Board under this section shall be valid throughout India for a period of ten years.]

[a] See Foot-note [a] under Section 3.

[a][5B. **Principles for guidance in certifying films.**—(1) A film shall not be certified for public exhibition if, in the opinion of the authority competent to grant the certificate, the film or any part of it is against the interests of the security of

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**Section 5 — Note 1**

(1) Order under Section 5 (4), by Ministry of Information and Broadcasting, New Delhi, served on petitioner in Bombay — Bombay High Court has no jurisdiction to entertain petition under Article 226. AIR 1955 Bom 381 (387): ILR (1955) Bom 346.

the State, friendly relations with foreign States, public order, decency or morality, or involves defamation or contempt of Court or is likely to incite the commission of any offence.

(2) Subject to the provisions contained in sub-section (1), the Central Government may issue such directions as it may think fit setting out the principles which shall guide the authority competent to grant certificates under this Act in sanctioning films for public exhibition.]

[a] See Foot-note [a] under Section 3.

[a][5C. **Appeals.**—Any person applying for a certificate in respect of a film who is aggrieved by any order of the Board—

(a) refusing to grant a certificate; or

(b) granting only an "A" certificate; or

(c) directing the applicant to carry out any excisions or modifications.

may, within thirty days from the date of such order, appeal to the Central Government, and the Central Government may, after such inquiry into the matter as it considers necessary and after giving the appellant an opportunity for representing his views in the matter, make such order in relation thereto as it thinks fit.]

[a] See Foot-note [a] under Section 3.

[a][6. **Revisional powers of the Central Government.**—(1) Notwithstanding anything contained in this Part, the Central Government may at any stage call for the record of any proceeding in relation to any film which is pending before, or has been decided by, the Board, and after such inquiry into the matter as it considers necessary, make such order in relation thereto as it thinks fit, and the Board shall dispose of the matter in conformity with such order :

Provided that no such order shall be made prejudicially affecting any person applying for a certificate or to whom a certificate has been granted, as the case may be, except after giving him an opportunity for representing his views in the matter.

(2) Without prejudice to the powers conferred on it under sub-section (1), the Central Government may, by notification in the Official Gazette, direct that –

(a) a film which has been granted a certificate shall be deemed to be an uncertified film in the whole or any part of India; or

(b) a film which has been granted a "U" certificate shall be deemed to be a film in respect of which an "A" certificate has been granted; or

(c) the exhibition of any film be suspended for such period as may be specified in the direction :

Provided that no direction issued under Cl. (c) shall remain in force for more than two months from the date of the notification.

(3) No action shall be taken under Cl. (a) or Cl. (b) of sub-sec. (2) except after giving an opportunity to the person concerned for representing his views in the matter.

(4) During the period in which a film remains suspended under Cl. (c) of subsection (2), the film shall be deemed to be an uncertified film.]

[a] See foot-note [a] under S. 3.

[a][6A. **Information and documents to be given to distributors and exhibitors with respect to certified films.**—Any person who delivers any certified film to any distributor or exhibitor shall, in such manner as may be prescribed, notify to the distributor or exhibitor as the case may be the title, the length of the film, the number and the nature of the certificate granted in respect thereof and the conditions, if any, subject to which it has been so granted, and any other particulars respecting the film which may be prescribed.]

[a] Inserted by the Cinematograph (Amendment) Act, 1953 (19 of 1953), S. 3 [16-5-1953].

**7. Penalties for contravention of this Part.**—[a][(1) If any person—

(a) exhibits or permits to be exhibited in any place—

(i) any film other than a film which has been certified by the Board as suitable for unrestricted public exhibition or for public exhibition restricted to adults and which, when exhibited, displays the prescribed mark of the Board and has not been altered or tampered with in any way since such mark was affixed thereto,

(ii) any film, which has been certified by the Board as suitable for public exhibition restricted to adults, to any person who is not an adult, or

(b) without lawful authority (the burden of proving which shall be on him), alters or tampers with in any way any film after it has been certified, or

(c) fails to comply with the provision contained in Section 6A or with any order made by the Central Government or by the Board in the exercise of any of the powers or functions conferred on it by this Act or the rules made thereunder,

he shall be punishable with imprisonment which may extend to three months, or with fine which may extend to one thousand rupees or with both, and in the case of a continuing offence with a further fine which may extend to one thousand rupees for each day during which the offence continues.]

(2) If any person is convicted of an offence punishable under this section committed by him in respect of any film, the convicting Court may further direct that the film shall be forfeited to the Government.

(3) The exhibition of a film, in respect of which an "A" certificate has been granted, to children below the age of three years accompanying their parents or guardians shall not be deemed to be an offence within the meaning of this section.

[a] Sub-section (1) was substituted for old sub-section (1) by the Cinematograph (Amendment) Act, 1953 (19 of 1953), S. 4 [16-5-1953].

[a][7A. **Power of seizure.**—(1) Where a film in respect of which no certificate has been granted under this Act is exhibited, or a film certified as suitable for public exhibition restricted to adults is exhibited to any person who is not an adult or a film is exhibited in contravention of any of the other provisions contained in this Act or of any order made by the Central Government or the Board in the exercise of any of the powers conferred on it, any police officer may, in pursuance of an order made in this behalf by the District Magistrate or by any Magistrate of the first class empowered in this behalf by the District Magistrate, enter any place in which he has reason to believe that the film has been or is being or is likely to be exhibited, search it and seize the film.

(2) All searches under this Act shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1898, relating to searches.]

[a] Sections 7A to 7F were inserted by the Cinematograph (Amendment) Act, 1959 (3 of 1959), S. 5 [12-3-1959].

[a][7B. **Delegation of powers by Board.**—The Central Government may, by general or special order, direct that any power, authority or jurisdiction exercisable by the Board under this Act shall, in relation to such matters and subject to such conditions, if any, as may be specified in the order, be exercisable also by the Chairman or any other member of the Board, and anything done or action taken by the Chairman or other member specified in the order shall be deemed to be a thing done or action taken by the Board.]

[a] See foot-note [a] under S. 7A.

[a][7C. **Power to direct exhibition of films for examination.**—For the purpose of exercising any of the powers conferred on it by this Act, the Central Govern-

ment or the Board may require any film to be exhibited before it or before any person specified by it in this behalf.]

[a] See foot-note [a] under S. 7A.

[a][**7D. Vacancies, etc., not to invalidate proceeding.**—No act or proceeding of the Board or of any advisory panel shall be deemed to be invalid by reason only of a vacancy in, or any defect in, the constitution of the Board or panel, as the case may be.]

[a] See foot-note [a] under S. 7A.

[a][**7E. Members of the Board and advisory panels to be public servants.**—All members of the Board and of any advisory panel shall, when acting or purporting to act in pursuance of any of the provisions of this Act, be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code.]

[a] See foot-note [a] under S. 7A.

[a][**7F. Bar of legal proceedings.**—No suit or other legal proceeding shall lie against the Central Government, the Board, advisory panel or any officer or member of the Central Government Board or advisory panel, as the case may be, in respect of anything which is in good faith done or intended to be done under this Act.]

[a] See foot-note [a] under S. 7A.

**8. Power to make rules.**—(1) The Central Government may, by notification in the Official Gazette, make rules[a] for the purpose of carrying into effect the provisions of this Part.

(2) In particular, and without prejudice to the generality of the foregoing power, rules made under this section may provide for—

(a) the number of persons who may constitute the Board and the manner in which the Board may exercise its powers, including the delegation of any of the powers of the Board to such person or persons as the Board may nominate in that behalf;
(b) the procedure of the Board for examining and certifying films as suitable for public exhibition and all matters ancillary thereto and the fees that may be levied by the Board;
(c) the appointment of officers subordinate to the Board and the regulation of the terms and conditions of service and the powers and duties of such officers;
(d) the conditions (including conditions relating to the length of films in general or any class of films, in particular) subject to which any certificate may be granted, or the circumstances in which any certificate shall be refused;
(e) the manner in which an appeal under this Part may be preferred;
(f) any other matter which by this Act is to be prescribed.

[b][(3) All rules made by the Central Government under this Part shall be laid for not less than thirty days before each House of Parliament as soon as may be after they are made, and shall be subject to such modifications as Parliament may make during the session in which they are so laid or the session immediately following.]

[a] For the Cinematograph (Censorship) Rules, 1958, see Gaz. of Ind., 1958, Pt. II-Sec. 3 (i), p. 920.
[b] Substituted for former sub-section (3) by the Cinematograph (Amendment) Act, 1959 (3 of 1959), S. 6 [12-3-1959].

**9. Power to exempt.**—The Central Government may, by order in writing exempt,[a] subject to such conditions and restrictions, if any, as it may impose, the exhibition of any film or class of films from any of the provisions of this Part or of any rules made thereunder.

[a] For exemptions see Gaz. of Ind., 1952, Pt. II-Sec. 3, pages 1578 to 1581.

## PART III

## REGULATION OF EXHIBITIONS BY MEANS OF CINEMATOGRAPHS

**10. Cinematograph exhibitions to be licensed.**—Save as otherwise provided in this Part, no person shall give an exhibition by means of a cinematograph elsewhere than in a place licensed under this Part or otherwise than in compliance with any conditions and restrictions imposed by such licence.

**11. Licensing authority.**[b]—The authority having power to grant licences under this Part (hereinafter referred to as the licensing authority) shall be the District Magistrate :

Provided that the State Government may, by notification in the Official Gazette, constitute, for the [a][whole or any part of a Union territory] such other authority as it may specify in the notification to be the licensing authority for the purposes of this Part.

[a] Substituted for the words "whole or any part of a Part C State" by the Repealing and Amending Act 1960 (58 of 1960), S. 3 and Sch. II [26-12-1960].

[b] For the State Amendments, see note under S. 1.

**12. Restrictions on powers of licensing authority.**[a]—(1) The licensing authority shall not grant a licence under this Part, unless it is satisfied that—

(a) the rules made under this Part have been substantially complied with, and

(b) adequate precautions have been taken in the place, in respect of which the licence is to be given, to provide for the safety of persons attending exhibitions therein.

### Section 10 — Note 1

(1) As regards the production of the films for exhibition Court can take judicial notice of the fact that the completed production of a film is a highly technical and scientific process which requires the services of persons who are experts in that line — What is finally distributed to the various cinema houses for exhibition is not what existed at the initial stage but it is the story, the plot or the ideas that are worked up and knit into a continuous version that constitutes the entertainment that is catered to the public. ('53) AIR 1953 Mad 269 (271, 272): ILR (1953) Mad 775: 1953 Cri LJ 532 (DB).

### Section 12 — Note 1

(1) Section 12 (4) comprises two categories of films, one consisting of films which may be called 'cultural films' and the other of 'indigenous films'. The policy underlying the enactment is to encourage exhibition of two classes of films (1), cultural and (2) indigenous. The words 'indigenous films' in Section 12 (4) include in their ordinary and accepted sense cultural as well as other films.

Where acting under Section 12 (4) of the Act, the Chief Commissioner of Ajmer issued a notification which, omitting what is not material, was as follows. (1) The licensee shall so regulate the exhibition of cinematograph films that at every performance open to the public, approved films are exhibited . . . . . (2) Only such films produced in India as are certified by the Central Government with the previous approval of the Film Advisory Board, Bombay, to be scientific films, films intended for education purposes, films dealing with news, current events or documentary films shall be deemed to be approved films for the purposes of these directions.

Held, that the words 'produced in India' in the impugned notification, was not to be read as a qualification annexed to the first category of films. but as referable to the second category, and would be perfectly intra vires under Section 12 (4) and that therefore the notification in so far as it requires that cultural films should have been produced in India was within Section 12 (4). AIR 1963 SC 408 (410, 411): (1963) 2 SCR 145. (ILR (1958) 8 Raj 1076, Partly Reversed.)

(2) Section 5 of the Punjab Cinema (Regulation) Act (2 of 1952) corresponds with Section 12 of the Cinematograph Act (1952). It is the licensing authority that has to consider the applications for licences and either to accept or to reject them. State Government in only an appellate authority and has no jurisdiction to decide applications directly. AIR 1966 SC 1081 (1084).

(3) An order rejecting an application for a licence is purely an administrative order and before an application is rejected it is not necessary to give an opportunity to an applicant to represent. AIR 1967 Goa 158 (168).

(4) No objective principles are outlined in Section 12 for the guidance of

(2) Subject to the foregoing provisions of this section and to the control of the State Government, the licensing authority may grant licences under this Part to such persons as that authority thinks fit and on such terms and conditions and subject to such restrictions as it may determine.

(3) Any person aggrieved by the decision of a licensing authority refusing to grant a licence under this Part may, within such time as may be prescribed, appeal to the State Government or to such officer as the State Government may specify in this behalf and the State Government or the officer, as the case may be, may make such order in the case as it or he thinks fit.

(4) The Central Government may, from time to time, issue directions to licensees generally or to any licensee in particular for the purpose of regulating the exhibition of any film or class of films, so that scientific films, films intended for educational purposes, films dealing with news and current events, documentary films or indigenous films secure an adequate opportunity of being exhibited, and where any such directions have been issued those directions shall be deemed to be additional conditions and restrictions subject to which the licence has been granted.

[a] For the State Amendment, see note under S. 1.

**13. Power of Central Government or local authority to suspend exhibition of films in certain cases.**[b]—(1) The Lieutenant Governor or, as the case may be, the Chief Commissioner, in respect of the [a][whole or any part of a Union[b] territory] and the District Magistrate in respect of the district within his jurisdiction, may, if he is of opinion that any film which is being publicly exhibited is likely to cause a breach of the peace, by order, suspend the exhibition of the film and during such suspension the film shall be deemed to be an uncertified film in the State, part or district, as the case may be.

(2) Where an order under sub-section (1) has been issued by the Chief Commissioner or a District Magistrate, as the case may be, a copy thereof, together with a statement of reasons therefor, shall forthwith be forwarded by the person making the same to the Central Government, and the Central Government may either confirm or discharge the order.

(3) An order made under this section shall remain in force for a period of two months from the date thereof, but the Central Government may, if it is of opinion that the order should continue in force, direct that the period of suspension shall be extended by such further period as it thinks fit.

[a] Substituted for the words "whole Part C State or any part thereof" by the Repealing and Amending Act, 1960 (58 of 1960), S. 3 and Sch. II [26-12-1960].

[b] For the State Amendments, see note under S. 1.

**14. Penalties for contravention of this Part.**—If the owner or person in charge of a cinematograph uses the same or allows it to be used, or if the owner or occupier of any place permits that place to be used in contravention of the

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**Section 12 — Note 1 (contd.)**

the licensing authority and the phraseology of Section 12 (2) indicates that the matter rests on the subjective discretion of that authority. Hence nothing laid down in the Act can lead one to conclude that the licensing authority has to act judicially. There is also nothing in the rules framed under the Act to suggest that the licensing authority is bound to act judicially in deciding application for a licence. AIR 1967 Goa 158 (167).

(5) If the licensing authority does not surrender its judgment to the Government, it is entitled in law to give due weight to the opinion of the Government. AIR 1967 Goa 158 (165).

(6) During the pendency of an appeal under Section 12 (3), a writ petition is maintainable. AIR 1967 Goa 158 (161).

provisions of this Part or of the rules made thereunder, or of the conditions and restrictions upon or subject to which any licence has been granted under this Part, he shall be punishable with fine which may extend to one thousand rupees and, in the case of a continuing offence, with a further fine which may extend to one hundred rupees for each day during which the offence continues.

**15. Power to revoke licence.**—Where the holder of a licence has been convicted of an offence under Sec. 7 or Sec. 14, the licence may be revoked by the licensing authority.

**16. Power to make rules.**[a]—The Central Government may, by notification in the Official Gazette, make rules—

(a) prescribing the terms, conditions and restrictions, if any, subject to which licences may be granted under this part;

(b) providing for the regulation of cinematograph exhibitions for securing the public safety;

(c) prescribing the time within which and the conditions subject to which an appeal under sub-section (3) of Section 12 may be preferred.

[a] For the State Amendment, see note under S. 1.

**17. Power to exempt.**[a]—The Central Government may, by order in writing exempt[b], subject to such conditions and restrictions as it may impose, any cinematograph exhibition or class of cinematograph exhibitions from any of the provisions of this Part or of any rules made thereunder.

[a] For the State Amendment, see note under S. 1.

[b] For exemptions, see Gaz. of Ind., 1954, Pt. II-Sec. 3, page 240; ibid, 1955, Pt. II-Sec. 3, page 310.

## PART IV

## REPEAL

**18. Repeal**[a].—The Cinematogarph Act, 1918 (2 of 1918), is hereby repealed :

Provided that in relation to Part A States and Part B States the repeal shall have effect only in so far as the said Act relates to the sanctioning of cinematograph films for exhibition.

[a] Part III of the Act as in force in Kutch Area of the State of Gujarat is repealed with effect from 10-12-1962—Guj. Act 40 of 1961, S. 9. Part III of the Act as in force in Coorg district of Mysore State is repealed by Mys. Act 23 of 1964, S. 23 (5).

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**Section 16 — Note 1**

(1) Rule 15 of Cinematograph Rules (1965) made under Section 16 does not offend Article 14 of the Constitution. AIR 1967 Goa 158 (168).

**Section 17 — Note 1**

(1) The exemptions authorised by the Notification of 1942 issued by the Chief Commissioner of Delhi under Section 9 of the Cinematograph Act of 1918 are not inconsistent with Section 17 of the present Act of 1952 which vests such power in the Central Government. ('57) AIR 1957 Punj 243 (244): ILR (1957) Punj 1373: 1957 Cri LJ 1172 (DB).

**Section 18 — Note 1**

(1) The wording of Section 18 shows that the repeal of the old Act of 1918 is confined to that portion of the old Act which is covered by Part II of the new Act. Section 6 is one of the repealed sections; but the issuing of licences and the procedure provided therefor cannot be said to come within the wording of the repealing section. ('55) AIR 1955 All 82 (85): ILR (1955) 2 All 37.

# [THE] CITIZENSHIP ACT, 1955
## (ACT LVII OF 1955)

[The text of the Act printed here is as on 1-5-1969.]

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THE FIRST SCHEDULE

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## STATEMENT OF OBJECTS AND REASONS

"Articles 5 to 9 of the Constitution determine who are Indian Citizens at the commencement of the Constitution and Article 10 provides for their continuance as such citizens subject to the provisions of any law that may be made by Parliament. The Constitution does not, however, make any provision with respect to the acquisition of citizenship after its commencement or the termination of citizenship or other matters relating to citizenship. Under Article 11, the Constitution expressly saves the power of Parliament to make a law to provide for such matters. It is obviously necessary to make such a law to supplement the provisions of the Constitution and this Bill seeks to achieve this object.

This Bill provides for the acquisition of citizenship, after the commencement of the Constitution, by birth, descent, registration, naturalisation and incorporation of territory. It also makes necessary provisions for the termination and deprivation of citizenship under certain circumstances. The Bill also seeks to formally recognise Commonwealth citizenship and permit the Central Government to extend on a reciprocal basis such rights of an Indian citizen as may be agreed upon to the citizens of other Commonwealth countries and the Republic of Ireland.

The notes on clauses appended to the Bill explain some of the important provisions thereof".

—Gaz. of India, Extra, 2-5-1955, Pt. II, S. 2, page 232.

## ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Amended by Act 65 of 1957.

—Repealed in part by Act 58 of 1960.

## COGNATE ACTS AND PROVISIONS

(1) Constitution of India, Arts. 5 to 11.

(2) Registration of Foreigners Act, 16 of 1939.

(3) Foreigners Act, 31 of 1946.

## [THE] CITIZENSHIP ACT, 1955
## (ACT LVII OF 1955)[a]

[30th December, 1955.]

**An Act to provide for the acquisition and termination of Indian citizenship.**

**Be it enacted by Parliament in the Sixth Year of the Republic of India as follows:—**

[a] For Statement of Objects and Reasons, see Gazette of India, Extraordinary, 2-5-1955, Pt. II, Sec. 2, p. 232.

The Act has been extended to the Union Territory of—

(1) Goa, Daman and Diu by S.O. 847, Gazette of India, 17-3-1962, Pt. II, Sec. 3 (i), Ext., p. 517.

(2) Dadra and Nagar Haveli by S.O. 846, ibid.

(3) Pondicherry — See G. S. R. 1640 Gaz. Ind., 8-12-1962, Pt. II, S. 3 (i), p. 1982.

**1. Short title.**—This Act may be called THE CITIZENSHIP ACT, 1925.

**2. Interpretation.**—(1) In this Act, unless the context otherwise requires,—

(a) "a Government in India" means the Central Government or a State Government;

(b) "citizen", in relation to a country specified in the First Schedule, means a person who, under the citizenship or nationality law for the time being in force in that country, is a citizen or national of that country;

(c) "citizenship or nationality law", in relation to a country specified in the First Schedule, means an enactment of the Legislature of that country which at the request of the Government of that country, the Central Government may, by notification[a] in the Official Gazette, have declared to be an enactment making provisions for the citizenship or nationality of that country:

Provided that no such notification shall be issued in relation to the Union of South Africa except with the previous approval of both Houses of Parliament;

[a] Singapore Citizenship Ordinance, 1957, declared as an enactment making provision for citizenship of Singapore—Gazette of India, Pt. II, Sec. 3 (ii), page 2.

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**Section 1 — Note 1**

(1) The Citizenship Act deals with citizenship after the Constitution came into force and confines it only to natural persons. The Constitution and the Act are completely exhaustive of the citizenship of this country and these citizens can only be natural persons the fact that corporations may be nationals of the country for purposes of International Law will not make them citizens of this country for purposes of Municipal Law or the Constitution. AIR 1963 SC 1811 (1821, 1823, 1835): (1964) 4 SCR 99. (Observations of Mukherjee, J. in AIR 1951 SC 41, held to be obiter; AIR 1954 SC 119 and AIR 1955 SC 661, Considered. AIR 1953 Raj 188, AIR 1961 Cal 258; AIR 1959 Cal 45 and AIR 1953 Assam 177, Impliedly overruled.)

(2) Citizenship Act does not deal with regaining of citizenship already lost under Article 7 of Constitution. AIR 1960 Andh Pra 106 (108): (1959) 2 Andh WR 472 (DB).

(3) The Act provides for citizenship of India after 26-1-1950 by acquisition in five different modes. AIR 1963 Guj 226 (229): (1963) (2) Cri LJ 265: (1963) 4 Guj LR 1073 (DB). (Reversed on facts in AIR 1965 SC 10.)

(4) The question of acquisition of citizenship after the Constitution was not provided for in the Constitution. This was provided for by the Citizenship Act, 1955. The Act does not touch the question of those persons who were citizens or deemed to be citizens at the time of the commencement of the Act, except in the context of the termination of such citizenship. The provisions in the Constitution and this Act supplement each other and have to be read together. AIR 1961 Madh Pra 110 (113, 114): 1961 (1) Cri LJ 516: 1961 Jab LJ 662 (DB).

## SECTION 2 — SYNOPSIS

**1. Sub-section (1) (b) — "Citizen".**

**2. Sub-section (1) (c) — "Citizenship or nationality law".**

**3. Sub-section (1) (f) — "Person".**

**Topic Indicator**

Purpose of definition of "citizen" — See Note 1.

Person migrating from India after 1-3-1947 — See Note 1.

Domicile — See Note 1.

Corporation if a citizen — See Note 3.

**1. Sub-section (1) (b) — "Citizen".** — (1) "Citizen" includes natural persons and not juristic persons like corporations. State Trading Corporation, a company registered under Indian Companies Act, 1956 is not a citizen within the meaning of Article 19 of Constitution and cannot ask for enforcement of fundamental rights granted to citizens under the said article. (Per Majority: Shah and Das Gupta JJ. contra). AIR 1963 SC 1811 (1821, 1823, 1835): (1964) 4 SCR 99. (Observations of Mukherjee J. in AIR 1951 SC 41, held to be obiter, AIR 1954 SC 119 and AIR 1955 SC 661, Considered, AIR 1953 Raj 188, AIR 1961 Cal 258, AIR 1959 Cal 45 and AIR 1953 Assam 177, Impliedly Overruled.)

(d) "Indian consulate" means the office of any consular officer of the Government of India where a register of births is kept, or where there is no such office, such office as may be prescribed;

(e) "minor" means a person who has not attained the age of eighteen years;

(f) "person" does not include any company or association or body of individuals, whether incorporated or not;

(g) "prescribed" means prescribed by rules made under this Act;

(h) "undivided India" means India as defined in the Government of India Act, 1935, as originally enacted.

(2) For the purposes of this Act, a person born aboard a registered ship or aircraft, or aboard an unregistered ship or aircraft of the Government of any country

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**Section 2 — Note 1 (contd.)**

(2) All citizens are nationals of a particular State, but all nationals may not be citizens of the State. In other words, citizens are those persons who have full particular rights and are still domiciled in that country. AIR 1963 SC 1811 (1819): (1964) 4 SCR 99.

(3) The definition of "citizen" or "citizenship or nationality law" given in Section 2 (1) (b) and (c) is for the purpose of placing a restriction on the foreigner who wants to get himself registered as Indian citizen. It is to give effect to the principle of reciprocity that in Section 5 (1), the words "citizen" and "citizenship or nationality law" is expressed in the terms of the definition. AIR 1962 All 383 (387): 1962 (2) Cri LJ 166: 1962 All LJ 123. (AIR 1959 All 79, Dissented from.)

(4) Pakistani national visiting India in 1957 on passport issued by Pakistan authorities is a foreigner. AIR 1959 Madh Pra 387 (389): 1959 Cri LJ 1337: 1961 Jab LJ 24 (DB).

(5) A person who has migrated from India to Pakistan after 1-3-1947 cannot be deemed to be a citizen of India and Articles 15 and 19 of Constitution do not apply to him. Such person cannot challenge Administration of Evacuee Property Ordinance 26 of 1949 as being inconsistent with those Articles. AIR 1951 Mad 930 (932): (1951) 2 Mad LJ 1 (DB).

(6) Mere residence or following a particular profession in India by the father of a minor girl is not conclusive for the purposes of determining his domicile. This is a question of fact to be determined on facts and circumstances of a case. ILR (1958) 8 Raj 893: 1959 Raj LW 322.

**2. Sub-section (1) (c) — "Citizenship or nationality law."** — (1) The expression "nationality" and "Citizenship" are not interchangeable terms. "Nationality" has reference to the jural relationship which may arise for consideration under international law. On the other hand "citizenship" has reference to the jural relationship under municipal law. In other words, nationality determines the civil rights of a person, natural or artificial, particularly with reference to international law, whereas citizenship is intimately connected with civic rights under municipal law. Hence, all citizens are nationals of a particular State, but all nationals may not be citizens of the State. In other words, citizens are those persons who have full politicial rights and are still domiciled in that country. AIR 1963 SC 1811 (1819): (1964) 4 SCR 99. (Vide P. Weis on Nationality and Statelessness in International Law p. 46; and Oppenheim's International Law, Vol. 1 pp. 642, 644 — For historical survey of the concept of nationality and citizenship see Paras 29 to 42 of the judgment of Hidayatullah J. and Paras 96 to 100 of the judgment of Shah J.)

(2) The definition of "citizen" or "citizenship or nationality law" given in Section 2 (1) (b) and (c) is for the purpose of placing a restriction on the foreigner who wants to get himself registered as Indian citizen. It is to give effect to the principle of reciprocity that in Section 5 (1), the words "citizen" and "citizenship or nationality law" is expressed in the terms of the definition. AIR 1962 All 383 (387): 1962 (2) Cri LJ 166: 1962 All LJ 123 (DB). (AIR 1959 All 79, Dissented from.)

(3) If a person declared to Pakistan authorities that his residence in Madras was temporary and the authorities accepted it he became citizen of Pakistan. AIR 1961 Mad 129 (143, 144): (1960) 2 Mad LJ 290.

**3. Sub-section (1) (f) — "Person".** — (1) "Citizen" includes only natural persons and not juristic persons like corporations. State Trading Corporation, a company registered under Indian Companies Act, 1956 is not a citizen within the meaning of Article 19 of Constitution and cannot ask for enforcement of fundamental rights granted to citizens under the said article. (Per Majority: Shah and Das Gupta JJ. contra). AIR 1963 SC 1811 (1821, 1823, 1835): (1964) 4 SCR 99. (Observations of Mukherjee J. in AIR 1951 SC 41, held to be obiter, AIR 1954 SC 119 and AIR 1955 SC 661, considered. AIR 1953 Raj 188, AIR 1961 Cal 258, AIR 1959 Cal 45 and AIR 1953 Assam 177. Impliedly overruled.)

shall be deemed to have been born in the place in which the ship or aircraft was registered or, as the case may be, in that country.

(3) Any reference in this Act to the status or description of the father of a person at the time of that person's birth shall, in relation to a person born after the death of his father, be construed as a reference to the status or description of the father at the time of the father's death; and where that death occurred before, and the birth occurs after, the commencement of this Act, the status or description which would have been applicable to the father had he died after the commencement of this Act shall be deemed to be the status or description applicable to him at the time of his death.

(4) For the purposes of this Act, a person shall be deemed to be of full age if he is not a minor, and of full capacity if he is not of unsound mind.

## ACQUISITION OF CITIZENSHIP

**3. Citizenship by birth.**—(1) Except as provided in sub-section (2) of this section, every person born in India on or after the 26th January, 1950, shall be a citizen of India by birth.

(2) A person shall not be such a citizen by virtue of this section if at the time of his birth—

(a) his father possesses such immunity from suits and legal process as is accorded to an envoy of a foreign sovereign power accredited to the President of India and is not a citizen of India; or

(b) his father is an enemy alien and the birth occurs in a place then under occupation by the enemy.

**4. Citizenship by descent.**—(1) A person born outside India on or after the 26th January, 1950, shall be a citizen of India by descent if his father is a citizen of India at the time of his birth:

### Section 3 — Note 1

(1) The State Trading Corporation, a company registered under the Indian Companies Act, 1956, is not a citizen within the meaning of Article 19 of the Constitution and cannot ask for the enforcement of fundamental rights granted to citizens under the said article the fact that corporations may be nationals of the country for purposes of International Law will not make them citizens of this country for purposes of municipal law or the Constitution. (Per Majority: Shah and Das Gupta JJ. contra.) AIR 1963 SC 1811 (1821, 1823, 1835): (1964) 4 SCR 99. (Observations of Mukherjee J. in AIR 1951 SC 41, held to be obiter. AIR 1954 SC 119 and AIR 1955 SC 661, considered. AIR 1953 Raj 188 and AIR 1961 Cal 258 and AIR 1959 Cal 45 and AIR 1953 Assam 177, Impliedly Overruled.)

(2) In India there is only one citizenship, namely the citizenship of India and person can be only an Indian citizen in whichever State his permanent home may be. AIR 1958 Bom 68 (71): ILR (1957) Bom 880: 1958 Cri LJ 161 (FB).

(3) A minor child born in India to a father domiciled in India is an Indian citizen by virtue of the provisions of Article 5 of the Constitution read with Section 3 of the Citizenship Act although its mother has lost her Indian citizenship by migrating to Pakistan after 1-3-1947. AIR 1957 Madh B 1 (3) (DB).

(4) Even on the interpretation of the definition clause in Para. 33, a person who has, after the partition of India, come to the Cachar District with the intention of staying there permanently is a domicile of Assam and is covered by the definition. Further, the person who claims citizenship right at the commencement of the Constitution on the ground of his domicile which has not been denied by the contesting parties also becomes domiciled in Assam and thus fulfils the requirements of the permanent resident and comes within the ambit and scope of Rules 51 and 52 of the Scholarship Rules. AIR 1958 Assam 25 (27, 28) (DB).

(5) Under Sections 3 and 4 which deal with acquisition of citizenship, by birth and descent, the provisions are restricted to the acquisition after 25-1-1950. AIR 1961 Madh Pra 110 (113, 114): 1961 (1) Cri LJ 516: 1961 Jab LJ 662.

(6) The Act provides for Citizenship of India after 26-1-1950 by acqusition in five different modes. AIR 1963 Guj 226 (229): 1963 (2) Cri LJ 265: (1963) 4 Guj LR 1073 (DB). (Reversed on facts in AIR 1965 SC 10.)

### Section 4 — Note 1

(1) Citizen includes only natural persons and not juristic persons like Corporations. AIR 1963 SC 1811 (1821,

Provided that if the father of such a person was a citizen of India by descent only, that person shall not be a citizen of India by virtue of this section unless—

(a) his birth is registered at an Indian consulate within one year of its occurrence or the commencement of this Act, whichever is later, or, with the permission of the Central Government, after the expiry of the said period; or

(b) his father is, at the time of his birth, in service under a Government in India.

(2) If the Central Government so directs, a birth shall be deemed for the purposes of this section to have been registered with its permission, notwithstanding that its permission was not obtained before the registration.

(3) For the purposes of the proviso to sub-section (1), any male person born outside undivided India who was, or was deemed to be, a citizen of India at the commencement of the Constitution shall be deemed to be a citizen of India by descent only.

**5. Citizenship by registration.**—(1) Subject to the provisions of this section and such conditions and restrictions as may be prescribed, the prescribed authority may, on application made in this behalf, register as a citizen of India any person who is not already such citizen by virtue of the Constitution or by virtue of any of the other provisions of this Act and belongs to any of the following categories:—

(a) persons of Indian origin who are ordinarily resident in India and have been so resident for six months immediately before making an application for registration;

(b) persons of Indian origin who are ordinarily resident in any country or place outside undivided India;

(c) women who are, or have been, married to citizens of India;

(d) minor children of persons who are citizens of India; and

(e) persons of full age and capacity who are citizens of a country specified in the First Schedule:

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**Section 4 — Note 1 (contd.)**

1823, 1835): (1964) 4 SCR 99. (Observ- of Mukherjee J. in AIR 1951 SC 41, held obiter —AIR 1954 SC 119 and AIR 1955 SC 661, Considered. AIR 1953 Raj 188; AIR 1961 Cal 258; AIR 1959 Cal 45 and AIR 1953 Assam 177, Impliedly overruled.)

(2) Under Sections 3 and 4 which deal with acquisition of citizenship by birth and descent, the provisions are restricted to the acquisition after 25-1-1950. AIR 1961 Madh Pra 110 (113, 114): 1961 (1) Cri LJ 516: 1961 Jab LJ 662 (DB).

(3) According to rule of private international law, the nationality and domicile of a minor are ordinarily determined by the nationality and domicile of his father. It is on this principle that Section 4 (1) and Section 8 (2) of Citizenship Act are based. Doubtless, this is not an invariable rule and statutory provision (e.g. Section 5 (4)) have been made in that Act to enable a minor to acquire a nationality different from that of his father. AIR 1961 Orissa 150 (151): 1961 (2) Cri LJ 353: 26 Cut LT 610.

(4) A child born in Karachi in 1949 to a father domiciled in India being a minor takes the domicile of its father and although in the circumstances its mother is held to have migrated to Pakistan no question of the migration of the child can arise so as to affect its status of Indian citizenship. AIR 1957 Madh B 1 (3): 1956 Madh BLJ 893 (DB).

**Section 5 — Note 1**

(1) Citizen includes only natural persons and not juristic persons like Corporations. AIR 1963 SC 1811 (1821, 1823, 1835): (1964) 4 SCR 99. (Observations of Mukherjee, J. in AIR 1951 SC 41 held to be obiter, AIR 1954 SC 119 and AIR 1955 SC 661, Considered. AIR 1953 Raj 188; AIR 1961 Cal 258; AIR 1959 Cal 45 and AIR 1953 Assam 177, Impliedly Overruled.)

(2) Orders mentioned in Sec. 21 General Clauses Act, 1897, are not orders contemplated in S. 5 of the Act. AIR 1967 SC 107 (109) : (1962) 1 SCR 772.

(3) The Act provides for citizenship of India after 26-1-1950 by acquisition in five different modes. Art. 10 of Constitution is subject to the provisions of the Act. AIR 1963 Guj 226 (229) : 1963 (2) Cri LJ 265 : (1963) 4 Guj LR 1073 (DB).

(4) Although clauses (a) and (e) overlap to a certain extent they are mutually exclusive and hence where clause (e)

Provided that in prescribing the conditions and restrictions subject to which persons of any such country may be registered as citizens of India under this clause, the Central Government shall have due regard to the conditions subject to which citizens of India may, by law or practice of that country, become citizens of that country by registration.

Explanation.—For the purposes of this sub-section, a person shall be deemed to be of Indian origin if he or either of his parents, or any of his grand-parents, was born in undivided India.

(2) No person being of full age shall be registered as a citizen of India under sub-section (1) until he has taken the oath of allegiance in the form specified in the Second Schedule.

**Section 5 — Note 1 (contd.)**

applies to a case the application of clause (a) thereto is immediately excluded. AIR 1958 Raj 172 (174) : ILR (1958) 8 Raj 928 (DB).

(5) Person born in India having no domicile in India at commencement of Constitution cannot acquire Indian Citizenship either under S. 5 of Citizenship Act or under Art. 5 of Constitution. (1963) 67 Cal WN 99.

(6) Person coming to India from Pakistan on the basis of passport can be treated as citizen of Pakistan. AIR 1962 All 383 (387) : 1962 (2) Cri LJ 166 : 1962 All LJ 123 (DB). (AIR 1959 All 79, Dissented from.)

(7) Mere long residence or acquisition of property is not enough to establish an intention of abandoning a domicile of origin and acquiring a domicile of choice. AIR 1966 Cal 552 (566) : 70 Cal WN 82 (DB).

(8) According to the rule of private international law the nationality and domicile of a minor are ordinarily determined by the nationality and domicile of his father. It is on this principle that S. 4(i) and S. 8(2) are based. However, under S. 5(4), a minor can acquire a nationality different from that of his father. AIR 1961 Orissa 150 (151, 152) : 1961 (2) Cri LJ 353 : 26 Cut LT 610.

(9) A person who has lost his Indian citizenship by virtue of Art. 7 of Constitution by going to Pakistan and remaining there even after attaining majority, cannot claim Indian citizenship unless the Central Government after due enquiry, registers him as a citizen of India under S. 5. AIR 1961 Orissa 174 (176) : 1961 (2) Cri LJ 658 : 27 Cut LT 189.

(10) A person cannot claim a right of residence on the basis of his alleged domicile when he clearly communicated his intention to give up his claim to Indian citizenship and also to leave India immediately by withdrawing the application for citizenship. AIR 1966 Cal 552 (566) : 70 Cal WN 82 (DB).

(11) The case of a person who has lost his Indian citizenship by his migration to Pakistan after 1-3-1947 and in respect of whom there is conclusive proof of his having become a citizen of that country falls under clause (c) of sub-section (1). Therefore the Collector has no jurisdiction to grant a certificate of citizenship by registration to such a person and it is only the Central Government which has power. AIR 1958 Raj 172 (175) : ILR (1958) 8 Raj 928 (DB).

(12) Where in 1947, A in Government service having his original domicile in territory of India chose to make final option for Pakistan, but later on after resigning came back to India in February 1948 and obtained a certificate from collector purporting to register him as citizen of India under S. 5 (i) (a), A's case was neither governed by S. 5(3) nor by Section 5(1)(c). The grant of certificate under S. 5(1)(a) was valid. AIR 1959 All 79 (80, 81, 82) : 1958 All LJ 729 (DB).

(13) When a certificate is in the form prescribed by rules and it purports to be granted by Sub-Deputy Collector in exercise of powers under S. 5 of Citizenship Act, it is not open to the State to contend at the hearing of the writ petition that the certificate has not been granted by the proper authority. AIR 1963 Assam 55 (55, 56) (DB).

(14) Where a person is born in Peshawar but domiciled in India at Jamshedpur since 1918 and his application for Indian citizenship was made through bona fide mistakes, in absence of fact that he acquired citizenship of any other country he cannot be held to be a foreigner. 1961 BLJR 793. (Order of deportation quashed.)

(15) Neither the Act nor the rules require the Collector to make an enquiry in case he rejects the application under S. 5(1)(a). Even if he is satisfied that all the conditions mentioned in R. 9 have been fulfilled he has ample power to refuse the certificate of citizenship under S. 5. The Court has thus, no power to interfere with the order of the Collector summarily rejecting the application under S. 5(1)(a). AIR 1965 Cal 160 (161) (DB). (AIR 1961 Cal 299, Overruled.)

(16) That a person files an application for grant of Indian Citizenship under S. 5(1) (a) is evidence of the fact that he is not an Indian citizen. AIR 1965 Cal 1 (2) : 1965 (1) Cri LJ 22 : 68 Cal WN 1140 (DB).

(17) The proviso to S. 5(1) makes it abundantly clear that the intention of

(3) No person who has renounced, or has been deprived of, his Indian citizenship, or whose Indian citizenship has terminated, under this Act shall be registered as a citizen of India under sub-section (1) except by order of the Central Government.

(4) The Central Government may, if satisfied that there are special circumstances justifying such registration, cause any minor to be registered as a citizen of India.

(5) A person registered under this section shall be a citizen of India by registration as from the date on which he is so registered; and a person registered under the provisions of clause (b) (ii) of Article 6 or Article 8 of the Constitution shall be deemed to be a citizen of India by registration as from the commencement of the Constitution or the date on which he was so registered, whichever may be later.

**6. Citizenship by naturalisation.**—(1) When an application is made in the prescribed manner by any person of full age and capacity who is not a citizen of a country specified in the First Schedule for the grant of a certificate of naturalisation to him, the Central Government may, if satisfied that the applicant is qualified for naturalisation under the provisions of the Third Schedule, grant to him a certificate of naturalisation:

Provided that, if in the opinion of the Central Government, the applicant is a person who has rendered distinguished service to the cause of science, philosophy, art, literature, world peace or human progress generally, it may waive all or any of the conditions specified in the Third Schedule.

(2) The person to whom a certificate of naturalisation is granted under sub-section (1) shall, on taking the oath of allegiance in the form specified in the Second Schedule, be a citizen of India by naturalisation as from the date on which that certificate is granted.

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**Section 5 — Note 1 (contd.)**

the legislature was that persons of a country mentioned in Sch. 1 would be qualified to be registered as citizens of India if there was a corresponding law in that country permitting citizens of India to become citizens of that country by registration. AIR 1962 All 383 (387): 1962 (2) Cri LJ 166: 1962 All LJ 123 (DB). (AIR 1959 All 79, Dissented from.)

(18) Sub-section (3) applies to the case of a person who has lost his Indian citizenship by any of the methods prescribed by Ss. 8, 9 and 10 and hence can be of no avail in determining the jurisdiction of the collector to grant certificates of citizenship to persons whose case falls under clause (e) of sub-section (1). AIR 1958 Raj 172 (174) : ILR (1958) 8 Raj 928 (DB).

(19) The Collector in the absence of any fraud cannot strictly speaking legally cancel a certificate of citizenship granted by him under sub-section (1)(a) even where he had acted without jurisdiction in granting the certificate. But the High Court dealing with the matter under its jurisdiction under Art. 226 will not interfere with the cancellation inasmuch as its effect was to restore only the true position. AIR 1958 Raj 172 (175): ILR (1958) 8 Raj 928 (DB).

(20) Where a person went to Pakistan prior to 1948 on temporary visit and returned to India after commencement of Constitution on Pakistan passport giving permanent address in Pakistan, such a person could not claim to be citizen of India on 26-1-1950 and civil suit by him for injunction restraining Government from deporting him did not lie. His only remedy was to obtain a permit for resettlement in India under Art. 7 of Constitution or in alternative to apply for registration under S. 5 of Citizenship Act. AIR 1967 All 565 (568).

**Section 6 — Note 1**

(1) Citizen includes natural persons and not juristic persons like corporations. AIR 1963 SC 1811 (1821, 1823, 1835): (1964) 4 SCR 99. (Observations of Mukherjee, J. in AIR 1951 SC 41 held obiter — AIR 1954 SC 119 and AIR 1955 SC 661, Considered — AIR 1953 Raj 188, AIR 1961 Cal 258, AIR 1959 Cal 45 and AIR 1953 Assam 177, Impliedly Overruled.)

(2) Where an application by a foreigner residing in U. P. is dismissed by Government of India and the order is communicated to him by U. P. Government, petition by him under Article 226 of Constitution is not maintainable. AIR 1960 All 565 (566, 567). (Information of Superintendent of Police not being order of deportation is also not open to challenge — AIR 1960 All 551, Followed.)

**7. Citizenship by incorporation of territory.**—If any territory becomes a part of India, the Central Government may, by order[a] notified in the Official Gazette, specify the persons who shall be citizens of India by reason of their connection with that territory; and those persons shall be citizens of India as from the date to be specified in the order.

[a] For Goa, Daman and Diu (Citizenship) Order, 1962 and Dadra and Nagar Haveli (Citizenship) Order, 1962, see S.Os. 959 and 960, Gazette of India, 29-3-1962, Pt. II, Sec. 3 (ii), Ext., p. 591. For Citizenship (Pondicherry) Order, 1962, see G.S.R. 1640, Gazette of India, 8-12-1962, Pt. II, Sec. 3 (i), p. 1982.

## TERMINATION OF CITIZENSHIP

**8. Renunciation of citizenship.**—(1) If any citizen of India of full age and capacity, who is also a citizen or national of another country, makes in the prescribed manner a declaration renouncing his Indian citizenship, the declaration shall be registered by the prescribed authority; and, upon such registration, that person shall cease to be a citizen of India:

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**Section 7 — Note 1**

(1) Citizen includes natural persons and not juristic persons like corporations. AIR 1963 SC 1811 (1821, 1823, 1835): (1964) 4 SCR 99. (Observations of Mukherjee, J. in AIR 1951 SC 41 held obiter — AIR 1954 SC 119 and AIR 1955 SC 661 Considered — AIR 1953 Raj 188 and AIR 1961 Cal 258, AIR 1959 Cal 45 and AIR 1953 Assam 177, Impliedly Overruled.)

(2) Where by an act of State there is cessation of territory by one State to another, the subjects of the former State can enforce only those rights which the new sovereign recognises. Similarly where there is acquisition of territory by a State, as between the new sovereign and the subjects of the former sovereign who become the subjects of the new sovereign by acquisition of territory, the rights of such subjects against the new sovereign depend upon recognition of liability by the new sovereign. Whether the new sovereign has recognised the rights of the new subjects as against itself and has undertaken the liabilities arising thereunder is a question of fact depending upon the action of the new sovereign after acquisition of territory concerned. AIR 1966 SC 442 (444 to 446): (1966) 1 SCR 357. (Rights under import licences obtained by citizen of former Portuguese territories before their acquisition by military action — Rights not recognised by new sovereign. AIR 1964 SC 1495, AIR 1958 SC 816 and AIR 1964 SC 1043, Relied on.)

**Section 8 — Note 1**

(1) The question whether a person is an Indian citizen or a foreigner, as distinct from the question whether a person having once been an Indian citizen has renounced that citizenship and acquired a foreign nationality, is not one which is within the exclusive jurisdiction of Central Government. Court can decide such a question. AIR 1961 SC 1467 (1469): 1961 (2) Cri LJ 573: (1962) 1 SCR 737.

(2) Article 10 of Constitution is subject to provisions of Citizenship Act — Matters falling under Sections 8 and 10 can be decided by Court. AIR 1963 Guj 226: 1963 (2) Cri LJ 265: (1963) 4 Guj LR 1073 (DB).

(3) Sections 8 (2) and 4 (1) are based on principle of private international law that nationality and domicile of minor are ordinarily determined by those of his father. AIR 1961 Orissa 150 (151, 152): 1961 (2) Cri LJ 353: 26 Cut LJ 610.

(4) Person obtaining Pakistani passport can be considered as foreigner. AIR 1962 All 383 (389): 1962 (2) Cri LJ 166: 1962 All LJ 123 (DB).

(5) A minor cannot change his nationality without action being taken or consent being given by his guardian. AIR 1961 All 507 (508): 1961 (2) Cri LJ 441: 1961 All LJ 222. (Minor son entering India on passport — Father living in India and an Indian national — Nothing to show that father consented to his sons renouncing Indian Citizenship — Deportation of minor and his re-entry — Minor is Indian citizen and no offence under Section 14 of Foreigners Act (1946) is committed.)

(6) Onus of proving that citizen of India has lost his citizenship is on party seeking to deprive him of those rights. AIR 1963 All 260 (263): 1963 (1) Cri LJ 724.

(7) Where in prosecution under Section 14 of Foreigners Act (1946) the accused is an Indian citizen by reason of birth, the burden is on prosecution to prove that he had in someway renounced or forfeited Indian Citizenship. AIR 1961 All 507 (508): 1961 (2) Cri LJ 441: 1961 All LJ 222.

(8) Mere long residence or acquisition of property is not enough to establish an intention of abandoning a domicile of origin and acquiring a domicile of choice. AIR 1966 Cal 552 (566): 70 Cal WN 82 (DB).

Provided that if any such declaration is made during any war in which India may be engaged, registration thereof shall be withheld until the Central Government otherwise directs.

(2) Where a male person ceases to be a citizen of India under sub-section (1), every minor child of that person shall thereupon cease to be a citizen of India:

Provided that any such child may, within one year after attaining full age, make a declaration that he wishes to resume Indian citizenship and shall thereupon again become a citizen of India.

(3) For the purposes of this section, any woman who is, or has been, married shall be deemed to be of full age.

**9. Termination of citizenship.**—(1) Any citizen of India who by naturalisation, registration or otherwise voluntarily acquires, or has at any time between the 26th January, 1950 and the commencement of this Act voluntarily acquired, the citizenship of another country shall, upon such acquisition or, as the case may be, such commencement, cease to be a citizen of India:

Provided that nothing in this sub-section shall apply to a citizen of India who, during any war in which India may be engaged, voluntarily acquires the citizenship of another country, until the Central Government otherwise directs.

(2) If any question arises as to whether, when or how any person has acquired the citizenship of another country, it shall be determined by such authority, in such manner, and having regard to such rules of evidence, as may be prescribed in this behalf.

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## SECTION 9 — SYNOPSIS

**1. "Any citizen of India."**
**2. Acquisition of citizenship of another country — Voluntarily.**
**2-A. "By naturalisation, registration or otherwise."**
**2-B. 'Between the 26th January, 1950 and the commencement of this Act."**
**3. "Ceases to be a citizen of India."**
**4. "Whether, when or how any person has acquired the citizenship of another country."**
**5. "It shall be determined by such authority."**
**6 "In such manner, and having regard to such rules."**
**6-A. Possession of passport of another country — Presumption.**
**7. Validity of section and rules.**
**8. Jurisdiction of Civil Court.**
**9. Jurisdiction of Criminal Court.**
**9-A. Prosecution under Section 14, Foreigners Act, 1946.**
**10. Order of deportation — Validity.**
**11. Jurisdiction of High Court under Article 226 of Constitution.**
**12. Stay of proceedings.**
**13. Election cases.**

**1. "Any citizen of India."**— (1) Section 9 embodies that prohibition which is recognized in the rule of international Law, namely, that no one can be a citizen of two independent States. ('57) AIR 1957 Andh Pra 1047 (1051): ILR (1957) Andh Pra 755 (DB).

(2) Section 9 applies to only those citizen of India, who acquired citizenship of other country on or after 26-1-1950, and not before that date. AIR 1960 All 431 (433). (Case under Section 14 of Foreigners Act, 1946.)

(3) Section 9 lays down a general principle that an Indian citizen will lose his citizenship if he voluntarily acquires citizenship of another country. Its purpose is to ensure that no citizen shall carry the political burden of a duel citizenship with its inevitable consequence of divided loyalties. But Parliament did not want to discourage Indian citizens from going abroad to Pakistan or any other country in search of jobs or livelihood. AIR 1963 All 260 (267): 1963 (1) Cri LJ 724.

(4) Person, not a citizen of India on 26-1-1950, cannot file suit for injunction restraining Government from deporting him. His remedy is for registration under Section 5, or obtaining permit for resettlement under Article 7 of Constitution. AIR 1967 All 565 (568).

(5) Where A, a lady residing in Lahore since 1946 and having no real intention to acquire Indian domicile, enters India in 1953 on Pakistan passport, she cannot claim to be a citizen of India. AIR 1959 Punj 375 (377, 378): 1959 Cr LJ 1018.

(6) Where a person and his wife did migrate to Pakistan and they were not Indian citizens when they entered India in 1954, the provisions of Citizenship Act were inapplicable to them. AIR 1960 Andh Pra 106 (110): (1959) 2 Andh WR 472 (DB).

(7) General rule of Private International Law regarding disability of certain classes of persons, like minors from changing

**Section 9 — Note 1 (contd.)**
their domicile, cannot be applied to a person who has migrated to Pakistan after 1-3-1947. Such a person is governed by Article 7 of Constitution and will be deemed not to be a citizen of India at the commencement of Constitution. AIR 1947 Pat 266 (267, 268) (DB). (AIR 1955 SC 282 and AIR 1961 SC 58, Rel. on; AIR 1965 All 191, Dissented from.)

(8) A minor cannot change his nationality without action being taken or consent being given by his guardian. AIR 1961 All 507 (508): 1961 (2) Cr LJ 441: 1961 All LJ 222: 1961 All WR (HC) 241.

**2. Acquisition of citizenship of India — Voluntarily.**— (1) Section does not lay down an objective test. Obtaining of passport from another country implies exercise of free volition by citizen in view of Paragraph 3 of Schedule 3 of Citizenship Rules (1956). AIR 1965 SC 1623 (1628): (1965) 2 Mad LJ (SC) 162: 1966 SCD 67.

(2) An inference drawn that an individual has acquired the nationality of a foreign State from the solemn declaration by that individual and acceptance of that declaration by the accredited official of that State, cannot be said to transgress the provisions of Section 9 (1) requiring expatriation to be voluntary. AIR 1961 Mad 129 (146): (1960) 2 MLJ 290: ILR (1960) Mad 697 (DB).

(3) Word "voluntarily" means person obtaining passport acted of his own volition and knew nature of his act and did not act in performance of a legal duty, nor due to coercion, or fraud, or misrepresentation, or mistake. When a person left India and after staying in Pakistan for five years came to India on Pakistani passport, acquisition of passport by him was voluntary. AIR 1969 All 223 (228).

(4) The expression "voluntarily" was used in Section 9 (1) in contradistinction to an acquisition of citizenship by operation of law. The expression is used to mean "naturalisation" in the narrow sense of that term, and as excluding compulsory, involuntary or collective naturalisation which some States have adopted at different times. The concept of private law rules regarding mistake which invalidate a contract or disposition cannot be invoked in interpreting the expression. AIR 1961 Mad 129 (138): (1960) 2 MLJ 290 (DB).

(5) Mere long residence or acquisition of acquisition of property is not enough to establish an intention of abandoning a domicile of origin and acquiring a domicile of choice. AIR 1966 Cal 552 (556): 70 Cal WN 82 (DB). (AIR 1964 Cal 422, Rel on.)

(6) The mere fact that a passport is given by a foreign country to a person, who is an Indian national, whether the passport is legal evidence or not, cannot lead to any irresistible inference that the said person had voluntarily acquired the citizenship of the foreign State for such a passport can also be issued to a citizen by birth or descent. AIR 1961 Raj 122 (125) (DB). (Case under Representation of the People Act (1951). (Reversed on another point in AIR 1962 SC 1156.)

**2-A. "By naturalisation, registration or otherwise."**— (1) Under Section 9 (1) place where naturalisation takes place is rendered immaterial that provision will apply even where a person obtained Pakistani passport not while in Pakistan but during the course of his residence in India. AIR 1961 Mad 129 (146): (1960) 2 MLJ 290: ILR (1960) Mad 697 (DB).

(2) A person cannot claim a right of residence on the basis of his domicile, when he clearly communicated his intention to give up his claim to Indian citizenship and also to leave India immediately by withdrawing the application for citizenship. AIR 1966 Cal 552 (566): 70 Cal WN 82 (DB).

**2-B. "Between the 26th January, 1950 and the commencement of this Act."**— (1) Even if an Indian citizen acquires foreign citizenship between 26-1-1950 and commencement of Citizenship Act, 1955, he also retains Indian citizenship by virtue of Section 9 (1), till the commencement of the Citizenship Act. Therefore, if he returns to India before commencement of the Act, he cannot be called a foreigner. AIR 1969 All 165 (170): 1969 Cri LJ 450.

(2) A person cannot be considered to have lost his citizenship merely by virtue of his remaining in Pakistan after 26-1-1950. AIR 1965 All 191 (192, 193): 1964 All LJ 760: 1965 (1) Cri LJ 522 (DB).

(3) Under Section 9 (1) the acquisition of foreign nationality would entail the loss of Indian citizenship only if the foreign citizenship was acquired after 26-1-1950. The obtaining of a Pakistani passport would afford indubitable evidence as to whether the foreign citizenship had been acquired after 26-1-1950 in view of Pakistan Citizenship Act (2 of 1951) and no further enquiry would be necessary. AIR 1961 Mad 129 (140): (1960) 2 MLJ 290 (DB).

(4) Section 9 (1) is in terms retrospective from 26-1-1950 and unless the rules contained any specific provision they would operate in so far as they related to the termination of citizenship during the same period, that is retrospectively Paragraph 3 of Schedule III cannot be read as confined to cases where the passport was obtained from 30-12-1955. AIR 1961 Mad 129 (143): (1960) 2 MLJ 290 (DB).

(5) For deciding the question of loss of Indian citizenship in the case of a person who had gone to Pakistan, whether that person went to Pakistan before or after 26-1-1950 is material. 1963 All WR (HC) 700: 1963 All Cr R 392.

**3. "Ceases to be a citizen of India."**— (1) Termination of Indian citizenship cannot depend upon action of foreign country in

**Section 9 — Note 3 (contd.)**
issuing passport. (1965) 1 SCA 642: (1965) 2 Law Rep 669: (1965) 2 SCJ 706: (1965) 2 Andh WR (SC) 162: (1965) 2 Mad LJ (SC) 162: (1966) SCD 67: AIR 1965 SC 1623 (1628).

(2) Under Section 9 (1) which constitutes the expatriation is stated objectively; and the intention with which these acts are done are not the conditions which impart validity to or import effectiveness to them. They operate in law regardless of the intentions of the actor. AIR 1961 Mad 129 (138): (1960) 2 MLJ 290 (DB).

(3) In determining whether a citizen of India lost his Indian citizenship and acquired that of Pakistan by combined effect of Section 9 of Indian Citizenship Act and Pakistan Citizenship Act, the Court shall apply the general principles of International Law. AIR 1963 All 260 (267): 1963 (1) Cr LJ 724. (Migration involves change of domicile.)

(4) If an Indian citizen has lost his citizenship under Section 9 (1), he ceases to be a citizen of India. 1966 BLJR 78.

(5) Once a citizen of India has acquired Pakistani citizenship between 26-1-1950 and the date of commencement of Citizenship Act (1955), he ceases to be a citizen of India. AIR 1961 Orissa 174 (176): 1961 (2) Cri LJ 658.

(6) If the person is not a citizen of India by reason of his acquisition of Pakistani citizenship, he is a foreigner within Section 2 (a) of Foreigners Act, 1946. (1960) 2 MLJ 290: ILR (1960) Mad 697: AIR 1961 Mad 129 (138) (DB).

(7) Where an Indian voluntarily migrates to Pakistan and obtains a Pakistani passport on a declaration of that nationality, he loses his Indian citizenship by virtue of the Act and Rules. AIR 1968 Madh Pra 29 (33): 1968 Cri LJ 172: 1967 MPLJ 743 (DB).

(8) Citizenship Act does not deal with regaining of citizenship already lost under Article 7 of the Constitution. (1959) 2 Andh WR 472: AIR 1960 Andh Pra 106 (108) (DB).

**4. "Whether, when or how any person has acquired the citizenship of another country."**— (1) Where there is proof that a person is, a citizen of India and he has lost his Indian citizenship by reason of acquiring the nationality of a foreign State then alone any question of invoking the provisions of Section 9 (2) arises. Where a Pakistani national has been legally deported out of India on a particular date, there is no question of Section 9 (2) being invoked or coming into play. 1965 Mad LJ (Cri) 150: 1965 (1) Cri LJ 506: * AIR 1965 SC 618 (621).

(2) Section 9 of this Act has no application to petition under Article 226 of Constitution against order of deportation made against a person under Section 3 (2) (c) of Foreigners Act, because the question therein is whether that person is a foreigner or an Indian citizen. AIR 1961 SC 1526 (1526, 1527) :(1962) 1 SCR 744: 1961 (2) Cri LJ 703.

(3) Question whether a person has acquired citizenship of another country by any of the means specified in Section 9 must be determined by Central Government. But the Central Government acquires the exclusive jurisdiction to determine this question only if and when it arises, not otherwise. AIR 1963 All 205 (206): 1963 (1) Cr LJ 562. (Question in suit whether plaintiff lost his Indian citizenship — Absence of plea by State that plaintiff acquired citizenship of Pakistan — Court has jurisdiction to decide question raised in suit.)

(4) The only relevant date of the arising of the question referred to in Sec. 9 (2) is date on which question arises before Central Government of India and not before government of any other country. AIR 1966 All 127 (128).

(5) A suit by the plaintiff for a declaration that he is a citizen of India and for a permanent injunction restraining the State from deporting him from India, involves the determination of the question whether the plaintiff voluntarily acquired the citizenship of another country and thereby ceased to be a citizen of India. AIR 1963 All 482 (483, 484): 1963 All LJ 75: 1963 All WR (HC) 236.

(6) In a case under S. 14, Foreigners Act, that the accused is a foreigner, is a fact in issue to be decided by the Court. The question whether they acquired the citizenship of another country is related to such a fact in issue. Jurisdiction of Court to decide it has not been taken away by Section 9 (2). AIR 1960 All 336 (337, 338): 1960 All LJ 86: 1960 Cri LJ 771. (Decision of Court is liable to be superseded by that of Central Government under Section 9 (2).)

(7) The question whether a person is a citizen of a country or not is a question of fact. AIR 1960 Andh Pra 106 (110): ILR (1960) 2 Andh Pra 546: (1959) Andh WR 472: 1959 Andh LT 894 (DB).

(8) The question as to whether any decision under Section 9 is necessary is dependent on whether a person in the first instance was an Indian national or whether or not he was deemed to be an Indian citizen under Article 5 of Constitution and further whether subsequently he acquired the nationality of another country. AIR 1964 Bom 235 (237, 238): 66 Bom LR 216: 1964 (2) Cri LJ 399. (Question whether person concerned is Indian national — Question of decision by Central Government under Section 9 does not arise.)

(9) It is only in cases where a dispute arises as to acquisition of foreign citizenship by a person who was originally an Indian citizen that the question has been left by the Citizenship Act to be determin-

**Section 9 — Note 4 (contd.)**

ed by an authority prescribed by the Act in such manner and having regard to such rules of evidence as may be prescribed in this behalf. (Per A. K. Mukherjee J.). AIR 1965 Cal 1 (3): 68 Cal WN 1140: 1965 (1) Cri LJ 22 (DB). (Section 9 held not applicable to the facts of the case.)

(10) Bar of Section 9 (2), Citizenship Act does not apply to a case where question arising for decision is whether a person has migrated to Pakistan in 1949 and has never become a citizen of India under Constitution and hence Court of law and not the Central Government has to decide that question. ('62) 66 Cal WN 108.

(11) Where in terms of the notice issued under the Foreigners Act by which a person is required to leave India, the authorities concerned proceed upon the footing that he was a foreigner — not that he was once an Indian Citizen and had lost the right of citizenship by acquiring the citizenship of a foreign country; no question can possibly arise as to application of sub-section (2) of Section 9 of the Citizenship Act and Rule 30 of the Citizenship Rules which contains reference to Schedule III. 1963 (2) Cr LJ 210 (213) (Cal).

(12) The question whether a person has or has not acquired the citizenship of another country is a matter dependent upon the municipal law of that country. AIR 1961 Mad 129: (1960) 2 MLJ 290 (DB).

(13) The question whether a man is a citizen of India or not can be determined by a Court of law, and the Court will, in this connection, take into consideration Articles 5, 6 and 7 of the Constitution. 1966 BLJR 78.

**5. "It shall be determined by such authority."**— (1) Section 9 (2) and Rule 30 (2) of Citizenship Rules (1956) contemplate inquiry to decide whether passport is voluntarily obtained. Inquiry can be made by Central Government only and not by Courts. AIR 1965 SC 1623 (1627): (1965) 2 Mad LJ (SC) 162: (1966) SCD 67.

(2) Question whether person lost citizenship of India under Section 9 (1), having acquired passport from Pakistan Government has to be decided by Central Government and not by Court. AIR 1963 SC 645 (647, 649): (1963) 1 Cri LJ 617: 1963 Supp 1 SCR 429.

(3) A person has right to approach Central Government to decide question whether he has lost his Indian Citizenship (Point conceded). AIR 1962 SC 70 (72): (1962) 1 SCR 779: (1961) 2 SCA 649. (View expressed in AIR 1960 All 637, held was open to grave doubt.)

(4) In view of Section 9 (2) of the Citizenship Act, a Court cannot decide whether an Indian citizen has acquired the citizenship of another country.

Under Rule 30 of the Citizenship Rules, 1956, the authority to decide that question is the Central Government. AIR 1961 SC 1467 (1469, 1470): 1961 (2) Cr LJ 573: (1961) 2 SCA 643. (Case under Section 14, Foreigners Act, 1946.)

(5) The order of Central Government under Section 9 (2) and Rule 30 determining that a person had voluntarily acquired citizenship of Pakistan after 26-1-1950 and before 15-3-1955, must be regarded as an executive order falling withing Article 77 (1) of Constitution and is valid though passed in the name of Central Government and not President. AIR 1969 All 165 (167): 1969 Cri LJ 450.

(6) Determination by Central Government of question whether person has acquired citizenship of another country during relevant period after 26-1-1950 and before 22-3-1954, is conclusive. AIR 1967 Andh Pra 105 (108, 109): (1966) 1 An WR 127: 1967 Cr LJ 423 (DB).

(7) The point as to whether a person has voluntarily acquired citizenship of a foreign State after the 26-1-1950 is one which falls to be determined by the Central Government under Section 9 (2). AIR 1965 All 191 (192, 193): 1956 (1) Cri LJ 522: 1964 All LJ 760 (DB).

(8) Decision of question whether person has acquired foreign citizenship is judiciai. AIR 1969 All 223 (229, 230).

(9) Order of Central Government under Section 9 (2) declaring petitioners as nationals of Pakistan, does not supersede decree passed after Act came into force, in pending civil suit by petitioners for declaring them as citizens of India, which decree was affirmed in appeal and became final. AIR 1961 All 137 (138).

(10) The Central Government is the competent authority to determine the question of acquisition of citizenship of another country for the purposes of Section 9 (2) and for no other purposes. Thus, Courts can determine the question of nationality unless the jurisdiction is one way barred by Section 9 (2). AIR 1960 All 431 (433): 1960 Cri LJ 875: 1959 All LJ 833. (Case under Section 14 of Foreigners Act).

(11) Central Government will have jurisdiction to determine nationality only in those cases where it is found that the person was a citizen of India on 26-1-1950 and had thereafter changed his nationality. 1966 All LJ 867 (DB).

(12) A person who has come in India after the commencement of the Constitution on a Pakistani passport and claims to be an Indian citizen is entitled to get the matter decided by the Central Government before he can be declared a foreigner under the Foreigners Act. AIR 1962 Assam 38 (39): (1963) 1 Cri LJ 565 (DB).

(13) Person entering India on foreign passport is prima facie not a citizen of India. If after entering India such person claims status of a citizen by virtue

**Section 9 — Note 5 (contd.)**

of R. 30 of Citizenship Rules (1956), the question whether, when or how he has acquired the citizenship of another country, is to be determined for purposes of Sec. 9 (2), by the Central Government. AIR 1959 Bom 525 (527): 1959 Cri LJ 1416: 61 Bom LR 803 (DB).

(14) Once a person is held to have been a citizen of India by virtue of Article 5, the question whether he has subsequently lost that citizenship can be determined only by the Central Government under Section 9 (2) of Citizenship Act read with Rules made thereunder. AIR 1965 Cal 302 (303): 1965 (1) Cr LJ 676: 69 Cal WN 126.

(15) Where certain persons are citizens of India at the commencement of the Constitution they continue to be so. The question whether they lost citizenship must be left to be determined by the Central Government under Section 9. AIR 1961 Madh Pra 110 (114-115): 1960 MPLJ 1246: 1961 (1) Cr LJ 516 (DB).

(16) The Central Government is the special tribunal created under the Act and rules to determine the question as referred to in Section 9 (2). AIR 1961 Raj 182 (184): 1961 (2) Cri LJ 283: 1961 Raj LW 108 (DB).

**6. "In such manner, and having regard to such rules."—** (1) Where in representations to Government of India, in response to notice, K not having explained his long stay in Pakistan and no plea having been taken by him that he was compelled to apply for passport as Pakistan citizen and did not, in fact, obtain it voluntarily, it could not be said that Government failed to hold any enquiry under Paragraph 3 of Schedule 3 of Citizenship Rules. Consequently order passed by Government holding K to have voluntarily acquired citizenship of Pakistan did not suffer from any infirmity. AIR 1967 SC 1143 (1145): (1967) 2 SCR 401: 1967 Cri LJ 1074.

(2) While Rule 30 of Citizenship Rules, 1956 contemplates the Central Government as authority for determining the question arising under Section 9 (2), Clause 4 of Schedule III of the Rules, takes within its ambit the case of a migrated person as also one to be determined under the powers conferred under Section 9 (2) and specifies that the permanency of residence and the intention of the migrant as considerations to be taken account of. AIR 1959 Andh Pra 241 (243, 244): (1959) 1 Andh WR 138: 1959 Cri LJ 561.

(3) Rules of evidence under Schedule III of Citizenship Rules, 1956 have not a compulsive force and though the authority normally would take them into account is not strictly bound to do so. AIR 1961 Mad 129 (140): (1960) 2 MLJ 290 (DB).

(4) Presumably enquiry under Sec. 9 (2) read with Rule 30 and Schedule III is to take place at the instance of the Central Government on receiving certain information that the person concerned has lost the citizenship of India. AIR 1959 Punj 261 (263): 60 Pun LR 696.

(5) Central Government can be said to have taken decision determining citizenship of a person under Rule 30 of Citizenship Rules by the date the Central Government has taken necessary steps to communicate the decision to the person concerned. AIR 1969 All 165 (168).

(6) There is nothing in the Act or the Rules requiring the provisional conclusion reached by the Central Government in respect of the acquisition of citizenship of another country to be communicated to the citizen concerned. AIR 1966 Madh Pra 346 (348, 349): 1966 MPLJ 705 (DB).

(7) It will be contrary to international propriety for the authorities of Indian Government to embark upon an enquiry as to whether the procedural or other requirements of the Pakistani Law have or have not been satisfied. AIR 1961 Mad 129 (139): (1960) 2 MLJ 290 (DB).

(8) Central Government while passing an order of termination of citizenship under Section 9 (2) need not state reasons, though it is proper that it does so. AIR 1964 Punj 14 (15): 65 Punj LR 800.

(9) Rule 30 and Schedule III of Citizenship Rules, 1956 not only prescribe the authority competent to determine questions mentioned in Section 9 (2) but also lay down the rules of evidence and thereby, by necessary implication, the determination of questions in a quasi-judicial manner. AIR 1966 Madh Pra 346 (348): 1966 MPLJ 705: 1966 Jab LJ 886 (DB). (AIR 1965 SC 1623 (1627), Rel. on.)

(10) Person affected must be given reasonable opportunity to rebut presumption arising out of voluntarily obtaining foreign passport. Ordinarily person must be given personal hearing. AIR 1969 All 223 (229, 230). (Officer concerned must not act upon office notes.)

(11) Determination of question whether person has acquired citizenship of another country postulates approach as in a quasi-judicial enquiry. AIR 1966 Madh Pra 346 (349, 350): 1966 MPLJ 705 (DB). (Faulty procedure followed by the authority — There was denial of reasonable opportunity.)

(12) The requirement of Section 9 (2) of the Citizenship Act and Rule 30 of the Citizenship Rules read with Schedule III thereof, is not satisfied in a case where a citizen's request to lead evidence in support of his plea that he has not acquired the citizenship of a foreign country voluntarily is not acceded to. AIR 1967 Punj 339 (342). (Determination of question under Section 9 (2) postulates quasi-judicial enquiry.)

(13) Onus of proving that a particular citizen of India has lost his citizenship is on party seeking to deprive him of those

**Section 9 — Note 6 (contd.)**
rights. 1963 (1) Cr LJ 724: AIR 1963 All 260 (263).

(14) Order determining nationality under Section 9 (2), passed by person authorised by Home Minister is in accordance with rules framed under Article 77 (3) of Constitution and is valid. 1967 Cr LJ 1223 (1224): 1967 All WR (HC) 104 (DB).

**6-A. Possession of passport of another country — Presumption.** — (1) Though proceedings under Section 9 (2) are quasi-judicial authority deciding question is not bound to give personal hearing to person concerned. 1967 Cr LJ 1223 (1224): 1967 All WR (HC) 104: 1967 All Cr R 97 (DB). (AIR 1950 SC 27, Rel. on.)

(2) Possession of foreign passport only raises presumption of foreign citizenship and is not conclusive. Burden to prove contrary, is on such person. AIR 1960 All 431 (433): 1960 Cr LJ 875: 1959 All LJ 833. (Case under Section 14 of Foreigners Act, 1946.)

(3) Entry in the passport is a conclusive evidence of the acquisition of the citizenship right of the country issuing the passport in view of Sch. III of Rule 30 framed under Section 9. AIR 1962 Assam 38 (38) (DB).

(4) A passport of Pakistan, on the strength of which a person enters India, raises a presumption against him that he has acquired the citizenship of that country. Such a presumption is rebuttable. The burden of proof in that event shifts on that person to explain that the declaration contained therein that he is a national of Pakistan is not true. AIR 1961 Guj 109 (114): (1961) 2 Guj LR 57.

(5) No doubt a passport is an identity and travel document but it might also evidence the nationality of the person to whom it is issued. AIR 1961 Mad 129 (138): (1960) 2 MLJ 290 (DB).

(6) Para. 3 of Sch. III of Citizenship Rules (1956), has regard not only to the obtaining of the passport of a foreign country but what is crucial is the contents of the document and in particular the declaration by official of foreign country that the holder of the passport has been recognised by him as a citizen of that country. AIR 1961 Mad 129 (143): (1960) 2 MLJ 290: ILR (1960) Mad 697 (DB).

(7) Entry in India on a short term visa on Pakistan passport indicates that visa-holder has acquired Pakistan Citizenship in view of Rule 5 (d) of Citizenship Rules (1956). AIR 1964 Punj 14 (15): 65 Punj LR 800.

(8) Passport to Indian National is no proof that he acquires foreign citizenship AIR 1961 Raj 122 (125): 1961 Raj LW 65 (DB). (Reversed on another point in AIR 1962 SC 1156.)

**7. Validity of section and rules.** — (1) Section 9 and Rule 3 in Sch. 3 of the Citizenship Rules, 1956, are intra vires and valid. AIR 1962 SC 1778 (1780): (1962) Supp 3 SCR 288. (AIR 1957 Andh Pra 1047, Partly reversed.)

(2) Section 9 (2) does not offend Article 19 (1) (e) of Constitution. AIR 1962 SC 1052 (1066, 1067): 1962 (2) Cri LJ 215: 1962 Sup 3 SCR 235.

(3) Sch. 3, Rule 3, Citizenship Rules, 1956 which makes it obligatory on the enquiring authority to infer the acquisition of citizenship of foreign country from the fact that the passport of foreign country has been obtained by an Indian citizen, is a 'rule of evidence' and falls within the scope prescribed by Section 9 (2). The challenge to its validity on the ground that it is a rule of substantive law must, therefore, fail. Thus, the rule must be held to be intra vires. (Per Majority: Dasgupta and Sarkar JJ, contra.) AIR 1962 SC 1052 (1064, 1065, 1070, 1071, 1072, 1073): 1962 Supp 3 SCR 235: 1962 (2) Cr LJ 215. (AIR 1957 Andh Pra 1047 and AIR 1960 All 637, Overruled. AIR 1959 Bom 192; AIR 1958 Raj 172 and AIR 1961 Mad 129, Approved.)

(4) In enacting Section 9 (2), the Legislature has not abdicated its essential legislative function in favour of the rule-making authority. Section 9 (2) is valid. AIR 1962 SC 1052 (1066, 1067): 1963 BLJR 99: (1963) 1 SCA 136: 1962 Supp 3 SCR 235: (1962) 2 Cr LJ 215.

(5) Clause 3 and Clause 5 (b) and (d) of Sch. 3 of Citizenship Rules which result in summarily defining an Indian Citizen of his citizenship by bringing Section 9 (1) into play, must be considered null and void in view of Article 19 (1) (e) and Article 13 (2) of Constitution. AIR 1961 All 507 (508): 1961 All LJ 222: 1961 (2) Cr LJ 441.

(6) Section 9 of the Citizenship Act does not violate the provisions of either Article 14 or Article 19 of the Constitution. It is not, correct to say that the Parliament has entrusted an arbitrary power to the Central Government for depriving citizenship rights of any person or class of persons. AIR 1960 Pat 98 (100): 1959 BLJR 584 (DB).

(7) Section 9 (2) of the Act and Para. 3 of Sch. III of Citizenship Rules, 1956 do not contravene Article 14 of Constitution. AIR 1961 Mad 129 (142): (1960) 2 MLJ 290 (DB).

(8) Rules contained in Sch. III of Citizenship Rules, 1956 do not infringe provisions of Article 19 (1) (d) and (e) of Constitution. AIR 1961 Mad 129 (136): (1960) 2 MLJ 290 (DB).

(9) The question whether a person was or was not a citizen of India is outside the scope of Article 19 of Constitution, but is dependent upon the relevant law which Parliament is enabled to make under Article 11 of Constitution and Entry 17 of Union List. AIR 1961 Mad 129 (136): (1960) 2 MLJ 290: ILR (1960) Mad 697 (DB). (Rules contained in Sch. III of Citizenship Rules, 1956 do not infringe pro-

**Section 9 — Note 7 (contd.)**

visions of Article 19 (1) (d) and (e) of Constitution.)

(10) In view of Article 11 of the Constitution, Parliament is competent to provide for the termination of citizenship by enacting Section 9. Parliament is also competent to make rules of evidence for purposes of determining whether a person has ceased to be an Indian citizen or not. The rules of evidence framed in Clause 3 of Sch. III of Citizenship Rules, 1956 are not violative of Article 19 of the Constitution and the Central Government has power to determine the question of citizenship in accordance with those rules. AIR 1962 All 383 (386, 390): 1962 All LJ 123: 1962 (2) Cri LJ 166 (DB). (AIR 1957 Andh Pra 1047, Dissented from.)

(11) Para. 3 of Sch. III of Citizenship Rules, 1956 do not contravene Article 14 of Constitution. AIR 1961 Mad 129 (142): (1960) 2 Mad LJ 290 (DB).

(12) Para. 3 of Sch. III of Citizenship Rules, 1956 cannot be held to be beyond the rule-making power under Section 9 (2) on the ground that the rule-making power under Section 9 (2) enabled only a rule of evidence to be prescribed, but Para. 3 of Sch. III had promulgated a rule of substantive law. AIR 1961 Mad 129 (140, 141): (1960) 2 MLJ 290 (DB).

(13) Para. 3 of Sch. III of Citizenship Rules, 1956, is not invalid on ground of unreasonableness. AIR 1961 Mad 129 (141, 142): (1960) 2 MLJ 290 (DB). (1943 KB 223, Rel. on.)

(14) Section 9 (2) contemplates, an enquiry to find out and arrive at a conclusion as to whether an Indian citizen had or had not acquired foreign nationality. Provisions of Para. 3 of Sch. III of Citizenship Rules, 1956 are not invalid as a rule of evidence on ground of its being in contradiction of Section 9 (2). AIR 1961 Mad 129 (140): (1960) 2 MLJ 290 (DB).

(15) Section 9 cannot be held to be unusually and unreasonably harsh on the ground of its not providing for similar safeguards provided for in Section 10. AIR 1961 Mad 129: (1960) 2 MLJ 290 (DB).

(16) Section 9 has not conferred an unregulated and naked arbitrary power constituting a denial of equal protection of laws. ('57) AIR 1957 Andh Pra 1047 (1051): ILR (1957) Andh Pra 755 (DB).

(17) The section cannot be held to be invalid on the ground that it violates Article 19. AIR 1957 Andh Pra 1047 (1051): ILR (1957) Andh Pra 755 (DB).

(18) The power of Central Government to appoint an authority under Section 9 permits it to appoint itself as the constituted authority. AIR 1957 Andh Pra 1047 (1053): ILR (1957) Andh Pra 755 (DB).

(19) Inasmuch as sub-section (2) of the section expressly provides for framing special rules of evidence to deal with matters arising under sub-section (1), Rule 3 of Sch. 3 of the Citizenship Rules framed under the Act cannot be struck down as going beyond the scope of sub-section (1). AIR 1958 Raj 172 (174): ILR (1958) 8 Raj 928 (DB).

**8. Jurisdiction of Civil Court.** — (1) Civil Court is not prohibited from determining questions concerning nationality of a person other than those mentioned in Section 9 (2). AIR 1962 SC 70 (72).

(2) Though Section 9 or Rule 30 do not expressly provide for a reference of the question barred under Section 9 (2) by Civil Court itself to the Central Government such a power can be inferred by necessary implication from Section 9 and Rule 30, itself. 1963 All LJ 75: 1963 All Cr P 77: 1963 All WR (HC) 78: AIR 1963 All 482 (483, 484). (AIR 1962 SC 70, Foll.)

(3) Section 9 (2) of the Citizenship Act, 1958 does not exclude or bar the jurisdiction of Civil Courts in determining the question as to the acquisition or termination of citizenship when such a question arises in any proceedings before them. AIR 1961 Guj 109 (115): (1961) 2 Guj LR 57: (1961) 2 Guj HCR 174. (AIR 1961 All 637 and AIR 1960 All 336 and AIR 1960 All 431, Rel. on; AIR 1958 All 165, Diss. from.)

(4) The question whether a person is an Indian citizen or a foreigner, as distinct from the question whether a person having once been an Indian citizen has renounced that citizenship and acquired a foreign nationality, is not one which is within the exclusive jurisdiction of the Central Government to decide and hence the Civil Court is competent to determine it by virtue of Section 9 (2) read with Rule 30. 1961 Andh LT 930: (1962) 1 Andh WR 110: AIR 1962 Andh Pra 247 (249).

(5) Where the Citizenship Act, 1955 came into force while a suit raising a question referred to in Section 9 (2), was pending, the jurisdiction of the Civil Court to determine the question is not barred by that provision. AIR 1963 All 260 (263): 1963 (1) Cr LJ 724.

(6) Once the Civil Court decides that the person had lost his Indian citizenship on 26-1-1950, the jurisdiction to decide the nationality of the person would rest in the Civil Court and not in the Central Government. 1966 All LJ 867 (DB).

(7) Civil Court has jurisdiction to decide question of citizenship of person who had migrated to Pakistan in 1947-48 and became Pakistani national. 1968 Raj LW 143 (DB).

(8) In suit for declaration that plaintiff is Indian Citizen and for permanent injunction restraining Government from deporting out of India an application for temporary injunction cannot be dismissed on sole ground that suit is not maintainable. Until the determination by Central Government that the plaintiff has lost his

**Section 9 — Note 8 (contd.)**
Indian citizenship he is entitled to say that he continues to be an Indian citizen and to seek the protection of Court from being unlawfully deported. AIR 1964 All 63 (64): 1963 All LJ 997.

(9) Section 9 (2) debars a Court from trying the issue whether an Indian citizen has acquired citizenship of another country, but the section does not bar the Court from considering the question whether the person concerned ever became a citizen of India. AIR 1965 Cal 1 (2): 1965 (1) Cri LJ 22: 68 Cal WN 1140 (DB).

(10) Suit for injunction restraining Government from deporting plaintiff alleging himself to be citizen of India is not barred. What is barred is decision by Court of question whether plaintiff has acquired foreign citizenship. When such question arises, proper course for Civil Court is to refer it to Central Government and stay further hearing until decision of Central Government is received and then decide suit according to law. AIR 1969 All 223 (226). (AIR 1963 All 482, Foll.; and AIR 1962 SC 70, Rel. on.)

(11) Finding that a person did not migrate to Pakistan and had no intention of settling there permanently is one of fact and cannot be reviewed in second appeal. AIR 1963 All 205 (206): 1963 (1) Cri LJ 562.

**9. Jurisdiction of Criminal Court.** — (1) The question whether a person is an Indian citizen or a foreigner, as distinct from the question whether a person having once been an Indian citizen has renounced that citizenship and acquired a foreign nationality, is not one, which is within the exclusive jurisdiction of the Central Government to decide. The Courts can decide such question. AIR 1961 SC 1467 (1469, 1470): 1961 (2) Cri LJ 573: (1962) 1 SCR 737. (Case under Section 14, Foreigners Act.)

(2) When the very question whether the person concerned is an Indian national is in dispute the question of any decision by the Central Government under Section 9 of the Act and the rules framed there under does not arise. Courts are competent to decide the question whether or not a person is an Indian citizen or whether or not he was deemed to be an Indian citizen under the provisions of Article 5 of the Constitution. 66 Bom LR 216: 1964 (2) Cr LJ 399: AIR 1964 Bom 235 (237, 238).

(3) Court in prosecution under Section 14 of Foreigners Act, 1946 has no power to determine the question of change of India citizenship. AIR 1965 Orissa 145 (147): 1965 (2) Cri LJ 232.

(4) There is no repugnance between the provisions of Section 9 (2) of the Citizenship Act and the provisions of the Criminal Procedure Code and the Evidence Act as to lead to the inference that Section 9 (2) takes away the jurisdiction of a Criminal Court to decide the question even though it relates to a fact in issue or a relevant fact. AIR 1960 All 336 (337, 338): (1960) Cr LJ 771: 1960 All LJ 86. (In case under Section 14, Foreigners Act, that the accused is a foreigner, is a fact in issue and the question under Section 9 (2) is related to it.)

(5) In view of Section 9 (2) of Citizenship Act (1955) read with Rule 30 of Citizenship Rules (1956), the question of loss of Indian Citizenship in the case of a person who had gone to Pakistan, can be decided only by Central Government and not by the Courts in India. 1963 All WR (HC) 700: 1963 All Cr R 392.

(6) Under Section 9 (2) acquisition of citizenship of another Country is to be decided by an authority. But questions whether a person has renounced his citizenship or whether he has been deprived of his citizenship are matters to which Section 9 (2) does not apply and they can be decided by Courts. AIR 1963 Guj 226 (229): 1963 (2) Cri LJ 265: (1963) 4 Guj LR 1073 (DB). (Reversed on facts in AIR 1965 SC 810.)

**9-A. Prosecution under Section 14, Foreigners Act, 1946.** — (1) Where after obtaining decision of Central Government under Section 9 and Rule 30, a person is prosecuted under Section 14 of Foreigners Act (1946) by State Government, the proceedings do not get vitiated on the ground that the order communicating decision of Central Government was served upon him after framing of charge under Section 14 against him. Unless there is some question of prejudice being caused, Court should not disregard decision of Central Government. AIR 1969 All 165 (169).

(2) Where person born and domiciled in India prior to coming into force of Constitution goes to India for short time but comes to India on Pakistan passport and overstays, in absence of decision of Central Government under Section 9 of Citizenship Act he cannot be prosecuted under Section 14 of Foreigners Act for breach of para. 7 (2) of Foreigners Order. 1963 (1) Cri LJ 817 (818) (All).

(3) Under Section 9 (2) read with R. 30 of the Citizenship Rules the proper authority to determine the question as to nationality of a person is the Central Government and the person cannot be prosecuted under Section 14 of Foreigners Act (1946) without first obtaining the decision of the Central Government under Section 9 (2) of the Citizenship Act. AIR 1962 All 383 (387): 1962 (2) Cri LJ 166: 1962 All LJ 123 (DB).

(4) Where in prosecution under Section 14 of Foreigners Act (1946) the accused is an Indian Citizen by reason of birth, the burden is on prosecution to prove that he had in someway renounced or forfeited Indian Citizenship. AIR 1961

**Section 9 — Note 9-A (contd.)**

All 507 (508): 1961 (2) Cr LJ 441: 1961 All LJ 222.

(5) Prosecution of accused under Section 14 read with Section 3 (2) (c) of Foreigners Act (1946) without determination of question of the acquisition of citizenship of another country as contemplated under Citizenship Act, is premature. AIR 1959 Andh Pra 241 (243, 244): 1959 Cri LJ 561: (1959) 1 Andh WR 138.

(5-A) Where a person who is not a foreigner enters India on Pakistani passport under Indian visa for limited period upto 30-4-1956 and overstays in India, such a person cannot be prosecuted under Section 14, Foreigners Act, 1946 for non-compliance with unauthorised order of District Superintendent of Police under Section 3 of that Act. AIR 1959 Bom 525 (527): 1959 Cri LJ 1416: 61 Bom LR 803 (DB).

(6) Where in prosecution under Section 14 of Foreigners Act (1946), the accused claims to be a citizen of India at the commencement of Constitution, burden lies still on him to show that requirements of Articles 7 and 9 of Constitution are fulfilled. AIR 1965 Guj 226 (232): 1963 (2) Cri LJ 265: (1963) 4 Guj LR 1073 (DB). (Reversed on facts in AIR 1965 SC 810.)

(7) Whether person lost citizenship of India under Section 9 (1) by migrating to Pakistan subsequent to Constitution coming into force has to be decided by Central Government and not by Court. Decision should be made prior to prosecution of accused. 1966 Mad LW (Cr) 19: 1966 Mad WN 99. (AIR 1962 SC 1778 and 1965 MWN Cri 85, Foll.; AIR 1963 SC 1035, Disting.)

(8) The question of change of citizenship of one country to another is a question exclusively determinable by Central Government under Section 9 and until such determination the State Government can take no action under Section 14 of the Foreigners Act, 1946. (1965) 7 OJD 37: 31 Cut LT 495 * 1965 (2) Cr LJ 232: AIR 1965 Orissa 145 (147).

(9) Section 9 (2) does not apply to a case governed by Article 7 of Constitution. AIR 1964 Pat 384 (386, 387): 1964 (2) Cri LJ 327: 1964 BLJR 322. (Person migrating to Pakistan in December, 1947 leaving his family in India -- Return to India on Pakistani passport obtained in 1957 -- Petitioner not leaving India as directed by authorities -- He is guilty of offence under Section 14, Foreigners Act.)

**10. Order of deportation — Validity.** — (1) An order of deportation passed by a State Government against a Pakistani found in the State cannot be sustained where there is no enquiry by the Central Government about his status. AIR 1962 SC 1778 (1780-1781): (1962) Sup 3 SCR 288.

(2) Deportation order by State Government before obtaining determination of Central Government on question of nationality is invalid. AIR 1965 All 191 (193): 1965 (1) Cri LJ 522: 1964 All LJ 760 (DB).

(3) In a case where the petitioner has stated in his application for passport and visa that he is a Pakistani national and has migrated from India to Pakistan in 1948, his nationality cannot be determined under the Citizenship Act. But Article 7 of the Constitution will apply and he must be deemed to be a Pakistani national. Hence his internment under Section 3 of the Foreigners (Internment) Order is valid (1966) 2 Andh WR 171 (DB). (AIR 1963 SC 645 and AIR 1962 SC 1952, Rel. on.)

(3-A) As the decision on the question whether a person had acquired the citizenship of another contry can be decided only by the Central Government an order of State Government, before obtaining the decision of the Central Government, expelling a person on the ground that he had obtained Pakistan citizenship is not a valid order. AIR 1957 Andh Pra 1047 (1053): ILR (1957) Andh Pra 755 (DB).

(4) Dispute regarding acquisition of foreign citizenship can be decided by Central Government alone. Notice under Section 3 (2) (c) of Foreigners Act in absence of such decision is invalid. AIR 1961 Assam 50 (52): ILR (1961) 13 Assam 174 (DB). (AIR 1960 Pat 98 and AIR 1959 Punj 261, Rel on.)

(5) The question of renunciation of citizenship will have to be decided by the Central Government, as a Tribunal under Section 9 (2), which has exclusive jurisdiction to determine that question. In absence of any order of Central Government declaring a particular person as a foreigner, the order of State Government declaring him a foreigner is premature. AIR 1962 Guj 194 (196, 197): (1962) 3 Guj LR 85 (DB). (Migration to Pakistan in 1953 during minority — Return to India in 1954 on Pakistani Passport — Absence of order by Central Government under Section 9 (2) of Citizenship Act — Presumption of renunciation cannot be made.)

(5-A) A person has to seek the determination of the question whether or not he is an Indian national or a national of any other country from the Central Government as provided by this section and Rule 30 of the Rules framed under the Act and he cannot seek a remedy from the High Court under Article 226 of the Constitution. ('58) AIR 1958 All 165 (166).

(5-B) An order of expulsion against a person will not be interfered with in writ proceedings where there is prima facie evidence in the shape of a passport and the visas obtained by him to show his having acquired foreign nationality. The appropriate authority before whom he should contest the question whether or not he has lost Indian nationality is the Central Government under Rule 30. AIR 1958 Andh Pra 761 (763).

**Section 9 — Note 10 (contd.)**

(6) If the person was not a citizen of India by reason of his acquisition of Pakistani citizenship he was a foreigner within Section 2 (a) of the Foreigners Act, 1946, on the date when the impugned orders were served on him and consequently the direction issued to him under Section 3 of the Foreigners Act, 1946 would therefore, be valid. AIR 1961 Mad 129: (1960) 2 MLJ 290: ILR (1960) Mad 697 (DB).

(7) In absence of order under Section 9 of Citizenship Act, an order under Section 3 (2) (c), Foreigners Act cannot be passed against a person who is citizen of India at commencement of Constitution, goes to Pakistan without visa and returns to India on Pakistan passport. AIR 1962 Punj 333 (336): 1962 (2) Cr LJ 99: 64 Punj LR 224 (DB).

(8) Person's right to citizenship can be terminated under Sections 9 and 10, after an enquiry has been held on notice to the person concerned. Deportation of an Indian citizen under Foreigners Act (1946) without any enquiry as to when and how he lost his citizenship is unreasonable. AIR 1959 Punj 261 (264): 60 Punj LR 696.

(9) Any action by the State Government in proceeding for deportation of a person without obtaining the decision of the Central Government on question under Section 9 (2) will be unauthorised and unjustified. AIR 1961 Raj 182 (184): 1961 (2) Cri LJ 283: 1961 Raj LW 108 (DB).

(10) Question of Citizenship to be determined before order of deportation is carried out. 1959 Raj LW 299: ILR (1958) 8 Raj 761 (DB). (Minor's nationality.)

**11. Jurisdiction of High Court under Article 226 of Constitution.** — (1) Where an order asking a person to leave India made under Section 3 (2) (c) of Foreigners Act is challenged in petition under Article 226 of Constitution, the question is whether that person is a foreigner or an Indian citizen. Section 9 of Foreigners Act applies to the case. Neither Section 8 of Foreigners Act, nor Section 9 of Citizenship Act, has any application to the case. AIR 1961 SC 1526 (1526, 1527): 1961 (2) Cr LJ 703: (1962) 1 SCR 744.

(2) Question relating to validity of order of Central Government determining nationality of a person under Section 9 (2) cannot be gone into in babeas corpus petition under Article 226 of Constitution. 1967 Cr LJ 1223 (1224): 1967 All WR (HC) 104 (DB).

(3) Section 9 (2) of the Act and Rule 30 and Sch. 3 of Citizenship Rules (1956) do not apply to person who has not acquired citizenship of another Country (Pakistan) and High Court under Article 226 of Constitution is competent to determine question of his nationality. 1962 (1) Cr LJ 256: 1962 All WR (HC) 226: 1962 All Cri 156.

(4) Section 9 (2) is no bar to the jurisdiction of High Court under Article 226 of Constitution to decide matters relating to acquisition of citizenship of foreign country by an Indian Citizen. AIR 1960 All 637 (640): 1960 All LJ 461. (Overruled on another point in AIR 1962 SC 1052 and doubted in AIR 1962 SC 70.)

(5) Question of citizenship of a person is a complicated question of fact and cannot be dealt with in writ petition. Question is essentially a political in nature and Central Government should be permitted to decide the matter in first instance. AIR 1960 All 559 (561): 1960 Cri LJ 1176.

(6) In proceedings under Article 226 of Constitution, wherein question of cessation of Indian Citizenship is raised, question of voluntary acquisition of foreign citizenship cannot be allowed to be raised subsequently so as to oust the jurisdiction of High Court by virtue of Section 9. AIR 1962 Assam 103 (104, 105): ILR (1962) 14 Assam 313 (DB).

(7) Question whether or not a person is an Indian national is a question of fact and not open in writ application. That matter ought to be decided by a suit. (1963) 2 Cr LJ 210 (213, 214) (DB) (Cal). (AIR 1961 SC 1467, Rel. on.)

(8) A petition under Article 226 of Constitution for writ to postpone deportation for affording him opportunity to move Government under Section 9 (2) is not maintainable. AIR 1960 Madh Pra 381 (381, 382) (DB).

(9) If certain persons were citizen of India, when Constitution came into force, but are alleged to have lost the citizenship on account of their acquisition of the citizenship of another country then that question will be determinable under Section 9 (2) of Citizenship Act by the Central Government but not by High Court under Article 226 of Constitution. 1964 Raj LW 591 (DB).

**12. Stay of proceedings.** — (1) Civil Court should refer the question covered by Section 9 (2) to the Central Government and stay further hearing of the suit till the decision of the Central Government is received. AIR 1963 All 482 (483, 484): 1963 All LJ 75.

(2) Even though the Magistrate in a case under Section 14, Foreigners Act has jurisdiction to decide the question as referred to in Section 9 (2) of Citizenship Act, he can stay the proceedings to await the decision of the Central Government on the question which would be binding on him. The matter, however, is within his discretion and he is not bound to stay the proceedings. AIR 1960 All 336 (337, 338): 1960 ALJ 86: 1960 Cr LJ 771. (Where, the accused had ample time to move the Central Government, in refusing to stay the proceeding the exercise of discretion by Court is not erroneous.)

(3) A person who is prosecuted under Section 14 of Foreigners Act is not entitled

**10. Deprivation of citizenship.**—(1) A citizen of India who is such by naturalisation or by virtue only of clause (c) of Article 5 of the Constitution or by registration otherwise than under clause (b) (ii) of Article 6 of the Constitution or clause (a) of sub-section (1) of Section 5 of this Act, shall cease to be a citizen of India, if he is deprived of that citizenship by an order of the Central Government under this section.

(2) Subject to the provisions of this section, the Central Government may, by order, deprive any such citizen of Indian citizenship, if it is satisfied that—

(a) the registration or certificate of naturalisation was obtained by means of fraud, false representation or the concealment of any material fact; or

(b) that citizen has shown himself by act or speech to be disloyal or disaffected towards the Constitution of India as by law established; or

(c) that citizen has, during any war in which India may be engaged unlawfully traded or communicated with an enemy or been engaged in or associated with, any business that was to his knowledge carried on in such manner as to assist an enemy in that war; or

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**Section 9 — Note 12 (contd.)**

to claim that the Criminal Court should stay its hands merely because the dispute about citizenship is raised before it for the first time. AIR 1961 Orissa 174 (177): 1961 (2) Cri LJ 658: 27 Cut LT 189.

**13. Election cases.** — (1) Jurisdiction of election tribunal to decide whether a person, elected as a member of gram panchayat under West Bengal Panchayat Act, (1 of 1957), had acquired citizenship of India, is not taken away by Section 9 (2). AIR 1963 Cal 527 (528) (DB). (AIR 1962 SC 70 and AIR 1961 SC 1467 and 66 Cal WN 108, Rel. on.)

(2) Passport to Indian national is no proof that he acquires foreign citizenship. AIR 1961 Raj 122 (125): 1961 Raj LW 65 (DB). (Case under Representation of the People Act (1951) — Reversed on another point in AIR 1962 SC 1156.)

(3) Where A opted for service under Pakistan Government in 1947 and left for Pakistan, leaving wife in India, but returned to India in 1953 on Pakistani passport and applied for Indian citizenship and on these facts the Electoral Authorities deleted A's name from electoral roll on finding that A migrated to Pakistan and never became citizen of India, order of Electoral Authorities could not be interfered under Article 226 of Constitution. Section 9 (2) did not preclude Tribunal from recording such finding. AIR 1965 Cal 1 (2, 3) (DB). (Case under Section 16 of Representation of the People Act, 1951.)

**Section 10 — Note 1**

(1) Section 10 is punitive in its nature and that is the ratio of the safeguards provided by it. AIR 1961 Mad 129 (137): (1960) 2 Mad LJ 290 (DB).

(2) If the certificate has been obtained by misrepresentation and fraud, it is open to get the certificate cancelled under Section 10, or to prosecute the person under Section 17. AIR 1963 Assam 55 (55) (DB).

(3) Where in applications for certificate of registration as Indian citizen, the applicants mention the fact that their applications for permission to settle permanently in India has been rejected by Government, there is no concealment of material facts. AIR 1967 SC 107 (108, 109): (1962) 1 SCR 772. (Cancellation of registration held to be wholly illegal.)

(4) In the case of a person who had migrated to Pakistan after 1-3-47 no question of an order under the section being necessary to deprive him of citizenship can arise because the citizenship is already lost by his migration long before the Act. (1958) 62 Cal WN 589 (594).

(5) Where a mohammadan and his wife and children were born in India and were domiciled in India at the commencement of Constitution on 26-1-1950, but left India for Pakistan for the first time in March 1950, he and his family members must be considered to be citizens of India within Article 5 of Constituton. AIR 1959 Punj 261 (263): 60 Pun LR 696.

(6) Passport by foreign country to Indian national is no proof that he voluntarily acquires foreign citizenship, because such a passport can also be given to citizen by birth or descent. AIR 1961 Raj 122 (125): 1961 Raj LW 65 (DB). (AIR 1957 Andh Pra 1047, Relied on.)

(7) If a person at the commencement of the Constitution is not a citizen of India or is deemed not to be so under Article 7, then he can be treated as a foreigner unless subsequently he acquires on has acquired citizenship of India under this Act. AIR 1959 Punj 261 (265): 60 Pun LR 696.

(8) It is not open to the High Court in a writ petition to express views on question of migration and adoption of nationality of another country, which to certain extent also relate to intention of party concerned. AIR 1959 Punj 261 (265): 60 Punj LR 696.

(9) A minor cannot change his nationality without action being taken on consent being given by his guardian. AIR 1961 All 507 (508): 1961 (2) Cr LJ 441: 1961 All LJ 222.

(d) that citizen has, within five years after registration or naturalisation, been sentenced in any country to imprisonment for a term of not less than two years; or

(e) that citizen has been ordinarily resident out of India for a continuous period of seven years, and during that period, has neither been at any time a student of any educational institution in a country outside India or in the service of a Government in India or of an international organisation of which India is a member, nor registered annually in the prescribed manner at an Indian consulate his intention to retain his citizenship of India.

(3) The Central Government shall not deprive a person of citizenship under this section unless it is satisfied that it is not conducive to the public good that that person should continue to be a citizen of India.

(4) Before making an order under this section, the Central Government shall give the person against whom the order is proposed to be made notice in writing informing him of the ground on which it is proposed to be made and, if the order is proposed to be made on any of the grounds specified in sub-section (2) other than clause (e) thereof, of his right, upon making application therefor in the prescribed manner, to have his case referred to a committee of inquiry under this section.

(5) If the order is proposed to be made against a person on any of the grounds specified in sub-section (2) other than clause (e) thereof and that person so applies in the prescribed manner, the Central Government shall, and in any other case it may, refer the case to a Committee of Inquiry consisting of a chairman (being a person who has for at least ten years held a judicial office) and two other members appointed by the Central Government in this behalf.

(6) The Committee of Inquiry shall, on such reference, hold the inquiry in such manner as may be prescribed and submit its report to the Central Government; and the Central Government shall ordinarily be guided by such report in making an order under this section.

## SUPPLEMENTAL

**11. Commonwealth citizenship.**—Every person who is a citizen of Commonwealth country specified in the First Schedule shall, by virtue of that citizenship, have the status of a Commonwealth citizen in India.

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**Section 11 — Note 1**

(1) Citizen includes only natural persons and not juristic persons like Corporations. State Trading Corporation, a Company registered under Companies Act, 1956 is not a citizen and cannot maintain petition under Article 32 for enforcement of fundamental right under Article 19. AIR 1963 SC 1811 (1821, 1823, 1835): (1964) 4 SCR 99. (AIR 1953 Raj 188 and AIR 1961 Cal 258, AIR 1959 Cal 45 and AIR 1953 Assam 177, Impliedly overruled.)

(2) The citizen of a Commonwealth has a status in between a foreigner and a citizen of India. He has more rights than a foreigner but less rights than a citizen of India. A Commonwealth citizen does not by virtue of that alone become a citizen of all the different individual States composing the Commonwealth. AIR 1965 Cal 312 (320, 321): 1965 (1) Cri LJ 679 (DB).

(3) Pakistan citizen on his Commonwealth citizenship cannot claim fundamental rights under Article 19 of the Constitution through doors of Citizenship Act, 1955. Nor Constitution (Declaration as to Foreign States) Orders, 1950 make him Indian citizen for purposes of Art. 19. AIR 1965 Cal 312 (319, 321): 1965 (1) Cr LJ 679 (DB).

(4) The fact that the citizen of Pakistan has the status of a commonwealth citizen in India does not confer on him the fundamental right to reside and settle in any part of India. Such a right if the citizens of Pakistan are to have in India must be conferred by the Central Government by a notification issued under S. 12. AIR 1957 Madh B 1 (3): 1956 Madh BLJ 893 (DB).

(5) In absence of notification under Section 12, persons who migrated to Pakistan after 1-3-1947 and who did not return to India till commencement of Constitution cannot be considered to be citizens of India by virtue of any of the provisions in Constitution or in this Act. AIR 1964 Madh Pra 272 (272, 273): 1963 Jab LJ 153 (DB). (AIR 1961 Madh Pra 110, Rel. on.)

**12. Power to confer rights of Indian citizen on citizens of certain countries.**—(1) The Central Government may, by order notified in the Official Gazette, make provisions on a basis of reciprocity for the conferment of all or any of the rights of a citizen of India on the citizens of any country specified in the First Schedule.

(2) Any order made under sub-section (1) shall have effect notwithstanding anything inconsistent therewith contained in any law other than the Constitution of India or this Act.

**13. Certificate of citizenship in case of doubt.**—The Central Government may, in such cases as it thinks fit, certify that a person, with respect to whose citizenship of India a doubt exists, is a citizen of India; and a certificate issued under this section shall, unless it is proved that it was obtained by means of fraud, false representation or concealment of any material fact, be conclusive evidence that that person was such a citizen on the date thereof, but without prejudice to any evidence that he was such a citizen at an earlier date.

**14. Disposal of application under Sections 5 and 6.**—(1) The prescribed authority or the Central Government may, in its discretion, grant or refuse an application under Section 5 or Section 6 and shall not be required to assign any reasons for such grant or refusal.

(2) Subject to the provisions of Section 15, the decision of the prescribed authority or the Central Government on any such application as aforesaid shall be final and shall not be called in question in any Court.

**15. Revision.**—(1) Any person aggrieved by an order made under this Act by the prescribed authority or any officer or other authority (other than the Central Government) may, within a period of thirty days from the date of the order, make an application to the Central Government for a revision of that order:

Provided that the Central Government may entertain the application after the expiry of the said period of thirty days, if it is satisfied that the applicant was prevented by sufficient cause from making the application in time.

(2) On receipt of any such application under sub-section (1), the Central Government shall, after considering the application of the aggrieved person and any report thereon which the officer or authority making the order may submit, make such order in relation to the application as it deems fit, and the decision of the Central Government shall be final.

**16. Delegation of powers.**—The Central Government may, by order, direct that any power which is conferred on it by any of the provisions of this Act other

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**Section 12 — Note 1**

(1) Conferment of all or any of the rights of a citizen of India on a citizen of any country specified in the first schedule can be made only by the Central Government under Section 12 by an order notified in the official Gazette. AIR 1964 Madh Pra 272 (272): 1963 Jab LJ 153 (DB). (Person migrating to Pakistan in March, 1947 and not returning to India till commencement of Constitution — He is not citizen of India.)

(2) Only citizens of India, can claim fundamental rights under Article 19, Constitution (Declaration as to Foreign States) Orders, 1950 does not make the Pakistan citizen Indian citizen for purpose of Article 19. AIR 1965 Cal 312 (319, 320, 321): 1965 (1) Cr LJ 679 (DB).

(3) Pakistanis, merely because they are Commonwealth citizens, cannot claim the fundamental right guaranteed by Art. 19 of the Constitution to reside and settle down in any part of India in the absence of a notification by the Central Government conferring such a right on them. AIR 1957 Madh B 1 (3): 1956 Madh BLJ 893 (DB) * AIR 1956 Madh B 211 (213, 214) (DB).

**Section 13 — Note 1**

(1) Section 10 is rather vague as no test is laid down therein as to when a person's citizenship gets in doubt. It could not be intention of the legislature that whenever a citizen of this country visits a foreign country on business or otherwise for short or long time his citizenship becomes doubtful and he must necessarily apply under Section 13 of the Act to escape the risk of being deported under the Foreigners Act. AIR 1959 Punj 261 (264): 60 Pun LR 696.

(2) A, person who is a citizen of India under the Constitution does not require a certificate of citizenship under Section 13 of the Citizenship Act. AIR 1959 Punj 261 (264): 60 Punj LR 696.

than those of Section 10 and Section 18 shall, in such circumstances and under such conditions, if any, as may be specified in the order, be exercisable also by such officer or authority as may be so specified.

**17. Offences.**—Any person who, for the purpose of procuring anything to be done or not to be done under this Act, knowingly makes any representation which is false in a material particular shall be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.

**18. Power to make rules.**—(1) The Central Government may, by notification in the Official Gazette, make rules[a] to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(a) the registration of anything required or authorised under this Act to be registered, and the conditions and restrictions in regard to such registration;

(b) the forms to be used and the registers to be maintained under this Act;

(c) the administration and taking of oaths of allegiance under this Act and the time within which and the manner in which, such oaths shall be taken and recorded;

(d) the giving of any notice required or authorised to be given by any person under this Act;

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**Section 17 — Note 1**

(1) If the certificate has been obtained by misrepresentation and fraud, it is open to get the certificate cancelled under Section 10, or to prosecute the person under Section 17. AIR 1963 Assam 55 (55) (DB).

## SECTION 18

### SYNOPSIS

1. Citizenship Rules (1956), R. 9.
2. Citizenship Rules (1956), R. 30.
3. Citizenship Rules (1956), Schedule 3, R. 3.
4. Citizenship Rules (1956), Schedule 3, R. 5.

**1. Citizenship Rules (1956), R. 9.**— (1) Question whether a person has satisfied all the conditions under Rule 9 is a question of fact and cannot be enquired into in proceedings under Article 226 of Consttiution. AIR 1964 Cal 324 (326).

**2. Citizenship Rules (1956), Rule 30.**— (1) An order of deportation passed by a State Government against a Pakistani found in the State cannot be sustained where there is no enquiry by Central Government about his status. AIR 1962 SC 1778 (1780, 1781): (1962) Supp 3 SCR 288. (Order made in AIR 1957 Andh Pra 1047, Confirmed.)

(2) The date of the arising of the question referred to in Section 9 (2) is the date when the question arises in India before the Central Government and not when the question arose before the Government of a foreign country at the time of grant of passport by it. AIR 1966 All 127 (128).

(3) Court cannot appraise evidence or reopen matters decided by Central Government under Section 9 (2) read with R. 30. AIR 1966 All 127 (128).

(4) Rule laid down in Rule 3 of Schedule 3 is for guidance of Central Government for determination of nationality of person. It is not binding on Courts of law. Possession of foreign passport only raises presumption of foreign citizenship and is not conclusive of this fact. AIR 1960 All 431 (433): 1960 Cri LJ 875: 1959 All LJ 833.

(5) Decision of a Criminal Court trying persons under Foreigners Act on question whether they acquired citizenship of Pakistan is only for the purposes of the case and is liable to be superseded by Central Government under Section 9 (2) read with Rule 30 of the rules framed under Section 18. AIR 1960 All 336 (337, 338): 1960 Cri LJ 771: 1960 All LJ 86.

(6) Question whether person is Indian national cannot be determined by petition under Article 226 of Constitution. AIR 1958 All 165 (166).

(7) Rule 30 of the Citizenship Rules appointing the Central Government as an authority to decide question of voluntary acquisition of citizenship of a foreign country does not offend the principles of natural justice. AIR 1957 Andh Pra 1047 (1053): ILR (1957) Andh Pra 755 (DB).

(8) A person who has come in India after the commencement of the Constitution on a Pakistani passport and claim to be an Indian citizen is entitled to get the matter decided by the Central Government before he can be declared a foreigner under Foreigners Act. AIR 1962 Assam 38 (38, 39) (DB).

(9) Where a person and his wife migrated to Pakistan within the meaning of Article 7 of Constitution, Citizenship Act did not apply. They could raise dispute before Central Government under Rule 30. AIR 1960 Andh Pra 106 (110): (1959) 2

(e) the cancellation of the registration of, and the cancellation and amendment of certificates of naturalisation relating to, persons deprived of citizenship under this Act, and the delivering up of such certificates for those purposes;

(f) the registration at Indian consulates of the births and deaths of persons of any class or description born or dying outside India;

(g) the levy and collection of fees in respect of applications, registrations, declarations and certificates under this Act, in respect of the taking of an oath of allegiance, and in respect of the supply of certified or other copies of documents;

(h) the authority to determine the question of acquisition of citizenship of another country, the procedure to be followed by such authority and rules of evidence relating to such cases;

(i) the procedure to be followed by the committees of inquiry appointed under Section 10 and the conferment on such committees of any of the powers, rights and privileges of civil courts;

(j) the manner in which applications for revision may be made and the procedure to be followed by the Central Government in dealing with such applications; and

(k) any other matter which is to be, or may be, prescribed under this Act.

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**Section 18 — Note 2 (contd.)**

Andh WR 472 (DB). (AIR 1955 Hyd 34 and AIR 1951 All 16, Relied on.)

(10) Where a person is a citizen of India at the time of commencement of Constitution, and such person goes to Pakistan without visa but returns to India on Pakistani passport, in absence of order under Section 9 no order under Section 3 (2) (c), Foreigners Act can be passed. AIR 1962 Punj 333 (336): 1962 (2) Cri LJ 99: 64 Pun LR 224 (DB).

**3. Citizenship Rules (1956), Schedule 3, Rule 3.**— (1) Schedule 3, Rule 3 of Citizenship Rules, 1956, which makes it obligatory on the enquiring authority to infer the acquisition of citizenship of foreign country from the fact that the passport of foreign country has been obtained by an Indian citizen, is a "rule of evidence" and not a rule of substantive law. It falls within the scope of Section 9 (2) and is valid. (Per Majority; Das Gupta and Sarkar, JJ., contra.) AIR 1962 SC 1052 (1065, 1066): 1962 (2) Cri LJ 404: (1962) 3 SCR 869. (AIR 1957 Andh Pra 1047 and AIR 1960 All 637, Overruled.) * AIR 1962 SC 1778 (1780): (1962) Supp 3 SCR 288.

(2) As a result of Section 9 read with Rule 3 in Schedule 3, as soon as it is shown that a person has acquired passport from the Pakistan Government, there is no automatic statutory cesser of his citizenship of India. Hence, an order of deportation passed by a State Government against a Pakistani found in the State cannot be sustained where there is no enquiry by Central Government about his status. AIR 1962 SC 1778 (1780, 1781): (1962) Supp 3 SCR 288. (Order made in AIR 1957 Andh Pra 1047, Confirmed.)

(3) Parliament was competent to enact Section 9 of the Citizenship Act and to make rules of evidence. Schedule 3, R. 3 is not violative of Article 19 of Constitution. AIR 1962 All 383 (386, 390): 1962 (2) Cri LJ 166: 1962 All LJ 123. (AIR 1957 Andh Pra 1047, Dissented from. AIR 1960 All 637, Distinguished.)

(4) Rule laid down in Rule 3 of Schedule III is for guidance of Central Government for determination of nationality of person. It is not binding on Courts of law. Possession of foreign passport only raises presumption of foreign citizenship and is not conclusive of this fact. AIR 1960 All 431 (433): 1960 Cri LJ 875: 1959 All LJ 833.

(5) Schedule 3, Rule 3 is not ultra vires of Article 19 of Constitution. AIR 1959 Bom 192 (193, 194): 1959 Cri LJ 577: 60 Bom LR 1186 (DB). (AIR 1957 Andh Pra 1047, Dissented from.)

(6) Where A having opted for service under Pakistan Government in 1947 left for Pakistan leaving wife in India, but after returning to India in 1953 on Pakistani passport applied for Indian citizenship and on these facts the Electoral Authorities directed deletion of A's name from electoral roll on finding that A migrated to Pakistan and never became citizen of India, such an order could not be interfered with under Article 226 of Constitution. AIR 1965 Cal 1 (2, 3): 1965 (1) Cri LJ 22: 68 Cal WN 1140 (DB).

(7) Persons who migrated to Pakistan within meaning of Article 7 of Constitution but subsequently came to India on a temporary permit representing himself to be a Pakistani national cannot claim that he went to Pakistan only for a temporary purpose. AIR 1964 Madh Pra 272 (272, 273): 1963 Jab LJ 153 (DB).

(3) In making any rule under this section, the Central Government may provide that a breach thereof shall be punishable with fine which may extend to one thousand rupees.

(4) All rules made under this section shall, as soon as may be after they are made, be laid for not less than fourteen days before both Houses of Parliament and shall be subject to such modifications as Parliament may make during the session in which they are so laid.

[a] For Citizenship Rules, 1956, see Gazette of India, Extra., 7-7-1956, Pt. II, Sec. 3, p. 1597, and for amendments to those Rules, see S.O. No. 872 published in the Gazette of India, 24-5-1958, Pt. II, Sec. 3, p. 716. For rules modified up to 1-1-1962, see General Statutory Rules and Orders, Vol. 4, p. 347.

For Citizens (Registration at Indian Consulates) Rules, 1956, see Gazette of India, Extra., 7-7-1956, Pt. II, Sec. 3, p. 1639. For said rule as modified up to 1-1-1962, see General Statutory Rules and Orders, Vol. 4, p. 396.

**19. Repeals.**—[Repealed by Act 58 of 1960, S. 2, Sch. I.]

## THE FIRST SCHEDULE

(See Sections 2(1) (b) and 5 (1) (e))

A. The following are Commonwealth countries[d] :—

1. United Kingdom.
2. Canada.
3. Commonwealth of Australia.
4. New Zealand.
5. Union of South Africa.[b]
6. Pakistan.
7. Ceylon.
8. Federation of Rhodesia and Nyasaland.[c]

[a][9. Ghana.

10. Federation of Malaya (Malaysia).

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**Section 18 — Note 3 (contd.)**

(8) Paragraph 3 of Schedule III of Citizenship Rules, 1956 is not invalid on ground of unreasonableness. AIR 1961 Mad 129 (141, 142): (1960) 2 Mad LJ 290 (DB). (1943 KB 223, Rel. on.)

(9) Rule 3 of Schedule III is a valid rule framed under Section 18 read with Sec. 9 (2). It cannot be said to go beyond the scope of Sec. 9 (1). AIR 1958 Raj 172 (174, 175): ILR (1958) 8 Raj 928 (DB). (AIR 1957 Andh Pra 1047. Dissented from.)

(10) Persons born in India migrating to Pakistan after partition but returning to India in 1956 on temporary passport from Pakistan are citizens of Pakistan by virtue of Schedule 3, Rule 3. AIR 1958 Raj 172 (174, 175): ILR (1958) 8 Raj 928 (DB). (Collector is not powerless to cancel a certificate once granted under Section 5 (1) (a).)

**4. Citizenship Rules (1956), Schedule 3, Rule 5.**— (1) The fact that a person has acquired passport from the Pakistan Government is not sufficient for his deportation from India. AIR 1962 SC 1778: (1962) Supp 3 SCR 288.

(2) Person migrating to Pakistan within Article 7 of Constitution but coming to India on a temporary permit representing himself to be a Pakistani national cannot claim that he went to Pakistan only for a temporary purpose. AIR 1964 Madh Pra 272 (272, 273): 1963 Jab LJ 153 (DB).

(3) General rule of Private International Law regarding the disability of certain classes of persons, like minors, from changing their domicile, cannot be applied to a person who has migrated to Pakistan after 1-3-1947 as required by Article 7 of Constitution. Such a person will be deemed not to be a citizen of India at the commencement of the Constitution. AIR 1967 Pat 266 (267, 268) (DB). (AIR 1965 All 191, Dissented from.)

**Schedule I — Note 1**

(1) Conferment of all or any of the rights of a citizen of India on a citizen of any country specified in the first schedule can be made only by Central Government under Section 12. AIR 1964 Madh Pra 272: 1963 Jab LJ 153 (DB). (Person migrating to Pakistan in March, 1947 and not returning to India till commencement of Constitution, is not an Indian citizen.)

11. Singapore.]

B. The Republic of Ireland.

Explanation.—In this Schedule, "United Kingdom" means the United Kingdom of Great Britain and Northern Ireland, and includes the Channel Islands, the Isle of Man and all Colonies; and "Commonwealth of Australia" includes the territories of Papua and the territory of Norfolk Island.

[a] Inserted by the Citizenship (Amendment) Act, 1957 (65 of 1957), Sec. 2 (27-12-1957).

[b] This has become a republic outside the Commonwealth—see South Africa Act, 1962 (10 and 11 Eliz. 2 c. 23) (31-5-1962).

[c] Federation of Rhodesia and Nyasaland has been dissolved. Both are independent nations—see Rhodesia and Nyasaland Act, 1963 (1963, c. 34).

[[d] The following are the other Commonwealth countries:—

(1) Republic of Nigeria.
(2) Sierra Leone.
(3) Republic of Tanganyika.
(4) Jamaica
(5) Trinidad and Tobago.
(6) Zanzibar.
(7) Uganda.
(8) Zambia.
(9) Malta.
(10) Gambia.
(11) Malawi.
(12) Guiana.
(13) Republic of Kenya.
(14) Botswana.
(15) Lesotho.
(16) Barbados.
(17) Mauritius.

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## THE SECOND SCHEDULE

(See Sections 5 (2) and 6 (2) )

**(Oath of Allegiance)**

I, A. B. ....., do solemnly affirm (or swear) that I will bear true faith and allegiance to the Constitution of India as by law established, and that I will faithfully observe the laws of India and fulfil my duties as a citizen of India.

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## THE THIRD SCHEDULE

(See Section 6 (1) )

**Qualifications for Naturalisation**

The qualifications for naturalisation of a person who is not a citizen of a country specified in the First Schedule are:—

(a) that he is not a subject or citizen of any country where citizens of India are prevented by law or practice of that country from becoming subjects or citizens of that country by naturalisation;

(b) that, if he is a citizen of any country, he has renounced the citizenship of that country in accordance with the law therein in force in that behalf and has notified such renunciation to the Central Government;

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**Schedule 3 — Note 1**

(1) Clause 1 to Proviso to Schedule 3 does not lay down any procedure for filing an application by a citizen of India to the Central Government to show that he continues to be such a citizen. AIR 1959 Punj 261 (264): 60 Pun LR 696.

(c) that he has either resided in India or been in the service of a Government of India or partly the one and partly the other, throughout the period of twelve months immediately preceding the date of the application;

(d) that during the seven years immediately preceding the said period of twelve months he has either resided in India or been in the service of a Government in India, or partly the one and partly the other, for periods amounting in the aggregate to not less than four years;

(e) that he is of good character;

(f) that he has an adequate knowledge of a language specified in the Eighth Schedule to the Constitution; and

(g) that in the event of a certificate of naturalisation being granted to him, he intends to reside in India, or to enter into, or continue in, service under a Government in India or under an international organisation of which India is a member or under a society, company or body of persons established in India:

Provided that the Central Government may, if in the special circumstances of any particular case it thinks fit,—

(i) allow a continuous period of twelve months ending not more than six months before the date of the application to be reckoned, for the purposes of clause (c) above, as if it had immediately preceded that date;

(ii) allow periods of residence or service earlier than eight years before the date of the application to be reckoned in computing the aggregate mentioned in clause (d) above.

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# [THE] CIVIL COURTS AMINS ACT, 1856
## (ACT XII OF 1856)

[The text of the Act printed here is as on 1-5-1969.]

## CONTENTS

**PREAMBLE**

SECTIONS

**1. [Repealed.]**
**2. Appointment of Amins.**
**3. Amins by whom appointed and to what Courts attached.**
**4. [Repealed.]**
**5. Duties of Amins.**
**6. [Repealed.]**
**7. [Repealed.]**
**8. Expense of Amins how charged.**
**9. When employed to sell property, deduction from proceeds. Expenses if no sale takes place.**
**10. Power of Civil Courts, North Western Provinces to employ Revenue Officers.**

## ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A.O., 1937; A.L.O., 1950.
—Amended in Agra by Act XIX of 1886, in U.P. by U.P. Act 20 of 1963.
—Repealed in part by Acts X of 1861; XIV of 1870; X of 1873; XII of 1873; XII of 1891.
—Repealed in Bengal and Assam by Bengal Act II of 1899.
—Short title given by Act V of 1897

# [THE] CIVIL COURTS AMINS ACT, 1856
## (ACT XII OF 1856)[a]

[9th May, 1856.]

**An Act to amend the Law respecting the employment of Amins by the Civil Courts in the Presidency of Fort William.[a]**

**Preamble.**

Whereas the law by which the Civil Courts are authorized to employ Amins upon local investigations is defective, and requires amendment; [b][ ° ° ° ] It is enacted as follows:—

[a] Short title given by the Amending Act, 1897 (V of 1897). Presidency of Fort William means the former Bengal Presidency.

This Act was declared, by the Laws Local Extent Act, 1874 (XV of 1874) Sec. 7 and Sch. V to be in force in Province of Agra (the former North--Western Provinces) except the Scheduled Districts. Agra is no longer a province. It is one of the districts of the State of Uttar Pradesh.

It has been declared, by notification under the Scheduled Districts Act, 1874 (XIV of 1874), to be in force in the Scheduled portion of the Mirzapur District and in Jaunsar Bawar—See Gazette of India, 1879, Pt. I, pp. 382-383.

This Act has been extended to the district of—

(i) Rampur, by Rampur (Application of Laws) Act, 1950 (U. P. Act XII of 1950) (30-12-1949);

(ii) Banaras, by Banaras (Application of Laws) Order, 1949 (30-11-1949); and

(iii) Tehri-Garhwal, by Tehri-Garhwal (Application of Laws) Order, 1949 (30-11-1949).

The Act has now been extended to the Union Territory of Pondicherry by Act 26 of 1968, S. 3, Sch. Pt. I (with effect from 5-9-1968).

This Act is repealed throughout Bengal by the Bengal Civil Court Amins Act, 1899 (Beng. II of 1899), S. 1.

[b] Certain words were omitted by the Amending Act, 1891 (XII of 1891).

**1. Repeal of Regulations.**—[Repealed by the Repealing Act, 1870 (XIV of 1870).]

**2. Appointment of Amins.**—In each district, officers to be designated Civil Court Amins shall be appointed for the purposes of this Act, and shall be remunerated by fixed monthly salaries.

[a][The number of Amins to be employed in each district shall be determined by the State Government.]

[a] Substituted for the original paragraph by A.O., 1937 (1-4-1937) and A.L.O., 1950.

**3. Amins by whom appointed and to what Courts attached.**—The [a][District Judge shall from time to time attach the Civil Court Amins] to the several Courts of the district according as the state of business may require:

Provided that an Amin attached to any particular Court may, with the sanction of the Judge, be employed occasionally by any other Court.

[a] Substituted for "Civil Court Amins shall be appointed by the Judge of the district and the Judge shall from time to time attach them", by A.O., 1937 (1-4-1937) and A.L.O., 1950.

**4. Declaration to be made by Civil Court Amins.**—[Repealed by the Indian Oaths Act, 1873 (X of 1873).]

**5. Duties of Amins.**—[a][° ° °] The Civil Court Amins may be employed in any of the following duties:—

(i) in investigating or adjusting accounts[b] in any suit or other judicial proceeding;

(ii) in making local investigations[b] when the Court may deem investigation on the spot to be requisite and proper for the purpose of elucidating the matters in dispute, or of ascertaining the amount of mesne profits or damages, in any suit or other judicial proceeding;

(iii) in delivering over possession[b] of lands, houses and other immovable property, in execution of decrees or orders of Court;

(iv) in the sale of movable property[b] and of houses, gardens and other immovable property of the kind described[c] in S. 3, Regulation 7, 1825;

(v) in ascertaining the sufficiency of sureties and the means of persons suing in forma pauperis.

[a] The words "Subject to such general directions and restrictions as may from time to time be prescribed by the Sudder Court" were repealed by the Repealing Act, 1873 (XII of 1873).

[b] For powers of Courts as to and provisions relating thereto, see Civil P. C. (1908), Order 26, Rule 11 and Order 41, Rule 27; Sec. 75, Order 26, Rule 9; Order 41, Rule 7; Order 21, Rule 35; and Order 21, Rule 78, respectively.

[c] That is "orchards, or small portions of lakhiraj land". Ben. Reg. VII of 1825 was repealed by the Repealing Act, 1874 (XVI of 1874), but not so as to affect the provisions referred to here, see S. 1, para. 2, of that Act.

**6. Procedure in referring accounts to Civil Court Amins.**—[Repealed by Act X of 1861].

**7. Procedure in cases of local enquiry.**—[Repealed, ibid.]

**8. Expense of Amins how charged.**—Whenever a Civil Court Amin may be employed on any duty connected with a pending suit, or the execution of a decree, except the sale of property, the Court shall estimate the time which the duty may be expected to occupy, and shall charge for the expense of the Amin such fixed rate per diem as may be determined by the Sadr Court.

The amount shall be paid into Court by the party at whose instance or for whose benefit the Amin is deputed, and shall be added to the costs of suit.

**9. When employed to sell property, deduction from proceeds.**—When a Civil Court Amin shall be employed to sell property, a deduction at the rate of one anna[a] in the rupee shall be made from the proceeds of the sale.

**Expenses, if no sale takes place.**

If no sale takes place by reason of the claim being satisfied, or for any other cause, a charge shall be made for the expenses of the Amin according to the time he may be employed.

A deposit to meet this charge calculated in the manner prescribed in the preceding section, shall be made before the Amin is deputed, and shall be returned to the depositor if the sale takes place.

All sums paid for the employment of Amins, and all sums deducted from the proceeds of sales, shall be credited to [b][the revenues of the States].

[a] In its application to the State of U.P., for the words 'one anna" substitute the words 'six naye paise'—see U.P. Act 20 of 1963, S. 2, Sch., item 1.

[b] Substituted for "Government" by A.O., 1937 (1-4-1937) and A.L.O., 1950.

**10. Power of Civil Courts, North-Western Provinces, to employ Revenue officers.**—Nothing contained in this Act shall be held to prohibit the Civil Courts in the North-Western Provinces[b] of the Presidency of Fort William from making use of the agency of the Revenue officer in investigations and adjustments of accounts connected with land paying revenue to Government [a][° ° °].

[a] The words "under such general directions as may from time to time be prescribed by the Sudder Court" were repealed by the Repealing Act, 1873 (XII of 1873), and the words "Wherever a Tuhseeldar, a Naib-Tuhseeldar or a Peshkar shall be employed in any such investigation or adjustment under the orders of a Civil Court, he shall possess all the powers vested in the Civil Court Amins by Sec. 7 of this Act; and the provisions of the said section shall be applicable to the proceedings held by such officer" with which the section concluded were repealed by the Amending Act, 1891 (XII of 1891).

[b] Now Agra.

# [THE] CIVIL DEFENCE ACT, 1968
## (ACT 27 OF 1968)

[The text of the Act printed here is as on 1-5-1969.]

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## STATEMENT OF OBJECTS AND REASONS

"After the Chinese invasion of our country in 1962 it was felt that in order to minimise loss of life, to maintain continuity of prohibition and to restore quickly the disrupted civil services, Civil Defence measures should be adopted in places which were the most likely targets of enemy air attack. With a view to providing the legal cover, a Chapter on the subject was included in the Defence of India Act, 1962 and rules for Civil Defence services were framed thereunder.

2. This law will however, cease to be operative six months after the revocation of the emergency but the Civil Defence Organisation as such has to be retained to provide the necessary machinery for raising and training the volunteers to man the various Civil Defence services and also to make other preparations so as to enable the authorities to adopt Civil Defence measures at short notice wherever necessary.

3. The Bill aims at continued maintenance of Civil Defence services which are already in position in the States and Union territories. It also enables the Central Government and the State Governments to extend the scope of Civil Defence if and when it may become necessary to do so.

4. This Bill incorporates all the provisions of Chapter III of the Defence of India Act and other relevant provisions spread over other chapters of the Defence of India Act and Rules. It also provides for payment of compensation to Civil Defence volunteers for injuries sustained while on duty".

—Gaz. of Ind. 1967, Pt. II-S. 2, Extra p. 1389.

## COGNATE ACTS AND PROVISIONS

1. Indian Reserve Forces Act, 4 of 1888.
2. National Cadet Corps Act, 31 of 1948.
3. Territorial Army Act, 56 of 1948.
4. Central Reserve Police Force Act, 66 of 1949.
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6. Border Security Force Act, 47 of 1968.
7. War Injuries Ordinance, 7 of 1941.
8. War Injuries (Compensation Insurance) Act, 23 of 1943.
9. Workmen's Compensation Act, 8 of 1923, Section 3.

## [THE] CIVIL DEFENCE ACT, 1968
## (ACT 27 OF 1968)[a]

[24th May, 1968]

**An Act to make provision for Civil Defence and for matters connected therewith.**

Be it enacted by Parliament in the Nineteenth Year of the Republic of India as follows:—

[a] For Statement of Objects and Reasons, see Gazette of India, 23-12-1967, Pt. II, S. 2, Ext., p. 1389.

## CHAPTER I

### PRELIMINARY

**1. Short title, extent and commencement.**—(1) This Act may be called THE CIVIL DEFENCE ACT, 1968.

(2) It extends to the whole of India.

(3) It shall come into force in a State or part thereof on such date, not being a date earlier than the date[a] of the expiry of the Defence of India Act, 1962, as the Central Government may, by notification, appoint and different dates may be appointed for different States or different parts thereof.

[a] The date appointed is 10-7-1968 for the whole of India—see Gazette of India, 6-7-1968, Pt. II, Sec. 3(ii), Ext., p. 761.

**2. Definitions.**—In this Act, unless the context otherwise requires,—

(a) "civil defence" includes any measures not amounting to actual combat, for affording protection to any person, property, place or thing in Indian or any part of the territory thereof against any hostile attack, whether from air, land, sea or other places, or, for depriving any such attack of the whole or part of its effect, whether such measures are taken before, during, at or after the time of such attack;

(b) "Civil Defence Corps" means the Corps formed wholly or mainly to meet the needs of civil defence and includes an organisation deemed to be a Corps under the proviso to sub-section (1) of Section 4;

(c) "hostile attack" means any attack by any person or body of persons, whether during any war, external aggression, internal disturbance or otherwise which endangers the security of any life, property, place or thing in India or any part of the territory thereof;

(d) "notification" means a notification published in the Official Gazette;

(e) "personal service injury" has the meaning assigned to it in the Personal Injuries (Emergency Provisions) Act, 1962;

(f) "State Government", in relation to a Union territory, means the Administrator of the Union territory.

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## CHAPTER II

### POWER OF CENTRAL GOVERNMENT TO MAKE RULES FOR CIVIL DEFENCE

**3. Power to make rules for civil defence.**—(1) The Central Government may, for securing civil defence, by notification, make rules[a] providing for all or any of the following matters, namely:—

(a) preventing the prosecution of any work likely to prejudice civil defence;

(b) instruction of members of the public regarding civil defence and their equipment for the purposes of such defence;

(c) provision, storage and maintenance of commodities and things required for civil defence;

(d) prohibiting or regulating traffic, and the use of vessels, buoys, lights and signals in ports and territorial, tidal and inland waters;

(e) control of lights and sounds;

(f) protection of life and property by taking fire prevention and other measures;

(g) securing of any buildings, premises or other structures from being readily recognisable in the event of a hostile attack;

(h) for the prevention of danger to life or property, the demolition, destruction or rendering useless of any building, premises or other structures or any other property;

(i) prohibiting or regulating the possession, use or disposal of—
  (i) explosives, inflammable substances, corrosive and other dangerous substances or articles, arms and ammunition;
  (ii) vessels;
  (iii) wireless telegraphic apparatus;
  (iv) aircraft; and
  (v) photographic and signalling apparatus and any means of recording information;
(j) evacuation of areas and the removal of property or animals therefrom;
(k) accommodation in any area of persons evacuated from another area and the regulation of the conduct of evacuated persons accommodated in such area;
(l) billeting of evacuated person or persons authorised to perform functions under this Act;
(m) salvage of damaged buildings, structures and property and disposal of the dead;
(n) seizure and custody or destruction of injured, unclaimed or dangerous animals;
(o) ensuring the safety of—
  (i) ports, dockyards, lighthouses, lightships, aerodromes and facilities associated with aerial navigation;
  (ii) railways, tramways, roads, bridges, canals and all other means of transport by land or water;
  (iii) telegraphs, post offices, signalling apparatus and all other means of communication;
  (iv) sources and systems of water-supply, works for the supply of water, gas or electricity and all other works for public purposes;
  (v) vessels, aircraft, transport vehicles as defined in the Motor Vehicles Act, 1939, and rolling stocks of rails and tramways;
  (vi) warehouses and all other places used or intended to be used for storage purposes;
  (vii) mines, oilfields, factories or industrial or commercial undertakings generally, or any mine, oilfield, factory or industrial or commercial undertaking in particular;
  (viii) laboratories and institutions where scientific or technological research or training is conducted or imparted;
  (ix) all works and structures being part of, or connected with, anything earlier mentioned in this clause; and
  (x) any other place or thing used or intended to be used for the purposes of Government or a local authority or a semi-Government or autonomous organisation, the protection of which is considered necessary or expedient for securing civil defence;
(p) control of any road or pathway, waterway, ferry or bridge, river, canal or other source of water-supply;
(q) precautionary measures, which the Government or any department thereof or any local authority, members of police force, fire brigade and members of any other service or authority employed primarily for purposes other than civil defence purposes should be required to take within their respective jurisdictions or with respect to any personnel employed by them;
(r) preventing or controlling any use of uniforms, whether official or otherwise, or flags or official decorations like medals, badges or other insignia or anything similar thereto, the wearing of which is calculated to deceive or to prejudice civil defence;
(s) precautions to be taken or action to be taken by persons or authorities with a view to protecting or acquainting the general public or any

members thereof against the dangers involved in any apprehended hostile attack;

(t) requiring the owner or occupier of any building, structure or premises to make or carry out such arrangements as may be necessary for the purposes of detection and prevention of fire;

(u) taking of specified measures for dealing with outbreaks of fire;

(v) directing that, subject to any specified exemption, no person present in any specified area shall, between such hours as may be specified, be out of doors except under the authority of a written permit granted by a specified authority or person;

(w) (i) prohibiting the printing and publication of any newspaper, newssheet, book or other document containing matters prejudicial to civil defence;

(ii) demanding security from any press used for the purpose of printing or publishing, and forfeiting the copies of, any newspaper, newssheet, book or other document containing any of the matters referred to in sub-clause (i);

(x) regulating the conduct of persons in respect of areas the control of which is considered necessary or expedient, and removal of persons from such areas;

(y) requiring any person or class of persons to comply with any scheme of civil defence;

(z) any other provision which may be necessary for the purposes of civil defence.

(2) Any rule made under sub-section (1) may provide that orders with regard to the matters specified therein may be made by the State Government.

(3) Any rule made under sub-section (1) may provide that a contravention thereof or any order made thereunder shall be punishable with fine which may extend to five hundred rupees, and where the contravention is a continuing one, with a further fine which may extend to fifty rupees for every day, after the first, during which such contravention continues.

[a] For Civil Defence Rules, 1968, see Gazette of India, 10-7-1968, Pt. II, S. 3 (i), page 403.

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## CHAPTER III

## CIVIL DEFENCE CORPS

**4. Constitution of Civil Defence Corps.**—(1) The State Government may constitute[a] for any area within the State a body of persons to be called the Civil Defence Corps (hereinafter referred to as the "Corps") and may appoint a person, not being, in its opinion, below the rank of a District Magistrate (to be known as the "Controller") to command such Corps[a]:

Provided that if there is in existence in any area in a State immediately before the commencement of this Act in that area, an organisation which, in the opinion of the State Government, may be entrusted with the functions of the Corps the State Government may, instead of constituting a separate Corps for such area call upon that organisation to take over or discharge the functions of the Corps in that area, and thereupon such organisation shall be deemed, for the purposes of this Act, to be the Corps for that area.

(2) The State Government may, for the purpose of co-ordinating the activities of the Controllers within the State, appoint a Director of Civil Defence[b] and every Controller shall comply with the directions given by such Director.

[a] District Magistrates of Kanpur, Agra, Varanasi, Allahabad, Lucknow, Meerut, Bareilly, Gorakhpur, Jhansi, Moradabad, Mathura, Saharanpur, and Dehra Dun appointed as Controllers to command all C.D. Corps in their respective districts—see U.P. Gazette, 8-2-1969, Pt. I, p. 313. Defence Corps have been constituted for

cities of Saharanpur, Dehra Dun, Ghaziabad, Hardwar, Jhansi, Tundla, Mathura, Moradabad and for areas comprised within radius of half a mile of each of the air-fields at Bakhi-kal-Talab, Sasarana and Hindaun in the districts of Lucknow, Saharanpur and Meerut, respectively—see ibild, p. 314.

[b] In Haryana State Director-General of Home Guards and Civil Defence has been appointed as Director of Civil Defence under the Act—see Haryana Gazette, 18-4-1969, Ext., p. 183.

**5. Appointment of members and officers.**—(1) The State Government may appoint[a] as members of the Corps persons who are fit and willing to serve as such and the Controller may appoint any member so appointed to such office or command in the Corps, as such member is, in the opinion of the Controller, fit to hold.

(2) Every person appointed to be a member of the Corps shall be given a certificate of membership in such form as may be prescribed.

[a] Powers of State Government under S. 5 (1) directed to be exercisable also by the District Magistrate concerned—see U.P. Gazette, 8-2-1969, Pt. I, p. 314.

**6. Dismissal of members of Civil Defence Corps.**—(1) Where any member of the Corps fails or has failed, in the opinion of the Controller, to discharge his duties as such member satisfactorily or is or has been found guilty of any misconduct in the discharge of his duties as such member, the Controller may, after an inquiry in which such member of the Corps has been given a reasonable opportunity of being heard in respect of the charges against him by an order, dismiss such member from the Corps.

(2) Where the Controller is of opinion that the continued presence of any member of the Corps is undesirable, he may, without assigning any reason, summarily dismiss such member from the Corps.

**7. Appeal.**—A member of the Corps who is dismissed from the Corps under Section 6 may prefer an appeal to the State Government within thirty days from the date of such dismissal and that Government may, on such appeal, confirm, modify or reverse the order made by the Controller or other authority.

**8. Functions of members of Civil Defence Corps.**—(1) The members of the Corps shall perform such functions in relation to the carrying out of measures for civil defence as may be assigned to them by rules made under this Act or by any other law for the time being in force.

(2) The State Government or the Controller may, by order, call out a member of the Corps for training, or for discharging such functions in relation to the carrying out of measures for civil defence as may be specified in such order.

(3) Subject to such orders as the Central Government may make in this behalf, any member of the Corps of any State may at any time be required, by order, to discharge functions in relation to civil defence in any other State and shall, while discharging such functions, be deemed to be a member of the Corps of that other State and be vested with the powers, functions and privileges and be subject to the liabilities of a member of the Corps in that other State.

**9. Power to make regulations.**—(1) The Central Government may, by notification, make regulations[a] for carrying out the purposes of this Chapter.

(2) In particular, and without prejudice to the generality of the foregoing power such regulations may—

(a) prescribe the functions of the members of the Corps and regulate the manner in which they may be called out for service;

(b) regulate the organisation, appointment, conditions of service discipline, accoutrement and clothing of members of any or all of the Corps;

(c) prescribe the form of certificates of membership of any or all of the Corps.

[a] For Civil Defence Regulations, 1968, see Gazette of India, 10-7-1968, Pt. II, Sec. 3 (i), Ext., p. 413.

## CHAPTER IV

## MISCELLANEOUS

**10. Provisions of the Personal Injuries (Emergency Provisions) Act to apply to injuries sustained by the members of the Corps.**—The provisions of the Personal Injuries (Emergency Provisions) Act, 1962, and of every scheme made thereunder shall apply, so far as may be, to every personal service injury sustained by any person appointed to be a member of the Corps as they apply to personal service injury sustained by a civil defence volunteer, subject to the modifications that—

(a) any reference to a civil defence volunteer under that Act or any scheme made thereunder shall be construed as reference to a member of the Corps; and

(b) any reference therein to the period of emergency shall, in relation to a member of the Corps, be construed as the period during which this Act is in force.

**11. Penalties.**—(1) If any member of the Corps on being called out by an order under sub-section (2) of Section 8 neglects or refuses without sufficient excuse to obey such order or to discharge his functions as such member or to obey any lawful order or direction given to him for the performance of his functions, he shall be punishable with fine which may extend to five hundred rupees, and where such neglect or refusal is a continuing one, with a further fine which may extend to fifty rupees for every day, after the first, during which such contravention continues.

(2) If any person neglects or fails without any reasonable excuse to obey any order made or direction given to him under this Act or rules made thereunder, he shall be punishable with fine which may extend to five hundred rupees, and where such negligence or failure is a continuing one, with a further fine which may extend to fifty rupees for every day, after the first, during which such negligence or failure continues.

**12. Effect of Act and rules, etc., inconsistent with other enactments.**—(1) The provisions of this Act or any rules made thereunder or any order made under this Act or any such rule shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act.

(2) Every appointment, order or rule made in relation to civil defence before the commencement of this Act by or under any law relating to civil defence shall, in so far as it is not inconsistent with the provisions of this Act, continue to be in force until it is rescinded or altered under this Act, and be deemed to have been made under the corresponding provisions of this Act.

Explanation.—"Commencement of this Act", in relation to any provision or area, means the commencement of that provision or, as the case may be, the commencement of this Act in that area.

**13. Ordinary avocations of life to be interfered with as little as possible.**—Any authority or person acting in pursuance of this Act shall interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purpose of ensuring the public safety and civil defence.

**14. Savings as to orders.**—(1) No order made in exercise of any power conferred by or under this Act shall be called in question in any Court.

(2) Where an order purports to have been made and signed by any authority in exercise of any power conferred by or under this Act, a Court shall, within the meaning of the Indian Evidence Act, 1872, presume that such order was so made by that authority.

**15. Act not to apply to measures taken for the protection of the Armed Forces.**—Nothing contained in this Act or any rule, regulation or order made thereunder shall apply to the Armed Forces of the Union or to any measures taken by

any of the authorities in control of the Armed Forces of the Union for the purpose of securing civil defence or safety of such forces or for the protection of any naval, military or air force installations or stores.

**16. Limitation of prosecutions.**—No prosecution for any offence punishable under this Act shall be instituted against any person except by, or with the consent of, the Controller or any person authorised by the Controller in this behalf.

**17. Power to delegate.**—The State Government may, by notification, direct that—

(a) all or any of the powers which may be exercised by it under this Act shall, in such circumstances and under such conditions, if any, as may be specified in that notification,[a] be exercised also by such officer, not being, in the opinion of the State Government inferior in rank to that of a District Magistrate as may be specified in the said notification;

(b) all or any of the powers which may be exercised by the Controller under this Act shall, in such circumstances and under such conditions, if any, as may be specified in that notification,[b] be exercised also by such officer, not being in the opinion of the State Government, inferior in rank to that of a Sub-Divisional Magistrate, as may be specified in the said notification.

[a] Powers of Government under the provision are exercisable by all District Magistrates in M.P. and by the District Magistrates of Kanpur, Agra, Varanasi, Allahabad, Lucknow, Meerut, Bareilly, Gorakhpur, Mathura, Moradabad, Jhansi, Saharanpur, Dehra Dun and Bulandshahr—see M. P. Gaz., 17-1-1969, Pt. I, p. 180 and U. P. Government Gazette, 8-1-1969, Pt. I, p. 206.

[b] Powers of Controller under the Act directed to be exercised by the Sub-Divisional Magistrates, Katni, in Jabalpur District and Khurai in Sagar District and by the Additional Collector in Bhopal, within their respective divisions—See M.P. Gaz., 17-1-1969, Pt. I, p. 180

**18. Protection of action taken in good faith.**—(1) No suit, prosecution or other legal proceeding shall lie against the Government, the Director or the Controller or any person, authorised by the Government or the Controller, for anything which is in good faith done or intended to be done under this Act or any rules or orders made thereunder or any orders issued under any such rule.

(2) No suit or other legal proceedings shall lie against the Government, the Director or the Controller or any person, authorised by the Government or the Controller, for any damage caused or likely to be caused by anything which is in good faith done or intended to be done under this Act or any rule made thereunder or any order issued under any such rule.

**19. Authorised persons and members of the Corps to be public servants.**—Any person authorised by the Controller or the State Government under this Act and every member of the Corps, while functioning as such, shall be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code.

**20. Rules and regulations to be laid before Parliament.**—Every rule and every regulation made by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or regulation or both Houses agree that the rule or regulation, as the case may be, should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.

# [THE CODE OF] CIVIL PROCEDURE, 1908
## (ACT V OF 1908)
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Where service substituted, time for appearance to be fixed.
20A. Service of summons by post.
21. Service of summons where defendant resides within jurisdiction of another Court.
22. Service within Presidency-towns of summons issued by Courts outside.
23. Duty of Court to which summons is sent.
24. Service on defendant in prison.
25. Service where defendant resides out of India and has no agent.
26. Service in foreign territory through Political Agent or Court.
27. Service on civil public officer or on servant of railway company or local authority.
28. Service on soldiers, sailors or airmen.
29. Duty of person to whom summons is delivered or sent for service.
30. Substitution of letter for summons.

ORDER VI
PLEADINGS GENERALLY
1. Pleading.
2. Pleading to state material facts and not evidence.
3. Forms of pleading.
4. Particulars to be given where necessary.
5. Further and better statement, or particulars.
6. Condition precedent.
7. Departure.
8. Denial of contract.

RULES
9. Effect of document to be stated.
10. Malice, knowledge, etc.
11. Notice.
12. Implied contract, or relation.
13. Presumptions of law.
14. Pleadings to be signed.
15. Verification of pleadings.
16. Striking out pleadings.
17. Amendment of pleadings.
18. Failure to amend after order.

ORDER VII
PLAINT
1. Particulars to be contained in plaint.
2. In money suits.
3. Where the subject-matter of the suit is immoveable property.
4. When plaintiff sues as representative.
5. Defendant's interest and liability to be shown.
6. Grounds of exemption from limitation law.
7. Relief to be specifically stated.
8. Relief founded on separate grounds.
9. Procedure of admitting plaint.
Concise statements.
10. Return of plaint.
Procedure on returning plaint.
11. Rejection of plaint.
12. Procedure on rejecting plaint.
13. Where rejection of plaint does not preclude presentation of fresh plaint.

DOCUMENTS RELIED ON IN PLAINT
14. Production of document on which plaintiff sues.
List of other documents.
15. Statement in case of documents not in plaintiff's possession or power.
16. Suits on lost negotiable instruments.
17. Production of shop-book.
Original entry to be marked and returned.
18. Inadmissibility of document not produced when plaint filed.

ORDER VIII
WRITTEN STATEMENT AND SET-OFF
1. Written statement.
2. New facts must be specially pleaded.
3. Denial to be specific.
4. Evasive denial.
5. Specific denial.
6. Particulars of set-off to be given in written statement.
Effect of set-off.
7. Defence or set-off founded on separate grounds.
8. New ground of defence.
9. Subsequent pleadings.
10. Procedure when party fails to present written statement called for by Court.

ORDER IX
APPEARANCE OF PARTIES AND CONSEQUENCE OF NON-APPEARANCE
1. Parties to appear on day fixed in summons for defendant to appear and answer.
2. Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs.
3. Where neither party appears, suit to be dismissed.
4. Plaintiff may bring fresh suit or Court may restore suit to file.
5. Dismissal of suit where plaintiff, after summons returned unserved fails for three months to apply for fresh summons.
6. Procedure when only plaintiff appears.
When summons duly served.
When summons not duly served.
When summons served, but not in due time.
7. Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance.
8. Procedure where defendant only appears.
9. Decree against plaintiff by default bars fresh suit.
10. Procedure in case of non-attendance of one or more of several plaintiffs.
11. Procedure in case of non-attendance of one or more of several defendants.
12. Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person.

SETTING ASIDE DECREES EX PARTE
13. Setting aside decree ex parte against defendant.
14. No decree to be set aside without notice to opposite party.

ORDER X
EXAMINATION OF PARTIES BY THE COURT
1. Ascertainment whether allegations in pleadings are admitted or denied.
2. Oral examination of party or companion of party.
3. Substance of examination to be written.
4. Consequence of refusal or inability of pleader to answer.

ORDER XI
DISCOVERY AND INSPECTION
1. Discovery by interrogatories.

RULES
2. Particular interrogatories to be submitted.
3. Costs of interrogatories.
4. Form of interrogatories.
5. Corporations.
6. Objections to interrogations by answer.
7. Setting aside and striking out interrogatories.
8. Affidavit in answer, filing.
9. Form of affidavit in answer.
10. No exception to be taken.
11. Order to answer or answer further.
12. Application for discovery of documents.
13. Affidavit of documents.
14. Production of documents.
15. Inspection of documents referred to in pleadings or affidavits.
16. Notice to produce.
17. Time for inspection when notice given.
18. Order for inspection.
19. Verified copies.
20. Premature discovery.
21. Non-compliance with order for discovery.
22. Using answers to interrogatories at trial.
23. Order to apply to minors.

ORDER XII
ADMISSIONS
1. Notice of admission of case.
2. Notice to admit documents.
3. Form of notice.
3A. Power of Court to record admission.
4. Notice to admit facts.
5. Form of admissions.
6. Judgment on admissions.
7. Affidavit of signature.
8. Notice to produce documents.
9) Costs.

ORDER XIII
PRODUCTION, IMPOUNDING AND RETURN OF DOCUMENTS
1. Documentary evidence to be produced at first hearing.
2. Effect of non-production of documents.
3. Rejection of irrelevant or inadmissible documents.
4. Endorsements on documents admitted in evidence.
5. Endorsements on copies of admitted entries in books, accounts and records.
6. Endorsements on documents rejected as inadmissible in evidence.
7. Recording of admitted and return of rejected documents.
8. Court may order any document to be impounded.
9. Return of admitted documents.
10. Court may send for papers from its own records or from other Courts.
11. Provisions as to documents applied to material objects.

ORDER XIV
SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT ON ISSUES OF LAW OR ON ISSUES AGREED UPON
1. Framing of issues.
2. Issues of law and of fact.
3. Materials from which issues may be framed.
4. Court may examine witnesses or documents before framing issues.
5. Power to amend, and strike out, issues.
6. Questions of fact or law may by agreement be stated in form of issues.
7. Court, if satisfied that agreement was executed in good faith, may pronounce judgment.

ORDER XV
DISPOSAL OF THE SUIT AT THE FIRST HEARING
1. Parties not at issue.
2. One of several defendants not at issue.
3. Parties at issue.
4. Failure to produce evidence.

ORDER XVI
SUMMONING AND ATTENDANCE OF WITNESSES
1. Summons to attend to give evidence or produce documents.
1-A. Production of witnesses without summons through Court.
2. Expenses of witness to be paid into Court on applying for summons.
Experts.
Scale of expenses.
3. Tender of expenses to witness.
4. Procedure where insufficient sum paid in.
Expenses of witnesses detained more than one day.
5. Time, place and purpose of attendance to be specified in summons.
6. Summons to produce document.
7. Power to require persons present in Court to give evidence or produce document.
8. Summons how served.
9. Time for serving summons.
10. Procedure where witness fails to comply with summons.
11. If witness appears, attachment may be withdrawn.
12. Procedure if witness fails to appear.
13. Mode of attachment.
14. Court may of its own accord summon as witnesses strangers to suit.

RULES
15. Duty of persons summoned to give evidence or produce document.
16. When they may depart.
17. Application of Rules 10 to 13.
18. Procedure where witness apprehended cannot give evidence or produce document.
19. No witness to be ordered to attend in person unless resident within certain limits.
20. Consequence of refusal of party to give evidence when called on by Court.
21. Rules as to witnesses to apply to parties summoned.

## ORDER XVII
## ADJOURNMENTS

1. Court may grant time and adjourn hearing.
Costs of adjournment.
2. Procedure if parties fail to appear on day fixed.
3. Court may proceed notwithstanding either party fails to produce evidence etc.

## ORDER XVIII
## HEARING OF THE SUIT AND EXAMINATION OF WITNESSES

1. Right to begin.
2. Statement and production of evidence.
3. Evidence where several issues.
4. Witnesses to be examined in open Court.
5. How evidence shall be taken in appealable cases.
6. When deposition to be interpreted.
7. Evidence under Section 138.
8. Memorandum when evidence not taken down by Judge.
9. When evidence may be taken in English.
10. Any particular question and answer may be taken down.
11. Questions objected to and allowed by Court.
12. Remarks on demeanour of witnesses.
13. Memorandum of evidence in unappealable cases.
14. Judge unable to make such memorandum to record reasons of his inability.
15. Power to deal with evidence taken before another Judge.
16. Power to examine witness immediately.
17. Court may recall and examine witness.
18. Power of Court to inspect.

## ORDER XIX
## AFFIDAVITS

1. Power to order any point to be proved by affidavit.
2. Power to order attendance of deponent for cross-examination.
3. Matters to which affidavits shall be confined.

## ORDER XX
## JUDGMENT AND DECREE

1. Judgment when pronounced.
2. Power to pronounce judgment written by Judge's predecessor.
3. Judgment to be signed.
4. Judgments of Small Cause Courts.
Judgments of other Courts.
5. Court to state its decision on each issue.
6. Contents of decree.
7. Date of decree.
8. Procedure where Judge has vacated office before signing decree.
9. Decree for recovery of immoveable property.
10. Decree for delivery of moveable property.
11. Decree may direct payment by instalments.
Order, after decree, for payment by instalments.
12. Decree for possession and mesne profits.
13. Decree in administration-suit.
14. Decree in pre-emption suit.
15. Decree in suit for dissolution of partnership.
16. Decree in suit for account between principal and agent.
17. Special directions as to account.
18. Decree in suit for partition of property or separate possession of a share therein.
19. Decree when set-off is allowed.
Appeal from decree relating to set-off.
20. Certified copies of judgment and decree to be furnished.

## ORDER XXI
## EXECUTION OF DECREES AND ORDERS
## PAYMENT UNDER DECREES

1. Modes of paying money under decree.
2. Payment out of Court to decree-holder.

### COURTS EXECUTING DECREES

3. Lands situate in more than one jurisdiction.
4. Transfer to Court of Small Causes.
5. Mode of transfer.
6. Procedure where Court desires that its own decree shall be executed by another Court.
7. Court receiving copies of decree, etc., to file same without proof.
8. Execution of decree or order by Court to which it is sent.

RULES
9. Execution by High Court of decree transferred by other Court.

APPLICATION FOR EXECUTION

10. Application for execution.
11. Oral application.
Written application.
12. Application for attachment of moveable property not in judgment-debtor's possession.
13. Application for attachment of immoveable property to contain certain particulars.
14. Power to require certified extract from Collector's register in certain cases.
15. Application for execution by joint decree-holder.
16. Application for execution by transferee of decree.
17. Procedure on receiving application for execution of decree.
18. Execution in case of cross-decrees.
19. Execution in case of cross-claims under same decree.
20. Cross-decrees and cross-claims in mortgage-suits.
21. Simultaneous execution.
22. Notice to show cause against execution in certain cases.
23. Procedure after issue of notice.

PROCESS FOR EXECUTION

24. Process for execution.
25. Endorsement on process.

STAY OF EXECUTION

26. When Court may stay execution.
Power to require security from, or impose conditions upon, judgment-debtor.
27. Liability of judgment-debtor discharged.
28. Order of Court which passed decree or of appellate Court to be binding upon Court applied to.
29. Stay of execution pending suit between decree-holder and judgment-debtor.

MODE OF EXECUTION

30. Decree for payment of money.
31. Decree for specific moveable property.
32. Decree for specific performance for restitution of conjugal rights or for an injunction.
33. Discretion of Court in executing decrees for restitution of conjugal rights.
34. Decree for execution of document, or endorsement of negotiable instrument.
35. Decree for immoveable property.
36. Decree for delivery of immoveable property when in occupancy of tenant.

ARREST AND DETENTION IN THE CIVIL PRISON

37. Discretionary power to permit judgment-debtor to show cause against detention in prison.
38. Warrant for arrest to direct judgment-debtor to be brought up.
39. Subsistence-allowance.
40. Proceedings on appearance of judgment-debtor in obedience to notice or after arrest.

ATTACHMENT OF PROPERTY

41. Examination of judgment-debtor as to his property.
42. Attachment in case of decree for rent or mesne profits or other matter, amount of which to be subsequently determined.
43. Attachment of moveable property, other than agricultural produce, in possession of judgment-debtor.
44. Attachment of agricultural produce.
45. Provisions as to agricultural produce under attachment.
46. Attachment of debt, share and other property not in possession of judgment-debtor.
47. Attachment of share in moveables.
48. Attachment of salary or allowances of public officer or servant of railway company or local authority.
49. Attachment of partnership property.
50. Execution of decree against firm.
51. Attachment of negotiable instruments.
52. Attachment of property in custody of Court or public officer.
53. Attachment of decrees.
54. Attachment of immoveable property.
55. Removal of attachment after satisfaction of decree.
56. Order for payment of coin or currency notes to party entitled under decree.
57. Determination of attachment.

INVESTIGATION OF CLAIMS AND OBJECTIONS

58. Investigation of claims to, and objections to attachment of, attached property.
Postponement of sale.
59. Evidence to be adduced by claimant.
60. Release of property from attachment.
61. Disallowance of claim to property attached.
62. Continuance of attachment subject to claim of incumbrancer.
63. Saving of suits to establish right to attached property.

SALE GENERALLY

64. Power to order property attached to be sold and proceeds to be paid to person entitled.

RULES
65. Sales by whom conducted and how made.
66. Proclamation of sales by public auction.
67. Mode of making proclamation.
68. Time of sale.
69. Adjournment or stoppage of sale.
70. [Repealed.]
71. Defaulting purchaser answerable for loss on re-sale.
72. Decree-holder not to bid for or buy property without permission.
Where decree-holder purchases, amount of decree may be taken as payment.
73. Restriction on bidding or purchase by officers.

SALE OF MOVEABLE PROPERTY
74. Sale of agricultural produce.
75. Special provisions relating to growing crops.
76. Negotiable instruments and shares in corporations.
77. Sale by public auction.
78. Irregularity not to vitiate sale, but any person injured may sue.
79. Delivery of moveable property, debts and shares.
80. Transfer of negotiable instruments and shares.
81. Vesting order in case of other property.

SALE OF IMMOVEABLE PROPERTY.
82. What Courts may order sales.
63. Postponement of sale to enable judgment-debtor to raise amount of decree.
84. Deposit by purchaser and re-sale on default.
85. Time for payment in full of purchase-money.
86. Procedure in default of payment.
87. Notification on re-sale.
88. Bid of co-sharer to have preference.
89. Application to set aside sale on deposit.
90. Application to set aside sale on ground of irregularity or fraud.
91. Application by purchaser to set aside sale on ground of judgment-debtor having no saleable interest.
92. Sale when to become absolute or be set aside.
93. Return of purchase-money in certain cases.
94. Certificate to purchaser.
95. Delivery of property in occupancy of judgment-debtor.
96. Delivery of property in occupancy of tenant.

RESISTANCE TO DELIVERY OF POSSESSION TO DECREE-HOLDER OR PURCHASER
97. Resistance or obstruction to possession of immoveable property.
98. Resistance or obstruction by judgment-debtor.
99. Resistance or obstruction by bona fide claimant.
100. Dispossession by decree-holder or purchaser.
101. Bona fide claimant to be restored to possession.
102. Rules not applicable to transferee lite pendente.
103. Order conclusive subject to regular suit.

## ORDER XXII

## DEATH, MARRIAGE AND INSOLVENCY OF PARTIES

1. No abatement by party's death, if right to sue survives.
2. Procedure where one of several plaintiffs or defendants dies and right to sue survives.
3. Procedure in case of death of one of several plaintiffs or of sole plaintiff.
4. Procedure in case of death of one of several defendants or of sole defendant.
5. Determination of question as to legal representative.
6. No abatement by reason of death after hearing.
7. Suit not abated by marriage of female party.
8. When plaintiff's insolvency bars suit.
Procedure where assignee fails to continue suit or give security.
9. Effect of abatement or dismissal.
10. Procedure in case of assignment before final order in suit.
11. Application of Order to appeals.
12. Application of Order to proceedings.

## ORDER XXIII

## WITHDRAWAL AND ADJUSTMENT OF SUITS

1. Withdrawal of suit or abandonment of part of claim.
2. Limitation law not affected by first suit.
3. Compromise of suit.
4. Proceedings in execution of decrees not affected.

## ORDER XXIV

## PAYMENT INTO COURT

1. Deposit by defendant of amount in satisfaction of claim.
2. Notice of deposit.
3. Interest on deposit not allowed to plaintiff after notice.
4. Procedure where plaintiff accepts deposit as satisfaction in part.
Procedure where he accepts it as satisfaction in full.

## ORDER XXV

## SECURITY FOR COSTS

1. When security for costs may be required from plaintiff.
2. Effect of failure to furnish security.

RULES

## ORDER XXVI
## COMMISSIONS

### COMMISSIONS TO EXAMINE WITNESSES

1. Cases in which Court may issue commission to examine witness.
2. Order for commission.
3. Where witness resides within Court's jurisdiction.
4. Persons for whose examination commission may issue.
5. Commission or request to examine witness not within India.
6. Court to examine witness pursuant to commission.
7. Return of commission with depositions of witnesses.
8. When depositions may be read in evidence.

### COMMISSIONS FOR LOCAL INVESTIGATIONS

9. Commissions to make local investigations.
10. Procedure of Commissioner.
Report and depositions to be evidence in suit.
Commissioner may be examined in person.

### COMMISSIONS TO EXAMINE ACCOUNTS

11. Commission to examine or adjust accounts.
12. Court to give Commissioner necessary instructions.
Proceedings and report to be evidence. Court may direct further enquiry.

### COMMISSIONS TO MAKE PARTITIONS

13. Commission to make partition of immovable property.
14. Procedure of Commissioner.

### GENERAL PROVISIONS

15. Expenses of Commission to be paid into Court.
16. Powers of Commissioners.
17. Attendance and examination of witnesses before Commissioner.
18. Parties to appear before Commissioner.

### COMMISSIONS ISSUED AT THE INSTANCE OF FOREIGN TRIBUNALS

19. Cases in which High Court may issue commission to examine witness.
20. Application for commission.
21. To whom commission may be issued.
22. Issue, execution and return of commissions, and transmission of evidence to foreign Court.

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## ORDER XXVII
## SUITS BY OR AGAINST THE GOVERNMENT OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY

1. Suits by or against Government.
2. Persons authorised to act for Government.
3. Plaints in suit by or against Government.
4. Agent for Government to receive process.
5. Fixing of day for appearance on behalf of Government.
6. Attendance of person able to answer questions relating to suit against Government.
7. Extension of time to enable public officer to make reference to Government.
8. Procedure in suits against public officer.
8A. No security to be required from Government or a public officer in certain cases.
8B. Definitions of "Government" and "Government pleader".

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## ORDER XXVIIA
## SUITS INVOLVING A SUBSTANTIAL QUESTION OF LAW AS TO THE INTERPRETATION OF THE CONSTITUTION

1. Notice to the Attorney-General or the Advocate-General.
2. Court may add Government as party.
3. Costs.
4. Application of Order to appeals.

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## ORDER XXVIII
## SUITS BY OR AGAINST MILITARY OR NAVAL MEN OR AIRMEN

1. Officers soldiers sailors or airmen who cannot obtain leave may authorise any person to sue or defend for them.
2. Person so authorised may act personally or appoint pleader.
3. Service on person so authorised, or on his pleader, to be good service.

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## ORDER XXIX
## SUITS BY OR AGAINST CORPORATIONS

1. Subscription and verification of pleading.
2. Service on corporation.
3. Power to require personal attendance of officer of corporation.

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## ORDER XXX
## SUITS BY OR AGAINST FIRMS AND PERSONS CARRYING ON BUSINESS IN NAMES OTHER THAN THEIR OWN

1. Suing of partners in name of firm.
2. Disclosure of partners' names.
3. Service.
4. Right of suit on death of partner.
5. Notice in what capacity served.
6. Appearance of partners.
7. No appearance except by partners.
8. Appearance under protest.
9. Suits between co-partners.

RULES
10. Suit against person carrying on business in name other than his own.

ORDER XXXI
SUITS BY OR AGAINST TRUSTEES, EXECUTORS AND ADMINISTRATORS
1. Representation of beneficiaries in suits concerning property vested in trustees, etc.
2. Joinder of trustees, executors and administrators.
3. Husband of married executrix not to join.

ORDER XXXII
SUITS BY OR AGAINST MINORS AND PERSONS OF UNSOUND MIND
1. Minor to sue by next-friend.
2. Where suit is instituted without next friend, plaint to be taken off the file.
3. Guardian for the suit to be appointed by Court for minor defendant.
4. Who may act as next friend or be appointed guardian for the suit.
5. Representation of minor by next friend or guardian for the suit.
6. Receipt by next friend or guardian for the suit of property under decree for minor.
7. Agreement or compromise by next friend or guardian for the suit.
8. Retirement of next friend.
9. Removal of next friend.
10. Stay of proceedings on removal etc., of next friend.
11. Retirement, removal or death of guardian for the suit.
12. Course to be followed by minor plaintiff or applicant on attaining majority.
13. Where minor co-plaintiff attaining majority desires to repudiate suit.
14. Unreasonable or improper suit.
15. Application of rules to persons of unsound mind.
16. Saving for Princes and Chiefs.

ORDER XXXIII
SUITS BY PAUPERS
1. Suits may be instituted in forma pauperis.
2. Contents of application.
3. Presentation of application.
4. Examination of applicant.
If presented by agent, Court may order applicant to be examined by commission.
5. Rejection of application.
6. Notice of day for receiving evidence of applicant's pauperism.
7. Procedure at hearing.
8. Procedure if application admitted.
9. Dispaupering.
10. Costs where pauper succeeds.
11. Procedure where pauper fails.
11A. Procedure where pauper suit abates.
12. State Government may apply for payment of court-fees.
13. State Government to be deemed a party.
14. Recovery of amount of court-fees.
15. Refusal to allow applicant to sue as pauper to bar subsequent application of like nature.
16. Costs.

ORDER XXXIV
SUITS RELATING TO MORTGAGES OF IMMOVEABLE PROPERTY
1. Parties to suits for foreclosure, sale and redemption.
2. Preliminary decree in foreclosure-suit.
3. Final decree in foreclosure-suit.
4. Preliminary decree in suit for sale. Power to decree sale in foreclosure-suit.
5. Final decree in suit for sale.
6. Recovery of balance due on mortgage in suit for sale.
7. Preliminary decree in redemption-suit.
8. Final decree in redemption-suit.
8A. Recovery of balance due on mortgage in suit for redemption.
9. Decree where nothing is found due or where mortgagee has been overpaid.
10. Costs of mortgagee subsequent to decree.
11. Payment of interest.
12. Sale of property subject to prior mortgage.
13. Application of proceeds.
14. Suit for sale necessary for bringing mortgaged property to sale.
15. Mortgages by the deposit of title-deeds and charges.

ORDER XXXV
INTERPLEADER
1. Plaint in interpleader-suit.
2. Payment of thing claimed into Court.
3. Procedure where defendant is suing plaintiff.
4. Procedure at first hearing.
5. Agents and tenants may not institute interpleader-suits.
6. Charge for plaintiff's costs.

ORDER XXXVI
SPECIAL CASE
1. Power to state case for Court's opinion.
2. Where value of subject-matter must be stated.
3. Agreement to be filed and registered as suit.
4. Parties to be subject to Court's jurisdiction.
5. Hearing and disposal of case.

ORDER XXXVII
SUMMARY PROCEDURE ON NEGOTIABLE INSTRUMENTS
1. Application of Order.
2. Institution of summary suits upon bills of exchange, etc.

RULES
3. Defendant showing defence on merits to have leave to appear.
4. Power to set aside decree.
5. Power to order bill, etc., to be deposited with officer of Court.
6. Recovery of costs of noting non-acceptance of dishonoured bill or note.
7. Procedure in suits.

## ORDER XXXVIII

## ARREST AND ATTACHMENT BEFORE JUDGMENT

### ARREST BEFORE JUDGMENT

1. Where defendant may be called upon to furnish security for appearance.
2. Security.
3. Procedure on application by surety to be discharged.
4. Procedure where defendant fails to furnish security or find fresh security.

### ATTACHMENT BEFORE JUDGMENT

5. Where defendant may be called upon to furnish security for production of property.
6. Attachment where cause not shown or security not furnished.
7. Mode of making attachment.
8. Investigation of claim to property attached before judgment.
9. Removal of attachment when security furnished or suit dismissed.
10. Attachment before judgment not to affect rights of strangers, nor bar decree-holder from applying for sale.
11. Property attached before judgment not to be re-attached in execution of decree.
12. Agricultural produce not attachable before judgment.
13. Small Cause Court not to attach immoveable property.

## ORDER XXXIX

## TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS

### TEMPORARY INJUNCTIONS

1. Cases in which temporary injunction may be granted.
2. Injunction to restrain repetition or continuance of breach.
3. Before granting injunction, Court to direct notice to opposite party.
4. Order for injunction may be discharged, varied or set aside.
5. Injunction to corporation binding on its officers.

### INTERLOCUTORY ORDERS

6. Power to order interim sale.
7. Detention, preservation, inspection, etc., of subject-matter of suit.
8. Application for such orders to be after notice.
9. When party may be put in immediate possession of land the subject-matter of suit.
10. Deposit of money, etc., in Court.

## ORDER XL

## APPOINTMENT OF RECEIVERS

1. Appointment of receivers.
2. Remuneration.
3. Duties.
4. Enforcement of receiver's duties.
5. When Collector may be appointed receiver.

## ODRER XLI

## APPEALS FROM ORIGINAL DECREES

1. Form of appeal.
What to accompany memorandum.
Contents of memorandum.
2. Grounds which may be taken in appeal.
3. Rejection or amendment of memorandum.
4. One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all.

### STAY OF PROCEEDINGS AND OF EXECUTION

5. Stay by Appellate Court.
Stay by Court which passed the decree.
6. Security in case of order for execution of decree appealed from.
7. [Repealed by Government of India (Adaptation of Indian Laws) Order, 1937.]
8. Exercise of powers in appeal from order made in execution of decree.

### PROCEDURE ON ADMISSION OF APPEAL

9. Registry of memorandum of appeal.
Register of Appeals.
10. Appellate Court may require appellant to furnish security for costs.
Where appellant resides out of India.
11. Power to dismiss appeal without sending notice to lower Court.
12. Day for hearing appeal.
13. Appellate Court to give notice to Court whose decree appealed from.
Transmission of papers to Appellate Court.
Copies of exhibits in Court whose decree appealed from.
14. Publication and service of notice of day for hearing appeal.
Appellate Court may itself cause notice to be served.
15. Contents of notice.

### PROCEDURE ON HEARING

16. Right to begin.
17. Dismissal of appeal for appellant's default.
Hearing appeal ex parte.
18. Dismissal of appeal where notice not served in consequence of appellant's failure to deposit costs.
19. Re-admission of appeal dismissed for default.

RULES
20. Power to adjourn hearing and direct persons appearing interested to be made respondents.
21. Re-hearing on application of respondent against whom ex parte decree made.
22. Upon hearing, respondent may object to decree as if he had preferred separate appeal.
Form of objection and provisions applicable thereto.
23. Remand of case by Appellate Court.
24. Where evidence on record sufficient, Appellate Court may determine case finally.
25. Where Appellate Court may frame issues and refer them for trial to.
Court whose decree appealed from.
26. Finding and evidence to be put on record.
Objections to finding.
Determination of appeal.
27. Production of additional evidence in Appellate Court.
28. Mode of taking additional evidence.
29. Points to be defined and recorded.

JUDGMENT IN APPEAL

30. Judgment when and where pronounced.
31. Contents, date and signature of judgment.
32. What judgment may direct.
33. Power of Court of Appeal.
34. Dissent to be recorded.

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35. Date and contents of decree.
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36. Copies of judgment and decree to be furnished to parties.
37. Certified copy of decree to be sent to Court whose decree appealed from.

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APPEALS FROM APPELLATE DECREES

1. Procedure.

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ORDER XLIV
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2. Application to Court whose decree complained of.
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6. Effect of refusal of certificate.
7. Security and deposit required on grant of certificate.
8. Admission of appeal and procedure thereon.
9. Revocation of acceptance of security.
9A. Power to dispense with notices in case of deceased parties.
10. Power to order further security or payment.
11. Effect of failure to comply with order.
12. Refund of balance deposit.
13. Powers of Court pending appeal.
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15. Procedure to enforce orders of the Supreme Court.
16. Appeal from order relating to execution.
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2. Court may pass decree contingent upon decision of High Court.
3. Judgment of High Court to be transmitted, and case disposed of accordingly.
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5. Power to alter, etc., decree of Court making reference.
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THE FIFTH SCHEDULE
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## STATEMENT OF OBJECTS AND REASONS

"The Bill is sufficiently explained in the Report of the Special Committee printed below." Simla, 3rd September, 1907. —H. ERLE RICHARDS.

**[Report of the Special Committee appointed to consider the amendment of the Civil Procedure Code.]**

We have the honour to present this report on the proposals to amend the Code of Civil Procedure which have been submitted for our consideration by the Government of India and, annexed to it, a draft Bill amended by us. A detailed account of the alterations introduced in the Bill will be found in the Notes on Clauses which form the second part of this Report, but we desire by way of perface to make some observations of a general character on the defects in the existing law which appear to us to call for reform and on the more important of those alterations.

1. The Code of Civil Procedure of 1882 has been in force for 25 years and the experience of those years has shown that the general llnes on which it proceeds are sound. The matters in which it has proved defective are, for the most part, matters of detail, and they arise, as it seems to us, mainly from the fact that it is impossible to frame a fixed and rigid Code in such a manner as to sufficiently meet the varying needs of an area so diversified as that to which the Code applies. In oui opinion it is essential that there should be some machinery to enable variations to be introduced in procedure to meet the different requirements of different localities as well as to enable defects to be remedied as they are discovered without resort to the tardy process of legislation. We propose to make provision for these purposes by a rearrangement of the Code. We recommend that matters of mere machinery should be relegated to Rules capable of alteration by each High Court, subject to certain checks, and that those provisions only should be retained in the body of the Code in which some degree of permanence and uniformity is desirable. This re-arrangement is in accordance with precedent and possesses advantages so obvious that it is needless to enlarge upon them.

2. The objection — and as it appears to us the only objection of substance — that can be urged against this proposal is that until the scheme of distribution had become familiar to those who have to administer the Act, the change may cause some confusion and the familiar numerical references to the present Sections will no longer apply. We are sensible that some inconvenience must arise from this cause in the first instance, but this is but a small disadvantage in comparison with the advantages to be obtained by the change, and we cannot think that any one will seriously contend that such a slight and temporary drawback should stand in the way of a reform which appears to us in other respects to be wholly beneficial.

3. The adoption of this principle has necessarily involved a departure from the arrangement of the present Code, but in other respects, we have advisedly adhered as closely as possible to the existing language, the meaning of which is now well understood by Courts and by practitioners. Speaking generally, it may be said, that we have only departed from the phraseology of the Code where experience has suggested improvements or competent authority has called for some change. We have refrained from altering the wording, merely, because it might be capable of improvement; for in any change, even of a verbal character, there is a risk of opening a door to fresh litigation. In the amendments that we have introduced, we have endeavoured to state general rules of procedure rather than to provide in detail for every possible contingency; for, we hold it to be a sound view that excessive elaboration of details of procedure tends to cramp the actions of the Court and in consequence, to encourage technicalities. For this reason, we have made no attempt to embody in the Code a digest of the very numerous decisions on the existing Sections; we have made amendments to meet case-law only on points on which there is a conflict of authority. And in this connexion we desire to point out that at the present time there is even less justification for the enactment of elaborate provisions in regard to procedure than at the time when the Code of 1882 was passed. Since then, the standard of legal efficiency in the mofussil has been materially raised, and the principles of procedure are now so well understood that the Courts may be trusted to apply them intelligently in cases for which no provision may be made in terms.

But although we have made the present Code the basis of our draft, we have carefully examined the Bill settled by the Select Committee in 1903, and we desire to express our acknowledgments to that Committee for the store of information it contains, and for the materials collected in their report.

Apart from the re-arrangement to which reference has been made, we have not introduced many changes of a radical character in the Code.

4. The general nature of some of the amendments we recommend, may be conveniently illustrated by a brief examination of the extent to which the various stages of a suit will be affected by them.

A. To begin with, it is hoped that the multiplicity of suits will be further curtailed by the new provisions we have inserted to remove limitations which we regard as needless on the comprehensiveness of a suit, and by the wider powers of amendment vested in the Courts under the Bill. An adequate check is provided by the power of a Court to interfere where the embarrassment is likely to result.

B. Increased facilities have been given for the service of process to which further reference is made in the Notes on Clauses. It is hoped that in the gradual introduction of service by post may be found a solution of one of the principal detects in our legal system.

C. In our opinion, it is most necessary that litigants in this country should come to trial with all issues clearly defined, and that cases should not be expanded or grounds shifted without reference to the true facts. For this purpose, we think that the present system of pleadings in the mofussil which is notoriously lax, should be improved, and we have incorporated in the rules an order on pleadings, which, it is hoped, will lead to sounder and fairer methods of arriving at the real points in dispute. The forms have been revised and we hope that they will be brought into more general use in the mofussil.

We have not been able, within the time at our disposal, to make these forms, or the other forms in the Appendix to Schedule I complete; but this is a matter of detail which can be further considered before the Bill is passed into law.

D. It is not possible to secure expedition in the disposal of suits, unless the questions of fact on which there is a real contest are narrowed down as far as possible. As a step towards this, we have incorporated in the rules an order in which provision is made for the admission not only of documents but also of facts. It must be left to litigants and their advisers to make adequate use of this order, but it is hoped that the Courts will encourage the use of it, since it certainly affords a means whereby the two principal evils of ligtigation, delay and expenses, can be materially diminished.

E. We attach much importance to a proper use being made by Courts in the mofussil of the procedure prescribed for the first hearing. The Code as it stands makes provision for the examination of parties by the Court, and we have altered the language so as to compel the production of documents at the first hearing. In our opinion, this will act as a substantial check on the fabrication of documentary evidence.

F. The provisions relating to the hearing of suits do not call for material alteration, but we have thought it well to provide expressly for the cases where a party dies between conclusion of the hearing and delivery of judgment. It would obviously be wrong that such an accident should in any way interfere with the disposal of the case, and we have therefore inserted a provision to enable judgment to be pronounced notwithstanding the death.

G. A change of importance has been made in regard to decrees. In the first place we have inserted an express provision recognizing the distinction between preliminary and final decrees. We hope, in this way, to afford facilities for checking the delay that now results from the objectionable practice of leaving for determination in execution questions which should be decid-

ed by the decree. This change should ensure the more expeditious disposal of a class of suits which at present are conspicuous for the delay to which they give rise. Another amendment of importance which we have introduced is in regard to mortgage-suits. These are very numerous and involve complicated questions of law. Hitherto some confusion has been occasioned by the co-existence of the provisions of the Transfer of Property Act and of the Code in regard to execution in mortgage-suits. We think that the provisions regulating this matter should be dealt with in their entirety in the Code, and we have therefore introduced rules in Order XXXIV to give effect to our view. We propose that the sections of the Transfer of Property Act affected by this change should be repealed. We desire to call the attention of those Provinces to which that Act does not apply to the effect of these changes.

In our opinion, it is expedient to give greater assistance to the Courts in the framing of decrees. The importance of this branch of procedure cannot be overrated; it is surrounded by difficulties which are a fruitful source of error and consequently of litigation. We have amplified the provisions of the Code to meet this defect, and have introduced some forms which can be adopted to meet the requirements of individual cases. We think that further forms might be added with advantage before the Bill becomes law.

H. Amongst other matters, we removed limitations which at present exist on the power of appointing Receivers, and have conferred a power to appoint Receivers on Subordinate Courts.

5. Execution.—The subject of execution is, perhaps, one of the most difficult with which we have had to deal. The present system, in the mofussil at any rate, tends to excessive delay and affords facilities for defeating the claims of creditors. At the same time the creditor often has only himself to blame, owing to his own laches in prosecuting his rights. In the Presidency town the same objections cannot be fairly raised; the system works well; whilst, in the mofussil, the difficulties arise not so much from the machinery itself, as from the defective manner in which it is worked. One of the most fruitful sources of litigation is the setting aside of execution sales, on the ground of irregularity in the publication of the sale proclamation. It is notorious that in many of these cases the Court's officer either through negligence or dishonesty has not duly published the proclamation, but it is impossible to deal with such cases by any provision in a Code. After a most careful consideration of the subject, we have not seen our way to any very drastic changes in the present system. We have found ourselves unable to accept the somewhat far-reaching proposal of the Committee of 1902 in relation to the execution of decrees by precept; but we are so far in accord with the view expressed by that Committee as to have been able to insert in the Bill a clause which enables the Court which passed the decree to issue a precept to any other Court to attach property of the judgment-debtor pending execution in the ordinary course. Beyond this we have felt we could not safely go.

We anticipate that there will be a substantial saving of time, and consequent expense, from the provision requiring that mesne profits shall be ascertained by the Court under the decree itself, and not as now in execution proceedings.

Clause 53 has been introduced to settle a long mooted point upon which there is much diversity of judicial opinion, as to whether or not questions as to the liability of ancestral property in the hands of a son or other descendant to whom it has come otherwise than by descent for the payment of the debt for which the decree was passed, can be determined under Cl. 47 of the present Bill, corresponding with Section 244 of the existing Code. We think they should be.

Other amendments deserving notice relate to (1) the power to break open the outer door of the judgment-debtor's dwelling house; (2) the date from which the purchaser's title accrues; (3) oral application for immediate execution; (4) the discretion of the Court in the execution of decrees for the restitution of conjugal rights; (5) the execution against partnership property; (6) extended facilities for attaching salaries; and (7) powers to decree-holders to carry decrees into effect at the expense of the judgment-debtor.

We regard the changes made in relation to execution as calculated to materially assist the judgment-creditor in recovering the fruits of his judgment.

6. Arbitration.— Two questions of importance have arisen in connexion with this subject: (1) Should any of the Sections of the Arbitration Act of 1899 be incorporated into the Code? (2) Should the right of appeal as now existing be altered, and if so, in what direction? We are of opinion that the best course would undoubtedly be to eliminate from the Code all the clauses as to arbitration, and insert them in a new and comprehensive Arbitration Act. There are, perhaps, difficulties as to this at present. We have determined, therefore, to have the arbitration clauses much as they are in the present Code; but we have placed them in a Schedule in the hope that at no distant date they may be transferred into a comprehensive Arbitration Act.

In regard to appeals, some change has been made. Upon this question, adopting the view of the Judicial Committee as expressed in Ghulam's case (ILR 29 Calcutta 167), we are strongly in favour of finality in cases of arbitration. If rights of appeal be given, the disappointed party will take advantage of every such right. To meet

the difficulty expressed in the case reported in ILR 25 Calcutta 141 (which followed many other cases in the Calcutta High Court), we have inserted the words "or being otherwise invalid" in sub-section (c) of Section 521 of the present Code. If therefore, either party considers the award as invalid on any ground, he can apply to have it set aside. We have thought it right to give one appeal from the opinion expressed by the Court on a special case under Section 517, and to allow one appeal as from order under Sections 521, 523 and 526. And having, regard to the rather wide language of the Judicial Committee in Ghulam's case we have further thought it advisable to make it clear that an order granting an application either under Section 523 or Section 526 is not to be deemed a decree within the meaning of the Code; otherwise there would be a wider right of appeal from orders under these Sections than from a decree under Section 522. The other alterations deal with the text, rather than with any question of policy or principle.

**7. Suits relating to public matters.—** We have inserted a clause to enable actions for public nuisances to be brought, with the consent of the Advocate-General, irrespective of special damage. It has been represented to us that such a power is needed and we concur in that view.

**8. Public Charities.—** The suggestion has been made on high authority that some express reference should be made in the Code to the power of the Court to apply Cy pres doctrine in the settling of schemes. But this power would appear to exist already within its proper limits (Mayor of Lyons' case LR 3 IA 32) and we do not think it necessary to make express reference to it.

It has been represented to us by more than one gentleman whose opinion is entitled to weight, that the power to enquire into the affairs of public charities should be made more extensive. The clause, as it stands, gives sufficient powers to the Courts to direct accounts and to frame schemes when once a suit has been instituted, but it is said that members of the public interested in any public charity ought to have the means of calling for and inspecting accounts without undertaking the burden of a suit, at least in the first instance. We are told that revenues derived from charitable trusts are in some cases very large in amount, that no accounts of their expenditure are ordinarily rendered and that there is good ground for believing that a considerable portion is mis-spent or squandered on useless objects.

The Hon'ble Dr. Rashbehary Ghose supports these views and has submitted a clause to give effect to them. It is in the following terms:

93-A. (1) The Court may also upon an applications by any two or more persons having the like interest and having obtained the like consent, direct any trustee of such charity to cause to be prepared and filed in the Court, within such time as may be specified in the order, a detailed account of the receipts and disbursements in connection with the trust property for a period not exceeding three years next preceding the date of the application.

(2) Such accounts, when filed in Court, shall be open to insection by the public.

(3) A trustee who fails to comply with any such directions shall be removed if a suit for that purpose be instituted, unless he can show good cause for such failure.

We have given to the subject our best consideration and desire to record our sympathy with the motives of the proposers. But we have not inserted the clause in the Bill because we think that the question is one of policy on which the public opinion of the communities interested should first be obtained. It affects primarily as we understand, the Hindu and, to a less extent, the Mahomedan community. And we should not feel justified in recommending an amendment of the law on such a subject as this, unless the leaders of those communities were to express their support of the proposal in unequivocal terms. If it is eventually decided to adopt the amendment, then we think that the clause proposed by Dr. Ghose may be accepted.

**9. Suits by or against firms.—** Attention is directed to the new provision in regard to suits by or against firms (O. XXX), which will, we hope, prove acceptable to the commercial community.

**10. New procedure.—** We have given power to provide by Rules for Counter-claims, Third Party Procedure, Summary Procedure in suits for debt or liquidated demands, as for instance, rent, or any other definite sum payable under a contract and originating summons. We are of opinion that these forms of proceeding may usefully be adopted in some areas but that this is a matter which should be left for each High Court to decide.

**11. Appeals.—** As regard appeals from original decrees we have departed but slightly from the existing Code. We have thought it advisable to give legislative sanction to the view that no appeal shall lie from a consent decree, or as to costs except by leave of the Court; but the most important change is that incorporated in Clause 97, which renders it obligatory upon a party, who considers himself aggrieved by a preliminary decree, to appeal from that decree, at the risk of being precluded from disputing its correctness on an appeal from the final decree. We feel strongly that this is a most useful provision, as tend-

ing to that which is so desirable, viz., finality in litigation.

As regards appeals from appellate decrees the only substantial departure from the existing Code is the insertion of Clause 103. Experience has shown the desirability of this clause, the effect of which will be to avoid remands, with their consequent delay and expense.

As regards appeals from order a comparison of Clause 104 of the Bill with Section 588 of the existing Code would support a prima facie inference that the right of appeal from orders has been materially curtailed. But this inference is dispelled on looking at sub-clause (h) of Clause 104 which allows an appeal from any order made under Rules from which an appeal is expressly allowed by Rules. We have gone carefully into the question of the cases in which an appeal should be allowed from these orders and our conclusion is expressed in the Rules themselves.

12. Rules.— The distribution of the provisions of the Code between the body of the Bill and the Rules is a matter on which opinions may well differ. The general principle on which we have proceeded has been to keep in the body of the Bill those provisions which appear to us to be fundamental and those provisions which confer powers operating outside the Province in which the Court is situated. In some cases we have adopted the plan of inserting leading provisions in the Bill, stating in general terms the powers of the Court, and of leaving the details to Rules; in matters of less importance the provisions have been relegated altogether to Rules. The result of this re-arrangement is to reduce the Act, as distinct from Schedules, to 155 clauses. The existing order of sequence has, speaking generally, been maintained, but the reduced bulk of the Bill has rendered it no longer necessary to reproduce the division into chapters.

It is proposed to vest the power of making Rules in High Courts, subject to the control of Local Governments, (or, in the case of the Calcutta High Court, of the Government of India), but we think it most desirable that in exercising this power, the Courts should have the advice of representatives of the various branches of the legal profession, and we have accordingly provided that, in the case of Chartered High Courts and of Chief Courts, Rules shall only be made after those Courts have taken the opinion of a Rule Committee on which there will be representatives of the Bar, of Vakeels or Pleaders and, in Presidency towns, of Attorneys. In the case of other High Courts power has been given to establish such Rule Committees as the Governor-General in Council may determine. It is believed that Standing Committees of this kind will be of great value. We have thought it better to require the same sanction as is required by the Indian High Courts Act of 1861, in order that the rule-making power should correspond with the power conferred under that Act; but we are of opinion that, in the interest of uniformity, it is expedient that all amendments of Rules should be communicated to the Government of India and to other High Courts before sanction is given to them. This, we understand, can be effected by executive order.

If our proposal is adopted, it will probably be useful to publish annually in every Province some manual corresponding to the English "Annual Practice" containing—

(1) the Act;

(2) all Rules of procedure made under it or under other Acts in the Province;

(3) notes of decisions on the Act and Rules.

13. We are sensible that there may be defects and flaws in the Bill which we append to this Report. The subject is complicated and technical and the time at our disposal has been limited. We do not doubt therefore that much improvement may be made in the Bill before it is finally passed into law. But, in our opinion, it is framed on the right lines. We believe for the reasons we have stated that in any reform of Civil Procedure it is essential to introduce some elsticity; to give wider powers of control to the High Courts, and to invest them with a larger discretion in regard to the conduct of cases which come before them. Mr. Dikshit, Subordinate Judge from Bombay, has been present throughout our deliberations, and we take this opportunity of acknowledging the help we have derived from his experience of the working of the Code in the mofussil. We desire also to record our acknowledgments of the services of Mr. Law, of the Legislative Department, who has attended to the clerical and press-work to our entire satisfaction.

(Signed) H. ERLE RICHARDS.
( " ) FRANCIS MACLEAN.
( " ) LAWRENCE JENKINS.
( " ) S. ISMAY.
( " ) RASHBEHARY GHOSE.

Simla, August 31st, 1907
—Gazette of India, 1907, Part V, page 179.

## ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

| Year | No. of Act | Short Title. | How affected |
|---|---|---|---|
| 1908 | V | THE CODE OF CIVIL PROCEDURE. | |
| 1908 | Reg IV | Andaman Nicobar Islands Regulation. | Extends the new Code and amended S. 100 by amending Reg. 3 of 1876, S. 14. |
| 1909 | III | Presidency Towns Insolvency Act | |
| 1914 | I | The Code of Civil Procedure (Amendment) Act | Amending S. 8 and S. 67. |
| 1914 | IV | The Decentralisation Act | Amending S. 138. |
| 1914 | X | The Repealing and Amending Act | Amending S. 60 and Form No. 7 in Appendix E. |
| 1914 | XVII | The Second Repealing and Amending Act | 1. Amending O. 5, R. 26.<br>2. Repealing S. 156 and the Fifth Schedule. |
| 1916 | XIII | The Amending Act | Amending Ss. 111, 116, 122, 123, 126, 129 and 130. |
| 1917 | XXIV | The Repealing and Amending Act | Amending S. 127 and S. 130. |
| 1919 | XVIII | The Repealing and Amending Act | Amending S. 122 and S. 123. |
| 1920 | XXIV | The Code of Civil Procedure (Amendment) Act | Amending O. 9, R. 5. |
| 1920 | XXVI | The Indian Limitation and Code of Civil Procedure (Amendment) Act | 1. Amending O. 45, R. 7.<br>2. Inserting new R. 9A in O. 45.<br>3. Adding new rub-rule (4) to R. 15 of O. 45. |
| 1920 | XXXVIII | The Devolution Act | Amending Ss. 5, 61, 67, 68, 125 and 143. |
| 1921 | III | The Code of Civil Procedure (Amendment) Act | Amending S. 55. |
| 1922 | IX | The Civil Procedure (Amendment) Act | 1. Inserting new S. 35A.<br>2. Amending S. 104 and O. 41, R. 33. |
| 1923 | XI | The Repealing and Amending Act | Amending S. 122 and S. 123. |
| 1923 | XXVI | The Code of Civil Procedure (Amendment) Act | Amending S. 60. |
| 1923 | XXIX | The Code of Civil Procedure (Amendment) Act | Amending O. 21, R. 32 and R. 33 |
| 1925 | XX | The Code of Civil Procedure (Amendment) Act | Amending S. 60. |
| 1925 | XXIII | The Legislative Members Exemption Act | Inserting new S. 135A. |
| 1925 | XXXII | The Oudh Courts (Supplementary) Act | Amending Ss. 122 and 123. |
| 1926 | I | The Small Cause Courts (Attachment of Immoveable Property) Act | 1. Amending S. 7<br>2. Inserting new R. 13 in O. 38. |
| 1926 | VI | The Code of Civil Procedure (Amendment) Act | Amending S. 103. |
| 1926 | XXII | The Code of Civil Procedure (Second Amendment) Act | Amending O. 3, R. 1 and R. 4. |
| 1926 | XXX | The Negotiable Instruments (Interest) Act | Amending O. 37, R. 2 and Form No. 4 in Appendix B. |
| 1926 | XXXIV | The Sind Courts (Supplementary) Act | Amending S. 122 and S. 123. |
| 1927 | X | The Repealing and Amending Act | Amending –<br>i. O. 5, R. 27 and R. 28.<br>ii. Heading of O. 28.<br>iii. O. 28, R. 1, R. 2 and R. 3. |
| 1928 | XVIII | The Repealing and Amending Act | Adding new sub s. (3) to S. 98. |
| 1929 | XXI | The Transfer of Properry (Amendment) Supplementary Act | 1. Suhstituting new Rules 2 to 8, 10, 11 and 15 for the old Rules in O. 34.<br>2. Substituting new Forms 3 to 11 in Appendix D for the old Forms.<br>3. Inserting new R. 8A in O. 34. |
| 1930 | XVI | The Transfer of Property (Amendment) Supplementary Act | Amending O. 43, R. 1. |

| Year | No. of Act | Short Title. | How affected. |
|---|---|---|---|
| 1932 | X | The Code of Civil Procedure (Amendment) Act | 1. Amending S. 78.<br>2. Inserting new Rr. 19, 20, 21 and 22 in O. 26 with heading. |
| 1934 | XXXV | The Amending Act | Amending S. 2, clause (17), S. 60, sub-section (1), clause (j), O. 5, R. 27 and R. 28 and O. 28. |
| 1934 | Punj. Act VII | The Punjab Relief of Indebtedness Act, 1934 | Amending S. 60. |
| 1936 | XXI | The Code of Civil Procedure (Amendment) Act | 1. Amending S. 51 and O. 21, R. 37.<br>2. Substituting new Rule 40 in O. 21 in place of the old Rule. |
| 1937 | VIII | The Code of Civil Procedure (Amendment) Act | 1. Inserting new S. 44A.<br>2. Amending O. 21, R. 22. |
| 1937 | IX | The Code of Civil Procedure (Second Amendment) Act | Amending S. 60. |
| 1937 | XVI | The Code of Civil Procedure (Third Amendment) Act | Amending O. 32, R. 3. |
| 1937 | | The Government of India (Adaptation of Indian Laws) Order | |
| 1939 | XXVI | The Code of Civil Procedure (Amendment) Act | Amending O. 21, R. 48. |
| 1940 | X | The Arbitration Act | Repealing S. 89, clauses (a) to (f) (both inclusive) of sub-section (i) of S. 104 and the Second Schedule. |
| 1940 | XXXIV | The Code of Civil Procedure (Amendment) Act | Amending Ss. 29 and 48. |
| 1940 | U. P. Act XIV | U. P. Regulation of Agricultural Credit Act, 1940 | Amending S. 48. |
| 1941 | IV | The Berar Laws Act | Amending S. 7 and O. 50, R. 1. |
| 1941 | XXI | The Federal Court Act | Repealing S. 111A and O. 45 R. 17. |
| 1941 | Assam Act II | The Civil Procedure (Assam Amendment) Act, 1941 | Substituting S. 138. |
| 1942 | XXIII | The Code of Civil Procedure (Amendment) Act | Adding new O. 27A. |
| 1942 | XXIV | The Code of Civil Procedure (Second Amendment) Act | 1. Inserting new R. 11A in O. 33.<br>2. Amending O. 33, Rr. 12 and 13.<br>3. Substituting new R. 14 in O. 33 for the original. |
| 1942 | XXV | The Repealing and Amending Act | Amending O. 21, R. 48. |
| 1943 | V | The Code of Civil Procedure (Amendment) Act | Amending S. 60 and O. 21, R. 48. |
| 1948 | I | The Federal Court (Enlargement of Jurisdiction) Act, 1947 | Modifying existing law relating to appeals to His Majesty in Council. |
| 1948 | VI | The Code of Civil Procedure (Amendment) Act, 1948 | Amending S. 80. |
| 1948 | | The Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948 | |
| 1948 | Bom. Act LX | The Code of Civil Procedure (Bombay Amendment) Act, 1948 | Amending S. 60. |
| 1948 | U. P. Act XXXV | The Code of Civil Procedure (U. P. Amendment) Act, 1948 | Amending S. 60. |
| 1949 | C. A. Act V | The Abolition of Privy Council Jurisdiction Act, 1949 | Modifying existing law as to appeals to His Majesty in Council. |
| 1949 | XXXII | The Code of Civil Procedure (Amendment) Act, 1949 | Amending S. 82. |
| 1949 | | The (Pakistan) Adaptation of Central Acts and Ordinances Order, 1949 | |
| 1950 | | Adaptation of Laws Order, 1950 | |
| 1950 | Madras Act XXXIV | The Code of Civil Procedure (Madras Amendment) Act, 1950 | Amending S. 60. |

| Year | No. of Act | Short title. | How affected. |
|---|---|---|---|
| 1951 | II | The Code of Civil Procedure (Amendment) Act, 1951. | 1. Amending Ss. 1, 2, 7, 35A, 60, 92, heading of Part IX, Ss. 116, 122, 123, 129 and O. 50, R. 1.<br>2. Substituting Ss. 29, 43, 44, 44-A, 78, 83 to 87B. |
| 1951 | XIX | The Code of Civil Procedure (Second Amendment) Act, 1951. | Amending O. 5, R. 25. |
| 1951 | XXIV | The Codes of Civil and Criminal Procedure (Amendment) Act, 1951. | Amending S. 113 and O. 46. |
| 1951 | LXX | Displaced Persons (Debts Adjustment) Act, 1951. | Modifying S. 60. |
| 1952 | XLVIII | The Repealing and Amending Act, 1952. | Repealing Ss. 154 and 155 and omitting Schedule IV. |
| 1952 | Mys. Act XIV | The Code of Civil Procedure (Mysore Amendment) Act, 1952. | Amending S. 60. |
| 1952 | Raj. Act XX | The Code of Civil Procedure (Rajasthan Amendment) Act, 1952. | Inserting new S. 48-A. |
| 1953 | Assam Act VIII | The Code of Civil Procedure (Assam Amendment) Act, 1953. | Substituting S. 123 (2) (a). |
| 1953 | XLII | The Repealing and Amending Act, 1953. | Amending Sub-s. (7-B) of S. 2. |
| 1953 | Hyd. Act XI | Code of Civil Procedure (Hyderabad Amendment) Act, 1953. | Amending S. 60. |
| 1954 | ... | Madras Adaptation of Laws Order, 1954. | Amending S. 1. |
| 1954 | U. P. Act XXIV | U. P. Civil Laws (Reforms and Amendment) Act, 1954. | 1. Amending Ss. 47, 51, 92, 102.<br>2. Substituting Ss. 35-A, 42, 144, 145. |
| 1956 | H. P. Act VI | The Code of Civil Procedure (Himachal Pradesh Amendment) Act, 1956. | Amending S. 60. |
| 1956 | LXVI | The Code of Civil Procedure (Amendment) Act, 1956. | 1. Amending Ss. 34, 35, 35-A, 47, 60, 82, 92, 102, 109, 133, 144 and First Schedule.<br>2. Omitting Ss. 68 to 72 and Third Schedule. |
| 1956 | LXVIII | Union Territories (Laws) Amendment Act, 1956. | Amending sub-s. (3) of S. 1. |
| 1956 | ... | Adaptation of Laws (No. 2) Order, 1956. | Amending Ss. 1, 7, 35-A, 92, 116, 122, 129, 130 and O. 50, R. 1. |
| 1957 | ... | Andhra Pradesh Adaptation of Laws Order, 1957. | Amending Ss. 1 and 113. |
| 1957 | Kerala Act XIII | Code of Civil Procedure (Kerala Amendment) Act, 1957. | Amending Ss. 60 and 100. |
| 1957 | Raj. Act XVI | Code of Civil Procedure (Rajasthan Amendment) Act, 1957. | Amending S. 60. |
| 1958 | Raj. Act XIX | Code of Civil Procedure (Rajasthan Amendment) Act, 1958. | Amending S. 60. |
| 1959 | Mad. Act XXII | Madras Hindu Religious and Charitable Endowments Act, 1959. | Affecting applicability of Ss. 92 and 93. |
| 1960 | U. P. Act XVI | U. P. Muslim Wakfs Act, 1960. | Affecting applicability of S. 92. |
| 1961 | Guj. Act XXXII | Ahmedabad City Courts (Amendment) Act, 1961. | Amending S. 8. |
| 1961 | Mad. A.L.O. | Madras (Added Territories) Adaptation of Laws Order, 1961. | Affects Ss. 1 and 113. |
| 1962 | An. P. Act X | The Code of Civil Procedure (An. Pra Unification and Amendment) Act, 1962. | Amending Ss. 1 and 113. |
| 1963 | XXVI | Code of Civil Procedure (Amendment) Act, 1963. | Amending Ss. 2, 60, 80. |
| 1963 | XXXVI | Limitation Act, 1963. | S. 48 omitted. |
| 1964 | XI | Mysore Small Cause Courts Act, 1964. | Affects O. 21, R. 6. |
| 1965 | XXX | Goa, Daman and Diu (Extension of Code of Civil Procedure and Arbitration Act) Act, 1965. | Extends the Code to Goa, Daman and Diu. |

| Year | No. of Act | Short title. | How affected. |
|---|---|---|---|
| 1965 | Reg. VIII | The Laccadive, Minicoy and Amindivi Islands (Laws) Regulation, 1965. | Extends the Act to the U. T. and amends proviso to S. 1 (3). |
| 1965 | Reg. IX | Laccadive, Minicoy and Amindivi Islands (Civil Courts) Regulation, 1965. | Applies the Code to suits and Proceedings before Courts of Subordinate Judges and Munsifs, subject to exceptions. |
| 1965 | Maha. Act VI | Code of Civil Procedure (Extension of Hyderabad Amendment) Act, 1965. | Extends amendments made by Hyd. Act XI of 1953 to the whole of Maharashtra. |
| 1966 | A. P. Act XVII | Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1966. | Affecting applicability of Ss. 92 and 93. |
| 1968 | XXVI | Pondicherry (Extension of Laws) Act,1968. | Inserts S. 45-A. |
| 1968 | President Act XXXV | U. P. Civil Laws Amendment Act, 1968. | Substitutes S. 42 in U. P. |

## COGNATE ACTS AND PROVISIONS

1. Continuance of Legal Proceedings Act, XXXVIII of 1948.
2. Court-fees Act, VII of 1870.
3. Decrees and Orders Validating Act, V of 1936.
4. Federal Court Act, XXV of 1937.
5. Federal Court (Enlargement of Jurisdiction) Act, 1 of 1948.
6. Foreign Awards (Recognition and Enforcement) Act, 45 of 1961.
7. Limitation Act, 36 of 1963.
8. Foreign Jurisdiction Act, 47 of 1947.
9. Maintenance Orders Enforcement Act, XVIII of 1921.
10. Presidency Magistrates (Court-Fees) Act, IV of 1877.
11. Public Suits Validation Act, XI of 1932.
12. Suits Valuation Act, VII of 1887.
13. Unclaimed Deposits Act, XXV of 1866.
14. Unclaimed Deposits Act, V of 1870.
15. Specific Relief Act, 47 of 1963.
16. Abolition of Jurisdiction of Privy Council Act, CA 5 of 1949.
17. Constitution of India, Ch. IV of Pt. V, Ch. V of Pt. VI.
18. Forfeited Deposits Act, 25 of 1850.
19. Railway Companies (Substitution of Parties in Civil Proceedings) Act, 14 of 1946.
20. Continuance of Legal Proceedings Act, 38 of 1948.
21. Legal Representatives Suit Act, 12 of 1855.
22. Decrees and Orders Validating Act, 5 of 1936.
23. Notaries Act, 53 of 1952.
24. Diplomatic and Consular Officers (Oaths and Fees) Act 41 of 1948.
25. Sheriff's Fees Act, 8 of 1852.

# THE CODE OF CIVIL PROCEDURE
## (ACT V OF 1908)

[21st March, 1908.]

An Act to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature.

WHEREAS it is expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature; It is hereby enacted as follows:—

### PREAMBLE — SYNOPSIS

**1. Scope and applicability.**
**2. Retrospective operation.**
**3. Code how far exhaustive.**
**3-A. Interpretation of the Code.**
**4. Judicial discretion.**

### TOPIC INDICATOR

Applicability of Code to Foreigners. See Note 1.
Code, if creates new rights. See Note 1.
Hindu Law, if overrides the Code. See Note 1.
Applicability to Income-tax proceedings. See Note 1.
Applicability to pending cases. See Note 1.
Limitation Act and the Code. See Note 3-A.

**1. Scope and applicability.**— (1) The Code consolidates and amends the laws relating to the procedure of the Courts of Civil Judicature in India. ('95) 22 Cal 788 (798): 22 Ind App 107 (PC) ° AIR 1930 All 225 (230): 52 All 619 (FB).

(2) The Code applies to the procedure of all Courts of Civil Judicature except that it does not affect any special or local law or any special jurisdiction or power con-

**Preamble — Note 1 (contd.)**

ferred or any special form of procedure prescribed by or under any other law for the time being in force. AIR 1956 Sau 29 (30) (DB) * AIR 1942 Cal 429 (434) (DB) * AIR 1940 All 24 (26, 27): ILR (1939) All 901 (DB) * AIR 1932 Oudh 199 (201): 7 Luck 716 (FB) * AIR 1921 PC 80 (82, 84): 48 Cal 481: 48 Ind App 76.

(3) Conflict between Civil P. C. and a special law — Latter prevails over former on principle that special law prevails over general. AIR 1942 Cal 49 (50): ILR (1942) 1 Cal 497 (SB) * AIR 1932 Oudh 163 (164) (DB).

(4) The Code is a Code conferring powers on a Court and is not a Code restricting and delimiting its unlimited powers. AIR 1929 Mad 757 (763): 52 Mad 899 (FB).

(5) Foreigners are not exempted from the operation of the Code. AIR 1927 All 413 (414): 49 All 669 (DB) * (1896) 20 Bom 133 (143) (DB) * AIR 1919 Mad 883 (884) (DB) * ('03) 26 Mad 544 (552): 30 Ind App 220 (PC). (Approving 17 Bom 662.)

(6) Property having a foreign origin is not outside the jurisdiction of Indian Courts. (1900) 24 Bom 407 (410, 413, 414) (DB).

(7) The Code, being an adjective law, is not primarily intended to create new rights or to take away existing rights. It mainly regulates the procedure in Civil Courts. AIR 1932 Lah 401 (407): 13 Lah 618 (FB) * AIR 1930 Oudh 148 (153): 7 OWN 232 (FB).

(8) A Code of procedure must be regarded as such. It is "procedure," something designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties; not a thing designed to trip people up. AIR 1955 SC 425 (429): (1955) 2 SCR 1 * AIR 1957 Pat 260 (263) (DB) * ('65) 67 Pun LR 1129 (1130) (DB) * AIR 1961 Pat 152 (154): 1961 BLJR 478.

(9) The Code cannot of itself establish a right which does not exist under the ordinary law. It is a Code of procedure only and not of substantive law. AIR 1930 Rang 317 (319): 9 Rang 7 * AIR 1936 Mad 50 (52): 59 Mad 202 (FB) * AIR 1932 Lah 401 (407): 13 Lah 618 (FB).

(10) The Code applies to proceedings under the Arbitration Act. AIR 1925 All 154 (155): 47 All 179.

(11) Hindu Law does not override express provisions as regards procedure laid down in the Code. AIR 1918 Cal 987 (988).

(12) Where a suit is barred under the terms of the Provincial Insolvency Act, no recourse can be taken to the Code. AIR 1930 Rang 317 (319): 9 Rang 7.

(13) The provisions of the Code have no bearing on the right of Letters Patent appeal. AIR 1939 All 618 (619): ILR (1939) All 750 (DB).

(14) The provisions of the Code apply to the Original Side of the Calcutta High Court subject to the Original Side Rules of the High Court. AIR 1966 Cal 591 (594): 70 Cal WN 729.

(15) Proceedings under Income-tax Act are not civil proceedings and hence rules relating to suits and appeals in exercise of civil jurisdiction are not applicable to those proceedings. AIR 1967 Mad 337 (340): (1965) 2 Mad LJ 275.

(16) General principle of pleading in suits including the maxim — Secundum allegata et non probata applies to writ proceedings. ILR (1968) 2 Punj 318 (325).

**2. Retrospective operation.**— (1) The Code is not retrospective so as to affect vested rights. ('10) 5 Ind Cas 102 (105) (FB) (Mad) *AIR 1914 PC 66 (67): 36 All 350.

(2) Except in the case of a right of appeal, the Code applies retrospectively so as to affect all other rights and matters dealt with by it. AIR 1955 Kutch 18 (19) *('13) 40 Cal 704 (709, 710) (DB) * ('12) 16 Ind Cas 834 (834) (Lah) * AIR 1930 Cal 422 (423): 57 Cal 148 (DB) * AIR 1967 Guj 7 (8): (1965) 6 Guj LR 893. (Right of appeal is a vested right coming into existence at the very inception of suit and would not be affected by subsequent amendment of section providing for appeal, unless the amendment is retrospective in operation.)

(3) The Code applies to all cases pending or about to be instituted at the time it came into force. ('11) 9 Ind Cas 815 (816) (Cal).

(4) A suit must be determined according to the law in force at its institution. A change in the law pending the action cannot affect the rights of the parties in the absence of a provision to the contrary. AIR 1956 Nag 281 (284) :ILR (1956) Nag 296 (DB) * ('55) AIR 1955 Mad 378 (380, 381): ILR (1955) Mad 870 (DB) * AIR 1954 Hyd 158 (159): ILR (1954) Hyd 115 (FB) * AIR 1953 Bom 282 (283): ILR (1953) Bom 707 (DB) * AIR 1953 Nag 361 (367): ILR (1953) Nag 702 (FB) * AIR 1953 Trav-Co 53 (57): ILR (1952) Trav-Co 605 (DB) * AIR 1941 FC 16 (37, 47): 1940 FCR 110.

**3. Code, how far exhaustive.**— (1) The Code is exhaustive on all matters specifically dealt with by it. The law in such matters must be ascertained only with reference to its provisions and a Judge cannot disregard or go outside the letter of the enactment according to its true construction. AIR 1952 Punj 381 (382) * AIR 1951 Madh B 1 (5): ILR (1952) Madh B 15 (FB) * AIR 1950 Pat 309 (310): 29 Pat 381 * AIR 1944 Sind 73 (79): ILR (1943) Kar 429 (DB) * ('02) 29 Cal 707 (715): 29 Ind App 196 (PC).

(2) It is a rule of construction of a statute like the Civil Procedure Code, that the Court ought not to act on the princi-

**Preamble — Note 3 (contd.)**

ple that every procedure is to be taken as prohibited unless it is expressly provided for, but should proceed on the opposite principle that every procedure is to be understood as permissible till it is shown to be prohibited by law. ('82) 5 All 163 (172) (FB) * AIR 1925 Mad 42 (44): 48 Mad 494 * ('89) 11 All 267 (287) (FB) * ('10) 37 Cal 399 (406).

(3) The Code is not exhaustive of all forms of procedure necessary to be used in the administration of justice. AIR 1917 Pat 495 (497) (DB) * ('06) 33 Cal 927 (932) (DB) * AIR 1917 Pat 375 (377) (DB).

(4) The Code, not being exhaustive, should be construed liberally and, as far as possible, merely technical objections should not be allowed to defeat substantial justice. AIR 1953 Mys 57 (58): ILR (1953) Mys 238 (DB).

**3-A. Interpretation of the Code.**— (1) A code of procedure is designed to facilitate justice and further its ends. Too technical a construction of sections which leaves no room for reasonable elasticity of interpretation should therefore, be guarded against (provided always that justice is done to 'both' sides) lest the very means designed for the furtherance of justice be used to frustrate it. AIR 1955 SC 425 (429): (1955) 2 SCR 1 * AIR 1961 Pat 152 (154): 1961 BLJR 478 * AIR 1957 Pat 260 (263, 264) (DB).

(2) Laws of procedure are grounded on principle of natural justice. Of course, there must be exceptions and where they are clearly defined they must be given effect to. Laws of procedure should be construed, whereby that is reasonably possible, in the light of that principle. AIR 1955 SC 425 (429): (1955) 2 SCR 1 * AIR 1957 Pat 260 (263, 264) (DB) * AIR 1961 Pat 152 (154): 1961 BLJR 478.

(3) Procedure is a handmaid and not mistress of law and rules of procedure should subserve and not govern. Procedure is only a channel to administer law and it should not be instrumental in impleading or obstructing justice. AIR 1959 Punj 71 (74): ILR (1958) Punj 2430 (DB).

(4)The body of the Code creates jurisdiction while the rules indicate the mode in which it is to be exercised. . . . . The body of the code is expressed in more general terms, but it has to be read in conjunction with the more particular provisions of the rules. AIR 1917 Cal 657 (658): ILR 43 Cal 148 (152) (DB) * AIR 1914 Cal 163 (164): ILR 41 Cal 108 (111) (DB) * AIR 1917 Cal 44 (46): ILR 44 Cal 929 (938) (FB) * AIR 1957 Andh Pra 172 (181): (1957) 1 Andh WR 318 (FB) * AIR 1939 Nag 186 (190): 1939 Nag LJ 228 (FB).

(5) Main body of the Civil P. C. sets forth the fundamental principles which can be amended by the legislature itself. The rules in Schedule 1 deal with matters of detail which can be modified by the High Courts with the previous approval of certain authorities. No rule in Schedule can confer upon any Civil Court jurisdiction which it would not have under the provisions in the body of the Code. AIR 1954 Madh Bha 156 (158): Madh BLR 1956 Civil 584 (2).

(6) In the case of a conflict between the Civil Procedure Code and its Schedule, the Code must prevail. (1914) 22 Ind Cas 690 (691) (DB) (Cal) * AIR 1939 Nag 186 (190): 1939 Nag LJ 228 (FB).

(7) The forms given in the schedule to the Code of Civil Procedure cannot control the clear words of the Code itself. AIR 1918 Cal 631 (632): 21 Cal WN 1147 (DB).

(8) It is not right to interpret the Code of 1908 with reference to the Codes of 1859 and 1882. AIR 1930 Oudh 148 (159): 7 OWN 232 (FB).

(9) The provisions of the Civil Procedure Code are subject to the provisions of the Limitation Act. Both Acts are general Acts and are in pari materia. The two Acts therefore, must be read together and must be treated as complementary of each other. AIR 1939 All 403 (405, 412): 1939 All LJ 522 (FB).

(10) A thing for which provision has been made must be done in that way or not at all. AIR 1967 All 136 (140): 1966 All LJ 990. (Attachment before judgment — Though a Court has jurisdiction to attach property, in order to achieve that object it is bound to follow procedure provided by the Code.)

(11) When language of statute is plain and does not admit of more than one meaning, duty of interpretation does not arise and language itself best declares intention of law-giver. AIR 1967 Punj 53 (59): 68 Pun LR 591 (FB). (No vagueness or ambiguity in various terms as used in Clause (ccc) introduced by Punjab amendment in Sub-section (1) of Section 60, Civil P. C.)

(12) Provision which has the effect of conferring a privilege on certain classes of debtors and of trenching on the ordinary right of creditor to realize his money from debtor's property must receive strict construction. AIR 1967 Punj 53 (59): 68 Pun LR 591 (FB). (Construction of Clause (ccc) introduced in sub-section (1) of Section 60 of the Code by Punjab amendment.)

(13) When a statutory provision creates a fiction it is first necessary to find out the purpose for which it was created in order to understand the scope and implication of the fiction. AIR 1967 Mad 45 (50): (1966) 2 Mad LJ 346 (FB). (Interpretation of sub-section (1) of Section 44-A, Civil P. C.)

(14) Order 1, Rule 8 of the Code is nothing but a rule of procedure for the convenience of the litigants where the number of persons interested in the subject-matter of litigation is numerous, and there will be no justification for putting a stricter interpretation on the expression "the same interest" as not to cover cases

## PRELIMINARY

**1. Short title, commencement and extent.**—(1) This Act may be cited as [THE] CODE OF CIVIL PROCEDURE, 1908.

(2) It shall come into force on the first day of January, 1909.

[a][(3) It extends[e] to the whole of India except—

(a) the Tribal Areas in the State of Assam;

(b) save as hereinafter provided the Scheduled Areas in the State of Madras;

(c) the State of Jammu and Kashmir; [b][°]

(d) [b][° ° °]

Provided that Sections 36 to 43 and Order XXXIV in the First Schedule shall extend also to the [c][° ° °] the East Godavari, West Godavari and Visakhapatnam

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**Preamble — Note 3-A (contd.)**

of similar but distinct interest of persons having common grievance. 1968 BLJR 515 (519, 520): ILR 46 Pat 977 (DB).

(15) The word 'may' in Order 39, R. 8, Civil P. C. used by the legislature in juxtaposition to the word "shall" adopted in the other sections, orders and rules of the Code of Civil Procedure is significant and indicates that the word is potential in scope and not necessarily signifying any obligation. The word is enabling and permissive. AIR 1969 Mad 204 (206): (1969) 1 Mad LJ 188.

(16) See also Note 3.

**4. Judicial discretion.**—(1) The Code in many of the sections leaves certain matters to the discretion of the Court. AIR 1931 Rang 194 (198): 9 Rang 281 (FB).

(2) The discretion must not be exercised in an arbitrary, vague or fanciful manner, but on judicial principles. ('79) 5 Cal 259 (265) (DB) * AIR 1924 Bom 1 (18): 48 Bom 87 * AIR 1957 Andh Pra 114 (117) (DB).

(3) Judicial discretion means that in certain proved or admitted circumstances the Court has been given power to act or not to act in a particular way and such discretion must be exercised within the limits to which an honest man competent to the discharge of his office ought to confine himself. AIR 1931 Rang 194 (198): 9 Rang 281 (FB).

**Section 1 — Note 1**

(1) Section 115 of the Code does not apply to Agency Tracts in the Andhra Pradesh by virtue of Section 1 (3). 1958-1 Andh WR 213 (214). (AIR 1919 Mad 682, Foll.)

(2) Code not made applicable to Courts continued by authority of Central Government out side India. (1965) 78 Mad WN 723 (726): ILR (1966) 2 Mad 522.

(3) It is for the party who asserts that the law different from that in force in the Union of India governs particular proceedings, to prove affirmatively that the said proceedings are so governed and also what that law is. AIR 1960 Punj 575 (577) (DB).

(4) The Code of Civil Procedure deals with procedural matters that is, with matters relating to the machinery for the enforcement of substantive rights, as contra-distinguished from the substantive rights themselves. As to the latter rights, one must look elsewhere, that is, to the statute law or the general principles of law. AIR 1964 Raj 140 (144): 1964 Raj LW 178 (DB).

(5) The procedure prescribed for under Section 8 of Travancore Civil P. C. (1100) having been repealed during the trial of the suit, retrospective effect must be given to the present Civil P. C. so far as actions pending on the date it came into force are concerned. AIR 1955 Trav-Co 275 (277): 1955 Ker LT 553.

(6) Suit filed in Travancore area before 1-4-1951 on which date Indian Code of Civil Procedure (As amended by Act 2 of 1951) was introduced — Dismissal of suit for default after 1-4-1951 — Application for restoration filed after 1-4-1951 but before 14-5-1952 on which amendment of Order 9, Rule 9 by High Court took effect — Application to be governed by Order 9, Rule 9 of Indian Code which was in force when it was filed. AIR 1954 Trav-Co 526 (533): 1954 Ker LT 827 (FB).

(7) Suit filed in Telangana area pending at the date Civil Procedure Code (Amendment) Act (2 of 1951) came into force — Second appeals in such suits could be filed on question of fact also — Second appeals continue to be governed by Section 602, Hyderabad Civil P. C. (3 of 1323-F). (1958) 1 Andh WR 116: ILR (1958) Andh Pra 106.

(8) Effect of Bihar Government Notification dated 26-8-1953 is that Civil P. C. (As amended by Act 2 of 1951) is not applicable to Sadar sub-division of District of Singhbhum except areas comprised in Chabiga and Chakradharpur municipalities — Notification expressly makes it retrospective and notification should be treated as having come into force on 1-4-1951 — Held, that it must be deemed that Code of Civil Procedure (Amendment) Act (2 of 1951) was not effective, in Kothan area on date when suit against petitioner was filed in 1952. AIR 1958 Pat 366 (368, 369) (DB).

Agencies in the [d][State of Andhra Pradesh] and Section 48 shall extend also to the said Agencies.][f]

[1882, S. 1.]

[a] Substituted for sub-sec. (3), by the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), S. 2 [1-4-1951].

The old sub-section (3) was as follows :

"(3) This section and Sections 155 to 158 extend to the whole of India except Part B States: the rest of the Code extends to the whole of India except Part B States and the Scheduled Districts".

[b] The word "and" at the end of clause (c), and clause "(d)" were omitted by Union Territories (Laws) Act 1950 (30 of 1950), S. 3 (2A) and Sch. Pt. B, as inserted by the Union Territories (Laws) Amendment Act, 1956 (68 of 1956), Ss. 2 (b) and 4 (with effect from 1-1-1957).

The old clause (d) was as follows: "the Union Territory of Manipur".

[c] words "Amindivi Islands and" omitted by Reg. 8 of 1965, Sec. 3 (i) and Sch. Amindivi Islands now form part of the Union Territory of Laccadive, Minicoy and Amindivi Islands to which the Code is extended by the said Regulation.

[d] Words "State of Madras" omitted and "Andhra Pradesh" substituted by A.L.O. (No. 2), 1956 [w. e. f. 1-11-1956].

[e] The Code has been extended to the Union territories of—

(i) Goa, Daman and Diu — See Act 30 of 1965, S. 3 [w. e. f. 15-6-1966];

(ii) Laccadive, Minicoy and Amindivi Islands — See Reg. 8 of 1965, S. 3 (i) and Sch. [w. e. f. 1-10-1967];

(iii) Pondicherry — See Act 28 of 1968, S. 3 (i) and Sch. Act as in Madras as on 1-8-1966 has been extended to the territory (w.e.f. 5-9-1968) — See G. I., 24-5-68, Pt. II, S. 3 (i), Ext., p. 305 and Pondi Gaz., Ext., 4-9-66;

(iv) Dadra and Nagar Haveli — See Reg. 6 of 1963 [1-7-1965].

The Code was extended to Chandernagore Area by Reg. 1 of 1952, S. 10 (c) [w. e. f. 2-5-1950].

The Code as it existed in 1876 had been extended to Andaman and Nicobar Islands by Reg. 3 of 1876, S. 14. S. 14 was amended by Reg. 4 of 1908 so as to extend the present Code to the said territory.

(f) Section 20 of the Code of Civil Procedure (Amendment) Act (2 of 1951) is as follows:

"**20. Repeals and savings.**—(1) If, immediately before the date on which the said Code comes into force in any Part B State° there is in force in that State any law corresponding to the said Code, that law shall on that date stand repealed :

Provided that the repeal shall not affect—

(a) the previous operation of any law so repealed or anything duly done or suffered thereunder, or

(b) any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed, or

(c) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if this Act had not been passed.

(2) Subject to the provisions contained in sub-section (1), notifications published, declarations and rules made, places appointed, agreements filed, scales prescribed, forms framed, appointments made and powers conferred under any enactment hereby repealed shall, so far as they are consistent with the said Code, have the same force and effect as if they had been respectively published, made, appointed, filed, prescribed, framed and conferred under the said Code and by the authority empowered thereby in such behalf.

(3) In every law or notification passed or issued before the commencement of this Act† in which reference is made to or to any Chapter or section of any law hereby

repealed, such reference shall, so far as may be practicable, be taken to be made to the said Code or its corresponding Part, Order, Section or Rule."

°The Code of Civil Procedure (1908) came into force, in Part B States on 1-4-1951.

†That is, 1-4-1951.

## STATE ADAPTATIONS

**Andhra Pradesh**

In its application to the State of Andhra Pradesh, (i) in Cl. (b) of sub-sec. (3) of Section 1 for the words "States of Andhra and Madras" as substituted by A. L. O., 1954, substitute the words and figures "State of Andhra as it existed immediately before the 1st November, 1956 and in the State of Madras";

Andh. Pra. A. L. O., 1957 [w. e. f. 1-11-1956].

(ii) in the proviso, for "State of Madras", substitute "State of Andhra"—An. A. L. O., 1954.

**Madras**

In its application to the added territories[a] in the State of Madras, in Cl. (b) of sub-section (3) of Section 1 as it stood after the above Andhra Pradesh amendment omit the words and figures "State of Andhra as it existed immediately before the 1st November, 1956 and in the".

—Madras (Added Territories) A. L. O., 1961 [1-4-1960].

[a] The expression "added territories" means the territories specified in the Second Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959 (LVI of 1959).

**2. Definitions.**—In this Act, unless there is anything repugnant in the subject or context,—

(1) "Code" includes rules:

(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be

### Section 2 (1) — Note 1

**1. Code and the 'rules' —Distinction.**— (1) The Code draws distinction between "body of the Code" and "the rules." AIR 1917 Cal 657 (658): 43 Cal 148 (DB).

(2) The body of the Code creates jurisdiction and is unalterable except by the Legislature. AIR 1917 Cal 44 (46): 44 Cal 929 (FB) * AIR 1917 Cal 657 (658): 43 Cal 148 (DB) * AIR 1957 Andh Pra 172 (181): (1957) 1 Andh WR 318 (FB).

(3) Rules indicate the mode in which jurisdiction is to be exercised and can be altered or amended by the High Courts. AIR 1954 Madh B 156 (158) * ('17) AIR 1917 Cal 44 (46): 44 Cal 929 (FB) * ('17) AIR 1917 Cal 657 (658): 43 Cal 148 (DB) * AIR 1957 Andh Pra 172 (181) (FB).

(4) Division between the body of the Code and the rules was introduced "to enable variations to be introduced in procedure to meet the requirements of different localities as well as to enable defects to be remedied as they are discovered without resort to the tardy process of legislation." Statement of Objects and Reasons.

(5) The body of the Code has to be read in conjunction with the more particular provisions of the rules. AIR 1917 Cal 44 (46): 44 Cal 929 (FB).

(6) In case of conflict between the rules and the body of the Code the latter must prevail. AIR 1914 Cal 581 (582) (DB) * ('26) AIR 1926 Mad 676 (678) * AIR 1939 Nag 186 (190): ILR (1939) Nag 250 (FB).

(7) Forms in the Schedule cannot control the Code. AIR 1918 Cal 631 (632) (DB).

See also Note 7 under Preamble.

(8) 'Code' includes the Civil Rules of Practice framed by High Court under Section 122, Civil P. C. AIR 1956 Andhra 108 (109).

(9) In the absence of any rules made by the High Court under Section 122, rules in the First Schedule will govern the procedure as dealt with therein. AIR 1960 Madh Pra 387 (387): 1960 Jab LJ 612.

(10) The Code includes the sections as well as the orders and rules contained in Schedule I. AIR 1954 Trav-Co 526 (529): ILR (1954) Trav-Co 929 (FB).

### SECTION 2 (2) — SYNOPSIS

1. DECREE AND ORDER — DISTINCTION.
2. ESSENTIALS OF DECREE.
   3. Adjudication necessary.
   4. Decision to be in suit.
   5. Decision to be on rights of parties.
   6. Rights must be conclusively determined.
   7. Formal expression of adjudication necessary.

either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 47 or Section 144, but shall not include—

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation.—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

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**Section 2 (2) — Synopsis (contd.)**

7-A. CLASSES OF DECREES — See Notes 8 to 13.

8. Compromise decree.

9. Preliminary decree.

10. Final decree.

11. Decree partly preliminary and partly final.

12. Order rejecting plaint.

13. Decision under S. 47 or S. 144.

14. APPEALABLE ORDERS.

15. DISMISSAL FOR DEFAULT.

**1. Decree and order — Distinction.** — (1) Definition of "decree" is important because right of first appeal and second appeal is determined by reference to it. Clause 2, Notes on clauses by Special Committee. AIR 1941 Oudh 590 (591) (DB) * AIR 1968 Andh Pra 239 (252) (FB).

(2) Whether the adjudication in any case is a decree or an order must be tested, not by reference to general principles but by the expression of the Code, construed in its plain and obvious sense. ('01) 23 All 152 (156, 157) (PC) * ('03) 30 Cal 660 (663, 664) (FB).

(3) The true nature of the adjudication under appeal, considered in the light of the provisions of the Code and not what it appears to be on its face that determines the question whether the adjudication is an order or a decree. ('55) 59 Cal WN 1056 (1058) * ('47) 1947 Mad WN 723 (731) (DB) * AIR 1939 Mad 897 (899): ILR (1940) Mad 394 (DB). (Per Krishnaswami Ayyangar J.) * AIR 1960 Mad 349 (350).

(4) An adjudication must be either "decree" or "order," but not both. ('15) AIR 1915 PC 116 (117, 118): 42 Ind App 91: 42 Cal 914.

(5) Both a decree as well as an order are formal expressions of any decision of a civil Court. AIR 1964 Andh Pra 216 (218): (1964) 1 Andh WR 185 (DB).

(6) Presence or absence of formal expression is not the true criterion of difference between decree and order. Nature of decision rather than the manner of its expression must determine its character as a decree or order. ('37) AIR 1937 Pat 349 (350).

(7) Finality of a decree or decision does not necessarily depend upon its being executable. AIR 1963 SC 992 (995) * AIR 1965 All 298 (299).

(8) An order is distinct from decree but where it has the force of a decree, it stands at par with a decree for purposes of Court-fee when the effect of the communication of order is that the decree already transmitted for execution stands amended, the order has the force of a decree. AIR 1965 All 298 (299) * AIR 1963 Pat 30 (32): 1962 BLJR 813 (DB) * AIR 1966 Mys 150 (151) (DB). (Order refusing to wind up company has not the force of decree.)

(9) Since Order 1, Rule 10 and O. 9, R. 2 have expressly called dismissals of suits under them as orders such dismissals are not decrees under Section 2 (2) although ordinarily the dismissal of a suit is decree. AIR 1916 All 326 (326): 38 All 357 (DB) * ('83) 9 Cal 627 (628) (DB) * AIR 1919 Mad 871 (873): 42 Mad 219 (DB) * AIR 1926 Nag 75 (75) * ('10) 8 Ind Cas 409 (409) (DB) (Oudh).

(10) "Decree" has been expressly defined in the Agra Tenancy Act (3 of 1926) and the definition contained in the Civil P. C. will not apply to that Act. AIR 1934 All 100 (100) (DB) * AIR 1938 All 124 (125).

(11) Rejection of application for sale under Section 4, Partition Act, is not a "decree". AIR 1941 Cal 311 (314) (DB).

(12) Expression 'order' in Article 11 of Sch. II of Court-fees Act, 1870 as amended in Madras — Not used in its generic sense so as to include all orders deemed to have been included within the definition of decree. AIR 1968 Andh Pra 239 (244) (FB).

(13) Award of Court in a reference under Section 18 of Land Acquisition Act (1894) is a decree. AIR 1967 Guj 118 (123).

(14) Order under S. 2 of the Partition Act (1893) is a decree within meaning of Section 2 (2), C. P. C. AIR 1967 Cal 627 (627) (DB).

(15) A proceeding under Section 11, Kerala Agriculturists Relief Act (31 of 1958), is a decree. 1960 Ker LT 1177: 1960 Ker LJ 1315.

**2. Essentials of decree.** — (1) Decision of Court to be "decree," must possess certain essential elements specified by the definition. AIR 1916 Lah 245 (246, 247): 1916 Pun Re No 128 (FB).

**Section 2 (2) — Note 2 (contd.)**

(2) A decree is a formal document drawn up in accordance with some decision of Court A mere finding, even though it may conclusively determine rights of parties with regard to some of matters in controversy in suit will not amount to a decree. AIR 1945 All 268 (270): ILR (1945) All 798 (FB) * AIR 1934 Pat 97 (99).

(3) A decree must be taken as one unit. Each subject-matter decided in suit cannot constitute separate decree. AIR 1956 Pat 325 (333): 35 Pat 499 (FB). (AIR 1936 Mad 881: ILR (1937) Mad 121, Dissent from.)

**3. Adjudication necessary.** — (1) An order refusing leave to decree-holder to bid at the sale, being only a decision on a matter of administration is not a decree. ('11) 38 Cal 717 (720): 38 Ind App 126: 6 Low Bur Rul 26 (PC).

(2) Order assessing value of properties under Order 21, Rule 66 is a matter of administration and is not a decree. ('04) 27 Mad 259 (261) (FB) * ('11) 10 Ind Cas 371 (372) (DB) (Cal) * ('11) 11 Ind Cas 759 (760) (DB) (Cal) * ('20) AIR 1920 Pat 636 (638) (DB).

(3) Order, dismissing appeal for want of prosecution is not a decree. ('14) AIR 1914 PC 66 (67): 36 All 350.

(4) Order dismissing appeal against preliminary decree upon it being withdrawn is a decree. ('33) AIR 1933 Mad 442 (446): 56 Mad 520 (DB).

(5) Judgment or order by officer who is not a "Court" is not a decree. ('25) AIR 1925 Bom 241 (241, 242): 49 Bom 442 (FB). (16 Bom 408, Overruled.)

(6) The order dismissing a suit under Order 9, Rule 5 against a defendant for non-service of summons on him is not a decree because it does not adjudicate any questions in controversy between the parties in the suit. AIR 1966 Cal 60 (62).

(7) Sending issue for determination by Mamlatdar — Order is not decree. (1963) 4 Guj LR 308 (310).

**4. Decision to be in suit.**— (1) "Suit" for the purposes of the Code, in which it has not been defined may be taken to mean a civil proceeding which is instituted by presentation of a plaint. ('33) AIR 1933 PC 63 (64): 54 All 1067: 60 Ind App 13 * ('58) 1958 Andh LT 925 (929) * ('39) AIR 1939 Nag 110 (111): ILR (1939) Nag 452 (DB) * 1958 Andh LT 896 (899) * (1958) 2 Andh WR 316 (319) (DB).

(2) An order on an application under Order 34, Rule 6, Civil P. C., is a decree. AIR 1945 Mad 425 (425, 426): ILR (1946) Mad 299.

(3) Proceedings under other Acts which, according to specific provisions therein, should be regarded as a suit under the Code are "suits" for the purposes of the Code. ('04) 8 Cal WN 748 (749) (DB) * (95) 17 All 475 (477) (DB) * ('13) 35 All 448 (450) (DB) * ('09) 1 Ind Cas 677 (679) (DB) (Cal) * ('94) 21 Cal 539 (541) (DB). * ('34) AIR 1934 Mad 103 (107): 57 Mad 271 (FB) * ('49) AIR 1949 Kutch 9 (9) * ('48) AI R1948 PC 12 (14): ILR (1948) Mad 505: 74 Ind App 264 * ('44) AIR 1944 Nag 284 (285): ILR (1944) Nag 780 (DB) * ('33) AIR 1933 Sind 78 (79): 27 Sind LR 109 (DB) * ('30) AIR 1930 Cal 411 (416) (DB).

[But see ('93) 20 Cal 888 (895) (DB).]

(4) The decision in a proceeding, which does not commence with a plaint and which is not to be treated as a suit under any other Act, is not a "decree." ('34) AIR 1934 Mad 103 (106, 107): 57 Mad 271 (FB). (Dissenting from AIR 1929 Mad 223.) * ('56) AIR 1956 Raj 119 (120): ILR (1956) 6 Raj 299 * ('55)AIR 1955 Mad 159 (160) * ('96) 23 Cal 723 (729, 730) (FB) * ('96) 18 All 101 (103) (FB) * ('95) 22 Cal 943 (948) * ('35) AIR 1935 Mad 373 (377) (DB) * 1962 Ker LT 393 (395) * AIR 1966 All 105 (106) * AIR 1965 Andh Pra 395 (396): (1965) 1 Andh WR 262 * 1958 Andh LT 896 (899, 901).

[See however ('39) AIR 1939 Mad 716 (716, 717).]

[But see ('18) AIR 1918 All 346 (349): 39 All 626 (632) (DB) * ('29) AIR 1929 Mad 223 (225) (DB).]

(5) An order passed on an application for leave to sue in forma pauperis is not a decree because the application becomes a suit only after the leave is granted. ('99) 21 All 133 (136) (FB) * ('17) AIR 1917 Cal 852 (853) (DB) * ('78) 1 All 745 (747) (FB) * ('83) 7 Bom 373 (376) (DB).

(6) Order on application for leave to institute suit under the Religious Endowments Act (20 of 1863) is not a decree. ('07) 34 Cal 584 (585) (DB) * ('87) 10 Mad 98 (99).

(7) Order in proceeding taken by Court in exercise of its inherent powers to punish for contempt of Court, is not a decree. ('05) 27 All 380 (381) (DB).

(8) The following proceedings have been held to be not suits:

(a) Proceeding under Section 16, Travancore Debt Relief Act. ('53) AIR 1953 Trav-Co 591 (600, 604, 606): ILR (1953) Trav-Co 633 (FB) * AIR 1954 Trav-Co 259 (FB).

(b) Application under Section 10, Guardians and Wards Act. ('52) AIR 1952 Nag 190 (192): ILR (1951) Nag 780.

(c) Proceedings under Chapter 7 of Presidency Small Cause Courts Act to eject tenant. ('49) AIR 1949 Bom 104 (105): ILR (1950) Bom 326 (DB).

(9) The following orders and decisions were held not to be decrees.

(a) Order filling up vacancies in committee of trustees under Religious Endowments Act. ('88) 11 Mad 26 (35): 14 Ind App 160 (PC).

(b) Decision in reference under Section 28 of Act (7 of 1870). ('90) 12 All 129 (157) (FB).

**Section 2 (2) — Note 4 (contd.)**

(c) Orders in proceedings under Section 104 (2), Bengal Tenancy Act. ('96) 23 Cal 723 (729) (FB).

[See also 1961 Ker LT 927 (928).]

(d) Award made under the Displaced Persons (Debts Adjustment) Act or an order dismissing application under Section 18 (1) of that Act. ('56) AIR 1956 Bom 563 (565): ILR (1956) Bom 211. (Award.)

[See however ('55) AIR 1955 Raj 81 (81): ILR (1954) 4 Raj 697 (DB). (Order dismissing application under Sec. 5 must be taken as decree.) * ('56) AIR 1956 Punj 153 (155). (Dismissal of application under Section 18 (1).)]

(e) Award under Mysore Co-operative Societies Act. ('54) AIR 1954 Mys 54 (56): ILR (1954) Mys 288. (Status of decree only after grant of Certificate.)

(f) Order of adjudication under Insolvency Act. ('58) 1958 Andh LT 925 (929) * 1958 Andh LT 896 (901) * (1958) 2 Andh WR 316 (320) (DB).

(g) Order under Section 52 (1) of Malabar Tenancy (Amendment) Act (31 of 1951). 1962 Ker LJ 517 (521).

(h) Decision under Section 19 (1) (f), Defence of India Act (1939). 1963 Cur LJ 272 (276) (Punj).

(i) Award of Debt Board under Hyderabad Agricultural Debtors Relief Act, 1956. AIR 1968 Bom 361 (363).

(j) Order under Section 17 (1) of the Bombay Act 57 of 1947 directing the landlord to restore possession of the premises to the tenant. 63 Bom LR 106 (115).

(k) Order under Section 11 (4) of the U. P. Encumbered Estates Act (25 of 1934). ILR (1966) 2 All 351 (359) (DB).

(10) A scheme suit cannot be deemed to continue as long as the scheme framed remains in being. Hence an order relating to the administration of the scheme is not one passed in a suit and is not a decree. ('47) AIR 1947 Bom 462 (463): ILR (1947) Bom 461 (DB).

[See however AIR 1941 Cal 618 (621) (DB).]

(11) Preliminary decree being a step in a pending litigation suit still continues after decree. AIR 1958 Cal 472 (474).

(12) Refusal of plaintiff's application made after preliminary decree for partition claiming augmented share as a result of his father's death is decree as it was made in pending suit and decided upon plaintiff's claim to a right to increased share in the property. AIR 1957 Bom 59 (60): I LR(1957) Bom 175 (DB).

(13) Proceeding under Section 12, U. P. Agriculturist's Relief Act (27 of 1934), is a suit within the meaning of Section 21 of the Arbitration Act of 1940. AIR 1949 All 100 (101): ILR (1948) All 363 (DB).

(14) The adjudications under Sections 9, 10, 11 and 13 of the Hindu Marriage Act (1955) are regarded as decrees only for the purpose of those sections and cannot be treated as decrees within meaning of Section 2 (2). AIR 1961 Andh Pra 359 (360): (1960) 1 An WR 270 (DB). ((1933) 66 MLJ 43, Relied on; 1959 ALT 573 and unreported decision in CMA No. 101 of 1957, Overruled.) * AIR 1966 Guj 139 (141) (DB) * AIR 1962 Pat 489 (490) (DB) * AIR 1969 Punj 69 (71) (DB). ("Decree" as used in Hindu Marriage Act (1955) is not equivalent to "decree" defined in Section 2 (2).)

[But see AIR 1965 All 280 (282). (AIR 1961 AP 359, Dissented from.)]

(15) Section 28, Hindu Marriage Act does not provide for an appeal against every order made by the Court in the proceedings under the Act, but only such orders which can fall within the definition of decrees under Section 2 (2), C. P. C. AIR 1960 Bom 315 (317). (An order granting interim relief under Section 24 of Hindu Marriage Act (1955) does not amount to a decree.)

(16) Order under Section 25 of the Hindu Marriage Act (1955) whether passed at the time of decree or at a subsequent stage is a decree. 1966 All WR (HC) 10: 1966 All LJ 308 (310).

(17) An appeal is but a continuation of a suit, therefore, the word "suit in Section 15 of the U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947) includes an appeal. AIR 1967 All 214 (217) (FB).

**5. Decision to be on rights of parties.**— (1) Adjudication must be one on the rights of the parties with regard to all or any of the matters in controversy in suit. ('55) 59 Cal WN 1056 (1058) * 1958 Andh LT 925 (929) * AIR 1941 Cal 618 (621, 622) (DB) * AIR 1916 Lah 245 (246, 247): 1916 Pun Re No. 128 (FB) * ('10) 7 Ind Cas 966 (967) (DB) (Bom) * AIR 1914 Cal 149 (149): 41 Cal 160 (DB) * AIR 1937 Mad 554 (554) * AIR 1929 Mad 223 (225) (DB) * AIR 1938 Nag 233 (234) * AIR 1964 AP 216 (218) (DB) * AIR 1969 Ker 38 (48) (FB) * AIR 1961 Raj 13 (15). (AIR 1941 Pat 1, Dissented.) * AIR 1960 Bom 334 (336) (DB). (Order under Section 24, Bombay Money-lenders Act (3 of 1947) determining a matter in controversy and is a decree — AIR 1941 Pat 1, Dissented.) * 1960 Raj LW 385 (388): ILR (1960) 10 Raj 952 * ('57) 59 Bom LR 610 (614) * AIR 1964 Orissa 86 (87) * AIR 1964 Madh Pra 234 (236) (DB) * AIR 1959 J and K 76 (77).

(2) "Rights" in the section mean substantive rights in regard to the subject-matter of the suit. ('12) 13 Ind Cas 800 (801): 1911 Pun Re No. 182 (DB) * ('01) 23 All 152 (156, 157): 27 Ind App 209 (PC)

**Section 2 (2) — Note 5 (contd.)**
* ('92) 19 Cal 463 (468) (FB) * ('57) AIR 1957 Raj 173 (174): ILR (1956) 6 Raj 327.

(3) Interlocutory orders on matters of procedure unless they decide upon substantive rights of parties are not decrees. AIR 1953 Madh B 45 (46): ILR (1953) Madh B 5 (DB) * AIR 1953 Trav-Co 367 (368) (DB) * AIR 1952 Assam 50 (50): ILR (1951) 3 Assam 136 (DB) * ('66) 10 Moo Ind App 413 (423) (PC) * (1859) 7 Moo Ind App 283 (302) (PC) * ('13) 35 All 582 (586) (SB) * ('92) 14 All 226 (232) (FB) * ('85) 7 All 876 (876) (FB) * ('14) 20 Cal L Jour 478 (481) * ('09) 1909 Pun Re (Civ) No. 98, Page 486 (487, 488) (DB) * 1956 Madh BLJ 806 (807) * ('55) 59 Cal WN 1148 (1149, 1150) * AIR 1953 Nag 28 (29): ILR (1953) Nag 481 (DB) * AIR 1953 Trav-Co 122 (122) (DB) * AIR 1952 Trav-Co 35 (36) (DB) * AIR 1948 Pat 67 (71): 26 Pat 127 (DB) * AIR 1948 Sind 124 (125): ILR (1947) Kar 194 (DB) * AIR 1947 Pat 255 (256) (DB) * AIR 1947 Pesh 55 (56) (DB) * AIR 1945 Oudh 312 (313): 20 Luck 557 (DB) * AIR 1943 Lah 140 (144) (FB) * AIR 1940 Bom 210 (214): ILR (1940) Bom 370 (DB) * ('99) 21 All 133 (135) (FB). (Dissenting from 9 All 129.) * ('97) 24 Cal 725 (735, 738) (FB) * ('87) 10 Mad 179 (184, 185) (FB). (Overruling 6 Mad 355.) * 63 Pun LR 112: AIR 1961 Punj 120 (123). (AIR 1920 Lah 395 and AIR 1949 EP 400 and AIR 1943 Nag 204 (FB) and AIR 1937 All 694 and ILR 35 All 159, Distinguished.)

[But see ('18) AIR 1918 All 97 (97): 40 All 553 * ('86) 12 Cal 273 (275).]

(4) Decisions on questions of limitation, jurisdiction, res judicata and maintainability of a suit which determine only the plaintiff's right to sue are not decrees. AIR 1943 Lah 140 (143) (FB). (AIR 1930 Lah 187, Overruled) * AIR 1957 Raj 146 (147): ILR (1957) 7 Raj 168 (FB) * ('57) AIR 1957 Cal 135 (136) (DB) * AIR 1957 Raj 173 (174): ILR (1956) 6 Raj 327 * AIR 1941 Oudh 590 (592) (DB) * ('13) 18 Cal L Jour 78 (80) (DB) * ('12) 15 Ind Cas 566 (566) (DB) (All) * AIR 1949 East Punj 222 (224, 225) (DB) * ('14) AIR 1914 Bom 149 (150): 39 Bom 339 (FB). (Overruling 37 Bom 60 and AIR 1914 Bom 36: 38 Bom 392.) * (1964) 1 An WR 349: (1964) 1 Andh LT 378 (379) * AIR 1964 Ori 136 (139) (DB) * 1959 MPLJ 1000: AIR 1959 Madh Pra 384 (386, 387).

[See contra ('15) AIR 1915 Mad 1222 (1223) (DB).]

(5) Right to costs is not a vested right and an order in respect thereof is not a decree. AIR 1953 Cal 13 (15): ILR (1954) 1 Cal 438 (DB) * AIR 1920 Pat 622 (625): 5 Pat L Jour 472 (FB) * 1961 Raj LW 527: AIR 1962 Raj 109 (111).

[See contra ('32) AIR 1932 Bom 378 (385).]

(6) Order having effect of dismissing suit or appeal itself if denies the substantive rights claimed by plaintiff against defendant may amount to decree if other elements are present. AIR 1956 Bom 569 (572) * ('51) AIR 1951 Nag 269 (270) * AIR 1950 All 57 (60): ILR (1950) All 975 * AIR 1947 Oudh 146 (147): 22 Luck 196 * AIR 1945 Nag 68 (68) (DB) * AIR 1941 Pat 385 (387): 20 Pat 417 (DB) * AIR 1941 Oudh 590 (592) (DB) * AIR 1939 Nag 39 (40): ILR (1940) Nag 324 (DB) * AIR 1919 Mad 871 (872): 42 Mad 219 (DB) * AIR 1931 All 333 (336): 53 All 466 (DB) * ('86) 8 All 108 (111) (FB) * ('13) 19 Ind Cas 971 (973) (DB) (Cal) * AIR 1916 Lah 245 (246): 1916 Pun Re No. 146 (FB) * AIR 1933 Mad 442 (446): 56 Mad 520 (DB) * AIR 1919 Mad 709 (709): 42 Mad 52 (DB) * AIR 1917 Mad 285 (286) (DB) * ('10) 8 Ind Cas 409 (409) (DB) (Oudh) * AIR 1965 SC 231 (237) * ILR (1964) Cut 674: AIR 1965 Orissa 102 (104, 106) (DB). (Order dismissing appeal as time-barred is decree. ILR 7 All 42 and 17 Cal WN 807 and AIR 1926 Cal 1105 and AIR 1941 Pat 108, Rel. on; ILR (1962) Cut 818, Overruled.) * AIR 1965 Orissa 193 (194) * AIR 1959 Manipur 13 (13) * AIR 1959 Tripura 6 (6).

(7) "Parties" in the section, means parties arrayed on the one side as plaintiffs and on the other as defendants. ('13) 16 Oudh Cas 350 (353) * AIR 1929 Cal 669 (670) (DB).

(8) Several defendants — All but one ex parte — Decree against contesting defendant — Not an ex parte decree. AIR 1967 Kerala 76 (76).

(9) Order on an application by a third person to be impleaded as the legal representative of a deceased plaintiff in the suit is not an order on the rights of the parties and is, therefore, not a "decree". AIR 1924 Mad 813 (815) * AIR 1925 All 431 (432): 47 All 741 (DB).

[But see AIR 1935 Lah 47 (48) * AIR 1916 Lah 245 (247): 1916 Pun Re No. 128 (FB).]

(10) In Interpleader suits, the opposing defendants will be deemed to be parties. Decision of their claims inter se will be a decree. ('08) 30 All 22 (23) * ('10) 33 Mad 220 (224) (DB).

Rights must be in controversy in suit.—
(11) Determination or even a conclusive determination of the rights of parties will not constitute a decree unless these rights have been in controversy in the suit. AIR 1939 Mad 897 (900): ILR (1940) Mad 394 (DB).

(12) "Matters in controversy in the suit" means the subject-matter of the suit with reference to which some relief is sought AIR 1941 Nag 84 (85): ILR (1941) Nag 90 (DB) * AIR 1915 Bom 42 (44): 39 Bom 422 (DB) * AIR 1915 Cal 272 (274) (DB) * AIR 1927 Cal 850 (851): 55 Cal 219 (DB)

[See AIR 1939 Mad 897 (900): ILR (1940) Mad 394 (DB).]

(13) Matters which though they are common ground must have been actually de-

**Section 2 (2) — Note 5 (contd.)**

cided if any question had arisen and which are the foundation of the whole determination come within the expression "matters in controversy in the suit." AIR 1915 PC 116 (118): 42 Cal 914: 42 Ind App 91.

(14) Matters which, though not arising on the face of the plaint arise at a subsequent stage of the suit and about which the parties are at controversy are "matters in controversy in the suit." AIR 1939 Mad 897 (900): ILR (1940) Mad 394 (DB) * AIR 1928 Oudh 362 (364): 3 Luck 628 (FB).

(15) Adjudication which determines only some of the matters in controversy in the suit will not be a decree unless it is sufficient to dispose of the suit. AIR 1943 Nag 204 (208, 209): ILR (1943) Nag 241 (FB). (AIR 1941 Nag 84: ILR (1941) Nag 90, Overruled.)

(16) Where an appellate Court after determining some of the cardinal issues remands the suit for fresh trial its decision amounts to a decree. AIR 1940 Nag 349 (353): ILR (1940) Nag 538 (DB).

(17) Where in a maintenance suit the Court framed six issues but decided first the first three issues relating to maintainability of suit and wrote a separate judgment and issued a decree, it was held that the decree determined the first three issues conclusively and was therefore appealable. AIR 1943 Mad 767 (767, 768).

(18) Where in a suit for taking partnership accounts Court at time of passing of final decree, reserved some issues which had important bearing on the accounts to be taken, it was held that the decision on those issues later on amounted to a decree. 1947 Mad WN 723 (731) (DB).

(19) Connected suits — Decree in one with condition that it will not be executed till disposal of another — Condition amounts to decree. (1960) 1 MLJ 330: AIR 1960 Mad 349 (350).

**6. Rights must be conclusively determined.**— (1) The decision to be a decree must be conclusive, so far as regards the Court expressing it is concerned. AIR 1928 Lah 841 (843) (DB) * ('85) 9 Bom 183 (195) * AIR 1931 Mad 471 (473, 474): 54 Mad 337 (DB) * AIR 1937 Oudh 12 (13): 12 Luck 586 (DB) * AIR 1935 Pat 456 (456) (DB) * ('08) 4 Low Bur Rul 256 (258, 261) (DB) * AIR 1966 Orissa 203 (204) * AIR 1965 Ker 1 (4) (FB) * (1962) 2 Andh WR 119: AIR 1963 Andh Pra 9 (DB) * 28 Cut LT 635: AIR 1963 Orissa 61 (64) * AIR 1962 Him Pra 32 (35).

(2) A mortgage suit in which a personal decree under Order 34, Rule 6, Civil P. C., can be passed continues to remain pending until the question of the extent of the personal liability of the mortgagor is not barred by limitation and remains to be decided. ('53) AIR 1953 Assam 16 (18): ILR (1953) 5 Assam 11.

(3) Personal decree under Order 34, Rule 6 is a decree as Order 34, Rule 6 prescribes a procedure for adjudicating conclusively the rights of the parties. AIR 1955 Andhra 251 (254): ILR (1955) Andhra 435 (DB).

(4) Order under Section 14 (4), West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), striking out defence of the tenant against ejectment does not conclusively negative his right and hence does not amount to a decree. AIR 1956 Cal 311 (312) (DB).

(5) Where appellate Court completely disposes of an appeal and frames decree in accordance with such disposal and decides some of the matters in controversy in the suit conclusively and then orders a retrial or remand, the decision amounts to a decree. ('54) ILR (1954) 4 Raj 622 (625) * AIR 1968 Guj 301 (304) * AIR 1966 Cal 580 (583) (DB) * 1962 Raj LW 588 (593).

(6) Dismissal of appeal under Order 41, Rule 11 (1) amounts to a decree. AIR 1955 Andhra 39 (40) * AIR 1958 Andh Pra 768 (772): ILR (1958) Andh Pra 553.

(7) The mere fact that the decree of the trial Court has been set aside does not make the appellate Court's order of remand a decree, when the entire matter is left open for decision of the lower Court. AIR 1966 Cal 310 (311).

(8) Decision rejecting application under Section 6 of the West Bengal Premises Rent Control (Temporary Provisions) (Amdt.) Act (62 of 1950) is a decree. AIR 1953 Cal 524 (526) (DB) * AIR 1953 Cal 412 (414): ILR (1953) 2 Cal 322 (DB).

(9) Decision under Section 5 (2), Malabar Tenancy (Amendment) Act (Madras Act 22 of 1956) constitutes "decree." AIR 1965 Ker 1 (4) (FB). (1961 Ker LJ 188 and 1962 Ker LJ 517, Dissented.)

(10) Where the plaintiff asks for primary relief and also aonther relief in the alternative and he is granted the alternative relief, the denial of primary relief amounts to a decree. AIR 1964 Ker 153 (153).

(11) Decision dismissing suit for want of evidence or proof is decree and mere fact that Rules 4 and 5 of Order 20, have not been complied with will not render order of dismissal otherwise than decree. ('57) AIR 1957 All 107 (110) (DB).

(12) Award of Labour Court or Industrial Tribunal — Like a decree, such an award once implemented cannot be amended. AIR 1967 All 430 (434) (DB).

(13) An order under Section 14 of the Religious Endowments Act (1863) granting the reliefs specified in the section, conclusively determines the rights of the parties and therefore amounts to a decree. AIR 1961 All 125 (129): 1960 All LJ 486 (DB).

**7. Formal expression of adjudication necessary.**— (1) A decree is a necessary

**Section 2 (2) — Note 7 (contd.)**

part of the ultimate procedure in all suits, without which the law could not be executed. ('83) 5 All 520 (526) (DB).

(2) It is essential for a decree that there should be a formal expression of the adjudication. AIR 1953 Kutch 42 (43) * AIR 1943 Nag 204 (208, 209): ILR (1943) Nag 241 (FB). (In view of this Full Bench, decisions in AIR 1930 Nag 122: 26 Nag LR 24; AIR 1921 Nag 108: 17 Nag LR 66 and AIR 1941 Nag 180 in so far as they hold the contrary view on this point should be deemed to have been overruled.) * AIR 1939 All 552 (554): ILR (1939) All 557 (DB) * AIR 1914 Sind 122 (123): 8 Sind LR 260 (DB) * AIR 1924 Bom 33 (34) (DB) * ('02) 29 Cal 758 (760) (FB) * AIR 1918 Upp Bur 28 (29): 3 Upp Bur Rul 1 * AIR 1966 Orissa 225 (226) * 1965 Ker LJ 33 (37) (DB).

(3) Formal expression in a decree must be both deliberate and given in the manner provided by law. ('10) 34 Bom 182 (188) (DB).

[See however ('42) AIR 1942 Lah 260 (263, 264): ILR (1942) Lah 307 (FB).]

(4) Formal expression of adjudication in a decree need not be in any particular form. ('12) 16 Ind Cas 45 (46) (DB) (Mad).

(5) Term "formal expression" in brief means all requirements of form that are necessary to observe. ('55) Madh BLJ 1955 HCR 714 (717). (Per Khan J.)

(6) Provision which does not follow from decision in suit cannot be included within the term "formal expression of an adjudication." ('56) 1956 Pat LR 590 (592).

(7) Nothing will operate as a decree unless formally drawn up. ('50) 1950 All WR (HC) 280 (281) * ('45) AIR 1945 All 268 (270): ILR (1945) All 798 (FB) * ('24) AIR 1924 Bom 33 (34, 35) (DB) * ('24) AIR 1924 Cal 1006 (1007) (DB) * ('92) 19 Cal 463 (467, 468) (FB) * ('12) 16 Ind Cas 45 (46) (DB) (Mad) * AIR 1964 Ori 136 (139) (DB) * 28 Cut LT 635: AIR 1963 Orissa 61 (63) * AIR 1959 Manipur 13 (14) * AIR 1959 Punj 88 (89): 60 Pun LR 185 * AIR 1959 Tripura 6 (7).

[See however AIR 1968 Ker 282 (283). (ILR (1966) Guj 143, Dissented) * AIR 1941 Nag 180 (181)* AIR 1921 Nag 108 (108): 17 Nag LR 66 * AIR 1930 Nag 122 (123): 26 Nag LR 24 * ('11) 9 Ind Cas 1019 (1022): 1911 Pun Re No. 41 * AIR 1930 Lah 125 (126).]

(8) Appeal under Section 96 lies only against a decree and where there is in fact no decree (i.e., a formal expression of an adjudication) there can be no appeal. 1950 All WR (HC) 280 (281) * AIR 1945 All 268 (270): ILR (1945) All 798 (FB) * AIR 1924 Bom 33 (34, 35) (DB) * AIR 1924 Cal 1006 (1007) (DB) * ('92) 19 Cal 463 (467, 468) (FB) * ('12) 16 Ind Cas 45 (46) (DB) (Mad).

[See however ('41) AIR 1941 Nag 180 (181) * ('19) AIR 1919 Lah 53 (54): 1919 Pun Re No. 66 (DB) * ('15) AIR 1915 Cal 272 (273) (DB) * ('29) AIR 1929 Sind 225 (227): 24 Sind LR 167 (DB) * AIR 1956 Assam 120 (120).]

(9) Decree as defined under Section 2 (2) comes into existence as soon as judgment is pronounced and although appeal cannot be filed until the formal decree is drawn up and prepared, an execution case can be filed. AIR 1962 Pat 398 (399) * AIR 1969 Guj 152 (155).

(10) Mere drawing up of order in form used for decrees will not, make it decree, if it does not, fall within definition of decree. ('42) AIR 1942 Mad 73 (74): ILR (1942) Mad 236 * ('58) AIR 1958 All 720 (727, 728) * ('26) AIR 1926 Bom 237 (238) (DB) * ('14) AIR 1914 Cal 157 (158) (DB) * ('30) AIR 1930 Nag 206 (207): 26 Nag LR 166 * ('34) AIR 1934 Pat 13 (14).

(11) Section 2 (2), defines a decree and specification of a certain time for the payment of decree does not form part of that definition. The provisions of Section 82, C. P. C., therefore, cannot be imported within the definition of the decree as given in Section 2, Clause (2). AIR 1960 J & K 59 (61) (DB).

(12) Court must decide the case on the materials placed before it and cannot pass a conditional or second decree if evidence to support it were to be produced in future. 76 Mad LW 32: ILR (1963) Mad 147: (1963) 1 Mad LJ 345: AIR 1963 Mad 302 (303, 304) (DB).

(13) Rule 289 of the Bombay High Court Rules permits a decree being drawn up without inserting the provision for costs and a decree so drawn up, once it is sealed by the seal of the Court, becomes a formal adjudication as contemplated by Section 2 (2). AIR 1959 Bom 357 (358): 60 Bom LR 963 (DB).

**8. Compromise decree.** — (1) A compromise or a consent decree is a decree within the meaning of this section. ('53) ILR (1953) 2 Cal 1 (3) * AIR 1922 Cal 358 (361): 49 Cal 220 (DB).

(2) Some plaintiffs absent — Decree in terms of compromise entered into by present plaintiffs on their own behalf — No adjudication of suit as regards absent plaintiffs — In respect of them there is dismissal for default not amounting to decree. 1963 All LJ 256: AIR 1963 All 412 (413) (DB) * (1955) 1955-1 MLJ 215 (219).

(3) Construction of compromise decree — See Notes on Order 23, Rule 3.

**9. Preliminary decree.** — (1) Adjudication which decides the rights of parties with regard to all or any of the matters in controversy in suit, but does not completely dispose of the suit, will be a preliminary decree. ('53) AIR 1953 Trav-Co 220 (223): ILR (1953) Trav-Co 89 (FB) * ('52) AIR 1952 Trav-Co 428 (429) (DB) * ('47) 1947 Mad WN 723 (731) (DB) * ('17)

**Section 2 (2) — Note 9 (contd.)**

AIR 1917 Lah 153 (153): 1917 Pun Re No. 7 * ('21) AIR 1921 Bom 220 (223): 45 Bom 627 * AIR 1963 SC 992 (995) * (1959) 1959-1 MLJ 165 (167) * ILR (1959) Punj 447 (453).

(2) A preliminary decree passed whether it is in a mortgage suit or a partition suit, is not tentative decree but must so far as the matters dealt with by it are concerned, be regarded as conclusive. (1963) 2 Mad LJ (SC) 126: AIR 1963 SC 992 (995).

(3) Where an adjudication completely disposes of the suit it is a final decree. ('52) AIR 1952 Trav-Co 428 (429) (DB) * ('42) AIR 1942 Oudh 1 (5): 17 Luck 249 (DB) * ('24) AIR 1924 Cal 160 (161) * ILR (1959) Punj 447 (453).

(4) Preliminary decree is passed in those cases in which Court has first to adjudicate upon the rights of parties and has then to stay its hand, for the time being, until it is in a position to pass a final decree in the suit. ('11) 9 Ind Cas 1019 (1021): 1911 Pun Re No. 41. (Followed in 1913 Pun Re No. 16.) * AIR 1931 All 386 (386): 53 All 283 (FB) *AIR 1916 Pat 370 (371): 1 Pat L Jour 406 (FB).

(5) Whether a decree is a preliminary decree or a final decre has to be decided on a reference to that decree itself. ('53) 1953 AMLJ 124 (125) * ('52) AIR 1952 Trav-Co 428 (429) (DB) * (1967) 2 Mad LJ 342 (344) * (1959) 1 MLJ 165 (167).

(6) Decision on constitutional validity of a provision as a preliminary point fulfills the condition of Section 2 (2) and is hence appealable. AIR 1969 Ker 38 (48) (FB).

(7) Interlocutory orders which do not decide the rights of parties cannot be treated as preliminary decrees. AIR 1916 Low Bur 44 (45) * AIR 1914 Bom 149 (152): 39 Bom 339 (FB). (Overruling practically 34 Bom 182: 36 Bom 536: 37 Bom 60.) * ('97) 24 Cal 725 (738, 740) (FB) * AIR 1926 Lah 337 (337) (DB) * AIR 1917 Lah 261 (265): 1917 Pun Re No. 62 (DB) * ('12) 13 Ind Cas 800 (801): 1911 Pun Re No. 82 (DB) * AIR 1921 Bom 220 (222): 45 Bom 627 (DB) * ('12) 15 Ind Cas 566 (566) (DB) (All)* AIR 1915 Bom 21 (21): 39 Bom 421 (DB) * ('13) 21 Ind Cas 387 (388) (DB) (Cal) * ('12) 15 Ind Cas 563 (565): 1913 Pun Re No. 16 (DB).

(8) Finding in a proceeding under Section 24, Bombay Agricultural Debtors Relief Act (28 of 1947), that the transaction is a mortgage is not a preliminary decree. AIR 1956 Bom 755 (755).

(9) Order on a preliminary issue regarding court-fees that the court-fee paid is sufficient is not a preliminary decree. AIR 1936 Cal 784 (785) (DB).

(10) The following are some of the cases in which a preliminary decree can be passed:

(a) Suits for possession and for rent or mesne profits. AIR 1948 Sind 124 (125): ILR (1947) Kar 194 (DB) * AIR 1942 Sind 60 (61, 62): ILR (1941) Kar 563 (DB) * AIR 1914 Cal 804 (804) (DB).

(b) Suits for dissolution of partnership. AIR 1915 PC 116 (117): 42 Cal 914: 42 Ind App 91.

(c) Suits for partition and separate possession. AIR 1952 Trav-Co 428 (429) (DB) * ('98) 20 All 311 (312) (DB) * ('92) 19 Cal 463 (467, 469) (FB) * ('95) 18 Mad 73 (87) (DB) *AIR 1938 Oudh 229 (230): 14 Luck 223 (DB).

(d) Suits for sale of mortgaged property. AIR 1916 Bom 305 (307): 40 Bom 321 (DB).

(11) Court is not precluded from passing a preliminary decree in cases not expressly provided for in the Code. AIR 1924 Cal 160 (162) (DB) * AIR 1921 Bom 220 (222): 45 Bom 627 (DB) * AIR 1953 Trav-Co 220 (222): ILR (1953) Trav-Co 89 (FB) * ILR (1959) Punj 447 (454) * AIR 1959 Pat 397 (398) (DB). (AIR 1942 Sind 60 and AIR 1925 All 588, Dissented.)

[But see ('19) AIR 1919 Cal 361 (362) (DB).]

(12) There cannot be more than one preliminary decree in the same suit. AIR 1915 Cal 272 (274) (DB) * AIR 1919 Mad 999 (1000): 42 Mad 296 (DB) * AIR 1930 Mad 528 (530): 53 Mad 378 * AIR 1924 Bom 33 (35) (DB) * AIR 1921 Oudh 224 (224): 24 Oudh Cas 366 (DB) * AIR 1959 Pat 397 (398) (DB). (AIR 1942 Sind 60 and AIR 1925 All 588, Dissented.)

[See however ('24) AIR 1924 Cal 160 (162) (DB) * ('47) 1947 Mad WN 723 (731) (DB).]

[But see ('57) AIR 1957 Andh Pra 25 (26).]

(13) So far as partition suits are concerned, if an event transpires after the preliminary decree which necessitates a change in shares, the Court can and should do so; and if there is a dispute in that behalf, the order of the Court deciding that dispute and making variation in shares specified in the preliminary decree already passed is a decree in itself. However this can only be done so long as the final decree has not been passed. AIR 1967 SC 1470 (1473): (1967) 2 SCWR 225. ((1913) ILR 35 All 159 and AIR 1945 Oudh 312 and AIR 1961 Punj 120, Overruled.) * (1967) 2 Mad LJ 342 (344) * 1968 Ker LJ 103: AIR 1968 Ker 282 (283). (ILR (1966) Guj 143, Dissented.)

(14) Order in supplemental proceedings after preliminary decree with regard to mode of accounting and the period for which defendant is liable amounts only to an interlocutory order in a pending suit and not to another preliminary decree. ('25) AIR 1925 All 588 (589): 47 All 543 (DB) * ('12) 13 Ind Cas 186 (186) (DB) (Cal).

[But see ('24) AIR 1924 Cal 160 (162) * ('30) AIR 1930 Cal 89 (91): 56 Cal 550 (DB).]

(15) Order of Appellate Court in an appeal from the preliminary decree in a

**Section 2 (2) — Note 9 (contd.)**
suit for redemption, remanding the case to the lower Court and giving directions as to the mode of taking accounts, is not a preliminary decree. ('34) AIR 1934 Pat 97 (99) (DB).

(16) Court cannot dismiss a suit after a preliminary decree is passed or vacate the decree for default in subsequent stages of the proceedings; it can only be reversed in appeal. ('52) AIR 1952 Cal 579 (580) * ('32) AIR 1932 Mad 519 (522) (DB) * 1963 Mys LJ (Supp) 81 (DB) * ILR (1959) Punj 447 (455).

(17) Where in a redemption suit for the formal expression given to adjudication of a matter in controversy does not comply with the provisions of Rule 7, it does not amount to a preliminary decree. AIR 1953 Kutch 28 (29).

(18) Orders directing accounts when they involve a decision of the rights of the parties will be preliminary decrees under the Code. AIR 1915 PC 116 (117): 42 Cal 914: 42 Ind App 91 * AIR 1960 Cal 190 (194, 198) (DB).

(19) In simple cases of suit for accounts which do not involve much scrutiny of accounts, a Court is not bound to pass a preliminary decree but can straightway give a decree for a certain amount if the material on record enables it to do so. AIR 1961 AP 143 (155): (1960) 2 Andh WR 115 (DB).

(20) In account suits and mesne profits cases, the final decree settles the actual liabilities and not the preliminary decree. In mortgage suits the preliminary decree really settles the liabilities and the final decree is substantially merely a postponement of the final order of the Court, to give the defendant a chance to pay. AIR 1953 Mad 415 (416): ILR (1953) Mad 826.

**10. Final decree.** — (1) A decree becomes final:

(a) When time for appeal has expired without any appeal being filed, or the matter has been decided by the decree of the highest Court. AIR 1917 All 323 (324) * ('90) 12 All 129 (155, 156) (FB) * AIR 1931 Cal 323 (324) (DB).

(b) When the decree, so far as regards the Court passing it, completely disposes of the suit. ('11) 7 Nag LR 41 (42) (DB).

(2) If an appeal from the preliminary decree succeeds, the final decree automatically falls to ground. AIR 1955 All 552 (554) (DB).

(3) Where in suit for recovery of money, the amount found due to decree-holder is declared and it is also laid down in decree in what manner that amount is to be paid the decree is final decree. AIR 1942 Oudh 1 (5): 17 Luck 249 (DB).

(4) Where a decree is passed for a sum representing past mesne profits and for subsequent mesne profits at a particular rate without directing any inquiry, the decree completely disposes of the suit and is therefore, a final decree. AIR 1925 Mad 1276 (1276) (DB) * ('58) 1958-1 Mad LJ 99 (100) * AIR 1928 Cal 804 (804) (DB).

(5) If, Court, merely declares that a party is liable for mesne profits and directs enquiry into the amount of mesne profits, the declaration, though decree, does not completely dispose of suit and is therefore, only a preliminary decree and not final one. ('87) 14 Cal 50 (53, 54) (DB).

(6) Mere order for preparation of a final decree is not a decree where no final decree has actually been passed. ('50) 1950 All WR (HC) 280 (281).

(7) Mere declaration of the share of plaintiff by preliminary decree in a partition suit would not amount to a final decision within Provincial Insolvency Act (1920), Section 28-A, first proviso. AIR 1956 Mad 413 (414): ILR (1956) Mad 1133 (DB).

(8) A decree to which a condition is attached, upon fulfilment of which the decree-holder is to enjoy the fruits of his decree, is nevertheless a final decree. AIR 1920 Oudh 25 (26): 23 Oudh Cas 254.

[But see AIR 1933 All 261 (262).]

(9) A final mortgage decree does not conclusively determine the suit because other rights of the parties, such as the question of the extent of the personal liability of the mortgagor, have yet to be determined upon an application made for the passing of a personal decree. AIR 1953 Assam 16 (18): ILR (1953) 5 Assam 11.

(10) Ordinarily there will be only one final decree in a suit. AIR 1945 Oudh 312 (313): 20 Luck 557 (DB). (Suits for partition.)

(11) Special circumstances may require the passing of more than one final decree in the same suit. AIR 1918 Cal 9 (10) * AIR 1958 Mad 462 (462): ILR (1958) Mad 417 * ILR (1967) 1 Mad 136: 79 MLW 395: (1967) 2 Mad LJ 342 (344).

[See also AIR 1940 Lah 1 (3): ILR (1940) Lah 171 (DB).]

[But see AIR 1967 Pat 131 (133) (DB). (In appropriate cases there can be more than one decree in preliminary form; there can be one or more interim final decrees, but one final decree.)]

(12) Although, once a preliminary decree is passed the parties have the right to take further steps for the passing of a final decree, the Court will refuse to act on such application when it is found that the parties had already taken advantage of the directions contained in the preliminary decree. AIR 1952 Cal 579 (584) (DB) * 1968 Pat LJR 322 * (1967) 2 Mad LJ 342 (346).

(13) Alteration in rights of parties subquent to preliminary decree must be adjusted before final decree is passed. ('58) AIR 1958 Cal 472 (474) * 1963 Ker LJ 39 (43): ILR (1963) 1 Ker 76 * 67 Cal WN 417 (423, 424) * 1963 Mys LJ (Supp) 81 (83) (DB). (Court has power to pass

**Section 2 (2) — Note 10 (contd.)**
appropriate orders till final decree is passed.)

**11. Decree partly preliminary and partly final.** — (1) A decree may be partly preliminary and partly final. AIR 1946 Sind 58 (61): ILR (1945) Kar 313 * AIR 1929 Cal 383 (383) (DB) * AIR 1914 Oudh 147 (148): 17 Oudh Cas 14 * AIR 1930 Mad 528 (530, 531): 53 Mad 378 * (1967) 2 Mad LJ 342 (344). (The Code itself contemplates the possibility of a decree partly preliminary and partly final.)

(2) If a preliminary decree for redemption, contains a clause for delivery of possession on payment of a certain sum by the mortgagor, he can apply for possession on making such payment. ('55) 68 Mad LW 383 (384).

(3) Compromise decree in partition suit — Decree allotting portions of plots to parties — Decree as framed not fixing identity of parties allotted — Decree, held, partly preliminary and partly final. 31 Cut LT 443 (445).

**12. Order rejecting plaint.** — (1) Order rejecting plaint does not negative rights of plaintiff as a dismissal of suit does. ('71) 7 Beng LR 663 (668) (FB).

(2) Section specially provides that rejection of plaint shall be deemed to be a decree. AIR 1956 Raj 164 (165): ILR (1956) 6 Raj 736 * AIR 1957 Raj 97 (98): ILR (1956) 6 Raj 1104 (DB) * AIR 1957 Pepsu 14 (16) (DB) * AIR 1955 Hyd 156 (157): ILR (1955) Hyd 56 (DB) * AIR 1954 Mad 880 (881) * AIR 1952 Mad 86 (87): ILR (1952) Mad 77 (FB) * AIR 1941 Pat 385 (389): 20 Pat 417 (DB) * AIR 1935 Cal 336 (337): 62 Cal 61 (DB). (Rejection of plaint for non-payment of deficit court-fee.) * AIR 1962 Guj 59 (61) * AIR 1968 Pat 187 (187).

[See however AIR 1964 Orissa 134. (Rejection of plaint for non-payment of deficit court-fee — Non-compliance due to mistake of pleader in entering wrong date in diary — Failure to file appeal is no bar for restoration of suit under Section 151.)]

(3) Rejection of a memorandum of appeal is a decree. AIR 1942 Lah 64 (65). (AIR 1922 Pat 281 and AIR 1927 Nag 100, Rel. on.) * ('86) 12 Cal 30 (31) (DB) * AIR 1936 Mad 101 (101): 59 Mad 805. (16 Mad 285, Followed.) * AIR 1939 Pat 83 (84): 17 Pat 687 (DB). (Do.) * ('85) 9 Bom 452 (453) (DB) * AIR 1938 Pat 461 (462): 17 Pat 245 (DB) * ('97) 21 Mad 152 (153) (DB) * AIR 1961 Andh Pra 112 (113): (1960) 2 Andh WR 4.

[See however ('03) 8 Cal WN 64 (65). (Rejection on the ground that no appeal lies.) * ('84) 1884 Pun Re (Civ) No. 115, p. 324 (325) * AIR 1922 Nag 62 (63, 64): 18 Nag LR 15.]

[But see AIR 1954 Bom 43 (45): ILR (1953) Bom 1176 (DB) * AIR 1941 Mad 836 (837, 838): ILR (1941) Mad 954 (FB) * AIR 1932 Cal 482 (484): 59 Cal 388 (DB) * ('95) 18 All 101 (103) (FB) * ('98) 21 All 133 (136) (FB) * AIR 1938 Nag 122 (124): ILR (1938) Nag 106 (FB) * AIR 1937 All 280 (281): ILR (1937) All 484.]

(4) Where application to sue as a pauper has never been granted, no order comes into existence which can be called a "decree". ('56) AIR 1956 Hyd 41 (43): ILR (1956) Hyd 143 (DB).

[But See AIR 1960 Mys 140 (140, 141) * AIR 1954 Mad 880 (881).]

(5) Whether order is one of rejection or of dismissal of a suit or appeal must be determined with reference to substance and not form of order. AIR 1936 Cal 804 (805): ILR (1937) 1 Cal 103 (DB).

(6) Dismissal of election petition on ground that petition did not disclose a cause of action was held to be equivalent to rejection of plaint and hence "decree". AIR 1958 All 596 (598, 599).

(7) Order dismissing appeal for deficient court-fee must be treated as equivalent to rejection thereof. AIR 1932 Cal 482 (484): 59 Cal 388 (DB) * AIR 1922 Nag 62 (63, 64): 18 Nag LR 15 * AIR 1922 Pat 281 (282): 6 Pat L Jour 625 (DB) * AIR 1968 Orissa 163 (165). (AIR 1950 Pat 470, Dissented.) * AIR 1968 Pat 48 (48).

(8) Returning plaint with directions to institute two different suits is substantially an order rejecting plaint and is a decree. ('86) 8 All 191 (193,194) (DB).

(9) Rejection of plaint in order to be decree, need not be limited to the cases provided for in O. 7, R. 11. ('86) 13 Cal 189 (191) (DB) * ('57) AIR 1957 Pepsu 14 (16) (DB) * ('89) 11 All 91 (92, 93) (FB) *('14) AIR 1914 Lah 153 (153): 1914 Pun Re No. 80 (DB) * ('15) AIR 1915 Mad 483 (484) (DB) * ('29) AIR 1929 Pat 615 (616) (DB).

(10) An order dismissing a suit under S. 8-B (3), (Bengal) Court Fees Act is, in substance, an order of rejection of a plaint under Order 7, Rule 11 (c) and as such amounts to a decree. AIR 1961 Cal 491 (493) (FB). (AIR 1953 Cal 42, Overruled.)

(11) Rejection of plaint not authorised by Code, will not amount to a decree. AIR 1937 All 280 (281): ILR (1937) All 484.

(12) Dismissal of suit for failure of plaintiff to pay additional court-fee though ordered after trial had completed is rejection of plaint and not dismissal for default. AIR 1949 Nag 373 (375): ILR (1949) Nag 391. (AIR 1935 Mad 569, Rel. on. — AIR 1941 Mad 836 (FB), Distinguished.)

(13) Returning plaint or memorandum of appeal for presentation to proper Court or for amendment is not a decree. ('05) 27 All 21 (22) (DB) * (1900) 1900 Pun LR No. 31, p. 137 (140) * AIR 1935 Mad 574 (575) * (1967) 2 An LT 114 (116) * AIR 1967 Pat 338 (339).

[But see ('78) 1 All 620 (622) (DB).]

(14) Dismissal of suit on ground that facts disclosed in plaint oust jurisdiction of

**Section 2 (2) — Note 12 (contd.)**
civil Court is not a rejection of the plaint. ('57) 61 Cal WN 789 (792).

**13. Decision under Sec. 47 or S. 144.**— (1) Determination of a question within Section 47 or Section 144 is "decree" though neither made in a suit, nor drawn up in the form of decree. AIR 1965 SC 1477 (1485) * AIR 1966 Mad 308 (309) * AIR 1966 Mys 112 (115) * AIR 1965 All 527 (533) (DB) * (1965) 2 MLJ 548 (549) * ILR (1965) Cut 943: (1966) 32 Cut LT 393. (Order rejecting application for restitution is decree.) * AIR 1963 Guj 1 (2) * (1963) 29 Cut LT 594 (597). (Order under Section 13, Orissa House Rent Control Act (31 of 1948) is a decree.) * AIR 1962 Punj 379 (381) * 1961 All LJ 669 (672) (DB) * (1960) 1 Andh WR 29: AIR 1960 Andh Pra 544 (545) * AIR 1955 Cal 295 (296) (DB) * AIR 1958 Madh Pra 333 (336) * 1957 BLJR 534 (536) * ('54) Madh BLJ (1954) HCR 112 (118) * AIR 1948 Mad 524 (525). (Order granting or refusing stay under Order 41, Rule 6 (2) falls under Section 47.) * AIR 1942 Mad 406 (406) (DB) * ('81) 3 All 633 (635) (FB) * AIR 1937 All 48 (49) (DB) * AIR 1936 Cal 812 (812) * AIR 1938 Nag 212 (216): ILR (1938) Nag 583 (DB) * AIR 1937 Oudh 337 (338): 13 Luck 309 (DB).

[See also AIR 1948 PC 12 (14): ILR (1948) Mad 505: 74 Ind App 264.]

(2) Order after contest between stranger auction-purchaser and judgment-debtor regarding delivery of possession is a decree. AIR 1956 Nag 81 (84): ILR (1956) Nag 371 (DB).

(3) Order under Section 47 or Section 144 to be a decree must have decided rights of the parties with regard to the matter in controversy in the proceedings under those sections. AIR 1967 SC 1344 (1348). (Order setting aside an auction sale as nullity on ground that deposit was not apid on the day of the sale is a decree.) * AIR 1964 Orissa 83 (85) * AIR 1963 Cal 515 (518) (DB) * (1963) 65 Punj LR 1092 * 1962 All LJ 915 (918) * AIR 1962 Punj 44 (45) * AIR 1954 Nag 31 (32) * ('54) Madh BLJ 1954 HCR 1081 (1084) * AIR 1953 Kutch 39 (39) * AIR 1952 Assam 30 (31): ILR (1952) 4 Assam 106 (DB) * AIR 1951 Mad 56 (57, 63): ILR (1951) Mad 393 (FB) * AIR 1951 Nag 216 (218): ILR (1951) Nag 260 * AIR 1950 Mad 296 (296) * AIR 1944 Nag 25 (26): ILR (1944) Nag 230 (DB) * AIR 1944 Pat 292 (293): 23 Pat 427 (DB) * AIR 1940 Bom 210 (211, 214): ILR (1940) Bom 370 (DB) * AIR 1940 Cal 257 (258, 259): ILR (1940) 1 Cal 393 (DB) * ('11) 10 Ind Cas 371 (371) (DB) (Cal) * AIR 1932 All 85 (89): 53 All 391 (DB) *AIR 1929 All 390 (391) (DB) * ('01) 23 All 152 (156, 157): 27 Ind App 209 (PC) * ('36) AIR 1936 Mad 623 (624) * ('04) 27 Mad 259 (261) (FB). (Overruling 23 Mad 568 and Dissenting from 30 Cal 617.) * ('37) AIR 1937 Rang 157 (158, 159) (DB).

(4) Decision under Section 47 or Section 144 to be a decree must be a final decision either granting a relief or refusing an application. AIR 1963 Cal 515 (518) (DB). (Order granting or refusing an application under the Debt laws for scaling down decretal amount is a decree within meaning of Section 2 (2).) * AIR 1962 Him Pra 32 (35) * AIR 1955 All 686 (686) (DB) * ('53) AIR 1953 Trav-Co 318 (319): ILR (1953) Trav-Co 143 * ('47) AIR 1947 Pat 255 (256) (DB) * ('91) 18 Cal 469 (472) (DB).

(5) An order passed under Section 151 allowing an amendment of an application filed in execution of a decree obtained in a suit of the nature of small causes is an order relating to the execution, discharge or satisfaction of the decree and is a decree within meaning of Section 2 (2). AIR 1950 All 580 (582) (FB).

(6) Disposal of objection by judgment-debtor under Section 30, Bengal Money-tenders Act, that the decree was already satisfied, is a decree. AIR 1954 Cal 105 (107, 108) (DB).

(7) In view of Section 36, C. P. C., an order of the Court executing an award under the Bombay Agricultural Debtors Relief Act (28 of 1947) holding that the satisfaction alleged by the debtor was not proved or that the application for execution is not maintainable are orders under Section 47, C. P. C. and are therefore decrees within meaning of Section 2 (2). AIR 1969 Bom 74 (76) (DB)

(8) Joint decree — Order of executing Court is an application by joint decree holders for substitution of heirs of deceased decree holder — Order amounts to a decree. AIR 1967 Assam and Nagaland 27 (27).

(9) Order directing payment of solatium to auction purchaser consequent on setting aside a sale is a 'decree' and falls under Section 47. AIR 1964 Mys 54 (56).

(10) Determination of a mere issue made prior to passing of final order is not a decree. ('15) AIR 1915 Mad 197 (198): 37 Mad 29 (DB). (Obiter.)

(11) Order merely determining a point of law arising incidentally in the course of a proceeding for determining rights of parties is not a decree. ('49) AIR 1949 East Punj 222 (224) (DB) * ('43) AIR 1943 Lah 140 (144, 145, 146) (FB) * ('33) AIR 1933 Pat 498 (499) (DB).

[But see ('91) 13 All 569 (571).]

(12) Refusal to summon a witness in a proceeding under Section 47 is not a decree. ('20) AIR 1920 Lah 443 (444). (Obiter.)

(13) Order that objection by judgment-debtor as to jurisdiction and limitation could not be allowed to be raised at that stage of case is not a decree. ('49) AIR 1949 East Punj 222 (224, 225) (DB). (AIR 1943 Lah 140 (FB), Rel. on.) * ('43) AIR 1943 Lah 140 (143) (FB).

**Section 2 (2) — Note 13 (contd.)**

(14) Refusal to stay or staying of execution by appellate Court pending appeal before it is not a decree. ('54) AIR 1954 Mad 1053 (1056): ILR (1953) Mad 1104 (FB).

(15) There is no distinction between a decree in a suit and a decree in a proceeding under Section 47 or Section 144. ('25) AIR 1925 Cal 102 (103) (DB).

**14. Appealable orders.** — (1) Adjudication from which appeal lies as appeal from order is not a decree. AIR 1964 Mys 147 (155) (DB) * AIR 1955 Pat 56 (57): 33 Pat 974 (DB) * ('57) AIR 1957 Pat 143 (144) * ('28) AIR 1928 Lah 137 (139): 9 Lah 380 (DB) * ('36) AIR 1936 All 763 (764) (DB) * ('39) AIR 1939 Oudh 104 (105) (DB) * ('12) 8 Nag LR 177 (179) * ('11) 33 Cal 339 (341) (DB) * ('38) AIR 1938 Nag 107 (107, 108): ILR (1938) Nag 436 (DB).

(2) Orders under Section 4, Partition Act, may be said to be on par with orders under Section 47 and Section 147 which are deemed to be decrees, and hence may be classified as appealable orders. ('57) AIR 1957 Andh Pra 25 (26) * ('57) AIR 1957 Cal 65 (66) (DB).

(3) When the appellate Court purports to act under Order 41, Rule 23, the order of remand is appealable even though it is passed irregularly. AIR 1966 Cal 580 (585) (DB).

**15. Dismissal for default.**— (1) That dismissal of suit or appeal for default is not a decree has been expressly provided for by section. AIR 1949 All 754 (757) * AIR 1924 All 144 (144): 45 All 669 (DB) * ('17) AIR 1917 Cal 728 (730): 44 Cal 954 (DB) * AIR 1917 Mad 732 (734) (DB) * AIR 1925 Oudh 485 (485): 28 Oudh Cas 124 (DB) * ('23) AIR 1923 Pat 514 (515): 2 Pat 739 (DB).

(2) Words "dismissed for default" extend to applications under Section 47 or Section 144 which are dismissed for default. AIR 1965 All 589 (590) * AIR 1963 Pat 59 (60) * ('88) 11 Mad 319 (321) (DB) * ('07) 29 All 596 (598) (DB) * AIR 1936 Cal 267 (268) (DB) * ('32) AIR 1932 Nag 14 (15): 27 Nag LR 339.

[But see observation in ('24) AIR 1924 Cal 830 (834), which confines dismissal for default to cases treated as such by Code itself.]

(3) "Default" in the section is not limited to cases of default specifically dealt with by the Code. (1966) 32 Cut LT 628: ILR (1965) Cut 823 * AIR 1950 Assam 169 (172) (DB). (AIR 1943 Nag 149: ILR (1943) Nag 613, Dissented.) * AIR 1941 Mad 836 (837, (838): ILR (1941) Mad 954 (FB).

[But see AIR 1942 Cal 539 (541): ILR (1942) 2 Cal 253.]

(4) Case taken up after short postponement — No one appearing on behalf of plaintiff — Dismissal of suit is not for default — Order is decree. 1965 All LJ 575 (576).

(5) Decree-holder's default in payment of process fee — Execution Court passing order "consign for default" — Order, held, did not amount to decree. AIR 1965 All 589 (590).

(6) A dismissal for non-prosecution of suit is a dismissal for default within the meaning of the section. AIR 1942 Oudh 362 (364, 365) (DB) * AIR 1955 Andhra 74 (78): ILR (1955) Andhra 27 (FB) * ('55) Madh B LJ 1955 HCR 1467 (1468) * AIR 1949 All 261 (262): ILR (1949) All 391.

[See also AIR 1933 PC 68 (70): 60 Cal 662: 60 Ind App 83 * AIR 1914 PC 66 (67): 36 All 350.]

[But see AIR 1937 All 284 (285).]

(7) Dismissal of suit for non-payment of deficit Court-fee demanded is a dismissal for default for the purposes of the section. 1961 Jab LJ 1267: AIR 1962 Madh Pra 237 (238) * AIR 1941 Mad 836 (837, 838): ILR (1941) Mad 954 (FB) * AIR 1955 Vindh Pra 46 (46).

[But see AIR 1942 Cal 539 (541): ILR (1942) 2 Cal 253.]

(8) Dismissal of appeal for non-prosecution by non-payment of Court-fee amounts to dismissal for default within meaning of Section 2 (2) and is not a decree. AIR 1963 All 398 (402).

(9) Some plaintiffs absent — Decree in terms of compromise entered into by present plaintiffs on their own behalf — No adjudication of suit as regards absent plaintiffs — In respect of them there is dismissal of suit for default not amounting to decree. AIR 1963 All 412 (413) (DB).

(10) Order made under Order 33, R. 11 falls within the words "any order of dismissal for default." AIR 1955 Andhra 74 (78): ILR (1955) Andhra 27 (FB).

(11) Order declaring the suit to have abated is a decree. AIR 1965 Ker 303 (304): 1965 Ker LT 236 * AIR 1964 Orissa 136 (139) (DB) * AIR 1963 All 389 (389).

(12) Order under Section 8-D (2) (Bengal) of the Court-fees Act dismissing suit for non-payment of costs of enquiry regarding its valuation is not a decree. ('51) ILR (1951) 1 Cal 642 (643).

(13) Order dismissing appeal on ground of abatement is not a decree. AIR 1953 Trav-Co 545 (550): ILR (1953) Trav-Co 745 (FB).

(14) Dismissal of suit for "want of prosecution" must be construed and treated as dismissal on merits for want of evidence where there are circumstances which bring the case under Order 17, Rule 3. ILR (1960) 1 All 546 (565) (DB) * AIR 1957 All 107 (110) (DB).

(15) Dismissal of suit as withdrawn by plaintiff under Order 23, Rule 1 is not a decree within Section 2 (2). AIR 1969 Ker 78 (78).

(3) "decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made:

(4) "district" means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a "District Court"), and includes the local limits of the ordinary original civil jurisdiction of a High Court;

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**Section 2 (3) — Note 1**

**1. Scope.—** (1) Decree-holder under the definition must be a person in whose favour a decree is passed and whose name is on record in the suit. AIR 1945 Oudh 225 (226): 20 Luck 414 (DB) * AIR 1944 Mad 363 (365) * AIR 1929 Bom 279 (281, 282) * AIR 1937 Mad 605 (606) * AIR 1937 Nag 30 (30, 31): ILR (1937) Nag 82.

(2) Even where the person in whose favour a decree is passed is only a benamidar he alone can be called the decree-holder. AIR 1940 Pat 472 (473) (DB).

(3) In case of a decree for specific performance, even defendant would be a "decree-holder." AIR 1923 Bom 26 (27): 46 Bom 990 (DB) * AIR 1932 Cal 579 (583): 59 Cal 501 (511) (DB).

(4) "Decree-holder" does not include attaching creditor. AIR 1925 All 123 (124).

(5) Person entitled to restitution by virtue of variation in the decree amount due to scaling down under the Madras Agriculturists' Relief Act (1938) is a decree-holder. AIR 1949 Mad 651 (651).

(6) Collector under Section 24 (3), U. P. Encumbered Estates Act, 1934 is deemed decree-holder, for purpose of execution against property situate outside U. P. 1954 All L Jour 473 (473).

(7) A decree obtained by the manager of a joint Hindu family firm cannot be executed by the partnership firm of the same name even though consisting of the same members of the family as partners. (1969) AIR 1969 Guj 55 (58).

(8) Where a decree happened to be passed in favour of second plaintiff on request by the first plaintiff that a decree may be so passed for and on behalf of him, the second plaintiff was the person in whose favour the decree was passed and hence decree holder. (1964) AIR 1964 Ker 149 (150): ILR (1963) 1 Ker 663.

(9) A decree-holder need not be a party to the suit. If the decree confers upon someone some enforceable right he is entitled to execute the same. AIR 1964 Mys 277 (279): 1964 (1) Mys LJ 243 * AIR 1969 Orissa 142 (143): 35 Cut LT 86.

(10) Decree-holder means a person in whose favour a decree has been passed as soon as the judgment has been pronounced and not necessarily a person in whose favour a decree has been formally prepared under Section 33. Therefore an execution filed shortly after the judgment was pronounced but before the formal decree was prepared is legal and valid. AIR 1962 Pat 398 (399): 1962 BLJR 434.

**Section 2 (4) — Note 1**

**1. "District Court," meaning of.—** (1) "District" means:

(a) Local limits of jurisdiction of a principal Civil Court of original jurisdiction. ('79) 4 Cal 222 (228) (DB).

(b) Local limits of ordinary original civil jurisdiction of a High Court. AIR 1915 Mad 608 (609) (DB).

(2) Words "District Court," do not necessarily include a High Court in the exercise of its ordinary original civil jurisdiction, wherever they occur. AIR 1927 Cal 290 (290) (DB). (Explaining 12 Cal WN 446.) * AIR 1965 SC 1449 (1450): (1965) 2 SCR 800 * AIR 1967 Mad 381 (384): ILR (1964) 2 Mad 666 (DB).

(3) "District Court" means only the principal Civil Court of original jurisdiction. ('89) 16 Cal 13 (15) (DB) * ('97) 21 Bom 45 (47) (DB).

[See also AIR 1964 Ker 314 (315, 316): 1964 Ker LJ 712.]

(4) Chief Court of Sind is not a District Court. AIR 1948 Sind 89 (90, 91): ILR (1947) Kar 164.

(5) In construing the term "District Court" in any section particular provisions thereof will have first to be considered and if the definition is repugnant to the sense of the particular provision it will not apply. ('08) 12 Cal WN 446 (447) * AIR 1960 Cal 577 (579). (In Sections 3 (b) and 19, Hindu Marriage Act. "District Court" means in any area where there is a City Civil Court that Court, irrespective of question of pecuniary valuation.)

(6) Words "District judge" in Section 7 (3) (b), Industrial Disputes Act, 1947, include Additional District Judge. AIR 1954 Assam 161 (165): ILR (1954) 6 Assam 161 (DB).

(7) This section does not apply to the scheduled district. ('95) 17 All 483 (484) (DB).

(8) The District Court or the High Court in appeal may provide that powers in relation to certain matters which may arise in the course of administration of the charity may be reserved to the District Court. In such case there is no enlargement of the jurisdiction of District Court. The District Court which is original Civil Court is simply empowered to implement the scheme as and when occasion arises. AIR 1965 Guj 181 (188): (1965) 6 Guj LR 49.

(9) Additional District Judge is included within the definition of District Judge under M. B. Civil Courts Act. 1961 Jab LJ 1431 (1432, 1433).

[a][(5) "foreign Court" means a Court situate outside India and not established or continued by the authority of the Central Government;]

[a] Substituted for Cl. (5) of S. 2 by the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), S. 4 [1-4-1951].

The old Cl. (5) of S. 2 was as follows :

"(5) 'Foreign Court' means a Court situate beyond the limits of the States which has no authority in the States and is not established or continued by the Central Government".

(6) "foreign judgment" means the judgment of a foreign Court.[a]

[a] As to when foreign judgments are not conclusive, see Sec. 13.

**Section 2 (5) — Note 1**

**1. Scope.—** (1) Court to be a "foreign Court" must be situate outside India. ('02) 29 Cal 509 (516) (SB) * AIR 1962 SC 1737 (1741, 1742, 1743, 1744): (1963) 2 SCR 577. (Ex parte decree passed by Gwalior Court on 18-11-1948 against resident of Allahabad — Decree transferred to Court at Allahabad on 14-9-1951 — Court held could not do so — Court at Allahabad could not execute decree — Court at Gwalior being a foreign Court and its decree being a nullity outside the State.) (Per majority.) * AIR 1961 Andh Pra 476 (477) (FB) * AIR 1959 Cal 663 (665): 63 Cal WN 442 * AIR 1959 Punj 265 (267): 61 Pun LR 418 (FB) * AIR 1954 Cal 67 (69, 70): 92 Cal LJ 24.

(2) Absolute independence is not necessary to constitute a State a foreign State and its Courts foreign Courts in relation to another State. A State may be under the suzerainty or paramountcy of another power, yet its Courts will be foreign Courts in another State when it has an independent civil, criminal and fiscal jurisdiction. AIR 1958 All 775 (780).

(3) Courts in England and Scotland are foreign Courts. ('84) 8 Bom 571 (574) * ('01) 28 Cal 641 (645) * ('71) 8 Bom HCR (OC) 200 (203) (DB) * ('13) 20 Ind Cas 704 (710, 712) (DB) (Mad) * ('09) 32 Mad 469 (471) (DB).

(4) Courts in Ceylon are foreign Courts. ('97) 20 Mad 112 (114) (DB) * ('09) 32 Mad 469 (473) (DB).

(5) Definition does not affect power of a Chartered High Court to restrain by injunction a person resident within its jurisdiction from filing or prosecuting a suit in a Court outside such jurisdiction, such Court being a "foreign Court" for that purpose. ('09) 36 Cal 233 (237).

(6) Fact that for administrative purposes various Courts in India are given separate territorial jurisdiction, does not make them "foreign Courts" with regard to one another. AIR 1937 Cal 172 (173, 174) (DB).

(7) Indian States like Mysore have ceased to be foreign States with the coming into force of Constitution of India. AIR 1954 Mad 1051 (1053): ILR (1955) Mad 80 (DB).

[But see AIR 1958 Ker 15 (18): ILR (1957) Ker 1036 (DB).]

(8) Definition of "foreign Court" in Jammu and Kashmir Civil P. C. is to the extent of its repugnancy to Articles 5 and 261 (3) of the Constitution of India inoperative and of no effect. AIR 1955 J and K 5 (6) (FB).

(9) Ex parte foreign decree passed by Bombay High Court on 22-6-43 against resident of Barwani (Madhya Bharat) — Decree transferred for execution to Court at Barwani on 9-8-51 — Bombay Court although held competent to transfer decree for execution, Barwani Court held incompetent to execute it, as decree was foreign decree. AIR 1964 Madh Pra 78 (81): 1963 Jab LJ 650 (DB).

(10) In order to invest a foreign judgment with validity the foreign Court should be a Court of competent jurisdiction in the international sense. In actions in personam a foreign Court can be considered as a Court of competent jurisdiction only under certain specified circumstances and if none of these circumstances is present, a foreign Court qua such a defendant cannot be regarded as a Court of competent jurisdiction. Such foreign judgment is an absolute nullity in the International sense. The position that prevailed before is maintained despite the inclusion of the Native States in the territory of India. (1962) AIR 1962 Andh Pra 400 (402, 404, 406): (1962) 1 Andh WR 272 (FB).

**Section 2 (6) — Note 1**

(1) A State may not be absolutely independent but is subject to the suzerainty and paramountcy of a superior power. Yet the judgment of a Court of that State is a foreign judgment in the Courts of another State when that State has an independent civil, criminal and fiscal jurisdiction. AIR 1958 All 775 (780).

(2) Decisions of the Courts of Indian States have ceased to be foreign judgments after the merger of these States with the Indian Union. AIR 1957 Him Pra 16 (21).

(3) The word "judgment" as used in Section 2 (6) has the English meaning and not the meaning given to it by Section 2 (9) of the Code. In other words, the term "foreign judgment" means the decree or order of a foreign Court as defined in Section 2 (5). 1965 Cur LJ 485 (487)

(7) "Government Pleader" includes any officer appointed by the [a][b][State] Government] to perform all or any of the functions expressly imposed by this Code on the Government Pleader and also any pleader acting under the directions of the Government Pleader :

[a] Substituted for the words "Local Government" by the Government of India (Adaptation of Indian Laws) Order, 1937 [1-4-1937].

[b] Substituted for the word "Provincial" by A. L. O., 1950 [26-1-1950].

[a][(7A) "High Court"[b] in relation to the Andaman and Nicobar Islands, means the High Court in Calcutta;]

[a] Inserted after Clause (7) by the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), S. 4 [1-4-1951].

[b] High Court in relation to the other Union Territories are; in relation to Dadra and Nagar Haveli, Bombay High Court — See S. 11 of Act 35 of 1961 [w. e. f. 1-7-1965]; in relation to Delhi and Himachal Pradesh, Delhi High Court, see S. 3 (i) [31-10-66] and S. 17 [1-5-1967] of Act 26 of 1966; in relation to Laccadive, Minicoy and Amindivi Islands, Kerala High Court — See Sec. 60 of Act 37 of 1956 [1-11-1956]; in relation to Chandigarh, Punjab and Haryana High Court — see S. 29 of Act 31 of 1966 [1-11-1966]; in relation to Pondicherry, Madras High Court — see S. 9 of Act 49 of 1962 [w. e. f. 6-11-1962].

Manipur, Tripura and Goa, Daman and Diu have Judicial Commissioner's Courts.

[a][(7B) "India", except in Sections 1, 29, 43, 44, [b][44A,] 78, 79, 82, 83 and 87A, means the territory of India excluding the State of Jammu and Kashmir";]

[a] Inserted by the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), S. 4 [1-4-1951].

[b] Inserted by Repealing and Amending Act, 1953 (42 of 1953), Sch. III, S. 4 [23-12-1953].

(8) "Judge" means the presiding officer of a Civil Court :

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**Section 2 (6) — Note 1 (contd.)**

(Punj) * (1967) 1967-2 Andh WR 335 (338).

(4) A judgment given in absentem by a foreign Court is an absolute nullity as a foreign judgment; in other words it is not a valid foreign judgment, the execution of which could be levied in Courts situated in a foreign territory. The merger of that foreign territory in India would not alter the character of that judgment. AIR 1962 Andh Pra 400 (404, 406): (1962) 1 Andh WR 272 (FB). (AIR 1952 Hyd 80 and AIR 1953 Hyd 19 and AIR 1955 Hyd 184 and AIR 1951 Bom 125 and AIR 1955 MP 1 and AIR 1950 Mad 293, Dissented from.) * AIR 1954 Cal 67 (69, 70): 92 Cal LJ 24.

(5) The effect of the judgment obtained before the constitutional changes does not change unless there is a specific provision to that effect. AIR 1962 SC 1737 (1744): (1963) 2 SCR 577.

(6) Subsequent political changes cannot change nature of judgment delivered by a Court which was a foreign Court when it pronounced that judgment. AIR 1965 Mys 97 (100): (1964) 1 Mys LJ 342.

(7) In order to determine whether a certain decree is or is not the decree of a foreign Court the Court has to determine its nature at the time of its birth and not at some subsequent date. AIR 1959 Punj 265 (267): 61 Pun LR 418 (FB).

**Section 2 (7) — Note 1**

(1) Advocate, other than Government Pleader, acting on behalf of Government or on behalf of public officer, represented by Government Pleader, can act without filing any power required under O. 3 but he can so act only after Court is informed by Government Pleader that he is acting under his directions for that case. AIR 1954 Cal 455 (457) (DB).

(2) The term 'Government Pleader' includes Assistant Government Advocate. (1967) 1967 Raj LW 297 (301).

(3) Rules relating to appointment of Government Pleader by Madras Government and as summarised in the Precis of the Standing Orders offended to G. O. No. 2962 Dt/- 10-8-1932 have no statutory force. AIR 1961 Mad 450 (472): ILR (1961) Mad 553 (DB).

**Section 2 (7-B) — Note 1**

(1) Since the word 'India' does not occur in Section 80, the provision need not be interpreted in the light of the definition of 'India' in Section 2 (7-B) of the Code. Suit against State of Jammu and Kashmir is not maintainable without giving notice to that Government. AIR 1969 Cal 11 (12): 72 Cal WN 795.

**SECTION 2 (8) — SYNOPSIS**

**1. "Court," meaning of.**

**2. Disqualification of Judges.**

**1. "Court," meaning of.**— (1) "Court" means "a place where justice is judicially administered." ('07) 30 Mad 326 (327) (DB) * ('81) 7 Cal 694 (696) (DB) * AIR 1934

(9) "Judgment" means the statement given by the Judge of the grounds of a decree or order.

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**Section 2 (8) — Note 1 (contd.)**
Cal 725 (728): 61 Cal 450 * ('83) 9 Cal 341 (354): 9 Ind App 152 (PC).

[See also AIR 1949 PC 129 (133).]

(2) Definitions of "Court" in Evidence Act and of "Court of Justice" in Penal Code do not afford much assistance in construing the word "Court" for purpose of this Code. ('88) 11 Mad 3 (5) (DB).

(3) A subordinate Judge does not exercise powers by authority delegated to him by State Government but under statutory provisions embodied in the Code. AIR 1940 Pesh 41 (43).

(4) From mere fact that functions to be performed under special statute are delegated to judicial officer, it cannot be inferred that he is acting as a Court and within the ordinary jurisdiction of his Court. ('56) ILR (1956) Madh B 246 (251).

(5) Consolidation officer functioning under Section 12 of U. P. Consolidation of Holdings Act (5 of 1954), is a Court. 1962 All WR (HC) 450 (451).

(6) An arbitrator is not a Court or a Judge. AIR 1968 All 22 (25).

(7) Commissioner under Madras Agricultural Income Tax Act (5 of 1955), is only Tribunal and not Court. (1963) 2 Mad LJ 131: 1963 Mad WN 359.

(8) District Judge includes Additional District Judge. AIR 1954 Assam 161 (164) (DB) * 1961 Jab LJ 1431 (1433).

(9) Munsif is a Judge inferior in rank to a Civil Judge. 1965 Raj LW 34 (34).

**2. Disqualification of Judges.**— (1) Judge having any interest in a case sufficient to create bias should not try it. In cases where any bias on the part of the Judge may be presumed, the party may show the grounds which raise the presumption. ('12) 14 Ind Cas 458 (459) (DB) (Cal) * ('95) 19 Bom 608 (610) (DB). ((1866) 1 QB 230, Referred to.) * ('84) 10 Cal 915 (918) (DB).

(2) (Per Hidayatullah, J., in a dissenting judgment).— No Judge can be considered to be competent to hear a case in which he is directly or indirectly interested. A proved interest in a Judge not only disqualifies him but renders his judgment a nullity. AIR 1963 SC 1 (51).

(3) However small may be extent of pecuniary or other interest of a judge in party or subject-matter, validity of decision is not affected if patry does not object after being apprised of such interest. 1962 Nag LJ (Notes) 64: 64 Bom LR 700 (701-702) (DB).

(4) A party, in absence of grounds raising presumption of bias, cannot question the impartiality of the Judge ('99) 22 Mad 155 (159, 160) (DB) * AIR 1954 Trav-Co 331 (347) (DB). (There must be real and substantial grounds to sustain the suspicion of bias as being legitimate and reasonable.)

## SECTION 2 (9) — SYNOPSIS

1. Essentials.
2. Scope and applicability.
3. Illustrative cases.

**1. Essentials.**— (1) A Judgment embodies the expression of the mind of the Court at the time of pronouncing it in open Court. A draft prepared is not a judgment, however heavily or often it may have been signed. It does not become a judgment unless it is delivered in open Court with the intention of making it the operative decision of the Court. AIR 1954 SC 194 (196) * AIR 1960 Madh Pra 163 (165): 1960 Jab LJ 328 (DB).

(2) Once pronounced, it becomes a judgment; but until signed, the judge may freely alter or amend it or even change it completely without any further formality except notice to the parties and a rehearing on the point of change, should that be necessary.

But after it has been signed, it shall not be altered or added to save as provided by Section 152, C. P. C. or on review. AIR 1954 SC 194 (196).

(3) Small irregularities in the manner of pronouncement or the mode of delivery, the manner in which it is to be recorded or the ways in which it is to be authenticated, the signing or the sealing, all the rules designed to secure certainty about its content and matter, do not matter These can be cured but what cannot be cured is the 'hard core.' e.g. the formal intimation of the decision and its contents formally declared in a judicial way in open Court. AIR 1954 SC 194 (196).

(4) Essential element of judgment is a statement of the grounds of decision. ('12) 15 Oudh Cas 78 (80): ('33) AIR 1933 Oudh 385 (386) (DB).

(5) The word 'judgment' as used in R. 4 of Order 20 of the Code means judgment as defined in Section 2 (9) and must in all eventualities contain a statement by the judge of the Court of Small Causes of the grounds on which the decree or order is passed by him. AIR 1966 Punj 227 (228): 1965 Cur LJ 884 (Punj) * (1963) 1 Andh WR 111 (114)* AIR 1963 Mad 87 (88) * AIR 1956 Nag 276 (277) (DB). (When a judge writes a single statement of the grounds and makes those grounds applicable to different decrees, it is the same judgment for the purposes of R. 4 of Order 45, of the Code.) * AIR 1952 Cal 671 (672).

**2. Scope and applicability.**— (1) Decision of Court is mere declaratory of law as it exists and cannot be treated as

(10) "Judgment-debtor" means any person against whom a decree has been passed or an order capable of execution has been made:

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**Section 2 (9) — Note 2 (contd.)**

statute imposing law for first time. 31 Cut LT 91 (98-99).

(2) The word 'judgment' as used in the expression "foreign judgment" occurring in Section 2 (6) of the Code has the English meaning and not the meaning given to it by Section 2 (9) of the Code. 1965 Cur LJ 485 (487) (Punj).

(3) The word "order" as used in Section 2 (9) means a formal "order" as distinguished from a "decree". AIR 1960 All 540 (540) (DB).

(4) Section 2 (9) defines the word "judgment" as defined in the Code and not elsewhere. AIR 1961 Mys 98 (100): 38 Mys LJ 1035 * AIR 1960 All 540 (540) (DB).

(5) Meaning of the word "judgment" in C. P. Code is not helpful in ascertaining meaning of the word in Section 10 of Delhi High Court Act, 1966. AIR 1969 Delhi 85 (89) (FB).

(6) Definition of 'judgment' in Code does not apply to the word as occurring in the Letters Patent. AIR 1957 Cal 727 (731).

(7) "Judgment" in Article 133, Constitution of India does not carry the sense in which it is defined under this section. AIR 1957 All 116 (117) (DB).

**3. Illustrative cases.**— (1) Note in Judge's diary that no enlargement of time would be given to judgment debtor and that final decree should be drawn up as applied for by decree-holder was held judgment. AIR 1939 Rang 294 (295, 296): 1940 Rang LR 72.

(2) Shorthand notes dictated by Judge cannot, until approved by Judge, be considered part of his actual judgment. AIR 1927 Bom 113 (115): 51 Bom 267 (DB).

(3) Order deciding preliminary issue in the case may be a judgment. AIR 1926 Lah 638 (638) (DB): ('12) 14 Ind Cas 371 (372) (Lah).

(4) Under Section 27 of the Pepsu Land Acquisition Act the award is to be deemed to be a decree and the statement of the grounds of the award a judgment within the meaning of Cls. (2) and (9) respectively of Section 2 of the Code. An appeal against award is therefore competent under Section 56 of the Act. (1963) 65 Punj LR 130 (132) (DB).

(5) Trial Judge acting extra cursum curiae with consent of both parties to suit — Decision is not award but judgment. AIR 1965 Cal 3 (9, 10).

(6) Direction to pass final decree after deficit Court-fee is paid is not a 'judgment' within the section. AIR 1968 Andh Pra 138 (140).

(7) Order rejecting application to appeal as pauper is not a judgment. AIR 1963 All 241 (242) (DB).

(8) Order of Election Tribunal containing statement of reasons for decision is a judgment within Section 12, Limitation Act. AIR 1964 SC 1099 (1113-1114).

(9) Single Judge of High Court dismissing appeal under Order 41, Rule 11, but giving reasons for confirming decision of first Court, is 'judgment' within Cl. 10 of Letters Patent (Nagpur). AIR 1956 Nag 211 (214): ILR (1956) Nag 226 (DB) * AIR 1964 Mys 145 (146).

(10) Interlocutory orders can be judgments, within Clause 15 of Letters Patent. ('55) AIR 1955 Bom 266 (269): ILR (1955) Bom 49 (DB).

(11) An order of a judge for posting an appeal before a Bench is not a judgment within Clause 15 of Letters Patent. (1964) 1 Andh LT 229: AIR 1965 Andh Pra 16 (17) (DB).

(12) Judge in second appeal refusing to declare case as fit for appeal — It is not a judgment. AIR 1960 All 540 (540) (DB).

**Section 2 (10) — Note 1**

(1) Definition does not include judgment-debtor's assignee. ('12) 13 Ind Cas 659 (660) (DB) (Mad).

(2) Surety for costs against whom decree for costs has been passed is judgment-debtor within the clause. ('34) AIR 1934 Bom 252 (254): 58 Bom 485 (DB).

(3) Attachment before judgment — Surety offered by defendant depositing amount decreed against defendant — Surety himself is not judgment-debtor. (1966) AIR 1966 Raj 194 (197): 1966 Raj LW 175.

(4) Person not impleaded in suit as defendant even on objection by defendant and against whom decree has not been passed is not judgment-debtor within Order 21, Rule 98. ('40) ILR (1940) All 87 (89, 90).

(5) Party to suit but against whom no decree has been passed is not a judgment-debtor. ('54) AIR 1954 Trav-Co 223 (224): ILR (1953) Trav-Co 1214.

[But see (1968) AIR 1968 Cal 547 (548): 73 Cal WN 4. (Pro forma defendant against whom no decree has been passed in partition suit, is judgment-debtor.)

(6) "Judgment-debtor" in Order 21, Rule 12 does not include his legal representative. ('52) AIR 1952 All 618 (619).

(7) For purposes of applying under Section 23, Madras Agriculturists Relief Act subsequent alienee of part of mortgaged property impleaded in suit on mortgage in which final decree for sale has been passed is judgment-debtor. ('40) AIR 1940 Mad 944 (945) (DB).

(8) Defendant transferring suit property after dismissal of suit for possession — Plaintiff filing appeal after transfer of property — Suit decreed in appeal — Defendant is judgment-debtor within meaning of Order 21, Rule 102 and Section 2 (10). (1964) 1964 Raj LW 487 (488).

(11) "legal representative"[a] means a person who in law represents the estate of a deceased person and include any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued:

[a] For substitution of legal representatives, see O. 22, R. 3 infra.

## SECTION 2 (11) — SYNOPSIS

**1. Scope.**
**2. "Person who in law represents estate of a deceased person".**
**3. "Intermeddler".**
**4. Representative Suits.**

**1. Scope.**—(1) There is no justification for holding that the word "estate" as used in S. 2(11) means the whole estate. AIR 1964 All 233 (234) : 1963 All LJ 222 (DB).

(2) The term "legal representative" is not limited to administrators, executors and heirs and must now be held to include any person who in law represents the estate of a deceased. 8 Cal WN 843, Rel. on. AIR 1962 SC 232 (239): (1962) 3 SCR 391.

(3) The word "legal representative" as defined in S. 2(11) of the Code of Civil Procedure does include a reversioner also who does not calim under the limited owner but under the absolute owner. AIR 1952 Pat 380 (382).

(4) A receiver is not a legal representative of a previous deceased receiver. (1966) 61 ITR 57 (62) (All).

(5) A legal representative as defined under S. 2(11) does not include the real owner. Therefore, so long as the benamidar does not purport to sue in a representative capacity, the real owner cannot come in on his death under O. 22, R. 3. AIR 1961 Mad 376 (376, 377): (1961) 2 Mad LJ 10.

(6) A universal legatee under the will of a deceased plaintiff is his legal representative and can continue the suit under O. 22, R. 3. AIR 1950 Mad 482 (483) : (1950) 1 Mad LJ 276 * (1966) 1 Mad LJ 318 (319) : 72 Mad LW 804 (805).

(7) In order to determine the legal representative of a deceased person it is not necessary that the existence or quantum of the estate to be represented should first be ascertained. The character of legal representative must accrue after and on account of the death of the person whose estate is to be represented. A transferee in a transfer inter vivos cannot be a legal representative. AIR 1956 Trav-Co. 147 (150) : 1955 Ker LT 739 (FB).

(8) When the mortgagor exchanges the mortgaged property with the property of A, during the pendency of the mortgage suit, and after the mortgagee obtains a decree upon his mortgage the mortgagor dies, the execution can properly proceed against A, who must be held to be the legal representative of the deceased mortgagor, he being a transferee pendente lite and bound by the decree. (1937) 2 Mad LJ 359, Foll. (1960) AIR 1960 Madh Pra 198 (200): 1960 Jab LJ 404: 1960 MPLJ 287.

(9) Legal representative of a deceased matatipathi, need not be a person who is entitled to become the matatipathi. Even if he is one who under arrangement made by deceased in his will has been appointed to safeguard property that is sufficient to make him a legal representative. (1958) (1958) 1 Mad LJ 230 (231).

See also Notes under Order 22, Rule 3.

**2. "Person who in law represents estate of a deceased person."** — (1) A legatee who obtains only a part of the estate of the deceased under a will can be said to represent his estate and is therefore a legal representative under S. 2 (11); the word "estate" in the context must not mean the whole of the estate. (1950) 1 Mad LJ 476 : AIR 1950 Mad 541, Overruled. AIR 1962 SC 232 (239) : (1962) 3 SCR 391 * AIR 1965 Pat 300 (303).

(2) The estate of a deceased person can be sufficiently represented even by a wrong person who is not a legal representative. ILR 25 Bom 337 (PC), Rel. on. Therefore, where the suit was instituted against a wrong person, the decree so passed would be binding on the correct legal representative. AIR 1962 All 125 (127).

(3) The Manager, Court of Wards is not legal representative of the deceased. It is the Court of Wards which in law represents the estate of the deceased ward during the continuance of the superintendence under S. 61 of the Madras Court of Wards Act, 1902 and it should be considered as the legal representative of the deceased ward. AIR 1960 Ker 288 (289) : 1960 Ker LJ 67 (DB).

(4) Under the enlarged definition of "legal representative" a person in possession of the estate belonging to the deceased must be deemed to be competent to represent the deceased. 1953 BLJR 673 (679) : ILR 32 Pat 903 (DB) * AIR 1964 Punj 532 (538) : 66 Pun LR 646.

(5) In law the heir of deceased represents his estate although in certain special cases, other persons such as administrator or executor may represent his estate. AIR 1957 Raj 283 (283) : 1957 Raj LW 186.

**3. "Intermeddler"**—(1) It is essential in order to constitute a persos an intermeddler, that there should be an intention on his part to act as a legal representative and to represent the estate of

**Section 2 (11) — Note 3 (contd.)**
the deceased. A trespasser or a person who claims a title in himself adversely to the estate of the deceased cannot be an intermeddler. AIR 1952 Madh B 153 (154) : Madh BLJ 1955 HCR 1281 * AIR 1950 Mad 541 (543, 544) : 63 Mad LW 388. (Overruled on another point in AIR 1962 SC 232) * AIR 1962 Punj 457 (462): 64 Pun LR 651.

(2) A person intermeddling with the estate of a deceased, should not be considered to represent the entire estate. The sphere of the representation of the estate of the deceased should be circumscribed by the sphere of the act of intermeddling done by him. If the dispute relates to property in which he had not intermeddled, he cannot be considered to be the legal representative in respect of that item of property. AIR 1959 All 419 (420): 1959 All LJ 268.

(3) Very slight act of intermeddling with the property of the deceased makes a person executor de son tort, and where he has so acted, he renders himself liable to an action not only by the rightful executor but also by a creditor of the deceased or by a legatee. AIR 1962 Punj 457 (462) : 64 Punj LR 651.

(4) An executor of his own wrong cannot bring any action in right of the deceased, though by his own conduct he exposes himself to an action being brought against him. Thus he is liable to be sued as an executor and made accountable for his conduct in dealing with the estate and he is also answerable for the acts of others when authorised by him. AIR 1962 Punj 457 (462) : 64 Pun LR 651.

(5) A person who is in possession of the property in respect of which a decree has been passed but who claims no title from the deceased judgment-debtor must be treated as a legal representative at least for continuing the execution under Section 50. AIR 1951 Nag 145 (148): 1950 Nag LJ 559.

[**Editorial Note.**—There is a conflict of decisions on the point and they have been discussed in this judgment. See for a recent decision of the Madras High Court which takes a contrary view: AIR 1950 Mad 541 (DB).

(6) Where the legatees help themselves to the legacis by unauthorisedly taking possession, they will be executors de son tort within the meaning of Section 303 of the Succession Act and are liable to be proceeded in execution as the legal representatives of the deceased judgmnt-debtor testator. AIR 1953 Mad 622 (624) : 1953-1 Mad LJ 470.

(7) Intermeddler in wrongful possession not legal representative for substitution as plaintiff — He may be legal representative to continue suit against deceased person. AIR 1965 Madh Pra 72 (74) : 1965 Jab LJ 113.

(8) Decree against assets of deceased—Assets in hands of third person — Execution by attachment of assets — Person in possession of assets can be brought on record for purposes of execution — Such person is intermeddling with the property of the deceased within the meaning of S. 2 of the Civil Procedure Code. (1964) 2 Andh WR 130.

**4. Representative Suits.**—(1) In order to invest a person with the status of a legal representative of the deceased, it is not necessary that he should be in actual possession of the assets of the deceased if he happens to be a person on whom the estate could devolve. (1961) 1961 Raj LW 132 : ILR (1961) 11 Raj 793 (797).

(2) Out of several tenants of occupancy holding having interest in the holding one B allowed to represent holding and accordingly he alone recorded in Landlord's Sharista—Held, on death of B the arrangement of representation came to an end and his son could not be his legal representative. AIR 1952 Pat 53 (54) : 30 Pat 779 (DB).

(3) A Hindu is strictly not the legal representative of his father or grandfather because he does not inherit the property from them but gets it by right of survivorship by virtue of his birth in their family. ILR (1955) 1 All 128 (138) (DB).

(4) Under S. 2 (11) it is only in cases where a party suing in a representative character dies that an enquiry on whom the estate devolves can arise. AIR 1964 Ker 149 (150) : ILR (1963) 1 Ker 663.

(5) On the death of a Hindu his sons who take by survivorship and his widow who takes under the statute can be substituted as legal representatives under O. 22, C. P. Code. AIR 1952 Punj 167 (170) : 54 Pun LR 73 (DB).

(6) A universal donee who by reason of a gift enters upon possession of the estate of a deceased donor, is a legal representative of the deceased. Devolution of interest in his favour from the deceased is not necessary for constituting a person as his (deceased's) legal representative. AIR 1964 Mad 78 (79, 80) : 76 Mad LW 692.

(7) Where a suit is brought by the manager of a Joint Hindu Family and the plaintiff dies pending the suit, it is sufficient to substitute for him the succeeding manager who effectively represents the surviving members and upon whom in a representative character the estate may be said to devolve. AIR 1959 Cal 368 (370-371) (DB).

(12) "mesne profits"[a] of property means those profits which the person in wrongful possession of such property acutally received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession :

[a] For recovery of mesne profits. see O. 20, R. 12.

**SECTION 2 (12) — SYNOPSIS**

**1. Scope.**
**2. "Person in wrongful possession."**
**3. "With interest on such profits."**
**4. Assessment of mesne profits.**
**5. Onus.**

**1. Scope.** — (1) Mesne profits are profits to which a person is entitled but from which he has been kept out by the defendant. AIR 1957 Raj 358 (358).

(2) Profits which a manager of joint Hindu family has to account for are not mesne profits. AIR 1957 Andh Pra 766 (770).

(3) Mesne profits can be claimed only regarding immovable property and not in regard to such property which cannot be deemed to be immovable property. AIR 1957 Manipur 9 (13).

(4) The expression "mesne profits" in Section 144 has not a different meaning from that in Section 2 (12). 1966 Ker LJ 844 (848) * AIR 1959 Andh Pra 182 (184).

(5) Mesne profits had to be decided by Court executing decree. They are to be determined by the decree itself and not in execution proceeding. Final decree will be passed for mesne profits which will be ascertained in an application and this cannot be regarded as a proceeding in execution but it is a proceeding in continuation of the suit itself. ILR (1963) Andh Pra 560 (DB).

(6) Where under a suit for partitions one co-owner was made liable to another for future mesne profits, the amount of mesne profits decreed was a "debt" within Section 2 (c), Kerala Agriculturists Debt Relief Act (31 of 1958). ILR (1959) Ker 1269 (1271) (DB).

(7) Use and occupation of land without consent of landlord — Suit for — Liability is under Tenancy Act and not under general law relating to claim for mesne profits as defined in Section 2 (12) Civil P. C. 145 PR 1893 and AIR 1953 HP 89, Dissented from. AIR 1955 NUC (Pepsu) 1351: ILR (1955) Patiala 115 (DB).

**2. "Person in wrongful possession."** — (1) The position of a person who is not found to be the real owner after the decision of the case is that he has been in wrongful possession from the very start. A suit brought against such a person for recovery of mesne profits does not become a suit for accounts merely because accounts have to be examined in order to ascertain the amount due to the plaintiff. Such a suit, therefore cannot be framed as a suit for account, and the plaintiff cannot put his own valuation on it. AIR 1963 Madh Pra 194 (195, 196, 197): 1963 MPLJ 87 (DB). (8 Nag LR 36 and AIR 1947 Bom 255, Rel. on.)

(2) Where the tenant fails to deliver up possession of the premises to the landlord on the expiry of his lease, his liability is that of a trespasser and if the property is not controlled by the Rent Control Act, the landlord is entitled to the mesne profits. AIR 1969 Delhi 59 (62, 63) (DB). ( (1904) Pun Re 5 and 1958 Pun Re 33 and AIR 1919 Lah 72 and AIR 1924 Lahore 643 and AIR 1928 Lah 554 and Civil Revn. No. 248 of 1948 Dated 3-9-1948 (Lah) and F. A. No. 190 of 1944 Dated 8-9-1948 (Lah), Dissented from.)

(3) Where a Court decrees mesne profits, it is declaring the possession of the person concerned as wrongful; when such possession is subsequently declared by statute to be rightful the decree becomes otiose, and the award of mesne profits becomes ineffective and unenforceable for the period the statute has superseded the decree. Eviction having been prohibited by statute, the continuance of the defendant-tenant in possession has to be held lawful and therefore the decree for mesne profits has to be held abrogated by virtue of the statute for the period the statute remains in force and the landlord-decree-holder is not entitled to any mesne profits for the period. AIR 1962 Ker 55 (55): 1961 Ker LT 704.

(4) The plaintiff is not bound to pay the defendant compensation for improvements as a condition precedent to obtaining possession. The defendant being a rank trespasser is not entitled to such compensation. AIR 1966 Ker 286 (292) (DB) * AIR 1966 Ker 72 (75): 1965 Ker LT 666 (DB).

(5) Defendant obtaining decree for possession — Execution — Possession obtained — Appellate Court holding decree to be without jurisdiction — Plaintiff regaining possession — Not entitled to mesne profits — Defendant's possession was not wrongful. AIR 1959 Mys 25 (27, 28): ILR (1958) Mys 461.

(6) Even upon a decree for specific performance, no title to the property passes until a conveyance is actually executed in obedience to decree or by Court in execution. Until title actually passes to plaintiff, the defendant continues to be the owner of the property and he cannot be said to be in unlawful

**Section 2 (12) — Note 2 (contd.)**

possession thereof and therefore liable for mesne profits. AIR 1966 Mys 215 (216).

(7) Suit for redemption — Court holding debt discharged and decreeing suit for redemption — Mortgagee held was not in wrongful possession till date of decree when relationship of mortgagor and mortgagee came to an end. ILR (1953) Mys 103: AIR 1953 Mys 121 (122).

(8) The expression 'mesne profits' as defined in Section 2 (12), is restricted only to those profits which are derived by a person in wrongful possession of property belonging to another. It has no application to profits accountable by a person not in wrongful possession of the property such as by a co-sharer, before partition. 27 Cut LT 43: AIR 1961 Orissa 111 (112) (DB). (AIR 1935 Pat 80 and AIR 1951 Mad 938 (FB) and AIR 1957 Andh Pra 766 and AIR 1958 Andh Pra 520 and AIR 1956 Pat 244, Rel. on. AIR 1935 Bom 306 and AIR 1938 Bom 231 (FB), Dissent. from.) * AIR 1964 Orissa 94 (96) * ILR (1958) Cut 161 (163, 164) * AIR 1955 NUC (Raj) 4612 * 1954 Raj LW 723.

(9) Sale to defendant held invalid and possession decreed — Execution of decree stayed in appeal — Because possession was ordered to be subject to payment by decree-holder defendant's possession cannot become lawful until payment on a later date — Decree-holder was held entitled to mesne profits of which he had been deprived by the stay. 1955 Nag LJ 557: ILR (1955) Nag 1042 (DB). (AIR 1921 Nag 162, Dissented from.)

(10) The position of a tenant, who was let into possession by a person whose title to the property was recognised by the plaintiff though ultimately it turned out to be well founded, cannot be regarded as that of a trespasser for purposes of mesne profits. In such a case the tenants cannot be viewed as trespassers from the time of their lease. It is only after the title of the plaintiffs to the suit lands has been accepted that their possession should be regarded as wrongful. AIR 1955 Andhra 36 (38, 39): (1954) 2 Mad LJ (Andhra) 141.

(11) Mesne profits against bona fide stranger-purchasers — Mortgage-decree and sale in execution thereof proved void against minor as he was not represented by proper guardian-ad-litem — Possession of auction-purchasers from date of delivery of possession must be held to be wrongful and hence they are liable for mesne profits. AIR 1968 Pat 12 (20, 22).

(12) Restitution of property on reversal of decree for eviction — Possession before restitution held wrongful in view of retrospective operation of Amending Act — Decree-holder is entitled for mesne profits. 1962 Ker LJ 1063 (1064).

**3. "With interest on such profits." —** (1) A person claiming mesne profits will be entitled to interest on the mesne profits up to the date of the plaint as part of the mesne profits. (1958) 1 Andh WR 427: AIR 1959 Andh Pra 64 (69, 70).

[Note:— This case is reversed on another point in AIR 1965 SC 1231 * AIR 1953 Mys 121 (122).]

(2) Interest is an integral part of mesne profits and has, therefore, to be allowed in the computation of mesne profits itself. That proceeds on the theory that the person in wrongful possession appropriating income from the property himself gets the benefit of the interest on such income. (1965) 2 SCWR 259: (1965) 2 SCJ 9: AIR 1965 SC 1231 (1235) * AIR 1963 SC 1405 (1413).

(3) The rate of interest to be allowed in regard to mesne profits or under Section 34 is discretionary, as there is no question of any contractual rate or any particular rate fixed by statute. The only limitation which is prescribed by Section 34 as it stands now, is that the rate shall not exceed 6 per cent. per annum a limitation which did not figure in the section before its amendment by Act LXVI of 1956 though Courts as a general rule, seldom awarded any rate in excess of 6 per cent. per annum. (1965) 2 SCJ 9: AIR 1965 SC 1231 (1236) * 1962 Ker LJ 1063 (1065) * AIR 1959 Andh Pra 64 (69, 70). (Reversed on another point in AIR 1965 SC 1231.)

(4) Mahant in possession of Devasthanam properties — Mahant removed under provisions of Act — Dispute over title of properties continuing for number of years — Mahant is liable to pay interest on mesne profits at normal rate of 6 per cent. (1965) 2 SCJ 9: (1965) 2 SC WR 259: AIR 1965 SC 1231 (1237). (AIR 1959 Andh Pra 64, Reversed.)

(5) It is for the trial Court while passing the final decree fixing the quantum of mesne profits to decide on the question of interest that may be allowed on the amount of profits. Where such decree is clear and unambiguous it will be incompetent for the executing Courts to modify it by making a provision for awarding future interest. If, on the other hand, the decree is capable of sustaining a construction that the question of interest is left to the discretion of the executing Court, it may be open to that Court to exercise such discretion in favour of the decree-holder and to allow him interest also by way of damages at the rate of 6 per cent. Where the decree has simply awarded a fixed amount by way of mesne profits, it has to be taken that interest on such amount has been disallowed. In such a situation the executing Court is clearly incompetent to direct recovery of interest also on the amount fixed by the decree. 1954 Ker

(13) "moveable property" includes growing crops :

(14) "order" means the formal expression of any decision of a Civil Court which is not a decree :

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**Section 2 (12) — Note 3 (contd.)**

LT 463: AIR 1954 Trav-Co 473 (486) (FB). (1946 Trav LR 400, Overruled.)

**4. Assessment of mesne profits.** — (1) The mesne profits necessarily should be the net profits i.e., the profits derived after making deductions towards the necessary expenditure for earning the said profits. AIR 1959 Andh Pra 64 (71): 1958 Andh LT 19: (1958) 1 Andh WR 427 (DB). (Reversed on another point in AIR 1965 SC 1231.) * 1966 Ker LJ 844 (848) * AIR 1954 Pat 447 (448): 1954 BLJR 300 (DB).

(2) The criterion for calculation of mesne profits cannot be what the person out of possession might have got had he been on the land. Mesne profits could only consist of what the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom. AIR 1959 Andh Pra 182 (184, 185): (1959) 2 Andh WR 641 (DB) * AIR 1963 SC 1405 (1413) * AIR 1966 Bom 266 (267) * (1966) 70 Cal WN 56 * 1966 Ker LJ 844 (848) * AIR 1952 Cal 47 (52) * AIR 1955 Andhra 36 (37).

(3) Past mesne profits should be claimed on the date of the suit because it is a cause of action which has already arisen on that date and failure to demand it would bar a future suit under O. 2, Rule 2. But the cause of action for a period after the filing of the suit could not have arisen on the date of the suit and if a claim for mesne profits for that period is to be ruled out it must be on grounds other than the ones in Order 2, Rule 2. 1965 Jab LJ 1012 (1016) * (1968) 9 Guj LR 220 (223, 236) * AIR 1966 Madh Pra 186 (188, 189) * AIR 1963 Madh Pra 194 (195, 196): 1963 Jab LJ 129 (DB).

(4) Mesne profits are something which a plaintiff cannot evaluate and it is solely for the Court to determine them on evidence before it. The claim in a suit for mesne profits is only a rough estimate even if a precise amount is stated and it is for the Court to ascertain the true amount and this can be in excess of amount claimed. AIR 1966 Ker 286 (292) * AIR 1963 SC 1405 (1413) : (1964) 1 S C R 515. (The assessment of compensation based, not on the value of the user but on an estimated return on the value of the property, cannot be sustained.)

(5) There is no basis for holding the lessor a trespasser and make him liable jointly along with the tenants for profits on the calculation of what the tenants got out of the land. (1954) 2 Mad LJ (Andhra) 141: 1954 Andh LT (Civil) 128: AIR 1955 Andh 36 (37).

(6) The true test in calculating mesne profits is what the ordinary prudent agriculturist would have grown on the land from which the plaintiffs have been excluded. Merely because for the previous years the plaintiffs have claimed in the plaint mesne profits at reduced rates, there is no question of estoppel. It is no doubt a circumstance to be taken into account for the purpose of assessment of mesne profits, but the admission in the plaint is by no means, conclusive. It might well be that the plaintiffs deliberately claimed mesne profits at a low rate for the purpose of avoiding payment of court-fee. 1954 BLJR 300: AIR 1954 Pat 447 (448) (DB).

(7) A claim for waste in respect of property in the possession of other and to which plaintiff has no access stands on much the same footing as a claim for mense profits. The plaintiff can only leave it to the Court to ascertain and determine compensation due, and he can only make an approximate claim as in the case of mesne profits. AIR 1966 Ker 286 (293) (DB).

(8) Suit for redemption — Mortgage amount deposited — Fact notified in decree — Plaintiff held entitled to get mesne profits from date of decree when defendant got notice of deposit. 1959 Ker LR 1296 (1298).

**5. Onus.** — (1) Profits actually received are within the contemplation of mesne profits and the burden of proving profits actually received is upon the person who has been in possession of the property. AIR 1961 Andh Pra 428 (429) * AIR 1966 Ker 286 (292) (DB).

**Section 2 (13) — Note 1**

(1) Definition is confined to purposes of this Code only. AIR 1915 Nag 69 (69): 11 Nag LR 18 * AIR 1916 Mad 1142 (1142).

(2) Standing Timber intended to be cut down and removed is movable property. AIR 1931 All 392 (393) (FB).

(3) Standing crops are movable property. AIR 1957 Andh Pra 349 (350).

**Section 2 (14) — Note 1**

(1) 'Order' as defined in the Code is analogous to a decree. AIR 1933 All 762 (763): 56 All 27 (DB).

(2) 'Order' in Section 2 (14) is used to mean what is popularly known to legal public as a formal order in contradistinction to decree and "judgment". AIR 1956 All 79 (80) (DB).

(3) Order usually passed in contempt proceedings is judgment and not an order. AIR 1956 All 79 (80) (DB).

(4) Order written by clerk and signed by Court is a proper order. ('43) 1943 All WR (Rev) 33 (33).

(15) "pleader"[a] means any person entitled to appear and plead for another in Court, and includes an advocate, a vakil and an attorney of a High Court:

[a] See Sec. 29 of Advocates Act which lays down that Advocates enrolled under the Act alone are entitled to practise law.

(16) "prescribed" means prescribed by rules:

(17) "public officer" means a person falling under any of the following descriptions, namely:—

(a) every Judge;

(b) every member of the Indian Civil Service;

(c) every commissioned or gazetted officer in the military, [a][naval or air] forces of [b][the Union] [c][° ° °] while serving under [d][the Government];

(d) every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order, in the Court, and every person especially authorized by a Court of Justice to perform any of such duties;

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**Section 2 (14) — Note 1 (contd.)**

(5) Order directing party to pay commissioner's bill and authorising the Commissioner to recover by executing the order if there was default in payment was held not to come within definition of "order". AIR 1957 Pat 501 (502).

(6) Judicial order must contain discussion of question at issue and reasons for which Court passed the order. AIR 1955 Bhopal 22 (23).

(7) Order which operates is one which Court decides to pass and not one clearly proved to have been dictated as a result of some mistake. AIR 1956 Pat 271 (273) (DB).

(8) Order of High Court in writ petition is not an order of Civil Court. AIR 1957 All 505 (518).

(9) Second appeal — Single judge delivering judgment — Refusing subsequent application for leave on ground of becoming functus officio on delivery of judgment — Order of refusal is not judgment within meaning of Rule 5 in Chapter 8 of Allahabad High Court Rules— It is neither judgment nor order within meaning of S. 2 (9) and (14) Civil P. C. (1960) AIR 1960 All 540 (540): 1960 All LJ 767 (DB).

(10) Award under Section 26 of Land Acquisition Act is order. AIR 1964 Andh Pra 216 (221): (1964) 1 Andh WR 185 (DB).

(11) Award of Debt Board under Hyderabad Agricultural Debtors Relief Act — Not an 'order'. AIR 1968 Bom 361 (363): 70 Bom LR 86.

(12) Order under Section 98 of Representation of the People Act. Containing reasons therefor is both a judgment and order. AIR 1964 SC 1099 (1113).

**Section 2 (15) — Note 1**

See Notes on O. 3, R. 4.

**Section 2 (17) — Note 1**

(1) Public officer is a "person" falling within description of sub-clauses (a) to (h) of this clause. Under General Clauses Act (10 of 1897), "person" includes "any body or association of individuals". AIR 1930 Mad 844 (852, 853).

(2) Cantonment committee is a public officer. ('10) 34 Bom 583 (587) (DB). [But see AIR 1929 Nag 70 (70).]

(3) A corporation can be a public officer. ('51) ILR (1951) 1 Cal 443 (450). (AIR 1929 Nag 70, Dissented from.)

(4) Person who was once in employ of Government but is so no longer is not a "public officer." AIR 1942 Mad 288 (289).

(5) Chairman of Municipality is not public officer. AIR 1947 Pat 385 (386): 25 Pat 739 (DB).

(6) Person answering to description in Clauses (a) to (g) will be regarded as public officer whether he receives pay or not. AIR 1955 Cal 556 (558).

**Clause (a).**—(7) Judge of High Court who is the Board constituted under Section 18, Bihar Land Reforms Act is a public officer. ('58) AIR 1958 Pat 235 (236): 36 Pat 507.

**Clause (b).**—(7-A) Member of I. C. S. holding substantive appointment — His services lent to Port Commissioners as Chairman of that body and as such becoming also Chairman of Dock Labour Board — Officer, as Chairman of Dock Labour Board, is not Public Officer within meaning of Section 2 (17) (b) or (h). (1967) 14 FLR 14 (17) (Cal).

**Clause (c)** — (8) Words "while serving under the Government" in clause (c) exclude persons placed in retired list. AIR 1914 Oudh 199 (199): 17 Oudh Cas 99 (DB). (Obiter.)

(9) Following are public officers under clause (c):

(a) Assistant surgeon in Indian medical service. AIR 1919 Bom 133 (134): 43 Bom 368 (DB).

(b) British officer in Indian Army. AIR 1918 Bom 32 (35): 43 Bom 716.

(c) Major in Indian Staff Corps. ('02) 25 Mad 402 (405) (DB) * ('02)

(e) every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;

(f) every officer of [d][the Government] whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience;

(g) every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of [d][the Government], or to make any survey, assessment or contract on behalf of [d][the Government] or to execute any revenue-process, or to investigate, or to report on, any matter affecting the pecuniary interests of [d][the Government], or to make, authenticate or keep any document relating to the pecuniary

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**Section 2 (17) — Note 1 (contd.)**

1902 Pun LR No. 143, p. 623 (625).

(d) Military officers acting as members of Court-martial convened under authority of Commander-in-chief. AIR 1946 Lah 247 (254, 255): ILR (1947) Lah 22 (SB).

(10) Officer of Regular Corps is not a Public officer. ('02) 1902 Pun LR No. 143, p. 623 (625) * ('97) 24 Cal 102 (106).

**Clause (d)** — (11) Following are public officers within the meaning cl. (d):

(a) Receiver appointed under Provincial Insolvency Act; ('20) AIR 1920 Bom 50 (50): 44 Bom 895 (DB) * AIR 1925 All 241 (242): 47 All 291.

(b) Official liquidator; AIR 1934 Oudh 158 (161): 9 Luck 577.

(c) Official Receiver appointed as receiver in any case; AIR 1931 Cal 61 (62): 57 Cal 1127 (DB) * AIR 1930 Lah 708 (709) (DB) * ('50) 54 Cal WN 960 (972) (DB).

(d) Receiver appointed under and with powers referred to in O. 40, R. 1; AIR 1940 Cal 1 (2, 3) (DB) * AIR 1931 Cal 503 (503): 58 Cal 850 (DB) * AIR 1933 Mad 105 (106).

(e) Official Assignee or official trustee. ('81) 7 Cal 499 (502) * ('89) 12 Mad 250 (252) * AIR 1925 Bom 344 (344): 49 Bom 638.

(f) Administration suit; person appointed to take charge and dispose of property; AIR 1947 Cal 221 (230): ILR (1944) 2 Cal 513 (DB).

(g) Common manager appointed under S. 95, Bengal Tenancy Act; AIR 1920 Cal 575 (579) (DB) * ('13) 40 Cal 150 (159) (DB).

(h) Bench clerk of civil Court: AIR 1918 Upp Bur 28 (30): 3 Upp Bur Rul 1.

(i) Sheriff of Bombay. AIR 1927 Bom 521 (523, 524): 51 Bom 749 (DB).

(12) Liquidator of Co-operative Societies is not an officer of a Court of justice and therefore not a public officer within the meaning of clause (d). AIR 1942 Lah 287 (288): ILR (1943) Lah 389 (DB).

**Clause (e)** — (13) Agent of Railway Company, although he has power under Section 131 of Railways Act to arrest certain person for offences committed on railway, is not a public officer under Cl. (e) of the definition. AIR 1939 Cal 386 (387): ILR (1939) 2 Cal 46 (DB).

**Clause (f)** — (14) Inspector of Police is a public officer. AIR 1937 All 90 (94): ILR (1937) All 390 (DB).

**Clause (g)** — (15) Manager appointed under Bengal Court of Wards Act is not a public officer. AIR 1939 Cal 720 (721): ILR (1940) 1 Cal 73.

(16) Adhikari who receives money towards arrears of public revenue is public officer. AIR 1942 Mad 288 (288).

(16A) Representative of Central Government nominated on recognized Stock Exchange under Section 4 (2) (iii) of Securities Contracts (Regulation) Act (1956) is public officer. (1967) ILR (1967) 1 Punj 448 (459, 460).

**Clause (h)** — (17) One who functions in relation to public religious or charitable endowments like public waqfs performs a public duty. ('44) AIR 1944 Cal 206 (210) (DB).

(18) Following are public officers within the meaning of this clause.

(a) Village headman. AIR 1923 Rang 250 (251).

[But see AIR 1959 Madh Pra 342 (343): 1958 Jab LJ 268. (Sarpanch of Panchayat is not a public officer as defined in S. 2 (17).]

(b) Administrator General. ('01) 25 Bom 529 (532) (DB).

(c) Collector acting as manager of minor's estate. ('88) 11 Mad 317 (318, 319) * ('81) 3 All 20 (22, 23) (FB) * AIR 1914 Bom 125 (126) (DB) * ('90) 14 Bom 395 (402) (DB).

(d) Advocate engaged by Government in civil suit on day fees. ('39) AIR 1939 Pat 77 (79, 80): 17 Pat 706 (DB).

(e) Government servant lent to private institution and paid by such institution. ('49) AIR 1949 Nag 362 (363): ILR (1949) Nag 232.

(f) Manager of estate under Bengal Court of Wards Act though he is paid by the estate. ('48) AIR 1948 Cal 150 (152): ILR (1948) 2 Cal 77.

[But See ('20) AIR 1920 Cal 167 (168).]

interests [d][the Government], or to prevent the infraction of any law for the protection of the pecuniary interest of [d][the Government]; and

(h) every officer in the service or pay of [d][the Government], or remunerated by fees or commission for the performance of any public duty:

[a] Substituted by Act XXXV of 1934, for "or naval."

[b] Substituted for the words "His Majesty" by A. L. O., 1950 [26-1-1950].

[c] Words "including His Majesty's Indian Marine Service" were omitted by Act XXXV of 1934.

[d] Substituted for "the Crown" by A. L. O., 1950 [26-1-1950].

(18) "rules" means rules and forms contained in the First Schedule or made under Section 122 or Section 125:

(19) "share in a corporation" shall be deemed to include stock, debenture stock, debentures or bonds;

(20) "signed", save in the case of a judgment or decree, includes stamped.

(21) State.[a] [Omitted by the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), S. 4.]

[a] The old Cl. (21) of Sec. 2 was as follows:

"(21) 'State' means a Part A State or a Part C State, and "States" means all the territories for the time being comprised within Part A States and Part C States."

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**Section 2(17) — Note 1 (contd.)**

(g) Liquidator appointed under S. 42, Co-operative Societies Act. ('42) AIR 1942 Lah 287 (288): ILR (1943) Lah 389 (DB) * ('39) AIR 1939 Nag 232 (233).

[See however ('40) AIR 1940 Mad 831 832, 833): ILR (1940) Mad 929 (DB).]

(h) Person performing public duty although paid out of Commission charged to private person. ('28) AIR 1928 Sind 76 (78): 22 Sind LR 63.

(i) Commissioner of Calcutta Corporation is Public Officer within meaning of Section 2 (17) (h). (1960) 64 Cal WN 60 (64).

(j) Minister of a State is a "public officer" within the meaning of Section 80 as defined in S. 2 (17) (h). AIR 1968 J and K 98 (102).

(k) Custodian under Administration of Evacuee Property Act is Public Officer. AIR 1964 Pat 275 (277): 1964 BLJR 291 (DB).

(l) Officers of Government functioning on deputation with State Electricity Board are public Officers. 1966 Cri LJ 868 (870): 1965 Raj LW 481.

(19) Fact that a person is a public officer within meaning of the section does not necessarily entitle him to benefits of Article 311. Constitution of India. ('57) AIR 1957 Orissa 112 (116).

(20) Port Commissioners under Calcutta Port Act are not Public Officers. ('51) ILR (1951) 1 Cal 443 (449, 450).

(21) Firm of Chartered Accountants to whom Government handed over management of an enemy firm under R. 113-A, Defence of India Rules was held not to be public officer. ('54) AIR 1954 Pat 596 (609) (DB).

[But see ('57) AIR 1957 All 492 (494).]

(22) Rehabilitation Finance Administrator is not Public Officer. (1959) 1959 Raj LW 351 (353).

**Section 2 (19) — Note 1**

(1) "Debenture" has not been precisely defined anywhere. (1881) 7 QBD 165 (172).

**Section 2 (20) — Note 1**

(1) Under Section 3 Cl. (56) of General Clauses Act, word "sign" includes in the case of person unable to write, a "mark." ('96) 6 Mad LJ 209 (210) * ('98) 2 Cal WN 603 (605) (DB).

(2) Definition in section is wider and "signed" includes "stamped" also. ('98) 25 Cal 911 (916) (DB).

(3) Where document is stamped it carries definite idea to person noticing it unlike in case of a "mark". ('98) 25 Cal 911 (915, 916) (DB).

(4) Mark will be signature only if person is unable to write. Stamping will be signature even if he is not illiterate. ('81) 3 All 575 (576) (DB) * AIR 1928 Mad 175 (175, 176): 51 Mad 242 (DB).

(5) Signing may be done by writing name in any part of document provided it is intended as acknowledgment by party that it is his instrument. ('81) 6 Cal 340 (352).

(6) Initials or other form of writing name may be signature, if it is clear as to who made it and if it is intended to operate as acknowledgment by party initialling that it is his instrument. ('07) 29 All 145 (146) (DB) * ('92-96) 1892-96 Upp Bur Rul 462 (463) * ('67) 8 Suth WR 395 (397) (DB).

(7) Definition of word 'signed' in Section 2 (20) cannot be extended to acts which are required to be done, under other special Acts like Public Demands Recovery Act. AIR 1954 Cal 355 (359): ILR (1956) 1 Cal 430 (DB).

**3. Subordination of Courts.**—For the purposes of this Code, the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court.

[1882, S. 2]

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**SECTION 3 — SYNOPSIS**

**1. Scope.**
**2. High Court.**
**3. District Court** — See Section 2 (4).

**Topic Indicator**

Collector's Court — See Note 1.
'Civil Court' — See Note 1.
Authority under Payment of Wages Act — See Note 1.
Compensation Officer — See Note 1.
Tahsildar and Revenue Divisional Officer — See Note 1.
Administrative Tribunal — See Note 1.

**1. Scope.** — (1) District Court is subordinate to the High Court. AIR 1929 All 581 (582, 583): 51 All 957 (DB). (District Judge acting under Charitable and Religious Trusts Act.) * (1956) 69 Mad LW 72 (74). (District Court revising the order of the Appellate Authority under Madras Buildings (Lease and Rent Control Act.)

[But see AIR 1929 Oudh 389 (390, 397): 4 Luck 539 (FB). (District Court acting in its appellate authority over rent suits is not subordinate to Chief Court.)]

(2) Court of an Additional District Judge is in no sense a civil Court of a grade inferior to that of a District Court. AIR 1959 Madh Pra 188 (189, 190): 1958 Jab LJ 749.

(3) Every Civil Court of a grade inferior to that of District Court is subordinate to High Court and District Court. (1894) 17 Mad 377 (378) (DB) * (1909) 3 Ind Cas 539 (540) (DB) (Cal).

(4) Collector's Court is not subordinate to District Court or High Court by virtue of this section. AIR 1942 Pat 1 (18, 29): 21 Pat 1 (FB). (Per majority of Full Bench — Meredith J., dissenting.) * (1878) 3 Cal LR 508 (509) (DB) * AIR 1930 Nag 271 (271): 26 Nag LR 309.

[See also AIR 1930 Pat 13 (14). (Revenue Courts are not subordinate to Civil Court.)]

(5) A Court of Subordinate Judge is subordinate to the District Court. (1909) 3 Ind Cas 539 (540) (DB) (Cal).

(6) Words "Civil Court" include Revenue Courts. AIR 1944 Mad 139 (141, 142): ILR (1944) Mad 595 (DB).

[See also AIR 1966 Mys 5 (9): (1965) 1 Mys LJ 223. (Words "civil Court" should not be narrowly construed — AIR 1960 Andh Pra 49, Dissented from.)]

(7) Section is not exhaustive or exclusive. AIR 1963 Andh Pra 37 (40).

(8) Section 3 must be interpreted as a comprehensive declaration, as a matter of corollary, of the subordination of all 'Courts of civil judicature' to District Court in a district area and to the High Court in a provincial area. AIR 1966 Mys 5 (9): (1965) 1 Mys LJ 223 * AIR 1951 Pat 140 (148): (1951-52) 3 FJR 394 (DB).

(9) A Court from whose decision an appeal lies to the High Court is a Court subordinate to the High Court. AIR 1964 All 504 (513, 516): 1964 All LJ 358 (FB). (AIR 1957 All 352, AIR 1962 All 378, AIR 1957 All 495 Overruled, Observation of Kapur J. in AIR 1955 Punj 197 (FB). Dissented from. 9 I A 171 (PC), AIR 1962 All 315 (FB) and AIR 1934 All 260 (FB), Rel. on.) * AIR 1967 Pat 153 (154): 1966 BLJR 632 (DB). (Authority under Section 28 of Bihar Shops and Establishments Act (8 of 1954) is tribunal. If not under Section 115, High Court can entertain application under Article 227 of Constitution.)

(10) The enumeration of Subordinate Courts in the section does not exclude all other Courts from being subordinate to the High Court. Madh BLJ 1955 HCR 275 (283) (DB).

[See AIR 1944 Mad 139 (141, 142): ILR (1944) Mad 595 (DB) * AIR 1946 Cal 508 (516, 517): ILR (1946) 2 Cal 573 (FB). (Object of Section 3 is not to define or enumerate Courts subordinate to High Court but simply to declare order of subordination, for the purpose of Code.)]

(11) Tahsildar and Revenue Divisional Officers discharging functions under Section 16 of Andhra Tenancy Act (18 of 1956) do not fall within the category of Courts enumerated in Madras Civil Courts Act (3 of 1873) and as such are not civil Courts subordinate to High Court. AIR 1960 Andh Pra 49 (51, 52): (1959) 2 Andh WR 264 (DB) * AIR 1955 NUC (Madh B) 5626. (A Small Cause Court is Subordinate to District Court.)

(12) Words 'Court immediately below' appearing in Article 133 (1) of the Constitution refer to Court which is subordinate to High Court. AIR 1962 Mad 490 (492): 75 Mad LW 480 (DB).

(13) Collector acting under the Bombay Mamlatdar's Courts Act is a Court subordinate to the High Court. (1913) 37 Bom 114 (116) (DB) * AIR 1966 Mys 5 (7, 10): (1965) 1 Mys LJ 223. (AIR 1946 Bom 200, Dissented from.)

(14) Collector's Court acting under Orissa Tenancy Act is subordinate to the High Court though it is not a Civil Court. AIR 1942 Pat 1 (19, 20): 21 Pat 1 (FB). (Per majority of Full Bench.)

(15) Sub-Collector and District Collector in proceedings under Section 15 of the Madras Agriculturists' Relief Act

**4. Savings.**—(1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

(2) In particular and without prejudice to the generality of the proposition contained in sub-section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land.

[1882, S. 4]

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**Section 3 — Note 1 (contd.)**

(1938) are subordinate to High Court AIR 1944 Mad 139 (141, 142): ILR (1944) Mad 595 (DB).

(16) Collector acting under S. 18 of the Land Acquisition Act of 1894 is not subordinate to the High Court, even assuming that he is a "Court". ('46) AIR 1946 Cal 508 (516, 517): ILR (1946) 2 Cal 573 (FB).

(17) Authority appointed under the Payment of Wages Act, 1936, is an administrative tribunal and not a civil Court and as such not subject to revisional jurisdiction of High Court. AIR 1950 Nag 14 (20): ILR (1949) Nag 905 (DB). (AIR 1945 Nag 94: ILR (1944) Nag 540, Overruled.)

(18) An administrative Tribunal cannot ignore the law declared by the highest Court in the State and initiate proceedings in direct violation of law so declared. (Per Magority: Sarkar J. Dubitante). AIR 1962 SC 1893 (1898, 1905): (1963) 3 SCR 338. (Proceeding before Collector of Customs under Section 167 (8) of Sea Customs Act, 1878.)

(19) Election Petitions Commissioners appointed under the Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order (1936) are independent and Special Tribunals and not a Court subordinate to the High Court. AIR 1949 Lah 131 (165): Pak LR (1949) Lah 215: 50 Cri LJ 598 (FB). (Cornelius J. contra.)

(20) Judge presiding over election tribunal under C. P. and Berar Municipalities Act, is not a civil Court. 1957 MPLJ 170 (174) (Nag).

(21) Tribunal constituted under Section 4 of Displaced Persons (Debts Adjustment) Act, 1951 is a Court subordinate to High Court. AIR 1964 All 504 (516): 1964 All LJ 358 (FB). (AIR 1957 All 352, Overruled.)

(22) Proceedings of quasi-judicial officers acting under Displaced Persons (Claims) Act, 1950, are subject to controlling jurisdiction of High Court under Article 226 of the Constitution. AIR 1957 Punj 186 (188): ILR (1957) Punj 348.

(23) See also, Section 115.

(24) Court of District Judge, when hearing an appeal under Section 12 of M. P. Accommodation Control Act (23 of 1955), is a Court subordinate to the High Court. ILR (1963) Madh Pra 347 (357).

**2. High Court.** — (1) For the definition of "High Court" see S. 3 Cl. (25) of the General Clauses Act, 10 of 1897.

**3. District Court.** — See Section 2 (4).

## SECTION 4 — SYNOPSIS

**1. Scope.**
**2. Special Procedure.**

**Topic Indicator**

Conflict between Code and special or local law — See Note 1.
Criminal proceedings before Rent Controller — See Note 2.
Suit regarding wakf — See Note 2.
Commission under Commission of Inquiry Act, 1952 — See Note 2.

**1. Scope.** — (1) Section 4, does not bar the applicability of the Code where the special or local law is silent. AIR 1954 Cal 347 (349): 57 Cal WN 948.

(2) When anything in the Civil P. C. is in conflict with anything in special or local law or with any special jurisdiction or power conferred or any special form of procedure prescribed by or under any other law, the Code will not (in the absence of any specific provision to the contrary) prevail so as to override such inconsistent provisions. AIR 1956 Nag 215 (217) (DB) * AIR 1957 Madh B 63 (64). (Section 4 of Madhya Bharat Mafi and Inam Tenants and Subtenants Protection Act (32 of 1954) is a law relating to special jurisdiction about inam tenants.) * 1957 All WR (HC) 157 (160) * AIR 1956 Nag 211 (213): ILR (1956) Nag 226 (DB) * AIR 1956 Sau 58 (62) (DB) * AIR 1955 Pat 1 (27): 33 Pat 690 (SB). (A valid special or local law ousting jurisdiction of Civil Court cannot be said to be repugnant to or inconsistent with the Civil P. C.) * ('55) ILR (1955) Madh B 413 (416) * ('55) ILR (1955) Mys 360 (362) * ('55) ILR (1955) 5 Raj 575 (579) * ('86) 13 Cal 221 (223) (DB) * ('86) 9 Mad 332 (333) (DB) * AIR 1937 All 365 (366) * AIR 1937 All 165 (166, 167): ILR (1937) All 386 (DB) * AIR 1937 All 129 (138): ILR (1937) All 350 (FB) * (1900) 27 Cal 508 (511 to 514) (FB). (Overruling 24 Cal 249.) * ('94) 17 Mad 298 (299) (DB). (Following 16 Mad 451) * AIR 1932 Oudh 163 (164) (DB) * ('31) AIR 1931 Oudh

**Section 4 — Note 1 (contd.)**

385 (385) * AIR 1930 Pat 130 (133) : 8 Pat 830 (DB) * AIR 1962 Andh Pra 245 (247): (1962) 1 Andh WR 24 (DB). (Power of review petition against order cancelling leave to appeal is specifically vested in Supreme Court.) * (1967) 1 Mys LJ 680 (682). (In execution of award under Bombay Agricultural Debtors' Relief Act (28 of 1947), provisions of Civil P. Code cannot be brought into play.) * AIR 1962 All 543 (546): 1962 All LJ 729 (DB). (Power of Allahabad High Court to entertain special appeal under Rule 5 of Chap. VIII of Rules of Court, is a special jurisdiction or power.) * AIR 1956 Sau 29 (30) (DB). (Exemption under Nawanagar State Agriculturists Act prevails over provisions of Section 60 C. P. C.)

[See also AIR 1955 Hyd 82 (89): ILR (1955) Hyd 337 * AIR 1955 Mys 65 (67): ILR (1955) Mys 43 (FB) * ('38) AIR 1938 Lah 658 (663) (DB).]

[See however AIR 1930 Cal 53 (54): 56 Cal 704. (Local Acts have no effect **beyond the local jurisdiction.)]**

**(3) When there is no conflict between special law and the Code, the** Code will apply. ('32) AIR 1932 Oudh 210 (213): 7 Luck 601 (FB) * ('57) 1957 All WR (HC) 157 (160). (Charitable and Religious Trusts Act does not contain anything which ousts revisional jurisdiction of the High Court under Sec. 115.) * (1967) 2 Andh LT 355 (357, 358): (1967) 2 Andh WR 355. (Relevant rule of Civil P. C. relating to amendment would apply in eviction proceeding under A. P. Act 15 of 1960.)

(4) The 'specific provision to the contrary' need not be in this Code itself or in the special or local law concerned. If a third Act provides that notwithstanding anything contained in the Code or in the special or local law the Code shall apply it is a "specific provision to the contrary." AIR 1946 Cal 1 (7): ILR (1947) 1 Cal 537 (SB).

(5) If the legislature says that an appeal arising out of trial for a statutory offence should be heard in accordance with the provisions of the Civil Procedure Code, there is nothing inherently objectionable in the legislation. AIR 1968 Cal 170 (174): 1968 Cri LJ 478.

(6) With regard to the transfer and hearing of appeals there exists no specific provision to the contrary in C. P. Code, and, consequently the State legislature can make a law even though in variation of the provisions of the Code by conferring special jurisdiction or power on an authority. 1964 All LJ 980 (984).

(7) Hyderabad Suits Against Government Act (5 of 1320 Fasli) (since repealed in 1951) not being special or local law cannot be implemented in new set up. AIR 1965 Andh Pra 288 (294) * (1955) 1 Andh WR 484 (DB).

**2. Special procedure.** — (1) If an order under Section 104 (1) is passed in appeal by a Single Judge of the High Court, an appeal from such an order is competent under Clause 15 of the Letters Patent and is not barred under S. 104 (2). AIR 1956 Nag 215 (217) (DB) * AIR 1956 Nag 211 (213): ILR (1956) Nag 226 (DB) * AIR 1940 Bom 216 (218): ILR (1940) Bom 426 (DB).

[See AIR 1964 Pat 76 (77, 78): 1964 BLJR 34 (DB) * AIR 1965 Pat 141 (141) (DB) * AIR 1965 Pat 472 (477, 478): 1965 BLJR 300 (FB). (Findings recorded by Single Judge in First Appeal cannot be interfered with in L. P. Appeal.)

[See also ('54) AIR 1954 Sau 152 (154, 155) (DB). (The appeal provided under Section 22 (a) (1) of the High Court of Saurashtra Ordinance (2 of 1948) from a decision of a single Judge to the Bench is a special jurisdiction.) * AIR 1965 Pat 196 (199): 1965 BLJR 24 (DB). (In Letters Patent Appeal from decision in first appeal, finding of fact can be interfered except in cases to which Section 100, Civil P. C. applies.)]

(2) The Provincial Insolvency Act is a special Act creating a special Court which is governed in matter of appeals in insolvency cases by Section 75 (1) of that Act and not by this Code. ('46) AIR 1946 Nag 42 (43): ILR (1945) Nag 719 (DB).

(3) The Travancore Nair Act (2 of 1100) being a special law and there being a special provision relating to appeals in that Act under Section 7 (4), the provisions of the Code relating to appeals will not apply to that Act. ('53) AIR 1953 Trav-Co 37 (39) (DB).

(4) Section 93 of the U. P. Panchayat Raj Act 26 of 1947 being a special law overrides the provision of Section 42 Civil P. C. (as amended in U. P.) AIR 1966 All 218 (220): 1965 All LJ 423.

(5) Presidency Small Cause Courts Act is a special law. Procedure in Civil P. C. will not be applicable. AIR 1968 Cal 234 (236).

(6) Order 39, Rule 2 cannot be invoked in order to issue injunction in election petitions under Calcutta Municipalities Act, 1951. AIR 1968 Cal 234 (238).

(7) In face of specific provisions in Chapter XXII of Rajasthan High Court Rules (1952), resort cannot be had to the provisions of Order 1, Rule 1 or R. 8 for that matter. AIR 1968 Raj 20 (22): 1967 Raj LW 144.

(8) Provisions of Order 11, Rule 19 (2) cannot abrogate the provisions of Sections 123, 162 of Evidence Act. 1956 Madh BLJ (HCR) 1532 (1537).

(9) Provisions of Order 44, Rule 1 are subject to provisions of Rule 10 (2) of

**5. Application of the Code to Revenue Courts.**—(1) Where any Revenue Courts are governed by the provisions of this Code in those matters of procedure upon which any special enactment applicable to them is silent, the [a][b][State] Government] [c][° ° °] may, by notification in the [d][Official Gazette], declare that any portions of those provisions which are not expressly made applicable by this Code shall not apply to those Courts, or shall only apply to them with such modifications as the [a][b][State] Government] [e][° ° °] may prescribe.

(2) "Revenue Court" in sub-section (1) means a Court having jurisdiction under any local law to entertain suits or other proceedings relating to the rent, revenue or profits of land used for agricultural purposes, but does not include a

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**Section 4 — Note 2 (contd.)**

(Allahabad) Rules of Court (1952). AIR 1965 All 79 (80): 1964 All LJ 283.

(10) Mysore Agriculturist's Relief Act (18 of 1928) is a special Act and normal discretion of the Court under Civil P. C. relating to amendment of pleadings, filing of pleadings and to amend issues already framed or to frame additional issues at any time before passing of a decree is controlled by Section 4 thereof. ILR (1958) Mysore 645 (647).

(11) Order against garnishee under Order 21, Rule 46-C by Small Cause Court — Revision alone maintainable. AIR 1962 Ker 233 (234): 1962 Ker LJ 472 (DB). (AIR 1962 Ker 26, Overruled.)

(12) The provisions of Sections 58-A and 59 of Madras Act 26 of 1948 operate as bar on the powers of Civil Court relating to arrest and detention of landholder in execution of decree. AIR 1961 Andh Pra 399 (400): (1961) 1 Andh WR 328 (DB).

(13) Acts creating special tribunals may provide that their procedure would be governed by the Civil P. C. AIR 1957 All 495 (499). (U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Section 48 — Tribunals are not civil Courts, even though they follow Civil P. C. — AIR 1951 Pat 140, AIR 1932 All 651 and 37 Bom 114, Dissented from.) * AIR 1968 Cal 170 (173, 174): 1968 Cri LJ 478. (Criminal proceeding before Rent Controller under Section 31 of W. B. Premises Tenancy Act (1956). Appeal against order — Provisions of Civil P. C. would apply.) * AIR 1962 Ker 343 (346): 1962 Ker LJ 902 (FB). (Suit regarding wakf instituted by private party — Provisions of Section 92 are not taken away by Section 55 Wakf Act.) * AIR 1961 Bom 225 (226, 227): 63 Bom LR 125 * (1954) 58 Cal WN 910: ILR (1956) 1 Cal 362 (DB). (Suit under Section 16 W. B. Premises Rent Control (Temporary Provisions) Act (17 of 1950) — Application under Order 9, Rule 13 to set aside ex parte decree rejected — Appeal lies.) * AIR 1967 Delhi 61 (63): 69 Punj LR (D) 29. (Court can order amendment of pleadings in proceedings under Delhi and Ajmer Rent Control Act.) * ILR (1963) Madh Pra 347. (Court of District Judge, while entertaining appeal under Section 12 of M. P. Accommodation Control Act (23 of 1955) is not exercising any special jurisdiction.)

(14) If any law prescribes that a certain person must be impleaded as a defendant, even though no relief is sought against him, the failure to implead him will be fatal to the suit, notwithstanding the provision in Order 1, Rule 9. AIR 1963 All 549 (550): 1963 All LJ 389 (FB).

(15) Commission appointed under Commission of Inquiry Act (1952) is neither a civil Court, nor are its proceedings judicial, nor do the provisions of Civil P. C. or of Evidence Act apply to its proceedings. AIR 1960 Punj 86 (94): ILR (1960) 1 Punj 416.

## SECTION 5 — SYNOPSIS

**1. Scope and object.**
**2. Revenue Courts.**
**3. Mamlatdar's Courts.**

**Topic Indicator**

Court under Madras Cultivating Tenant's Protection Act — See Note 2.
Settlement Officer — See Note 2.

**1. Scope and object.** — (1) When local Revenue or Rent Acts are silent on any particular matter of procedure the provisions of the Code would apply. AIR 1925 All 264 (265) (DB).

[See also AIR 1956 Hyd 164 (165): ILR (1956) Hyd 1 (DB).]

(2) Local law creating special tribunal may lay down that its procedure would be governed by the Code. But this would not make the Tribunal a Civil Court. AIR 1957 All 495 (499). (AIR 1951 Pat 140, AIR 1932 All 651 and 37 Bom 114, Dissented from.)

(3) Section 5 provides that in cases where the Code applies to Revenue Courts, the State Government may declare that any portions of the Code so applicable shall not apply to those Courts or shall apply to them with such modification as the State Government may prescribe. AIR 1956 Hyd 164 (165): ILR (1956) Hyd 1 (DB).

(4) The object of the section is to preserve the summary character of rent litigation under local laws, and to avoid delay and difficulty in the easy realisation of rents. AIR 1930 All 556 (556) (DB) * ('29) AIR 1929 Oudh 341 (347): 4 Luck 573 (DB).

Civil Court[f] having original jurisdiction under this Code to try such suits or proceedings as being suits or proceedings of a civil nature.

[1882, S. 4A.]

[a] Substituted for the words "Local Government" by Government of India (Adaptation of Indian Laws) Order, 1937 [1-4-1937].

[b] Substituted for "Provincial" by A. L. O., [26-1-1950].

[c] The words "with the previous sanction of the Governor-General in Council" are repealed by the Devolution Act, XXXVIII of 1920.

[d] Substituted by Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Official Gazette".

[e] The words "with the sanction aforesaid" are repealed by the Devolution Act XXXVIII of 1920.

[f] For promoting the development of democratic institutions and securing a greater measure of participation by the People in the Five Year Plans, in almost all the States and Territories Zilla Parishads or Panchayats have been established and functioning for the last many years. Nyaya Panchayats or Gram Panchayats or Panchayati Adalats formed under these Acts have been given criminal and civil jurisdictions, within defined limits. Procedure to be followed by them has also been prescribed by these Acts and hence it has been laid down in many of these Acts that Code of Civil Procedure or Code of Criminal Procedure or Evidence Act shall not apply to them. For example, see West Bengal Panchayat Act, 1956 (1 of 1957), S. 96; Punjab Gram Panchayat Act, 4 of 1953, S. 66 and Rajasthan Panchayat Act 21 of 1953, S. 49.

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**Section 5 — Note 1 (contd.)**

(5) Where a rent suit is transferred to a Civil Court for trial, by reason of a question of title arising therein, the suit will be governed by this Code and not by the special law applicable to the Revenue Court. AIR 1939 Pat 369 (370).

**2. Revenue Courts.** — (1) The fact that the Revenue Courts are created under local law, with special jurisdiction to entertain proceeding relating to rent, revenue or profits of land used for agricultural purposes does not mean that these Courts are not Courts of Civil Judicature. The matters tried by them relate to civil rights and the Courts trying them are thus Civil Courts ('83) 9 Cal 295 (301, 303): 9 Ind App 174 (PC) * ('09) 36 Cal 252 (254) * ('03) 26 Mad 518 (520) * AIR 1935 Nag 125 (125): 31 Nag LR 246.

[See however AIR 1957 All 495 (499). (Courts do not become Civil Courts, merely because their procedure is governed by the Civil P. C.) * AIR 1942 Pat 1 (20, 29): 21 Pat 1 (FB). (The Court of the Deputy Collector and the Collector while trying cases or hearing appeals under the Orissa Tenancy Act are Revenue Courts and not Civil Courts even though they may be trying suits or proceedings of a civil nature.)]

(2) The Code is applicable to the procedure of the Revenue Courts except where its operation is negatived by the special or local law governing such suits. ('97) 19 All 510 (511) * ('83) 5 All 406 (413, 418) (FB) * (1900) 22 All 182 (189) * ('92) 14 All 347 (347) * ('11) 38 Cal 832 (840) (DB) * ('94) 21 Cal 514 (518) (DB) * ('83) 9 Cal 295 (303): 9 Ind App 174 (PC) * (1900) 10 Mad LJ 398 (399) * ('97) 21 Mad 236 (237) (DB) * AIR 1918 Oudh 217 (220): 21 Oudh Cas 220.

[See also (1967) 80 Mad LW 419 (421): (1968) 1 Mad LJ 190. (Proceedings in Courts constituted under Mad. C. T. Protection Act are governed by provisions of Civil P. C. "as far as possible" — Provisions of Code will not prevail over special provisions of the Special Act.)]

(3) Even where the trial of the suit is specially provided for by the special or local law, the procedure prescribed by the Code will apply where an appeal is taken to a Civil Court from the decree of the Revenue Court, or such decree is transferred for execution to the Civil Court. ('01) 28 Cal 532 (537).

(4) Settlement Officer appointed under East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (1948) is not Revenue Court. (1965) AIR 1965 Punj 454 (455): 1965 (2) Cri LJ 669: 1965 Cur LJ 293.

**3. Mamlatdar's Courts.** — (1) These are Civil Courts but established under a special law with a special form of procedure prescribed for suits contemplated therein. ('93) 17 Bom 645 (647) (DB) * AIR 1966 Mys 5 (8): (1965) 1 Mys LJ 223.

(2) The Code generally has been held to be inconsistent with the nature of the special Act and therefore not applicable. ('88) 13 Bom 552 (553, 554) (DB) * ('12) 6 Sind LR 67 (70) (DB) * ('92) 17 Bom 645 (647) (DB).

**6. Pecuniary jurisdiction.**—Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any Court jurisdiction over suits the amount or value of the subject-matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction.

[1882, S. 6 last para 1877, Ss. 6 and 7; 1859, Ss. 383 and 384.]

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**SECTION 6 — SYNOPSIS**

**1. Scope.**
**2. Pecuniary jurisdiction (General) —** See Section 15.
**3. Determination of jurisdiction.**
**4. Decree in excess of pecuniary jurisdiction.**
**5. Execution of decrees in excess of pecuniary limits — See Section 38.**
**6. Transfer of decree for execution — Jurisdiction of transferee Court.**
**7. Value of subject matter.**

**1. Scope.**— (1) Section does not apply to proceedings which are not suits or continuation of suits. ('26) AIR 1926 Cal 853 (854) (DB).

(2) Word 'Suit' in Section 6 cannot be interpreted to include 'execution proceedings'. AIR 1966 Ker 318 (320): 1966 Ker LJ 530: (1889) ILR 16 Cal 465. (AIR 1940 Cal 161 and AIR 1936 Pat 177, Dissented from.)

[But see ('40) 1940 Nag L Jour 244 (249). (The word 'suit' includes proceedings in execution.)]

(2-A) In claim suit, Court can stay execution of decree, though passed by superior Court. AIR 1969 Andh Pra 236 (237).

(3) Munsif with a pecuniary jurisdiction up to Rs. 2000, can entertain application to execute an award for Rs. 15,000 passed by the President of the Calcutta Improvement Tribunal in an apportionment case, the proceeding before the Improvement Tribunal not being a suit. ('26) AIR 1926 Cal 853 (854) (DB).

(4) Court can try incidentally an issue as to property the value of which is beyond its jurisdiction. ('37) AIR 1937 Rang 219 (220) * AIR 1969 Assam 81 (84): 1969 Cri LJ 854 . (AIR 1968 Raj 368, Dissented from.)

(5) A reference to Civil Court under Section 146 of the Code of Criminal Procedure is neither a suit nor a proceeding. Competency of the Court consists in its territorial jurisdiction alone and not in its pecuniary jurisdiction. ('58) AIR 1958 Pat 308 (309, 310): 1958 Cri L Jour 796 (DB).

(6) Proceedings before Civil Court under Section 146 (1-A) Criminal P. C. are not in nature of suit. AIR 1965 All 442 (442): 1965 (2) Cri LJ 337.

(7) Section 6 speaks of only the pecuniry jurisdiction and not of territorial nor even of jurisdiction of the Court with reference to the nature of the suit. This section is not primarily concerned with actual fixation of pecuniary limit of ordinary jurisdiction. That is essentially within province of the Civil Courts Act. AIR 1966 AP 66 (67: (1965) 1 Andh WR 366.

(8) The City Civil Court and not the High Court, has exclusive jurisdiction to entertain and dispose of suit under Section 19, Hindu Marriage Act (1955) without any qualification that the matter should be within the pecuniary limits of its jurisdiction. AIR 1960 Cal 577 (579, 580).

**2. Pecuniary jurisdiction (General.) —** See Section 15.

**3. Determination of jurisdiction.**— (1) The "value of a suit" for the purposes of jurisdiction is determined by the valuation in the plaint. ('54) AIR 1954 All 749 (750) * ('51) 3 Pepsu LR 458 (461) * ('41) AIR 1941 Nag 138 (139): ILR (1941) Nag 194 (DB) * ('29) AIR 1929 Bom 337 (339) (DB) * ('95) 17 All 69 (76) (DB) * ('94) 16 All 286 (288) (DB) * ('88) 10 All 524 (528) (DB) * ('90) 15 Bom 82 (83) (DB) * ('24) AIR 1924 Cal 783 (785): 51 Cal 737 (DB) * ('34) AIR 1934 Lah 803 (803) * ('17) AIR 1917 Mad 663 (663) * ('15) AIR 1915 Mad 683 (684) (DB) * ('28) AIR 1928 Nag 288 (288): 24 Nag LR 23 * ('99) 2 Oudh Cas 103 (106, 107) * ('35) AIR 1935 Pat 160 (161): 14 Pat 414 (DB) * ('15) AIR 1915 Sind 3 (3): 9 Sind LR 164 (DB) * AIR 1959 Punj 646 (648). (After determination by Court, plaint must be amended.) * 1959 MPLJ 1045 (1046) * (1965) 69 Cal WN 469 (472).

[See also ('34) AIR 1934 Pat 184 (185, 186): 13 Pat 329 (SB). (Criterion is an examination of the plaint and not an examination of the issues which have been framed.) * ('32) AIR 1932 All 473 (474) (DB) * ('32) AIR 1932 All 460 (460) (DB) * ('31) AIR 1931 All 664 (664) * ('96) 20 Bom 675 (676) (DB).]

[See however ('78) 2 Cal L Rep 134 (136, 137) (DB).]

(2) Where the plaintiff by fraud or misrepresentation, deliberately overvalues or undervalues the claims of choosing his forum, the jurisdiction is not determined by this valuation. ('91) 13 All 320 (322, 323) (DB) * ('93) 15 All 363 (365) (DB) * ('11) 35 Bom 239 (242) (DB). (Consent of parties cannot affect jurisdiction.) * ('12) 16 Ind Cas 940 (941) (DB) (Cal) * ('35) AIR 1935 Oudh 296 (297): 10 Luck 587 (DB).

[See ('37) AIR 1937 Cal 643 (644, 645).]

(3) In the case of deliberate fraudulent valuation, it is the true value at which the plaint ought to have been valued that will represent the value of the suit. ('90) 17 Cal 680 (683) (DB) * ('83) 8 Bom 31 (33, 34) (DB).

[See ('51) AIR 1951 Mad 661 (662, 663).]

(4) Jurisdiction is not affected by the defendant's plea in the suit. ('50) AIR 1950 Madh B 14 (14) * ('46) AIR 1946 All

**Section 6 — Note 3 (contd.)**

379 (382): ILR (1946) All 692 (FB) * ('39) 182 Ind Cas 178 (179) (Pat) * ('30) AIR 1930 All 193 (198): 52 All 501 (FB) * ('88) 10 All 524 (528) (DB) * ('89) 13 Bom 489 (491) (DB) * ('89) 1889 Pun Re No. 69, p. 220 * ('88) 1888 Pun Re No. 44, p. 112 (FB) * ('26) AIR 1926 Mad 37 (38) * ('98) 21 Mad 271 (273) (DB).

[See also ('10) 6 Ind Cas 131 (132, 133, 134) (DB) (Cal) * ('91) 15 Bom 400 (405) (DB).]

(5) Where in a mortgage suit a subsequent mortgagee is added as a defendant who wants his rights to be investigated and decided, the suit for the purpose of jurisdiction has to be valued on the amount due on the plaintiff's prior mortgage; the jurisdiction is not lost if the amounts claimed on the prior and subsequent mortgages taken together exceed the pecuniary jurisdiction of the Court. ('51) AIR 1951 Bom 426 (428): ILR (1952) Bom 1. (AIR 1941 Nag 138; ILR (1941) Nag 194, Foll.) * ('41) AIR 1941 Nag 138 (140): ILR (1941) Nag 194 (DB).

(6) Where the plaintiff institutes his suit in a particular forum by valuing his suit accordingly, he cannot in appeal assert that the suit ought to have been tried by a Court of a lower grade than that in which it was instituted. ('40) AIR 1940 Bom 242 (243, 244) (DB).

(7) Section 6 is subject to provision expressly made in Section 11 of the Suits Valuation Act. (1962) 66 Cal WN 476 (483).

(8) The pecuniary jurisdiction is governed by the value stated by the plaintiff in the plaint and such jurisdiction is not ousted by the Court finding that a decree for a sum exceeding the limit of its ordinary pecuniary jurisdiction should be given to the plaintiff. AIR 1961 Madh Pra 67 (71): 1961 Jab LJ 47. (8 CPLR 86 and 9 Nag LR 112 and AIR 1941 Nag 346 (350). Foll.; ILR 34 Cal 954 (FB) and 15 Cal WN 506 and ILR 39 Cal 663, Dissent. from.)

(9) The jurisdictional value of a suit does not change with the form of the decree and the forum of appeal is to be determined by the value of the suit and not by the value of the decree. AIR 1960 Punj 434 (436, 437). (83 Pun Re 1912 and AIR 1914 Lah 432 and AIR 1936 Lah 133 and AIR 1938 Lah 765, Foll.; 16 Pun Re 1908 (FB), Not foll.)

(10) See also Section 15.

**4. Decree in excess of pecuniary jurisdiction.** — (1) Where A sues B in the Munsif's Court for recovery of Rs. 2,000 for past mesne profits (i.e., mesne profits up to date of suit) and for future mesne profits at the rate of Rs. 1,000 per annum and it is found at the time of the decree that the plaintiff is entitled to Rs. 4,500 for past and future mesne profits, or where A sues B in the Munsif's Court for accounts valuing the suit tentatively at Rs. 500, and on the taking of accounts after the preliminary decree, the amount found due to plaintiff is Rs. 4,500, the Munsif's Court can pass a decree for Rs. 4,500. ('94) 16 All 286 (290) (DB). (Accounts.) * ('11) 33 All 97 (99) (DB). (Redemption.) * ('27) AIR 1927 Bom 83 (83): 50 Bom 839 (DB). (Not following 21 Ind Cas 783 (Bom).) * ('32) AIR 1932 Bom 111 (113): 56 Bom 23 (DB) * ('29) AIR 1929 Bom 337 (339) (DB) * ('47) AIR 1947 Cal 68 (70): ILR (1946) 2 Cal 599 (DB). (AIR 1925 Cal 1076: 53 Cal 14 (FB), Foll.) * ('25) AIR 1925 Cal 1076 (1081, 1082, 1083): 53 Cal 14 (FB). (Approving 21 Cal 550 and 40 Cal 56. Overruling AIR 1915 Cal 352; 43 Cal 650 and AIR 1920 Cal 517.) * ('18) AIR 1918 Mad 998 (1002): 40 Mad 1 (FB) * ('15) AIR 1915 Mad 683 (684) (DB) * ('02) 25 Mad 543 (544) (DB) * ('21) AIR 1921 Pat 118 (119, 120): 6 Pat L Jour 54 (DB) * ('17) AIR 1917 Pat 334 (335): 2 Pat L Jour 394 (DB) * ('34) AIR 1934 Pat 204 (207): 13 Pat 344 (FB) * ('39) AIR 1939 Rang 115 (117): 1939 Rang LR 134 (DB) * ('37) AIR 1937 Rang 320 (322): 1937 Rang LR 214 (FB). (AIR 1924 Rang 354; 2 Rang 408, Overruled.) * ('43) AIR 1943 Sind 73 (74, 75): ILR (1942) Kar 488 (DB) * ('25) AIR 1925 Sind 324 (324, 328): 18 Sind LR 286 (DB) * ('13) 9 Nag LR 112 (115, 116) (DB) * ('95) 8 CPLR 86 (88) * ('11) 9 Ind Cas 414 (414) (Oudh).

[See also ('52) AIR 1952 All 196 (197) (DB). (Compromise petition — Claim not originally included in suit included in the compromise petition and total amount exceeding pecuniary jurisdiction — Held, decree could not be passed in terms of the compromise.) * ('25) AIR 1925 All 376 (377): 47 All 534 (DB) * ('91) 13 All 320 (322) * ('86) 9 Mad 208 (212, 213) (DB) * ('21) AIR 1921 Mad 508 (509).]

[But see ('40) AIR 1940 Lah 186 (189) (DB) * ('06) 1906 Pun Re No. 46 p. 165 (167) * ('29) AIR 1929 Lah 107 (109, 110) * ('12) 15 Ind Cas 773 (774): 1912 Pun Re No. 96 * ('12) 13 Ind Cas 312 (313) (DB) (Lah) * ('08) 1908 Pun Re No. 16, p. 88 (95, 96) (FB).]

(2) In every case when the Court is seized of jurisdiction, it cannot and does not lose it by any change in the value of the subject-matter of the suit after the institution of the suit, or by the precise ascertainment of its value in cases which do not admit of such ascertainment at the time of the institution, except when the plaint is allowed to be amended. ('43) AIR 1943 Sind 73 (74, 75): ILR (1942) Kar 488 (DB) * ('57) 1957 Ker LT 1211 (1212). (Partition suit.) * ('18) AIR 1918 Mad 998 (1002): 40 Mad 1 (FB): 1961 Raj LW 473 (476): ILR (1961) 11 Raj 1173. (If during the course of proceedings it becomes necessary that there must be consolidation of two or more actions, the Court cannot be deemed to be incompetent to exercise jurisdiction if the combined valuation of

**7. Provinciál Small Cause Courts.**—The following provisions shall not extend to Courts constituted under the Provincial Small Cause Courts Act, 1887, [a][or under the Berar Small Cause Courts Law, 1905] or to Courts exercising the jurisdiction of a Court of Small Causes [b][under the said Act or Law, [c][or to Courts in [d][any part of India to which the said Act does not extend] exercising a corresponding jurisdiction] ], that is to say,—

(a) so much of the body of the Code as relates to—

(i) suits excepted from the cognizance of a Court of Small Causes;

(ii) the execution of decrees in such suits;

(iii) the execution of decrees against immoveable property; and

(b) the following sections, that is to say,—

section 9,

sections 91 and 92,

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**Section 6 — Note 4 (contd.)**

the suits consolidated is beyond the pecuniary limit of the Court.)

[See also ('94) 16 All 286 (290) (DB). (Otherwise there would be no certainty as to the Court in which suit should be brought or as to the Court in which appeal should be brought.)]

(3) In a suit for damages the Court cannot award damages in excess of its pecuniary jurisdiction. ('26) AIR 1926 Cal 596 (596) (DB).

(4) The assessment of mesne profits in excess of the pecuniary jurisdiction of the Court does not render the decree null and void or without jurisdiction. (1962) 66 Cal WN 476 (478). (AIR 1925 Cal 1076 (FB), Rel. on.)

**5. Execution of decrees in excess of pecuniary limits** — See Section 38.

**6. Transfer of decree for execution — Jurisdiction of transferee Court.**— (1) Where a decree is transferred for execution to another Court under Section 39 (1) read with Order 21, Rules 5 to 8 the jurisdiction of transferee Court to deal with the execution application does not depend upon either the valuation of the suit, in which the decree had been passed, or the amount of the original decree, but on that actual amount under execution. AIR 1962 All 586 (588): 1962 All LJ 707.

**7. Value of subject-matter.** — (1) The words "value of the subject matter" in Section 6 and the words "value of the relief" Order 7, Rule 11 of the Code of Civil Procedure have been used in identical sense and the value of the subject matter is, without more, the value of the relief. AIR 1961 Cal 229 (239): 65 Cal WN 1 (20) (SB). (AIR 1955 Cal 144 (DB), Overruled.)

(2) The value of a suit for partition for the purpose of jurisdiction is the value of the share claimed by the plaintiff and not the value of the whole property of which partition is sought. AIR 1953 Pat 342 (343): 1953 BLJR 359 (DB) * (1962) 28 Cut LT 433 (434).

## SECTION 7 — SYNOPSIS

**1. Scope and object.**

**2. Suits excepted.**

**3. Execution against immovable property.**

**4. Attachment before judgment.**

**1. Scope and object.** — (1) The section is intended to apply to Small Cause Courts established with exclusive jurisdiction to try small cause suits and also to other civil Courts of ordinary original jurisdiction specially empowered to exercise small cause jurisdiction in respect of specified classes of suits. ('53) AIR 1953 Trav-Co 41 (42) (DB).

(2) The saving clause relating to revision as contained in Section 20, Travancore-Cochin Civil Courts Act, 1951, is in apparent conflict with the express provision to the contrary as contained in Section 19 of the Act and in Section 7, Civil Procedure Code, and has to the extent of such repugnancy to be ignored as being void under Art. 254 of the Constitution of India. ('53) AIR 1953 Trav-Co 41 (43) (DB).

(3) Section does not apply to proceedings started in the State of Travancore-Cochin before the Code of Civil Procedure (Amendment) Act, 1951 came into force. ('54) AIR 1954 Trav-Co 125 (126): ILR (1953) Trav-Co 776 (DB).

(4) So far as the recording of evidence is concerned, neither Section 7 nor O. 50 excludes the operation of R. 13 of O. 18 which will, therefore, apply to the Small Cause Courts because of Section 17 of the Provincial Small Cause Courts Act. ('53) ILR (1953) 1 Cal 277 (278).

(5) In respect of Small Causes Court decrees and orders, that no appeals lay against them is manifest in the provisions of S. 7 and O. 50, Civil Procedure Code. (1959) 1959-2 Andh WR 455 (456).

**2. Suits excepted.** — (1) To see whether a particular suit is excepted from the cognizance of a Court of Small Causes, the nature of the plaint and the reliefs sought are to be considered. ('37) AIR 1937 Pat 25 (27).

(2) Where a compromise decree between A and B required B to build wall according to certain specification, and the wall was not built according to specification, but A after completing the wall filed suit for recovery of expenses of Rs. 190 such a suit is cognizable by Small Cause Court.

sections 94 and 95 [e][so far as they authorize or relate to—

(i) orders for the attachment of immoveable property,

(ii) injunctions,

(iii) the appointment of a receiver of immoveable property, or

(iv) the interlocutory orders referred to in Clause (e) of Section 94] and

Sections 96 to 112 and 115.

[1882, S. 5; 1877, S. 7; 1859, S. 384.]

[a] Inserted by Berar Laws Act IV of 1941.

[b] Substituted by Berar Laws Act IV of 1941, for the words "under that Act".

[c] Inserted by the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), S. 5 [1-4-51].

[d] Substituted for "Part B States" by A. L. O. (No. 2), 1956 [1-11-1956].

[e] Substituted by the Small Cause Courts (Attachment of Immovable Property) Act I of 1926, for "so far as they relate to injunctions and interlocutory orders".

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**Section 7 — Note 2 (contd.)**

AIR 1961 Madh Pra 107 (107, 108): 1961 MPLJ 156.

(3) The Rent Controller under the Delhi Rent Control Act, has to, as far may be, follow the practice and procedure of a Court of Small Causes. A suit for possession of immovable property or for recovery of an interest in such property is excepted from the cognizance of Court of Small Causes. Application under proviso to Section 14 of Rent Control Act being in the nature of a suit for possession of immovable property, provision contained in Order 23, Rule 3 does not and cannot apply to that application. AIR 1969 Delhi 7 (10).

(4) Kerala High Court Amendments to Order 21, Rule 46 — Insertion of Rr. 46-C, 46-I — Order against garnishee under Order 21, Rule 46-C by Small Cause Court — Order though has force of decree under Rule 46-I is not appealable — Provision of Sections 96 to 112 of Code of Civil Procedure have specifically been excluded in their application to Small Cause Courts. AIR 1962 Ker 233 (234): (1962) 1 Ker LR 467 (DB). (AIR 1962 Ker 26, Overruled.)

(5) Section 47, Civil P. C. is not inapplicable to Provincial Small Cause Courts. ILR (1960) 1 Cal 895.

**3. Execution against immovable property.** — (1) A Small Cause Court cannot execute its decree against a share in joint property where part thereof is immovable property. AIR 1914 Nag 13 (13): 10 Nag LR 17.

(2) A Small Cause Court can create a charge on immovable property. AIR 1937 All 194 (195): ILR (1937) All 418.

[But see AIR 1939 Nag 118 (120): ILR (1941) Nag 356.]

(3) The question as to the jurisdiction of the Court to execute the decree has no relevance to the question as to its jurisdiction to try the suit. AIR 1950 Cal 415 (417) (DB).

(4) As a result of the amendment of Section 42 by U. P. Act (25 of 1954), a decree of a Small Cause Court cannot be executed against immovable property at all either by that Court because of the prohibition in the Civil Procedure Code, or by any other Court because of the restriction imposed by the amended Section 42. AIR 1960 All 512 (513): 1960 All LJ 352.

(5) Though the Judge on the Original Side and the Small Cause side is the same the Courts are different under S. 33 of the Provincial Small Cause Courts Act, and a transfer is essential to confer jurisdiction on the Court on the Original Side to attach and sell immovable properties for satisfying small cause decree. AIR 1951 Mad 491 (492): 1951-1 Mad LJ 150.

(6) See also Notes under Section 39.

**4. Attachment before judgment.** — (1) An attachment before judgment of moveable property by a Small Cause Court is not prohibited by the section. AIR 1919 Cal 6 (7): 46 Cal 717 (720, 721) (DB) * AIR 1925 Cal 1 (4): 52 Cal 275 (FB). (Held, that a Small Cause Court can pass an order for attachment of immovable property also but cannot actually attach.)

(2) An order for attachment before judgment of movable property falls within Section 94, Clause (b), and is not an "interlocutory order" referred to in Section 94, Clause (e). AIR 1925 Cal 1 (6): 52 Cal 275 (FB).

(3) It had been held before Act 1 of 1926 that an attachment before judgment of immovable property was not prohibited by the section. AIR 1925 Mad 589 (591): 48 Mad 488 (DB) * AIR 1925 Cal 1 (5): 52 Cal 275 (FB). (Approving AIR 1924 Cal 193 and Overruling AIR 1923 Cal 176: 49 Cal 994.)

(4) The Small Cause Court to which original suit is transferred can pass an order for attachment of immovable property before judgment. ('58) 1958 Andh LT 557 (558).

**8. Presidency Small Cause Courts.**—Save as provided in Sections 24, 38 to 41, 75, Clauses (a), (b) and (c), 76, 77 and 155 to 158, and by the Presidency Small Cause Courts Act, 1882, the provisions in the body of this Code shall not extend[c] to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay:

[a][Provided that—

(1) the High Courts of Judicature at Fort William, Madras and Bombay, as the case may be, may from time to time, by notification in the [b][Official Gazette], direct that any such provisions not inconsistent with the express provisions of the Presidency Small Cause Courts Act, 1882, and with such modifications and adaptations as may be specified in the notification, shall extend to suits or proceedings or any class of suits or proceedings in such Court;

(2) all rules heretofore made by any of the said High Courts under Section 9 of the Presidency Small Cause Courts Act, 1882, shall be deemed to have been validly made.]

[1882, S. 8; 1859, S. 382.]

[a] Provisos inserted by the Code of Civil Procedure (Amendment) Act I of 1914.

[b] Substituted by Government of India (Adaptation of Indian Laws) Order, 1937, [1-4-1937] for "Local Official Gazette."

[c] Sections 2, 3, 10 to 14, 28 to 37, 42 to 53, 55 to 60, 62 to 64, 73, 74, 78 to 85, 87, 88, 94, 95, 132 to 136, 139, 141 to 149, 151 and 153, as amended upto 1-1-1965 extended to all suits and proceedings in the Court of Small Causes, Calcutta—see Cal. Gaz, 20-4-1967, Pt. I, p. 757.

## SECTION 8 — SYNOPSIS

**1. Scope.**

**2. Proviso.**

**3. "Save as provided . . . . by the Presidency Small Cause Courts Act, 1882".**

**4. Execution of foreign decrees.**

**1. Scope.**— (1) The word "suit" in the section includes decree passed therein. Hence Section 48 does not apply to a decree passed by a Presidency Small Cause Court and it can be executed even after the expiry of the twelve years' period mentioned in that section. ('50) AIR 1950 Mad 504 (506): ILR (1951) Mad 1 (FB). (AIR 1941 Mad 477, Overruled.) * ('42) AIR 1942 Pat 128 (128) (DB).

**2. Proviso.**— (1) First proviso is intended to be supplementary to the rules of procedure prescribed by the High Court under Section 9 of the Presidency Small Cause Courts Act, 1882. ('52) AIR 1952 Cal 671 (672) (DB) * ('18) AIR 1918 Mad 645 (646).

[See also AIR 1967 Bom 361 (363): 68 Bom LR 857. (S. 104 is not extended to Presidency Small Cause Courts by Bombay High Court.)]

(2) Under special procedure in Rule 1, of Chap. 23 of Rules of Practice and Procedure made by Calcutta High Court under Section 9 of Presidency Small Cause Courts Act read with Section 8 withdrawal of application to sue as poor person does not bar second application to sue as such poor person and such withdrawal without leave of Court to bring fresh application of suit is not hit by either Order 23, R. 1 (3) of Code or by Rule 1 (3) of Rules of Practice and Procedure. AIR 1965 Cal 233 (235): 69 Cal WN 580.

(3) Dismissal of application with brief pronouncement without stating contentions raised and reasons for conclusion is not a judgment within the meaning of Order 20, Rule 1 of the Code, which is applicable to Presidency Small Cause Court in Madras. AIR 1963 Mad 87 (88): (1962) 2 Mad LJ 443.

(4) Chapter 37 of Rules of Practice and Procedure framed by Calcutta High Court under Section 8 (2) does not include rule similar to Order 39, Rule 2 of the Code. Hence, Order 39, Rule 2 of Code does not apply to Presidency Small Causes Court of Calcutta. AIR 1968 Cal 234 (237, 238).

**3. "Save as provided . . . . . by the Presidency Small Cause Courts Act, 1882".**— (1) As to the provisions of the Code, which have been made applicable, by the Presidency Small Cause Courts Act itself to Small Cause suits. see the following cases. ('51) ILR (1951) 2 Cal 474 (479) * ('21) AIR 1921 Bom 180 (181): 45 Bom 972 (DB) * ('10) 6 Ind Cas 722 (722) (Mad).

[See also ('47) AIR 1947 Cal 1 (8): ILR (1947) 1 Cal 537 (SB) * AIR 1962 Pat 272 (272, 273): 1962 BLJR 56. (In view of special provision in Section 31 (b) of Presidency Small Cause Courts Act — Decree can directly be transferred to concerned Civil Court in another State notwithstanding Order 21, Rule 5.)]

**4. Execution of foreign decrees.**— (1) Presidency Small Cause Court held had no jurisdiction to execute the decree of a foreign Court. ('51) AIR 1951 Mad 289

## STATE AMENDMENT

**Gujarat**

In Section 8 in the opening para, after the words "Calcutta, Madras and Bombay", insert the words "and in the city of Ahmedabad."

—Gujarat Act XIX of 1961 as amended by Guj. Act XXXII of 1961, S. 21 and Schedule [1-11-1961].

## PART I
## SUITS IN GENERAL
## JURISDICTION OF THE COURTS AND RES JUDICATA

**9. Courts to try all civil suits unless barred.**—The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Explanation—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

[1882, S. 11; 1877, S. 11; 1859, S. 1.]

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**Section 8 (contd.)**

(290). (Observations of Sheshagiri Aiyar J. in AIR 1918 Mad 645, Held, obiter and not correct.)

(2) See also Order 51, Rule 1.

**SECTION 9 — SYNOPSIS**


**1. SCOPE.**
**2. COURT AND TRIBUNAL — DISTINCTION.**
**3. JURISDICTION OF COURTS—GENERAL**
**4. Absence of jurisdiction and error in the exercise of it.**
**5. Consent cannot give or oust jurisdiction.**
**6. Objection to jurisdiction** — See Section 21.
**7. Jurisdiction with reference to subject matter.**
**8. Consensual jurisdiction.**
**9. Local jurisdiction** — See Section 16.
**10. Personal jurisdiction** — See Section 20.
**11. Pecuniary jurisdiction** — See Sections 6 and 15.
**12. Valuation of plaint determines jurisdiction** — See Section 15.
**13. Appellate jurisdiction** — See Section 96.
**14. Jurisdiction of foreign Courts** — See Section 13.
**15. "SUBJECT TO THE PROVISIONS HEREIN CONTAINED."**
**16. SUITS OF A CIVIL NATURE.**
**17. Suits relating to rights in property.**
**18. Other common law rights.**
19. Suit by Government servant for arrears of salary.
20. Right of worship.
21. Right relating to religious and other processions.
22. Right of burial.
23. Right of person elected as director or chairman to act as such.
24. Right of franchise.
25. Suit for dissolution of marriage.
26. Restitution of conjugal rights.
27. Right of person as member of club.
**27-A. Rights under contract.**
27-B. Suit for accounts.
28. Suit for rent.
**29. Suit for administration.**
**30. Suit for office.**
31. Suit for fees attached to religious office.
**31-A. SUITS NOT OF A CIVIL NATURE** — See Notes 32 to 39.
**32. Suit whether lies where there is no such right as that claimed.**
33. Right of privacy.
**34. Suits involving principally caste property.**
35. Suits relating to caste property.
36. Suits for inspection and rendition of accounts of caste property.
37. Suits relating to expulsion from caste.
**38. Suits for upholding mere dignity or honour.**
**39. Suits relating purely to religious rites or ceremonies.**
**40. SUITS EXPRESSLY BARRED.**
**41. Exclusive jurisdiction of Revenue Courts.**
**42. Bar by the Criminal Procedure Code.**
**43. Matters dealt with by a special tribunal.**
**44. Domestic tribunal.**
**45. Suits on judgments.**
**46. SUITS IMPLIEDLY BARRED.**
**46-A. Political questions.**
**47. Acts of State.**
**48. Suits barred on the ground of public policy.**
49. Barrister, if can sue for his fees.
50. Fraud.
**51. Bar of general remedy of suit.**

**Section 9 — Synopsis (contd.)**

52. Summary and concurrent remedies.
53. Alternative Courts.

**54. ACTS OF LEGISLATURE — POWERS OF CIVIL COURT TO QUESTION.**

**Topic Indicator**

Elections — See Notes 16, 24.
Foreign States and Government — See Note 46-A and Sections 84 to 87.
Idols and religious and charitable trusts — See Notes 16, 20, 21, 39.
"Office" — See Note 30.
Onus — See Note 1.
Religious marks in a temple — See Note 16.
Removal of obstruction to public way — See Note 18.
Setting aside decrees — See Note 50.
Suits against Government, Public and Judicial Officers — See Notes 47, 48 and Sections 79 and 80.
Suits against Municipal Corporation — See Notes 16, 24, 43 and 51.
Suit against State — See Note 47.
Suit by defeated claimant in Insolvency Court — See Note 53.
Suit for share in offerings — See Note 31.
Suit regarding temple property — See Notes 17 and 39.
Suits regarding partitions, sales or registration by Revenue authorities under Rent and Revenue Acts — See Note 41.
Suit relating to private trusts — See Note 17.
Thoroughfares — See Notes 18 and 21.

**1. Scope.** — (1) A litigant having a grievance of a civil nature has, independently of any statute, a right to institute a suit in some Court or other unless its cognizzance is either expressly or impliedly barred. 1955 Raj LW 512 (513) * AIR 1958 Andh Pra 403 (405): 1958 Cri L Jour 739 * 1958 Andh LT 383 (384) * AIR 1957 Pat 564 (570) (DB) * AIR 1953 Nag 302 (304) * AIR 1953 Trav-Co 541 (542) * AIR 1952 Mad 273 (275): ILR (1952) Mad 540 (DB) * AIR 1951 Cal 147 (147, 148): ILR (1952) 2 Cal 49 (DB) * AIR 1943 Cal 59 (61, 62) (DB) * AIR 1942 Oudh 93 (96): 17 Luck 205 (DB) * AIR 1941 Cal 167 (172): ILR (1940) 2 Cal 342 (DB) * AIR 1935 Rang 376 (385): 13 Rang 648 (FB) * (1906) 28 All 545 (549, 550) (FB) * AIR 1925 Bom 188 (192): 49 Bom 291 (DB) * (1901) 28 Cal 28 (35) (DB) * (1897) 24 Cal 107 (111, 113) (DB) * AIR 1916 Mad 1119 (1121): 38 Mad 41 (43) (DB) * AIR 1961 SC 149 (153): (1961) 1 SCR 616. (Section 23 of Ajmer Land and Revenue Regulation does not bar jurisdiction of Civil Court to entertain suit to challenge factum, validity and legality of adoption.) * AIR 1969 Mad 108 (110): ILR (1968) 3 Mad 638 (DB) * 1967 MPLJ 904 (FB) * AIR 1967 Mad 318 (323): (1966) 2 Mad LJ 226 * AIR 1966 MP 104 (106): 1966 MPLJ 100 * AIR 1965 Cal 148 (151): 68 Cal WN 757. (A right to sue is not barred by the provisions of the Calcutta Municipal Act.) * 1962 All LJ 162 (DB) * AIR 1961 Pat 142 (144): 1961 BLJR 3 (FB) * AIR 1959 Punj 581 (582) * (1958) 1 Andh WR 283.

(2) As far as the C. P. C. is concerned, the word suit means a suit instituted in a civil Court by the presentation of a plaint. Any other proceeding instituted even in a Civil Court would not be a suit. (1965) 67 Bom LR 903 (904): 1966 Mah LJ 334 (DB) * AIR 1966 Pat 305 (312): ILR 44 Pat 22 (DB).

(3) Civil Courts being Courts of unlimited jurisdiction subject to limits of pecuniary jurisdiction imposed by statutes and limits of territorial jurisdiction must be presumed to have jurisdiction in respect of every civil right unless exclusion of such jurisdiction is expressed or necessarily can be implied. AIR 1961 Mad 423 (426): (1961) 1 Mad LJ 188.

(4) In order that Courts may have jurisdiction to try a suit, its cognizance should not have been expressly or impliedly barred and suit must be of civil nature. AIR 1955 Punj 166 (169): ILR (1955) Punj 840 (DB) * AIR 1958 Ori 26 (31) (DB) * 1957-1 Mad L Jour 5 (6) (DB) * (1884) 6 All 110 (112) (DB) * AIR 1969 Delhi 3 (4) * (1968) 81 Mad LW 386 * AIR 1967 All 218 (220) * AIR 1967 Mad 182 (185): (1966) 2 Mad LJ 415 * AIR 1966 Mad 225 (230): ILR (1965) 1 Mad 614 (DB) * AIR 1963 All 574 (577).

(5) Every presumption should be made in favour of the jurisdiction of a Civil Court. AIR 1953 Nag 302 (304) * AIR 1953 Pepsu 107 (108): ILR (1953) Patiala 280 (DB) * AIR 1952 Punj 340 (342) * AIR 1951 Bom 423 (425): ILR (1952) Bom 1 (DB) * AIR 1948 Pat 49 (51, 56): 26 Pat 377 (DB) * AIR 1946 Pat 385 (389): 25 Pat 7 (DB) * AIR 1943 Lah 48 (49): ILR (1943) Lah 826 (DB) * AIR 1942 Lah 217 (227): ILR (1943) Lah 191 (FB) * AIR 1941 Mad 530 (532): ILR (1941) Mad 850 (FB) * AIR 1941 Nag 226 (230): ILR (1941) Nag 279 (DB) * AIR 1940 PC 105 (110): ILR (1940) Mad 599: ILR (1940) Kar PC 194 * AIR 1940 Cal 554 (555) (DB) * AIR 1934 PC 84 (86): 61 Ind App 177: 57 Mad 443 * AIR 1928 All 511 (513) (DB) * AIR 1933 Rang 124 (127): 11 Rang 125 * AIR 1969 Mad 108 (110): ILR (1968) 3 Mad 638 (DB) * (1966) 2 Andh WR 218: (1966) 2 Andh LT 280 (282) * AIR 1966 Madh Pra 104 (106): 1966 MPLJ 100 * AIR 1966 Mys 178 (183): (1965) 2 Law Rep 67 (DB) * 1962 Raj LW 41 (42).

[See also 1959 Ker LJ 34 (36).]

(6) The exclusion of jurisdiction of Civil Courts is not to be readily inferred; such exclusion must be either explicitly expressed or clearly implied. AIR 1956 Pat 425 (427): 35 Pat 385 (DB) * AIR 1958 Andh Pra 100 (102) * AIR 1958 Cal 65 (66) (DB) * AIR 1957 Mad 724 (726): ILR (1957) Mad 832 * 1957 Andh LT 823 (826) * (1957) 61 Cal WN 789 (791) (DB)

**Section 1 — Note 1 (contd.)**

* AIR 1955 Pat 320 (325): 34 Pat 487 (DB) * ILR (1955) 7 Assam 201 (208) * AIR 1953 Orissa 300 (303) (DB) * AIR 1952 Punj 94 (97) * AIR 1951 Bom 440 (446): ILR (1952) Bom 378 (DB) * AIR 1969 SC 439 (446): (1969) 1 SCJ 792 * AIR 1969 SC 78 (90): (1968) 2 SCA 479 * AIR 1964 SC 322 (324): (1964) 1 SCR 752 * AIR 1964 SC 807 (814) * AIR 1962 SC 547 (550): (1962) 3 SCR 673 * AIR 1966 Cal 285 (289) (FB) * AIR 1969 Delhi 3 (4) * AIR 1969 Mad 191 (198): ILR (1968) 3 Mad 335 * (1968) 1 MLJ 153: ILR (1968) 2 Mad 792 * (1968) 2 MLJ 463: ILR (1968) 2 Mad 432 * AIR 1969 Mad 108 (110): ILR (1968) 3 Mad 638 (DB) * AIR 1968 Andh Pra 311 (314): (1968) 1 Andh WR 413 (DB) * (1968) 2 An WR 192: (1968) 1 Andh LT 278 * AIR 1968 Cal 91 (95): 72 Cal WN 717 * AIR 1968 Delhi 162 (163) * 15 Law Rep 97: (1968) 2 Mys LJ 227 * (1967) 2 Mad LJ 302: 80 Mad LW 44 (DB) * (1967) 2 Mys LJ 503: 12 Law Rep 568 * AIR 1967 Bom 92 (94): 68 Bom LR 180 (DB) * AIR 1966 MP 104 (106): 1966 MPLJ 100 * ILR (1966) 2 Punj 844 (849) * AIR 1966 Orissa 1 (3, 4): 31 Cut LT 996 (DB) * 1965 All WR (HC) 367: 1965 All LJ 677. (Prohibitions as to jurisdiction are not to be assumed: there has to be a clear and unambiguous provision in the enactment.) * AIR 1965 Andh Pra 326 (328): (1965) 2 Andh WR 88 (DB) * AIR 1965 Mad 149 (151): 1965 1 Mad LJ 203 * ILR (1964) Bom 80 (89): 1963 Mah LJ 633 * (1964) 30 Cut LT 509 * 1964 BLJR 122 (DB) * 1963 Ker LT 330 (332) * 1962 MPLJ 738 (739) * AIR 1962 Mad 7 (15): (1962) 1 Mad LJ 92. (AIR 1954 Mad 454, overruled on another point.) * 1962 Raj LW 41 (42) * ILR (1961) 1 Punj 141 (149) * AIR 1960 J and K 47 (49) (DB) * ILR (1960) 10 Raj 1589 (1591) * AIR 1959 Ori 144 (145) * 25 Cut LT 381 (DB) * (1958) 1 Andh WR 283 * ILR (1958) Mys 490 (496).

[See also (1960) 62 Pun LR 410 (412).]

(7) In interpreting the statute in question one shoud not necessarily make an attempt to abridge its operation or cut down or modify its objectives with a view to give effect to the rule of interpretation that the ousting of jurisdiction should not be readily inferred but should be clearly established. (1967) 2 Mys LJ 503: 12 Law Rep 568.

(8) It is well established that statutes, should in the absence of express language or words of necessary intendment to the contrary, be construed in such a way as to avoid the effect of transferring the determination of questions of title from Civil Courts to the executive officers. AIR 1959 Punj 206 (208): 61 Pun LR 208.

(9) The onus lies on the party, seeking to oust the jurisdiction, to establish his right to do so. AIR 1956 Mad 388 (390) * AIR 1958 Mys 148 (150) * AIR 1955 Pat 320 (325): 34 Pat 487 (DB) * AIR 1946 Pat 385 (389): 25 Pat 7 (DB) * AIR 1934 PC 84 (86): 61 Ind App 177: 57 Mad 443 * AIR 1928 Lah 121 (121): 9 Lah 504 (FB) * AIR 1966 SC 1718 (1719, 1720): (1966) 3 SCR 617 * AIR 1967 SC 781 (785): (1967) 1 SCR 280 * AIR 1968 Delhi 162 (163) * AIR 1969 Mad 108 (110): ILR (1968) 3 Mad 638 (DB) * AIR 1959 Orissa 144 (146): 25 Cut LT 381 (DB).

(10) A liberal construction should be placed upon the section. (1890) 12 All 409 (417) (FB) * (1887) 14 Cal 644 (648) (DB).

(11) The general power vested in Courts under this section to entertain all suits of a civil nature does not carry with it the general power of making declarations except in so far as such power is expressly conferred by statute. (1910) 34 Bom 676 (680) (DB).

(12) There does not appear to be any express bar with respect to suits for a declaration in the negative. AIR 1959 Punj 581 (582).

(13) It is not the duty of the Court to initiate any proceedings on behalf of the parties. AIR 1926 Pat 62 (63) (DB).

(14) Where a party is not carrying out a bona fide litigation, he is not entitled to move the High Court in its equitable jurisdiction. AIR 1951 Punj 79 (87).

(15) Section 9 deals with jurisdiction to entertain a suit and not with jurisdiction to entertain an appeal. AIR 1957 All 257 (258): ILR (1957) 1 All 287 (DB).

(16) This section recognises the power of the legislature to vest in another tribunal exclusive powers over any given subject-matter, and where exclusive jurisdiction is thus created by the legislature, the Civil Court evidently cannot interfere with it. AIR 1957 Pat 564 (570) (DB) * AIR 1964 Mys 107 (109): (1965) 2 Mys LJ 403 (FB) * AIR 1963 Pat 398 (400). (The Bombay Civil Court is a Court contemplated by the Civil P. C.)

(17) The Administration of Evacuee Property Act (1950), does not bar the jurisdiction of ordinary Courts. AIR 1957 Punj 58 (60): ILR (1957) Punj 211 (DB).

**2. Court and tribunal — Distinction.**— (1) There is a real distinction between Court and a tribunal, irrespective of whether the person constituting the tribunal is a Judge of a Court or appeal is provided for from its orders to the High Court. AIR 1955 Punj 197 (210) (FB).

[See also AIR 1968 Goa 78 (81). (Claims Tribunal under Motor Vehicles Act is not a 'civil Court.')

(2) Whether an authority constituted under a special statute is an administrative body or a tribunal discharging the functions of a judicial character or a Court, depends on the nature of the powers conferred on the authority by the statute. AIR 1954 Mad 340 (342) * AIR 1958 Mad 360 (363): ILR (1958) Mad 614 (DB).

**Section 9 — Note 2 (contd.)**

[See also 1969 Lab IC 225: 1968 Ker LT 610. (Authority under Section 20 Minimum Wages Act, (1948) is tribunal and not Civil Court.) * AIR 1964 All 348 (348). (Munsif trying suit for recovery of rent under S. 7-B, U. P. (Temproprary) Control of Rent and Eviction Act functions as ordinary Court.)]

(3) While special Courts have jurisdiction over a limited class of suits specified in the statute the jurisdiction of the Civil Courts is not limited to any class of suits. AIR 1954 Mad 340 (345) * 1967 Raj LW 21 (24): ILR (1966) 16 Raj 691 (DB).

(4) The principle that where in order to give a relief, it will be necessary as an incidental matter to cover another subject otherwise within the exclusive jurisdiction of a different forum is applicable only to civil Courts and cannot be extended to tribunals. (1968) 81 Mad LW 386.

**3. Jurisdiction of Courts — General.** — (1) Section 9 deals with Courts, not with the rights of parties, to find what the jurisdiction of the Court is and what civil suits it may try. AIR 1914 Cal 152 (153): 41 Cal 384 (390) * AIR 1966 All 367 (369): 1965 All LJ 549. (False allegations in plaint cannot give jurisdiction to Court where it has none.)

(2) The section only provides for jurisdiction of Civil Courts but does not give a right of action. If a suit of civil nature is competent then civil Courts will have jurisdiction to try it. It can mean nothing more. AIR 1955 Punj 166 (170): ILR (1955) Punj 840 (DB).

(3) Jurisdiction consists in taking cognizance of a case involving the determination of some jural relation, in ascertaining the essential points of it and in pronouncing upon them. (1887) 11 Bom 488 (490) (DB) * (1962) 28 Cut LT 60 (63).

(4) Jurisdiction means the legal authority to administer justice according to the means which the law has provided and subject to the limitations imposed by that law upon the judicial authority. (1885) 7 All 345 (350) * AIR 1927 Bom 272 (275): 51 Bom 416 (DB) * (1885) 7 All 230 (239) (FB) * AIR 1925 Cal 373 (375) * AIR 1921 Cal 34 (37): 48 Cal 138 (FB) * (1909) 1 Ind Cas 86 (90) (DB) (Cal) * (1906) 33 Cal 68 (71) (FB) * (1901) 28 Cal 324 (329) (DB) * AIR 1922 Pat 322 (333) (DB) * AIR 1967 Ker 97 (99): 1967 Ker LT 629 (DB).

(5) The power and jurisdiction of a Civil Court to decide a particular matter depends on the general law and cannot be founded on a provision in a Government order. AIR 1955 Mad 639 (641): ILR (1956) Mad 17 (DB).

(6) There is no legal authority to administer justice where the Judge has not been legally and validly appoints as such. (1894) 16 All 136 (156) (FB) * (1898) 20 All 287 (293, 294): 25 Ind App 54 (PC) * (1883) 7 Bom 341 (344) (FB) * AIR 1962 SC 1621 (1629, 1630): (1963) 1 SCR 778.

(7) If a Judge, though validly appointed, is disqualified from trying any particular case by reason of his personal or pecuniary interest therein he has no lagal authority to administer justice. (1884) 10 Cal 915 (919, 920) (DB) * (1895) 19 Bom 608 (611) (DB).

(8) A Judge cannot legally administer justice where he acts outside the limitations imposed by the law upon his judicial authority. (1912) 39 Cal 353 (362).

(9) Limitations imposed by law upon the judicial authority of a Judge may be territorial or pecuniary or may refer to the subject-matter of the litigation or the nature of the litigation or the class or rank of which the tribunal belongs. AIR 1955 Pepsu 3 (8): ILR (1955) Patiala 215 (DB) * (1885) 7 All 345 (350) (DB) * AIR 1967 Ker 97 (99): 1966 Ker LJ 807 (DB).

(10) A Court must have jurisdiction throughout the proceedings until termination of those proceedings by the judgment of the Court. The jurisdiction continues until something happens to take it away. AIR 1950 Pat 392 (417): 29 Pat 790 (SB) * AIR 1961 Madh Pra 295 (297): 1961 MPLJ 587 (DB).

(11) If an effective and valid order is passed under a statute the subsequent amendment thereof or withdrawal of jurisdiction will not in the majority of cases affect the enforceability of such a valid and binding order. (1956) 60 Cal WN 551.

(12) If the Court has jurisdiction to try the suit when it comes on for disposal it cannot refuse to assume jurisdiction by reason of the fact that it had no urisdiction to entertain it at the date when it was instituted. AIR 1952 Bom 365 (373) (DB).

[See also AIR 1955 Bom 55 (59, 60): 56 Bom LR 955. (Court must normally have regard to the circumstances existing as at the date when the issue of jurisdiction is tried and must decide it in the light of circumstances existing as at that date, and omit from consideration the state of things which prevailed when the suit was filed.)]

(13) Suit for restitution of conjugal rights — Instituted before commencement of Hindu Marriage Act (1955) — Court clothed with jurisdiction under Act — Held Act having come into force during pendency of suit could not govern suit. AIR 1962 Mad 400 (402, 403): 1962 Mad WN 223.

(14) If a Court has no jurisdiction over the subject-matter of the litigation, its judgments and orders are mere nullities and have no effect either as estoppel or otherwise and may be declared to be void by every Court in which they may be presented. AIR 1956 Cal 317 (319, 320) (DB) * AIR 1957 Madh Pra 71 (72) (FB)

**Section 9 — Note 3 (contd.)**

* AIR 1958 Mad 490 (494): ILR (1958) Mad 622 (DB) * AIR 1952 Nag 275 (278). ILR (1952) Nag 534 (DB) * AIR 1952 Pepsu 119 (124): ILR (1952) Patiala 281 (DB) * AIR 1952 Raj 184 (186): ILR (1952) 2 Raj 415 (DB) * AIR 1952 Trav-Co 125 (128): ILR (1951) Trav-Co 624 * AIR 1950 East Punj 188 (193) (DB) * AIR 1942 Cal 496 (497, 498): ILR (1942) 1 Cal 149 * (1911) 38 Cal 639 (668, 669) (DB) * AIR 1969 Madh Pra 44 (45): 1968 MPLJ 698 (DB) * AIR 1967 Kerala 97 (99): 1967 Ker LT 629 (DB) * AIR 1969 Orissa 21 (22) * 34 Cut LT 1175 * AIR 1965 Manipur 52 (53) * AIR 1963 Pat 60 (61): 1963 BLJR 20 * AIR 1962 Andh Pra 479 (483): 1962 (2) Cri LJ 727: (1962) 2 Andh WR 290 (FB).

(15) An objection to jurisdiction based on over-valuation or under-valuation should be dealt with under Section 11, Suits Valuation Act. The same principle has been adopted in Section 21, Civil P. C. AIR 1954 SC 340 (342): 1955 SCR 117 * AIR 1955 All 569 (571) (DB) * AIR 1956 Andhra 253 (254).

(16) Whether a Court has jurisdiction or not has to be decided with reference to the initial assumption of jurisdiction by that Court. AIR 1952 Nag 275 (277, 278): ILR (1952) Nag 534 (DB) * AIR 1962 SC 1621 (1629, 1630): (1963) 1 SCR 778 * (1968) 1 MLJ 153: ILR (1968) 2 Mad 792.

(17) What is to be looked into to determine jurisdiction of a Court is allegations made in plaint cause of action alleged in plaint is important point to be taken into consideration while arriving at a decision as to whether civil Court has jurisdiction or not and not what defendant alleges in support of his claim after filing suit. (1959) 37 Mys LJ 485 (DB) * AIR 1966 Orissa 84 (85): 32 Cut LJ 94 * (1964) 30 Cut LT 199: ILR (1964) Cut 40 (DB) * 1961 Raj LW 636 (637): ILR (1962) 12 Raj 188.

(18) A Court is always clothed with jurisdiction to see whether it has jurisdiction to try the cause submitted to it. AIR 1953 SC 16 (19): 1953 SCR 185 * AIR 1953 Trav-Co 541 (542) * AIR 1950 Lah 229 (231): Pak LR (1950) Lah 568 (FB) * ILR (1950) All 326 (329) * AIR 1942 Mad 675 (677) (DB) * AIR 1940 Pat 406 (408) (DB) * (1887) 11 Bom 488 (490) (DB) * AIR 1965 Mad 450 (450, 451): (1965) 2 Mad LJ 150 (DB) * AIR 1964 Guj 22 (25): (1964) 5 Guj LR 265 * ILR (1963) Andh Pra 617 * (1967) 10 Law Rep 805 (812) (DB).

[See also AIR 1965 Andh Pra 25 (27): (1964) 2 Andh WR 225.]

(19) Where the jurisdiction of the Court is challenged, it cannot refuse to enquire into questions on which its jurisdiction depends. AIR 1955 Assam 12 (15) (DB) * AIR 1952 Trav-Co 125 (128): ILR (1951) Trav-Co 624 * AIR 1948 Oudh 138 (139): 23 Luck 137 * AIR 1945 Cal 23 (24): ILR (1944) 1 Cal 434 * AIR 1935 All 678 (682): 58 All 98 (DB) * (1961) 1 Mad LJ 335 (DB).

(1968) 2 Mad LJ 367. ( (1958) 1 MLJ 232 and (1958) 2 MLJ 184, Overruled.)

[See also AIR 1969 Mad 172 (176).]

(20) A judicial investigation of all allegations and facts, sufficient to guide the Court, should precede the admission or negation of jurisdiction. AIR 1951 Bom 390 (391) (DB) * AIR 1933 Oudh 191 (192): 8 Luck 676 (DB) * AIR 1917 Cal 481 (483) * AIR 1921 Pat 32 (32): 5 Pat L Jour 397 (DB) * 74 Mad LW 167: (1961) 1 Mad LJ 335 (DB).

(21) When a Court is called upon to decide a matter of jurisdiction, no question of hardship and no consideration of technicality can be permitted to affect the judgment. AIR 1920 Cal 113 (114): 47 Cal 555 (FB) * AIR 1938 Lah 129 (134) (DB) * AIR 1935 All 842 (842) * AIR 1936 Cal 138 (141) (DB) * AIR 1935 Rang 517 (518).

(22) The presumption is in favour of giving jurisdiction to the highest Court. (1912) 8 Nag LR 179 (181) * AIR 1935 Rang 174 (176) * AIR 1929 Bom 471 (473): 53 Bom 819.

(23) It is the duty of the party alleging want of jurisdiction to prove his allegation. AIR 1951 Ajmer 83 (2) (83) * AIR 1919 All 328 (328) (DB) * AIR 1935 Oudh 96 (107) (DB).

(24) Where the superior Court transfers a suit to the inferior Court with a direction to dispose of it according to law, the inferior Court has to consider whether under the law the suit was maintainable in any civil Court. The inferior Court cannot get jurisdiction from the mere fact of transfer. 1952 Raj LW 37 (39) (DB).

(25) Jurisdiction is not the same thing as procedure but the words "jurisdiction" and "proceedings" are interchangeable AIR 1957 All 505 (515) (DB).

(26) When a Court construes a section which ousts the jurisdiction of a Civil Court, the section must be construed strictly. AIR 1957 Bom 239 (240): ILR (1957) Bom 720 (FB) * AIR 1966 SC 1718 (1719): (1966) 3 SCR 617 * AIR 1968 All 369 (379, 380): 1968 All LJ 595 (FB) * AIR 1969 J and K 9 (11): 1968 Kash LJ 127 (FB) * AIR 1967 All 118 (120): 1967 All LJ 111 * AIR 1966 Madh Pra 104 (106): 1966 MPLJ 100 * 1965 All WR (HC) 367: 1965 All LJ 677 * (1965) 67 Bom LR 903 (904): ILR (1966) Bom 632 (DB) * AIR 1964 All 395 (405). (U. P. (Temporary) Control of Rent and Eviction Act (1947) conferring special jurisdiction on authorities and rights of landlord under general law taken away.) * (1964) 5 Guj LR 847 (860): ILR (1964) Guj 1138 * 1962 MPLJ 738 (739) * AIR 1960 All 68 (70): 1959 All LJ 472 (DB) * AIR 1960 Punj 11 (13) * (1959) 61 Punj LR 932 (DB) * 1959 Ker LJ 34 (36) *

**Section 9 — Note 3 (contd.)**
AIR 1959 Punj 206 (208): 61 Pun LR 208 * (1958) 2 Mad LJ 591.

(27) Statute purporting to exclude jurisdiction of civil Court but its language obscure as regards its scope — Principles for its interpretation where two meanings are possible Court will reject one which will make the statute oppressive in its operation — Court will not interpret the Act in a manner which will lead to multiplicity of litigation or offend against well-established principles of jurisprudence. AIR 1967 All 118 (120): 1967 All LJ 111.

(28) No Tribunal can confer jurisdiction upon itself by misconstruing a section. AIR 1969 Goa 16 (25): (1968) 2 Lab LJ 536: 1969 Lab IC 151.

(29) Prima facie, no matter is deemed to be beyond the jurisdiction of a superior Court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior Court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular Court. What is true of inferior Courts is equally true of tribunals of limited authority. AIR 1969 Goa 16 (22): (1968) 2 Lab LJ 536: 1969 Lab IC 151.

(30) Plea of limitation involves a question of law alone and such a question of limitation affects the jurisdiction of Court. 1962 All LJ 229: 1962 All WR (HC) 26 (28) (DB).

**4. Absence of jurisdiction and error in the exercise of it.** — (1) The existence of jurisdiction is very different from the exercise of jurisdiction. AIR 1952 Nag 278 (281): ILR (1952) Nag 444 (FB) * AIR 1958 Andh Pra 1 (3): ILR (1957) Andh Pra 326 (FB) * AIR 1958 Andh Pra 384 (388): ILR (1958) Andh Pra 243 (DB) * AIR 1952 Pat 458 (461): 31 Pat 746 (DB) * AIR 1952 Raj 184 (186): ILR (1952) 2 Raj 415 (DB) * AIR 1941 Nag 364 (367): ILR (1941) Nag 266 (DB) * AIR 1940 Pat 406 (408) (DB) * AIR 1967 Ker 97 (99): 1966 Ker LJ 807 (DB) * AIR 1966 Pat 29 (31, 32): 1965 BLJR 594 (DB) * (1962) 28 Cut LT 60 (63) * AIR 1959 Cal 464 (470, 471): 63 Cal WN 467 (DB) * 1968 Punj LJ 64.

(2) When there is jurisdiction over the person and the subject-matter, the decision of all other questions in the cause is only an exercise of that jurisdiction. AIR 1952 Nag 278 (281): ILR (1952) Nag 444 (FB) * AIR 1952 Nag 275 (278): ILR (1952) Nag 534 (DB) * AIR 1940 Pat 406 (408) (DB) * AIR 1921 Cal 34 (37): 43 Cal 138 (FB) * (1886) 8 All 111 (113) (FB) * AIR 1928 Cal 606 (608) (DB) * AIR 1929 Pat 568 (569): 9 Pat 527 (FB) * AIR 1923 Pat 242 (245, 247): 2 Pat 335 (DB).

(3) Jurisdiction does not depend upon the regularity of the exercise of that power or upon correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly AIR 1954 All 391 (393): 1954 Cri L Jour 847 * AIR 1958 Ker 158 (160) (DB) * AIR 1957 Cal 59 (64) (DB) * AIR 1953 Pat 61 (62): 31 Pat 708 (DB) * AIR 1953 Trav-Co 620 (621, 622) (DB) * AIR 1952 Nag 275 (278): ILR (1952) Nag 534 (DB) * AIR 1952 Pat 458 (461): 31 Pat 746 (DB) * AIR 1951 Pat 529 (532): 30 Pat 366 (DB) * AIR 1943 Mad 449 (450, 453): ILR (1943) Mad 804 (DB) * AIR 1921 Cal 34 (37): 48 Cal 138 (FB) * (1905) 32 Cal 296 (315): 32 Ind App 23 (PC) * AIR 1929 Pat 568 (569): 9 Pat 527 (FB) * (1900) 25 Bom 337 (347): 27 Ind App 216 (PC) * AIR 1953 Pat 75 (77): 32 Pat 43 (DB) * AIR 1952 Trav-Co 316 (317): ILR (1951) Trav-Co 635 (DB) * AIR 1951 All 715 (2) (718) (DB) * AIR 1926 Cal 1101 (1103) (DB) * (1885) 11 Cal 6 (8): 11 Ind App 237 (PC) * AIR 1964 SC 907 (910): (1964) 1 SCR 495 * AIR 1967 Andh Pra 51 (55): (1966) 1 An WR 11 (DB). (Decree passed in suit barred by time — Court having jurisdiction over party and subject-matter — Decree is not a nullity.) * AIR 1967 Ker 97 (100): 1967 Ker LT 629 (DB) * AIR 1960 Mad 8 (9): (1959) 10 STC 207 * AIR 1959 Ker 194 (196): 1959 Ker LT 1 (DB) * AIR 1959 Manipur 12 (13) * AIR 1959 Raj 51 (53): ILR (1958) 8 Raj 969 (DB) * 1968 All LJ 77: 1968 All WR (HC) 305.

(4) The boundary between an error of judgment and the usurpation of power is that the former being reversible by an appellate Court is only voidable, while the latter is an absolute nullity. AIR 1952 Pepsu 119 (124): ILR (1952) Patiala 281 (DB) * AIR 1958 All 636 (638) (DB) * AIR 1951 Bom 68 (69) (DB) * AIR 1951 Punj 415 (416) * AIR 1941 Nag 364 (367): ILR (1941) Nag 266 (DB) * AIR 1921 Cal 34 (37): 48 Cal 138 (FB) * AIR 1937 Cal 211 (212): ILR (1937) 1 Cal 781 (DB) * AIR 1962 Andh Pra 479 (483): (1962) 2 Andh WR 290 (FB) * 1968 Punj LJ 64.

(4-A) Jurisdiction — Exercise of — Execution of decree — Power of executing Court to go behind the decree — Exercise of and existence of jurisdiction — Distinction. (1962) 28 Cut LT 60 (63) * 1961 Jab LJ 1476 (1478) * AIR 1959 Cal 464 (470, 471): 63 Cal WN 467 (DB).

(5) If in exercise of judicial discretion a Judge usurps jurisdiction, which he does not possess, that alone would be a valid ground of appeal. Where jurisdiction is usurped by a Court in passing an order, against which an appeal would lie if it had been passed with jurisdiction, an appeal against the order cannot be defeated on the ground that the order was made without jurisdiction. AIR 1968 Pat 352 (358) (DB).

(6) Where a Court decides that it has jurisdiction to entertain a matter and on the basis of that decision adjudicates on the matter, the adjudication is not a

**Section 9 — Note 4 (contd.)**

nullity. AIR 1949 Mad 780 (783) (DB) * AIR 1942 Mad 675 (677): ILR (1943) Mad 217 (DB).

[See also 1958 MPC 682 (684). (S. 74 M. B. Panchayat Vidhan does not imply exclusion of jurisdiction of Civil Court.)]

(7) Where a tribunal is a regular one owing its existence to an Act of the Legislature it has jurisdiction to determine what are the cases which fall within its jurisdiction and if the tribunal decides the question wrongly, the proper remedy is to file an appeal against it and not by way of challenging the jurisdiction of the tribunal. AIR 1947 Bom 413 (423) * AIR 1962 Assam 98 (101): ILR (1962) 14 Assam 359 (DB) * AIR 1960 Assam 59 (60, 61, 62): ILR (1957) 9 Assam 315 (DB).

[See also AIR 1963 Pat 11 (14, 15): 1963 BLJR 11. (An act done in wrong exercise of its jurisdiction by a tribunal is only amenable to correction by its superior authority and not the municipal Court.)]

[See however AIR 1951 Bom 68 (70) (DB).]

(8) Where there is jurisdiction over the subject-matter but only non-compliance with the procedure prescribed as essential for the exercise of jurisdiction, the defect might be waived, but the same may not be said in a case where there is inherent lack of jurisdiction. AIR 1958 Andh Pra 384 (388): ILR (1958) Andh Pra 243 (DB) * AIR 1967 Ker 163 (169): 1967 Ker LT 238 (DB) * AIR 1963 Pat 286 (287, 288): 1963 BLJR 445 (DB).

**5. Consent cannot give or oust jurisdiction.** — Where the Court has no inherent jurisdiction, no amount of consent, acquiescence or waiver can create it. (1887) 9 All 191 (203): 13 Ind App 134 (PC) * AIR 1957 Madh Pra 71 (72) (FB) * AIR 1958 All 636 (638) (DB) * AIR 1958 Manipur 7 (11) * AIR 1958 Pat 105 (106) (DB) * AIR 1957 Assam 101 (102): ILR (1955) 7 Assam 451 (DB) * AIR 1957 Mad 25 (31, 32): ILR (1956) Mad 1200 (DB) * AIR 1957 Pat 61 (64): 35 Pat 718 (DB) * AIR 1957 Punj 214 (218): ILR (1957) Punj 1032 (DB) * AIR 1954 SC 340 (342): 1955 SCR 117 * AIR 1951 SC 230 (237, 242): 1951 SCR 380 * AIR 1954 Mad 103 (105): ILR (1953) Mad 1047 (FB) * AIR 1956 Bom 459 (466): ILR (1956) Bom 100 (DB) * AIR 1956 Hyd 129 (130): ILR (1956) Hyd 368 (DB) * AIR 1956 Mad 680 (681): ILR (1957) Mad 78 (DB) * AIR 1956 Pat 294 (297): 35 Pat 292 (DB) * AIR 1956 Trav-Co 200 (203): ILR (1956) Trav-Co 206 (DB) * AIR 1955 Andh 175 (176) * AIR 1955 Cal 161 (162) (DB) * AIR 1955 Manipur 39 (40) * AIR 1954 Bom 176 (177): ILR (1954) Bom 334 (DB) * AIR 1954 Pat 164 (167): 32 Pat 540 (DB) * AIR 1953 All 458 (459) (DB) * AIR 1953 Nag 136 (138): ILR (1953) Nag 433 (DB) * AIR 1953 Vind Pra 51 (54) * AIR 1952 Raj 184 (186): ILR (1952) 2 Raj 415 (DB) * AIR 1950 East Punj 188 (193) (DB) * AIR 1948 Cal 322 (329) (DB) * AIR 1947 PC 78 (79): 74 Ind App 50: 1947 FCR 59 * AIR 1969 Goa 16 (22): (1968) 2 Lab LJ 536: 1969 Lab IC 151. (This is so even in regard to Tribunal.) * AIR 1969 Mad 172 (176): (1968) 2 Mad LJ 367 * (1969) 71 Pun LR 41 (43): 1968 Cur LJ 391 * ILR (1967) Guj 982 (994): 9 Guj LR 1018 * (1967) 10 Law Rep 805 (812) (DB) * 1966 All WR (HC) 799 * AIR 1966 Orissa 84 (86): 32 Cut LT 94 * AIR 1965 All 589 (590): 1965 All LJ 849 * (1965) 10 FLR 219 (All): (1965) 2 Lab LJ 593 * AIR 1965 Andh Pra 25 (28): (1964) 2 Andh WR 225 * AIR 1965 Cal 59 (65): 69 Cal WN 545 * AIR 1965 Guj 131 (134): (1965) 6 Guj LR 99 (DB) * AIR 1965 Manipur 52 (53) * AIR 1963 All 117 (118) * AIR 1963 Ker 114 (115): 1962 Ker LJ 1267 * AIR 1963 Pat 118 (121): 1962 BLJR 681 (DB). (Petitioner not estopped from raising objection in writ petition.) * 1963 Raj LW 284 (287) * 1962 All WR (HC) 25. (Invalid reference to arbitration under Section 22 of U. P. Consolidation of Holdings Act (1954) — Principle of acquiescence or estoppel not applicable.) * AIR 1962 Cal 635 (637): 66 Cal WN 970 (SB) * AIR 1962 Madh Pra 310 (311): 1962 MPLJ 343 * 1962 Raj LW 41 (45) * AIR 1961 Punj 87 (91): ILR (1960) 1 Punj 341. (But this rule has its limitation and cannot extend to cases where the Court has Extraordinary Original Civil Jurisdiction.) * AIR 1960 All 730 (732): 1960 All LJ 220. (Although a mistake committed by a party in approaching a wrong Court does not confer jurisdiction on a Court, the circumstance has to be taken into consideration in deciding whether the High Court should interfere in revision or not.) * AIR 1960 Andh Pra 371 (371): 1960 Cri LJ 75 * AIR 1960 J & K 29 (33) (DB) * AIR 1960 Raj 105 (112): ILR (1959) 9 Raj 869 (DB) * AIR 1959 Punj 646 (648) * AIR 1959 Raj 136 (140): 1959 Raj LW 212.

[See also (1967) 1967-2 Mad LJ 57: ILR (1968) 1 Mad 630. (Court not wanting in inherent jurisdiction — Filing of suit in accordance with agreement — Neither party can question jurisdiction of Court.) * 1959 MPLJ 566: AIR 1959 Madh Pra 13 (17) (DB). (Bar under Administration of Evacuee Property Act (1950) — Custodian impleaded at his own request not precluded from raising bar.)]

(2) Where the Court has jurisdiction, the consent of parties will not oust it. AIR 1955 Madh B 193 (197): ILR (1956) Madh B 237 (FB) * AIR 1955 Cal 161 (162) (DB) * AIR 1954 Bom 176 (177): ILR (1954) Bom 334 (DB) * AIR 1943 Lah 295 (296) * AIR 1930 Nag 189 (190): 26 Nag LR 103 * (1908) 30 All 560 (566, 567) (FB) * AIR 1959 Punj 646 (648).

**Section 9 — Note 5 (contd.)**

(3) Estoppel against a party cannot confer jurisdiction on a Court where it had none. 1947 All WR (IC) 67 (70) * AIR 1931 All 490 (494): 54 All 25 (FB) * AIR 1960 Andh Pra 134 * AIR 1959 Punj 646 (648).

(4) A party may waive irregularities in the exercise of jurisdiction. AIR 1953 Trav-Co 620 (621, 622) (DB) * AIR 1952 Pat 328 (331): 29 Pat 149 (DB) * 1949 Trav-Co LR 70 (71) (DB) * AIR 1943 Mad 721 (724): ILR (1944) Mad 202 (DB) * AIR 1943 Mad 449 (453): ILR (1943) Mad 804 (DB) * AIR 1922 Mad 447 (451): 45 Mad 90 (DB).

[See AIR 1951 SC 230 (237, 242): 1951 SCR 380.]

(5) A party may waive an enquiry into the existence of facts necessary to give jurisdiction. AIR 1956 Pat 294 (297): 35 Pat 292 (DB) * (1910) 35 Bom 24 (27, 28) (DB) * AIR 1919 Mad 242 (244) (DB) * AIR 1926 All 650 (652) * AIR 1927 Bom 135 (138) (DB) * (1908) 35 Cal 394 (399) * AIR 1923 Pat 562 (563) (DB) * AIR 1923 Pat 209 (211) (DB) * AIR 1922 Pat 34 (35): 1 Pat 356 (DB).

(6) Where the want of jurisdiction has to depend upon proof of certain facts, then if those facts have not been raised and proved, a party cannot be permitted to raise a plea of want of jurisdiction so as to render its decision void and ineffective. AIR 1956 Pat 294 (297): 35 Pat 292 (DB).

(7) When a party submits to the jurisdiction of a Court and takes a chance of getting a decision in his favour he cannot be permitted to challenge the jurisdiction of that Court after the decision has gone against him. AIR 1956 Pat 294 (297): 35 Pat 292 (DB) * AIR 1962 Pat 338 (339): 1962 BLJR 294 (DB).

(8) Where the Court has no jurisdiction, because of the privilege attaching to a party, that party may waive the privilege. AIR 1952 Raj 184 (186): ILR (1952) 2 Raj 415 (DB).

(9) If the judgment of the Court cannot be effective against the party who has submitted to it, the Court will not exercise jurisdiction. AIR 1954 Pat 164 (168): 32 Pat 540 (DB).

(10) Where there are two Courts having jurisdiction to try the suit, the parties may agree that a suit should be brought in one of those Courts. Such an agreement does not contravene the provisions of Section 28 of the Contract Act. AIR 1956 Trav-Co 200 (203): ILR (1956) Trav-Co 206 (DB) * AIR 1957 Cal 240 (241) * AIR 1957 J & K 7 (7) * AIR 1955 Cal 161 (162) (DB) * AIR 1955 J & K 26 (27) (DB) * AIR 1954 Mad 845 (846): ILR (1954) Mad 855 (DB) * AIR 1946 Lah 57 (60): ILR (1945) Lah 281 (FB) * AIR 1940 All 241 (242): ILR (1940) All 232 (DB) * AIR 1968 Mad 194 (194): (1967) 1 Mad LJ 299 * AIR 1964 Mys 147 (151): (1963) 2 Mys LJ 513 (DB) * (1963) 1 Mys LJ 194 * AIR 1962 Andh Pra 452 (454): (1962) 1 Andh WR 165 (DB). (It does not deprive any Court of its inherent jurisdiction.)

[See also AIR 1966 Mys 178 (183): (1965) 2 Law Rep 67 (DB). (Party having liberty to choose one among several forums provided by statute — Matter should be considered from point of view of context and purpose of particular statutes.)]

[See however AIR 1956 Madh B 120 (121).]

(11) It is one thing to say that the Court has no jurisdiction and quite another to say that the Court should not entertain the suit because of the agreement of the parties to file a suit in the particular Court. In the former case the Court lacks the necessary jurisdiction. In the latter case the Court retains its jurisdiction but refuses to entertain a suit in order to give effect to the valid stipulation of the contract between the parties. AIR 1955 Madh B 193 (197): ILR (1956) Madh B 237 (FB).

(12) In a case where the parties in pursuance of a clause in contract request for the change of forum to the Court in some other country the determination of the forum will depend upon the nature of the evidence that has to be produced by the plaintiff and the place where it will be most easily available. AIR 1967 Cal 24 (25): ILR (1960) 2 Cal 85.

**6. Objection to jurisdiction** — See Section 21.

**7. Jurisdiction with reference to subject-matter.** — (1) Jurisdiction with reference to the subject-matter of the dispute means jurisdiction with reference to the nature of the claim made. AIR 1956 Mad 610 (611) * AIR 1928 Nag 221 (222) * (1890) 15 Bom 400 (403, 404, 405) (DB) * AIR 1959 Raj 162 (166) * 1959 Raj LW 459.

(2) The jurisdiction with reference to the subject-matter of a claim depends upon the allegations in the plaint and not upon those which may ultimately be found true. AIR 1956 Hyd 17 (18): ILR (1955) Hyd 829 * AIR 1957 Orissa 17 (19): ILR (1956) Cut 677 (DB) * AIR 1956 Sau 58 (60) (DB) * ILR (1955) Punj 553 (556) * AIR 1954 All 171 (172) (DB) * AIR 1953 Pepsu 107 (109): ILR (1953) Patiala 280 (DB) * AIR 1951 Bom 390 (391) (DB) * AIR 1951 Him Pra 51 (51, 52) * AIR 1950 All 407 (409): ILR (1951) 2 All 568 (DB) * AIR 1949 Bom 337 (339) (DB) * AIR 1946 All 379 (382): ILR (1946) All 692 (FB) * AIR 1942 Pat 493 (505): 21 Pat 397 (DB) * AIR 1942 Lah 217 (223): ILR (1943) Lah 191 (FB) * AIR 1922 Nag 10 (11, 12): 18 Nag LR 121 * AIR 1930 All 193 (198): 52 All 501 (FB) * AIR 1924 All 652 (654): 46 All 553 (DB) * (1888) 10 All 524 (528) (DB) * AIR 1967 SC 369 (375): (1964) 3 SCR 964 * (1967) 8 Guj LR 297 * AIR 1966 All 559 (559): 1966 All LJ 316 * (1965) 69 Cal WN 469 * AIR 1963 All 574 (578) * (65) 69 Cal WN 469. (The value for the purposes of

**Section 9 — Note 7 (contd.)**
jurisdiction is ordinarity to be determined, on the basis of the claim made, not on the decision upon that claim.) * AIR 1962 Andh Pra 447 (449): (1962) 1 Andh WR 36 * 1961 All LJ 854 * AIR 1960 All 573 (577): 1960 All LJ 314 * ILR (1960) Bom 482 (DB) * ILR (1958) Cut 180 (184) * AIR 1955 Bom 55 (57, 58): 56 Bom LR 955.

(3) The question of maintainability of a suit must be dealt with on the footing of the allegations in the plaint being correct. If, afterwards, the allegations are found to be not correct the suit is liable to be dismissed not on the ground that it is not maintainable but on its merits. AIR 1936 Pat 572 (575) (DB) * AIR 1964 All 63 (64): 1963 All LJ 997. (Suit for declaration that plaintiff is Indian citizen and for permanent injunction restraining Government from deporting him out of India — Maintainability — Application for temporary injunction — Application cannot be dismissed on sole ground that suit is not maintainable under Section 9, Citizenship Act.)

(4) It is necessary to consider what the cause of action in the plaint is and what is the substantive relief which the plaintiff would be entitled to, if he succeeds in the suit, in order to determine whether the Court has jurisdiction, irrespective of what prayers the draftsman has thought fit to put in the plaint. AIR 1956 Bom 649 (649).

(5) Where facts are alleged indicating that a different Court has jurisdiction, the Court must determine all facts upon which its jurisdiction depends. AIR 1951 Bom 390 (391) (DB) *AIR 1948 Oudh 138 (139): 23 Luck 137 * AIR 1945 Cal 23 (24): ILR (1944) 1 Cal 434 * AIR 1965 Mad 450 (450): (1965) 2 Mad LJ 150 (DB).

(6) Civil Court having no jurisdiction over subject-matter of suit — It cannot decide any question on merits — It can simply decide question of jurisdiction and, order return of plaint for presentation to proper Court if it comes to conclusion that it has no jurisdiction. AIR 1965 SC 338 (342): (1964) 3 SCR 763.

(7) The illegality of the claim made in the plaint cannot take away the jurisdiction of the Court to entertain the suit, though it may be a ground of defence to the suit. AIR 1933 Sind 29 (32): 26 Sind LR 395.

**8. Consensual Jurisdiction.** — (1) Where a consensual jurisdiction conferred by a statute requires for its constitution the consent of all the parties, this must mean the consent of all whose interests are concerned in the proceedings. The absence of consent, whether due to unwillingness to consent or inability to consent as in the case of minors, is equally fatal. AIR 1944 PC 5 (6).

**9. Local jurisdiction** — See Section 16.

**10. Personal jurisdiction** — See Section 20.

**11. Pecuniary jurisdiction** — See Sections 6 and 15.

**12. Valuation of plaint determines jurisdiction** — See Section 15.

**13. Appellate jurisdiction** — See Section 96.

**14. Jurisdiction of foreign Courts** — See Section 13.

**15. "Subject to the provisions herein contained".** — (1) A decree passed in contravention of Section 47 of the Code is a nullity. AIR 1956 Cal 317 (319) (DB).

**16. Suits of a civil nature.** — (1) Suit of Civil nature ordinarily means a suit in which any valuable right is sought to be enforced. In most cases a justiciable right has a pecuniary value. AIR 1962 All 20 (21) * 1967 All WR (HC) 610 (611). (Suit of a civil nature means suits to enforce legal rights.)

(2) It is not the status of the parties to the suit but the subject-matter of the suit, which determines whether or not the suit is one of a civil nature. AIR 1939 All 394 (397): ILR (1939) All 345 (DB) * AIR 1948 All 382 (392, 393): ILR (1949) All 26 (FB) * AIR 1965 Andh Pra 326 (328): (1965) 2 Andh WR 88 (DB) * AIR 1969 Delhi 220 (228).

[But see AIR 1936 All 117 (117, 118) (DB).]

(3) A civil right means a right vesting in a person in his capacity as the citizen of a State, and it does not seem to matter whether that right arises out of a statute or otherwise, and when a tax is imposed on a citizen and he claims that he is not liable and goes to Court to establish that right, he is asserting a civil right. AIR 1960 All 84, Diss from. AIR 1965 Punj 459 (462): 67 Pun LR 729 (FB) * AIR 1959 All 607 (608): 1959 All LJ 727 (DB). ("Civil" means pertaining to private rights and remedies of a citizen.)

(4) In view of Section 9, Court cannot entertain a suit which is not of a civil nature. Prima facie suits raising questions of law, religious rites and ceremonies only are not maintainable in a civil Court for they do not deal with legal rights of parties. The explanation to the section implies two things, namely, (i) a suit for an office is a suit of a civil nature and (ii) it does not cease to be one even if the said right depends entirely upon a decision of a question as to the religious rites or ceremonies. AIR 1961 SC 1720 (1724): (1962) 2 SCR 509.

(5) The Explanation to this section certainly does not confine the limits of the nature of suits contemplated by the main section. The section takes within its broad sweep all questions where one person claims any privilege in himself as against others. It cannot be assumed that only a right which is claimed, in relation to a temple, such as the right to perform worship in a temple, or the right to receive religious honours or privileges attached to an office as its perquisite or remuneration

**Section 9 — Note 16 (contd.)**
could be agitated under Section 9. AIR 1967 Mad 451 (453): (1967) 1 MLJ 371.

(6) Where a proceeding is in aid of establishing a civil right or for disputing one it would be a civil proceeding. Broadly speaking if the proceedings taken establish or negative a man's office or status or would affect his right to property of any kind it will be a civil proceeding. AIR 1963 Cal 364 (366) (DB).

(7) A suit by or against the Government or a local authority like a municipality can be one of a civil nature. AIR 1940 Lah 451 (454).

(8) In every democratic country the right of franchise is considered to be a very valuable right, and though the exercise of the right results in electing members to legislative bodies, which have political power, the nature of the right is essentially of civil character. AIR 1959 All 607 (609) (DB). (AIR 1958 Andh Pra 642, Dissented from.)

(9) Right to seek election of legislature is civil right. Election petition is civil proceeding within Article 133 of the Constitution. AIR 1959 All 607 (610) (DB). (AIR 1958 Andh Pra 642, Dissented from.)

[See however (1967) 8 Guj LR 337.]

(10) Suit for declaration of plaintiff's right to patta and possession of land. Plaintiff claims rights of a purely civil nature which a civil Court is competent to determine and grant redress. There is no law which expressly or by necessary implications of its provisions bars such a suit. (1961) Andh LT 836 (846) (FB).

(11) Questions relating to caste or to religious rites or ceremonies or to social matters, are not questions relating to civil rights. (1910) 34 Bom 455 (458) (DB) * (1869) 6 Bom HCR (AC) 19n (20n) (DB).

[But see (1892) 16 Bom 281 (283) (DB).]

(12) A suit in which the principal question is one relating to caste or to religious rites and ceremonies is not a suit of a civil nature. AIR 1939 Mad 102 (105) * AIR 1958 Manipur 29 (30) * AIR 1939 Mad 757 (758) (DB) * AIR 1935 Nag 156 (162).

(13) Where the principal question in a suit is one of a civil nature and the adjudication on such question necessarily involves the determination of a caste question or a question relating to religious rites and ceremonies, the jurisdiction of the civil Court is not barred. (1877) 2 Mad 62 (65): 6 Ind App 120 (PC) * AIR 1958 Manipur 29 (30) * AIR 1958 Orissa 26 (31) (DB) * (1895) 19 Bom 507 (522) * (1887) 11 Bom 534 (535) * AIR 1919 Low Bur 81 (91): 9 Low Bur Rul 220 (FB).

(14) The section draws no distinction between a right of a civil nature existing at common law and one created by a statute. AIR 1956 Pat 205 (207) * AIR 1949 Lah 131 (158): 50 Cri L Jour 598: Pak LR (1949) Lah 215 (FB) * AIR 1963 Cal 364 (367) (DB).

(15) While a proceeding not governed by the Code cannot be said to be a civil proceeding, a proceeding governed by it is not necessarily a civil proceeding. There must be something in the jurisdiction of the tribunal which makes the proceeding a civil proceeding. AIR 1957 All 505 (515) (DB).

(16) The nature of a dispute which is essentially of a civil nature is not fundamentally altered because, on the consideration of expediency, the Legislature has entrusted the jurisdiction over the dispute to a special tribunal. AIR 1957 Bom 9 (10): ILR (1956) Bom 925 (DB).

(17) In the eye of the law idols are property and the right to deal with such property must, in the event of dispute, be determined by a Civil Court. (1882) 4 Mad 315 (316) (DB) * (1911) 12 Ind Cas 537 (538) (DB) (Mad).

(18) The removal or alteration of namams (religious marks) in a temple is an interference with property in respect of which a suit will lie in a Civil Court. (1907) 30 Mad 158 (166) (DB).

(19) A suit for a declaration of Civil rights in respect of certain contracts, arbitration agreements and awards is a suit of civil nature and a civil Court is not barred from taking cognizance thereof unless, it is either expressly or impliedly barred. AIR 1960 Cal 702 (708, 709): 64 Cal WN 616 (DB).

(20) Suit for partition of Sishya Sancharam and earnings made out of it — Not a civil nature — Suit is not maintainable. (1969) 1 An WR 142 (FB).

(21) Right to run customary bull race is a right of civil nature. AIR 1967 Mad 451 (453): (1967) 1 Mad LJ 371.

(22) A suit by a Hindu wife for an injunction perpetually restraining her Hindu husband from contracting a second marriage is a suit of a civil nature. AIR 1964 Mys 247 (249, 250): (1964) 1 Mys LJ 183.

(23) Directive principles of State policy — Not enforceable in Court of law — The matter is entirely an administrative one. AIR 1964 MP 231 (232): 1964 MPLJ 527 (DB).

**17. Suits relating to rights in property.**— (1) A dispute as to conditions upon which the property of one could be held by another or the amount which one should pay to the other for its use and occupation is dispute of civil nature. AIR 1949 Lah 94 (97): Pak LR (1949) Lah 139 (DB).

(2) Village washerman service inam lands — Suit by inamdar for ejectment of trespasser is maintainable in civil Court. (1955) 21 Cut L Tim 152 (153) (DB).

(3) A suit for partition is maintainable between the joint holders of a village blacksmith service inam. Such a suit is not prohibited by Section 21 of Madras. Hereditary Village Offices Act (3 of 1895). (1958) 2 Andh WR 608.

(4) A suit to establish that the land is

**Section 9 — Note 17 (contd.)**

a part of the permanently settled estate lies in civil Court. (1885) 7 All 140 (144, 145) (DB).

(5) A suit for passing a scheme in respect of a private debutter estate is maintainable in civil Court. AIR 1932 Cal 117 (117) (DB) * AIR 1953 Mad 750 (753) (DB) * AIR 1952 Cal 763 (768): ILR (1954) 2 Cal 41.

(6) A suit for maintenance of an illegitimate child notwithstanding an order of the Magistrate refusing to grant maintenance lies in civil Court. (1905) 32 Cal 479 (481) (DB).

(7) A woman belonging to Christian community has a right by virtue of Section 9, C. P. C., to file suit for maintenance against her husband. AIR 1966 Mad 225 (230): ILR (1965) 1 Mad 614 (DB).

(8) A suit for a declaration of title to rent-bearing land is of civil nature. (1881) 7 Cal 437 (441) (DB).

(9) A suit to establish the plaintiff's right to a share in an occupancy tenure lies in civil Court. AIR 1923 Lah 500 (501): 4 Lah 195 (DB).

(10) A suit for partition of abadi land is a suit of civil nature. AIR 1921 Lah 157 (159): 2 Lah 73 (DB).

(11) A suit for joint possession of shamilat lies in civil Court. AIR 1915 Lah 295 (296): 1915 Pun Re No. 44.

(12) A right to succeed to a hereditary office is property and a claim to such right is cognizable by civil Court. AIR 1956 Mad 146 (147, 148): ILR (1957) Mad 631.

(13) A claim to succeed to a jagir is a civil right and in the absence of any express or implied bar a civil Court of competent jurisdiction is empowered to adjudicate upon the claim under Section 9, C. P. C. ILR (1961) 11 Raj 93 (98) (DB).

(14) A claim to Yajman Vritti is cognizable by a civil Court. AIR 1953 Madh B 7 (9) (DB) * AIR 1942 All 320 (323): ILR (1942) All 821 (DB).

(15) A suit to set aside sale under Public Demands Recovery Act lies in civil Court: (1903) 30 Cal 619 (622).

(16) Where the plaintiff has no interest in any property but simply claims to perform certain duties, as where a joint trustee of a temple claims to enjoy the management and superintendence of a temple, the Civil Court cannot take cognizance of it. (1897) 19 All 428 (433).

(17) A right to property under the terms of a will is of a civil nature and a suit to enforce the terms of the will is triable by a Civil Court. AIR 1953 Nag 276 (277): ILR (1953) Nag 565 (DB) * AIR 1953 Pat 202 (204): 31 Pat 978 (DB).

(18) Suits respecting temple and other religious property are cognizable by Civil Courts. (1882) 4 Mad 315 (316) (DB) * AIR 1957 Andh Pra 498 (499) (DB) * AIR 1957 Mad 583 (585) (DB) * (1889) 13 Bom 548 (550) (DB) * (1894) 21 Cal 463 (469) (DB) * (1907) 30 Mad 158 (166) (DB) * AIR 1914 Low Bur 178 (178): 8 Low Bur Rul 145 (DB) * AIR 1967 SC 436 (440): (1966) Sup SCR 270 * 1962 Jab LJ 117 (118).

[See also (1966) 2 Mad LJ 278 (282): ILR (1966) 2 Mad 92. (Private family endowment — Person in whom management is vested cannot alter fundamental principles relating to endowment which may destroy trust — Person in management cannot alter custom, mode of worship or character of institution — Civil Court can grant appropriate relief in such cases.)]

(19) Even in the case of a private trust a suit can be filed for the removal of the trustee or for settlement of a scheme for the purpose of effectively carrying out the objects of the trust. If there is a breach of trust or mismanagement on the part of the trustee, a suit can be brought in a civil Court by any person interested for the removal of the trustee and for proper administration of the endowment. AIR 1968 SC 915 (918, 919): (1968) 2 SCR 897.

(20) Customary payments, such as mamuls in the Agency Tracts of Gunjam, can be enforced by way of a suit in a Civil Court. AIR 1958 Orissa 15 (18): ILR (1957) Cut 501 (DB).

(21) A right to priestly dues or voluntary offerings of the jajmans for the funeral rites or ceremonies does not constitute property. ILR (1958) Andh Pra 642 (648) (DB).

(22) Copyright is a property, and therefore, a suit seeking reliefs for infringement of copy right is a suit of civil nature. AIR 1967 Mad 381 (384, 385): ILR (1964) 2 Mad 666.

(23) The claim to succeed to a jagir was a civil right and in the absence of any express or implied bar, a Civil Court of competent jurisdiction was empowered to adjudicate upon the claim under Section 9 of the Code of Civil Procedure. 1961 Raj LW 155 (157): ILR (1961) 11 Raj 93 (DB).

(24) Suit for partition of Jagir properties as well as other movable and immoval properties — The claim for other properties is cognizable by civil Court unless it could be shown that such other properties became Jagir properties which was impartible. ILR (1966) 16 Raj 497: 1966 Raj LW 469 (492) (DB).

**18. Other common law rights.** — (1) The right to lawfully use a public highway is a right of civil nature. (1897) 24 Cal 524 (526) (DB) * (1895) 22 Cal 551 (558) (DB) * (1904) 31 Cal 839 (846) (DB) * (1888) 15 Cal 460 (467) (FB).

(2) A right to kill one's own cattle is a right of civil nature. (1908) 30 All 181 (187, 188) (DB) * AIR 1930 All 753 (756) (DB).

(3) A right to hoist the flag of a saint is a right of civil nature. (1910) 7 All L Jour 830 (832).

**Section 9 — Note 18 (contd.)**

(4) A suit for recovery of a debt which has accrued from the relationship of master and servant is of a civil nature. AIR 1953 Cal 613 (617).

(5) Question of date of birth or of a person's age is a matter pertaining to civil rights and civil Court have jurisdiction to decide it — Order on question of age is not an administrative order: 69 Punj LR 179 (180): 1967 Cur LJ 70. (AIR 1965 SC 961 and AIR 1957 Trav-Co 124 and AIR 1959 Mad 88 and AIR 1963 MP 335, Rel. on.)

**19. Suit by Government servant for arrears of salary.** — (1) A suit for recovery of arrears of pay by a civil servant for the period he was actually in office is maintainable in a civil Court. AIR 1954 SC 245 (249): 1954 SCR 786 * AIR 1955 SC 600 (601): 1955-2 SCR 391 * AIR 1955 Cal 45 (48) (DB) * AIR 1955 Assam 17 (20): ILR (1954) 6 Assam 383 (DB) * 1965 All LJ 292 * AIR 1961 Cal 626 (635): 65 Cal WN 607 (DB). (Overruled on another point in AIR 1966 SC 951.)

(2) Suit by Government servant for arrears of salary — Railway Establishment Code Vol. I, Rule 1314 (5) — Special provident fund contribution — Subscriber a non-gazetted officer, retired — Unsatisfactory record of service of subscriber — Railway authorities contributing only sixty per cent of amount — Suit for recovery of withheld amount does not lie in civil Court though it is common law liability. AIR 1968 Mad 87 (88, 89): 80 Mad LW 381.

**20. Right of worship.** — (1) A right of worship is a civil right. AIR 1955 All 68 (73): ILR (1955) 2 All 128 (SB) * AIR 1953 Orissa 151 (152): ILR (1953) Cut 423 * AIR 1948 Oudh 279 (281) * AIR 1945 Mad 234 (235, 236) * AIR 1939 Mad 102 (106) * AIR 1917 Mad 868 (889) * (1890) 13 Mad 293 (297) (DB) * AIR 1963 Ker 49 (50, 51): 1962 Ker LJ 286.

(2) A suit to establish a right of worship is a suit of a civil nature. AIR 1952 SC 245 (250): 1952 SCR 849: ILR (1953) 1 All 42 * AIR 1917 Mad 903 (904) (DB) * (1891) 13 All 419 (422, 429, 430) (FB) * (1890) 12 All 494 (501, 505) (FB) * (1885) 7 All 461 (474) (FB).

(3) A suit to restrain persons from interfering with the right of worship is a suit of civil nature. AIR 1954 Punj 47 (48): ILR (1954) Punj 440 (DB) * AIR 1952 Punj 163 (165) * AIR 1925 Bom 209 (209, 210) (DB) * (1885) 7 All 178 (182, 184) (FB).

(4) A suit will lie to restrain a rival class of persons from joining in worship. AIR 1944 Mad 416 (417) * (1882) 5 Mad 313 (319) (DB) * (1883) 7 Bom 323 (328) (DB).

(5) A sect of Christians cannot sue for partition of a church building for purposes of exclusive worship by the sect. AIR 1917 Mad 431 (440): 39 Mad 1056 (1071, 1078) (DB).

(6) A suit will not lie to compel the hereditary priests of a temple to take out certain ornaments from the temple treasury and to adorn the image on festive days. (1880) 5 Bom 80 (82) (DB).

(7) A suit will not lie to declare the rights of persons to stand in a particular row of the congregation, or to prescribe the modes of worship, prayers and religious precedence. AIR 1939 Mad 102 (106).

(8) A suit to establish the mere right of holding a lighted torch inside the chariot during a car festival in a temple is not cognizable by a Civil Court. AIR 1953 Mad 701 (703).

**21. Right relating to religious and other processions.** — (1) Persons have a right to conduct a religious procession with its appropriate observances along a highway. AIR 1955 All 68 (73): ILR (1955) 2 All 128 (SB) * AIR 1948 Oudh 279 (281) * AIR 1925 PC 36 (38) * AIR 1931 All 674 (676): 53 All 836 (DB) * AIR 1920 Bom 15 (18): 44 Bom 410 (DB) * AIR 1918 Bom 162 (163): 42 Bom 438 (DB) * AIR 1919 Mad 674 (675): 42 Mad 271 (280, 281, 282) (FB) * AIR 1925 Oudh 656 (657): ILR (1959) Cut 437 (DB).

(2) A suit for a declaration of a right to take out a religious procession lies in a Civil Court. (1897) 24 Cal 524 (526) (DB) * AIR 1931 All 341 (346): 53 All 484 (DB) * AIR 1925 PC 36 (36, 38): 52 Ind App 61: 47 All 151 * AIR 1964 Orissa 18 (20): 29 Cut LT 208 * ILR (1959) Cut 437 (DB).

(3) The worshippers in a mosque or temple which abuts on a high road cannot compel the processionists to intermit their worship while passing the mosque or temple on the ground that there was continuous worship there. (1950) 55 Mys HCR 317 (321, 323) (DB) * (1883) 6 Mad 203 (217) (FB) * AIR 1964 Orissa 18 (21): 29 Cut LT 208.

(4) A permanent arrangement validly come to between rival communities regulating their method of taking out religious processions will be upheld and enforced by a Court of law. AIR 1929 All 519 (520) (DB).

[But see AIR 1948 Oudh 279 (282).]

(5) The right to conduct procession extends to social or political processions including a funeral procession. AIR 1954 Mad 179 (183, 184) * AIR 1950 Bom 192 (195) (FB).

(6) A citizen has a right to file a declaratory suit to establish his right to conduct of non-religious procession without proof of special damage. AIR 1950 Bom 192 (195) (FB).

**22. Right of burial.** — (1) The right of burial is a civil right and an interference with the right of reciting prayers in connection with such burial is an invasion of

**Section 9 — Note 22 (contd.)**
the civil right, in respect of which a civil suit would lie. (1907) 30 Mad 15 (16) (DB)* (1902) 26 Bom 198 (200) (DB) * (1894) 18 Bom 699 (702) (DB) * AIR 1930 Oudh 54 (54): 5 Luck 489.

[But see AIR 1930 Rang 143 (144): 7 Rang 603 (DB).]

**23. Right of person elected as director or chairman to act as such.**— (1) The right of a person elected as a director of a company to act in that capacity is a civil right and a suit will lie for an injunction restraining other directors from wrongfully excluding him from acting as a director. AIR 1924 Cal 982 (983): 51 Cal 916 (DB).

(2) A suit will lie for a declaration that the removal by the State Government of a person from the chairmanship of the District Board was illegal and for an injunction restraining interference with his work as a chairman. AIR 1943 Cal 59 (61. 62) (DB).

**24. Right of franchise.**— (1) A right to vote is a civil right. A suit, therefore, for a declaration that the plaintiff is a qualified voter, or for an injunction against the Chairman of a Municipality for his refusal to insert his name in the register of voters will lie. AIR 1921 Cal 85 (87): 48 Cal 378 (DB).

(2) Suit for a declaration that the plaintiff has been duly elected is a suit of civil nature. (1897) 24 Cal 107 (111) (DB).

(3) A suit for a declaration that the election of the defendant is void is a suit of a civil nature. AIR 1926 Mad 319 (320) * (1964) 1 Mad LJ 272.

(4) A suit for a declaration that the votes obtained by the majority are invalid is one of a civil nature. AIR 1923 Bom 305 (316): 47 Bom 809.

**25. Suit for dissolution of marriage.**— (1) A suit for dissolution of a Hindu marriage is a suit of civil nature and a Court has jurisdiction to try such a suit. AIR 1939 Cal 430 (432) (DB).

(2) A suit by a Hindu woman for a declaration that the second marriage between her husband and another woman is void in view of the provisions of the Hindu Marriage Act, 1955 is maintainable in a civil Court. As marriage is a status and with it are matters relating to property. Succession and allied rights and the action of the husband and the second wife thereafter those rights it cannot be held that the first wife has no right to seek remedy by a suit in civil Court. (1964) 2 Andh WR 142.

**26. Restitution of conjugal rights.**— (1) A suit for the enforcement of conjugal rights and duties is one of a civil nature and is entertainable by the Civil Courts. (1891) 13 All 126 (139) (DB) * (1867) 11 Moo Ind App 551 (610, 615, 616) (PC) * (1897) 19 All 515 (516, 517) (DB) * (1886) 10 Bom 301 (310, 313) (DB) * (1901) 28 Cal 37 (44) (DB). (Suitable terms may however be imposed.) * AIR 1924 Mad 49 (51): 46 Mad 791 (DB).

(2) The cause of action, in a suit for restitution of conjugal rights, consists in the wife's absenting herself from her husband's house without his consent. (1894) 18 Bom 316 (318) (DB) * (1894) 18 Bom 327 (331) (DB).

(3) Where the parties are Christians, a decree for restitution of conjugal rights can be granted under Section 32 of the Divorce Act, 1869, only by the District Court or High Court. AIR 1947 Pesh 53 (55) * 1958 Andh LT 383 (385).

(4) Suit for restitution of conjugal rights — Jurisdiction of Civil Court is barred in view of Sections 4 and 9, Hindu Marriage Act. AIR 1959 Madh Pra 410 (411): 1959 MPLJ 928 * AIR 1963 Punj 118 (119): ILR (1963) 1 Punj 84.

(5) The scheme of the Hindu Marriage Act suggests that the District Court alone should deal with suits for restitution of conjugal rights and the jurisdiction of the Munsiffs and civil Judges to try such suit is taken away. AIR 1959 All 7 (9): 1958 All LJ 556.

(6) Jurisdiction of Court — Relationship of husband and wife — Special Court can still proceed to determine whether such relationship exists and to decide whether the case is a fit one to decree restitution of conjugal rights. AIR 1967 Punj 235 (236): 68 Pun LR 744.

**27. Right of person as member of club.**— (1) A suit lies in respect of the wrongful expulsion of a member from a social club. AIR 1939 Bom 35 (37).

(2) Individual members of a society has the right to challenge by a suit the new constitution framed by the society, as being invalid and ineffective on the ground that the procedure for amending or changing the constitution prescribed by the rules of the society and by the provision of the Societies Registration Act were not followed and a Civil Court can take cognisance of the same. AIR 1962 All 610 (618): 1962 All LJ 148 (DB).

**27-A. Rights under contract.**— (1) A suit for a declaration of civil rights in respect of certain contracts, arbitration agreements and awards is a suit of civil nature and a Civil Court is not barred from taking cognizance thereof unless, it is either expressly or impliedly barred. AIR 1960 Cal 702 (708, 709): 64 Cal WN 616 (DB).

(2) Any dispute between parties with regard to rights and privileges granted under a contract must be litigated in Ordinary Civil Courts and not in proceedings under Article 226 of Constitution. AIR 1964 Madh Pra 42 (45): 1963 Madh Pra LJ 701 (DB).

**27-B. Suit for accounts.**— (1) A suit for accounts is an extraordinary remedy which is available to the plaintiff under special

**Section 9 — Note 27-B (contd.)**
circumstances. Such a remedy is frequently resorted to in suits between principal and agent between partners, and other persons between whom there is a fiduciary relationship and also of contract. In equity, a suit for accounts is entertainable where there are circumstances of special complication necessitating the taking of accounts, been examined. AIR 1960 Punj 415 (416). (AIR 1960 EP 92 and AIR 1954 Punj 179, Rel. on.)

(2) Where the plaintiff could not assess before the suit the amount due to him. The test in all cases is, whether having regard to the terms of the agreement between the parties and the nature of the work done by the plaintiff, it was possible for him to bring a suit for a definite amount or for an amount which was ascertainable or on the other hand, a total sum which could only be determined after the accounts in the possession of the defendant had been examined. AIR 1960 Punj 415 (416).

(3) A suit for an account only lies when the defendant is liable to account to the plaintiff. There must be something more than a mere relationship of debtor and creditor. The defendant must stand in some other relation to the plaintiff, such as that of agent or bailee or receiver or trustee or partner or mortgagee. AIR 1959 Punj 92: 60 Punj LR 444.

(4) An employee or an agent cannot sue the employer or the principal for accounts except under very exceptional circumstances. His suit, however, for specific sum of money due to him as commission for specific work done is however maintainable. AIR 1957 Mad 21 * AIR 1960 Orissa 123 (125): 26 Cut LT 471.

**28. Suit for rent.** — (1) A suit for recovery of arrears of rent is a suit of a civil nature. AIR 1953 Nag 302 (304).

**29. Suit for administration.** — (1) The power to entertain an administration suit is given not by Order 20, Rule 13, but by Section 9 of the Code. AIR 1950 Lah 12 (16): Pak LR (1949) Lah 697 (DB)*(1964) 2 Andh WR 455: (1964) 2 Andh LT 277.

(2) Neither Section 9 nor Order 20, Rule 13 is of any assistance in finding out the person or persons who can sue for administration. On a combined reading of Form No. 14 in Appendix 'A' and Form No. 17 in Appendix 'D' it is reasonable to infer that a creditor is one of the persons who is entitled to get a decree for the administration of the estate of his deceased debtor. It is, therefore, open to a creditor to sue for an administration decree. AIR 1960 Mys 53 (56): ILR (1959) Mys 278 (DB).

(3) Estate duly administered — Application for Letters of administration made with object to agitate question of title — Application should be rejected — Question can be decided by way of regular suit. AIR 1953 All 507 (508). ((1910) 5 Ind Cas 395 (Cal) and (1912) 16 Ind Cas 588 (1) (Cal), Relied on.)

(4) There is no bar to bring a suit for administration in respect of the assets of more than one person. AIR 1960 Assam 183 (185, 186) (DB).

**30. Suit for office.** — (1) The existence of an office involves the existence of some duties to be performed by the holder of the office. AIR 1951 Orissa 64 (69): ILR (1950) Cut 337 (DB) * AIR 1957 Mad 522 (529): ILR (1957) Mad 764 (DB) * AIR 1916 Mad 379 (380) (DB) * AIR 1931 Bom 273 (274, 275) (DB) * AIR 1928 Mad 377 (378) (DB) * AIR 1919 Mad 1026 (1028) (DB) * AIR 1917 Pat 37 (40): 2 Pat L Jour 705 (DB).

(2) Right to office — Existence of duties — Duties must be enforceable by law, custom or usage. AIR 1953 Orissa 151 (152): ILR (1953) Cut 423 * ILR (1954) Trav-Co 1338 (1341) * AIR 1951 Orissa 64 (69): ILR (1950) Cut 337 (DB) * AIR 1939 Mad 886 (886, 887): ILR (1940) Mad 40 (DB) * AIR 1917 Pat 37 (39, 40): 2 Pat L Jour 705 (DB) * AIR 1961 SC 1720 (1727): (1962) 2 SCR 509.

(3) Right to office — No duties attached to office — No suit will lie in civil Court. AIR 1953 Mad 701 (703) * AIR 1939 Mad 886 (887): ILR (1940) Mad 40 (DB) * (1910) 32 All 527 (538, 540) (DB) * (1905) 28 Mad 23 (25) (DB) * (1899) 9 Mad L Jour 355 (358) (DB).

(4) Where a Muhammadan sued for possession of an alleged hereditary religious office, the functions of which were the digging up and burying a pot, distributing sherbet, collecting money and distributing a small portion thereof, it was held that the suit was not one for any religious office. AIR 1916 Mad 379 (381) (DB).

(5) A Gaywal Gaddi is not an office. AIR 1917 Pat 37 (39): 2 Pat L Jour 705 (DB).

(6) The explanation to Section 9 enacts that a suit in which a right to an office is in question is a suit of a civil nature. AIR 1956 Mad 146 (147, 148): ILR (1957) Mad 631 * AIR 1957 Punj 173 (181): ILR (1957) Punj 873 (FB)*ILR (1954) Trav-Co 1338 (1340) * AIR 1939 Mad 102 (106) * AIR 1961 SC 1720 (1724): (1962) 2 SCR 509.

(7) The explanation to Section 9 has been enacted notwithstanding that the right to an office may depend entirely on a decision of questions as to religious rites or ceremonies. (1882) 5 Mad 313 (318, 319) (DB) * (1911) 11 Ind Cas 175 (178) (DB) (Mad) * (1909) 33 Bom 387 (391) * (1909) 4 Ind Cas 894 (894) (DB) (Lah) * AIR 1959 All 598 (606).

[Reversed on another point in AIR 1962 All 610.]

(8) Where the secular and religious duties of a mahant are interdependent and inseparably blended the Civil Court has jurisdiction to remove the mahant not only

**Section 9 — Note 30 (contd.)**
from his secular but also from the religious office. AIR 1940 PC 24 (29): 69 Ind App 32: ILR (1940) 1 Cal 266: ILR (1940) Kar PC 47.

(9) It is not essential that the office need be one which brings in any profits to those claiming it. (1888) 15 Cal 159 (162) (DB).

(10) Suit in respect of right to office — To maintain suit it is not necessary that any fees or emoluments should be attached to office. AIR 1951 Orissa 64 (69): ILR (1950) Cut 337 (DB). (Claim to purohitship of temple.) * (1889) 13 Bom 429 (433) (DB) * AIR 1937 Mad 403 (404). (Claim to lead horse and hold kalasam.) * AIR 1927 Cal 783 (785): 54 Cal 614 (DB) * AIR 1959 All 598 (606). (Reversed on another point in AIR 1962 All 610.)

(11) Though a right to an honorary office to which no remuneration is attached, such as that of a secretary of an association, is a civil right, a suit for a declaration that the plaintiff's dismissal from such office is not justified will not lie where his continuance in office depends upon rules which the society has power to alter at any moment. AIR 1915 All 197 (197, 198): 37 All 313 (316) (DB).

(12) A hereditary prist of a family or class of persons cannot by suit, compel such persons to accept his ministrations. (1867) 2 Agra 80 (80) (DB) * (1910) 6 Ind Cas 864 (867, 868) (DB) (Cal) * (1884) 7 Mad 424 (427, 428) (DB) * AIR 1916 Pat 215 (216): 1 Pat L Jour 381 (DB) * AIR 1919 Pat 312 (313) (DB) * AIR 1929 Pat 103 (107): 8 Pat 677 (DB).

(13) A suit for a declaration of a right to perform 'purohitgiri' in a particular village to the exclusion of others would not be maintainable in view of Article 19 (g) of the Constitution. AIR 1953 Hyd 1 (3): ILR (1952) Hyd 481 (FB).

(14) An exclusive right to officiate as hereditary priest of an entire village is neither a civil right nor an office. AIR 1951 Kutch 56 (56).

(15) The holding of a Birat Jajmani is not per se the holding of a religious office. AIR 1953 Raj 144 (145): ILR (1952) 2 Raj 116 (DB) * ILR (1958) Andh Pra 642 (648) (DB).

(16) Sishya Sancharam is not an office. (1969) 1 An WR 142: (1969) 1 Andh LT 201 (FB).

(17) Question whether alienor was owner of property or its Mutawalli cannot be decided in writ jurisdiction, but must be decided by regular civil suit — See Constitution of India, Article 226. AIR 1967 Raj 1 (4): 1966 Raj LW 582 (DB).

**31. Suit for fees attached to religious office.** — (1) Fees or emoluments attached to an office can be recovered by suit, when the services are actually performed, from the yajman or the person for whom they were performed. (1871) 6 Mad HCR 449 (451) (DB) * (1897) 7 Mad L Jour 23 (25) (DB).

(2) Fees or emoluments attached to office — Services cannot performed — Can be recovered by suit from usurper of office. 1942 Nag LJ 443 (444) * (1879) 2 Mad 62 (65): 6 Ind App 120 (PC) * (1899) 17 Cal 906 (909, 910) (DB) * AIR 1920 Bom 98 (99): 44 Bom 733 (DB) * (1897) 21 Bom 821 (822) (DB). (Village Joshi.) * AIR 1928 Nag 150 (151) * (1907) 3 Nag LR 47 (48).

(3) A right to offer ministrations to pilgrims and to receive the offerings is a right in property and a suit for declaration of such right or for an injunction restraining another person from interfering with such right will lie. AIR 1942 All 320 (323): ILR (1942) All 821 (DB) * AIR 1921 All 316 (317, 318): 43 All 20 (DB) * AIR 1925 Bom 209 (209, 210) (DB).

(4) No suit will lie for a declaration of a right to receive offerings. AIR 1952 SC 245 (250): 1952 SCR 849: ILR (1953) 1 All 42.

(5) No suit will lie for the recovery of a gratuity or voluntary offering. AIR 1954 Mad 346 (347) * (1907) 29 All 683 (684, 685) (DB) * (1909) 33 Bom 278 (292) (DB) * AIR 1921 All 374 (376, 377): 43 All 159 (DB).

(6) No suit will lie for damages against any person for failing to make an offering where there is no duty to make it. AIR 1954 Mad 346 (347) * AIR 1919 Mad 396 (397) (DB).

(7) Voluntary offerings made to usurper of office in his personal capacity — No suit lies for recovering same. AIR 1954 Mad 346 (347) * (1911) 10 Ind Cas 41 (43) (DB) (Cal) * AIR 1916 Pat 215 (216): 1 Pat LJ 381 (DB) * (1913) 35 All 412 (418) (FB) * (1899) 26 Cal 356 (358) (DB) * AIR 1929 Pat 103 (107, 108): 8 Pat 677 (DB).

(8) Where voluntary offerings have been contributed to a temple or a fund, any person entitled to share in it can maintain a suit in respect thereof. AIR 1923 All 425 (426): 45 All 437 (DB) * AIR 1926 Bom 161 (163): 50 Bom 148 (DB) * AIR 1921 Bom 297 (298): 45 Bom 683 (DB) * AIR 1919 Lah 372 (372): 1919 Pun Re No. 26 (DB) * AIR 1920 Mad 137 (141) (DB).

(9) Long and uninterrupted usage or agreement to share offerings — Usage or agreement can be enforced by suit. AIR 1954 Mad 346 (347) * AIR 1953 Madh B 7 (9) (DB) * (1863) 9 Moo Ind App 344 (384) (PC) * AIR 1928 Lah 730 (731) * AIR 1918 Oudh 462 (463): 20 Oudh Cas 265 * AIR 1916 Pat 215 (216): 1 Pat L Jour 381 (DB).

(10) Joint right of performance of ceremonies or joint right to share in profits — Suit for share of profits lies. AIR 1924 Oudh 252 (255): 27 Oudh Cas 114 (DB) * (1906) 4 Cal L Jour 469 (471) (DB). (Joint right to share in the offerings.) *

**Section 9 — Note 31 (contd.)**
(1900) 27 Cal 30 (33) (DB) * AIR 1919 Sind 35 (40): 13 Sind LR 56 (DB).

(11) The holding of Birat Jajmani is not per se the holding of religious office. AIR 1953 Raj 144 (145): ILR (1952) 2 Raj 116 (DB).

**31-A. Suits not of a civil nature** — See Notes 32 to 39.

**32. Suit whether lies where there is no such right as that claimed.** — (1) A person whose rights are not affected by an order cannot challenge its legality. The existence of a right and its infringement, actual or threatened, by an order is an essential condition for the maintainability of a suit for a declaration that the order is illegal. 1967 All LJ 410: 1967 All WR (HC) 370.

(2) The invasion of privacy by opening windows is not a wrong for which an action would lie. (1894) 18 Mad 163 (164) (DB).

(3) No one has an absolute right to obtain a licence or a lease which can be enforced against the Government in a Civil Court. AIR 1953 Mad 583 (586): ILR (1953) Mad 722 (DB).

(4) Where a person removed from service pleads that after he was properly discharged from service as a combatant, he was entitled to go back as a civilian into the civil personnel, because of the lien which he held on his substantive appointment, then if he has not been given an opportunity to take advantage of it, he has no right to enforce it through a Court of law. AIR 1956 Punj 42 (44): ILR (1955) Punj 1279.

(5) Brit Khakrobi — Right of scavenging in specified area — Rival claimants — Right cannot be enforced unless origin by way of grant or lost grant or custom of a long and uninterrupted usage to the exclusion of others is established. AIR 1964 All 249 (252): 1964 All LJ 135 (FB). (AIR 1958 All 699, Rel. on.)

**33. Right of privacy.** — (1) Right of privacy — Right not recognised by law — No suit lies to enforce right. (1895) 18 Mad 163 (164) (DB) * (1872) 9 Bom HCR 266: (269) (DB) * (1901) 5 Cal WN 147 (149, 150) (DB) * ('86) 3 Mad HCR 141 (143, 144) (DB).

(2) Right of privacy recognised by local custom — Maxim sic uteri tuo ut alienum non laedas will apply. (1870) 14 Suth WR 103 (104) (DB) * (1907) 29 All 582 (584) * (1888) 10 All 358 (387, 388) (DB) * (1900) 2 Bom LR 454 (459) (DB) * (1872) 9 Bom HCR (AC) 266 (269) (DB) * (1869) 5 Bom HCR (AC) 42 (44, 45) (DB).

(3) Right of privacy has been recognised where purdah system prevails — Infringement of right gives rise to cause of action. (1869) 6 Bom HCR 143 (145) (DB) * (1894) 16 All 69 (71, 72) (DB) * (1888) 10 All 358 (387) (DB) * (1907) 29 All 582 (584).

(4) Right of privacy — Burden lies on person setting up right to prove that it exists. 1882 Pun Re No. 19, p. 72 (73) * 1892 All WN 159 (159, 160) * (1872) 9 Bom HCR (AC) 266 (269) (DB).

**34. Suits involving principally caste questions.** — (1) A caste may be defined as comprising any well defined native community governed for certain internal purposes by its own rules and regulations. (1896) 20 Bom 190 (192) (DB) * (1910) 33 Mad 342 (349, 350) (DB).

(2) As to whether any particular question is a caste question or not, the test is whether the taking cognizance of the matter in dispute would be an interference with the autonomy of the caste. If it would be, then the Civil Courts have no jurisdiction. (1882) 6 Bom 725 (727) (DB) * (1889) 23 Bom 122 (130) (DB) * AIR 1932 Bom 122 (126): 56 Bom 242 (FB) * AIR 1924 Bom 522 (522, 523) (DB) * (1896) 29 Bom 784 (788) (DB) * (1894) 17 Mad 222 (224) * AIR 1929 Sind 1 (3, 4): 23 Sind LR 299.

(3) Rights in property or other civil rights of members of caste — Jurisdiction of Civil Courts in respect of such rights is not barred. AIR 1953 Sau 133 (134) (DB) * (1888) 12 Bom 225 (228) (DB) * AIR 1935 Bom 367 (371) * AIR 1926 Bom 69 (70): 50 Bom 124 (DB) * AIR 1917 Mad 431 (433, 436, 438): 39 Mad 1056 (1061) (DB).

(4) Claim to be invited to dinner by particular fraternity — No suit lies. (1891) 15 Bom 599 (610, 611) * (1869) 11 Suth WR 457 (459, 460) (DB).

(5) Claim to be invited for certain ceremonies — No suit lies. (1863) 1 Mad HCR 301 (308) (DB) * (1884) 7 Mad 91 (92) (DB) * (1912) 17 Ind Cas 527 (528) (DB) (Mad).

(6) Claim to have social intercourse with others — Suit is not maintainable. (1874) 22 Suth WR 517 (518) (DB).

(7) No suit will lie to compel the members of a caste to attend the funerals in the plaintiff's family. (1894) 18 Bom 115 (118).

(8) A suit by certain members of the community for removal of the patel of the caste who is in management of the caste property involves principally a caste question and is barred under Section 9. (1953) 6 Sau LR 380 (383).

(9) Where the membership and character of a member of the caste are injuriously affected by what has been done, his civil rights are affected and the Civil Courts may discuss the act done even though a caste question is involved in it. AIR 1915 Mad 908 (909) (DB) * (1887) 11 Bom 534 (536) (DB).

(10) The question of caste, in the Hindu Society, has always been a matter primarily for the caste itself and the Hindu Society and Courts could effect only to what has been decided by the people themselves. It is true that the Court has to

**Section 9 — Note 34 (contd.)**
decide the precise status of a caste in a dispute between the parties but primarily its decision would deal only with the controversy between the contending parties A Court could neither take upon itself the task of finally and conclusive declaring for all times the status of a particular caste or section of the Hindu Society nor would it expect that the verdict would be the last word on the subject. AIR 1969 All 68 (71): 1969 Cri LJ 133.

**35. Suits relating to caste property.** — (1) A suit by one faction of a caste against another faction thereof for a share of the property belonging to the caste as a whole is not maintainable in Civil Court. (1881) 5 Bom 84n (85n) (FB) * (1881) 5 Bom 83 (84) (DB).

(2) Where, by a resolution passed by majority at a meeting of the caste, a wadi belonging to the caste is to be managed by the plaintiff, the latter can maintain a suit against the members, who are in wrongful possession thereof for its recovery. AIR 1926 Bom 69 (70): 50 Bom 124 (DB).

(3) A right to use caste property in accordance with the rules and usages of the caste is a civil right and a suit will lie for declaration of such right. AIR 1924 Bom 522 (522, 523) (DB) * AIR 1929 Rang 77 (78, 79): 6 Rang 783 (DB).

(4) Where the majority of a caste has by resolution prescribed the mode of user, the minority will be bound by it and a suit will lie to restrain the minority from using it in any but the prescribed mode. (1895) 19 Bom 507 (522, 523).

**36. Suits for inspection and rendition of accounts of caste property.** — (1) Privilege in regard to inspection of caste documents. No suit lies to enforce such privilege. (1910) 34 Bom 467 (476) (DB).

(2) Property of caste in management of trust beneficiaries seeking to obtain discovery of accounts of management — Suit lies in Civil Court. 1953 AMLJ 128 (129) * (1953) 6 Sau LR 380 (381) * AIR 1932 Bom 122 (125): 56 Bom 242 (FB).

(3) Suit for rendition of accounts of management of caste property — Question involved is one of internal automony of caste —Civil Courts has no jurisdiction to interfere. (1953) 6 Sau LR 380 (382).

**37. Suits relating to expulsion from caste.** — (1) The expulsion or ex-communication of a person from a caste affects his civil rights and the Courts are therefore competent to question the validity or otherwise of such expulsion. (1894) 21 Cal 463 (470, 471) (DB) * AIR 1935 Bom 367 (370) * AIR 1934 Bom 431 (433) (DB) * (1899) 23 Bom 122 (125, 126) (DB) * AIR 1935 Nag 156 (162).

(2) Caste exercising its jurisdiction to ex-communicate member with care and caution—Courts will not interfere with decision. (1900) 24 Bom 13 (22, 23) (DB) * (1894) 17 Mad 222 (225) (DB) * AIR 1935 Bom 361 (364) (DB) * (1891) 15 Bom 599 (611) * AIR 1930 Mad 100 (101, 102) (DB).

(3) The Courts will award relief to the injured party where the expulsion is subversive of the principles of natural justice. (1889) 12 Mad 495 (499) (DB) * (1887) 10 Mad 133 (144, 145) (DB) * AIR 1920 Cal 223 (228, 229): 47 Cal 623 (629, 630) (DB) * AIR 1932 Mad 445 (451, 453): 55 Mad 727 (DB).

(4) Illegal expulsion from caste — Court may grant declaration that plaintiff is entitled to be re-admitted to caste. (1867) 7 Suth WR 299 (300) (DB).

(5) In case of wrongful expulsion the Court may award damages. (1889) 12 Mad 495 (500) (DB).

(6) Ex-communication proceedings amounting to defamation of plaintiff — Court may award damages for injury caused to plaintiff's character. (1891) 15 Bom 599 (610, 611) * (1902) 26 Bom 174 (178, 179) (DB) * (1909) 33 Mad 67 (69) (DB) * (1883) 6 Mad 381 (391) (DB).

**38. Suits for upholding mere dignity or honour.** — (1) A claim to establish a mere dignity or honour, even though connected with an office, is not cognizable by the Civil Court. AIR 1961 SC 1720 (1727): (1962) 2 SCR 509 * ILR (1954) Trav-Co 1338 (1340) * AIR 1929 Mad 493 (496) (DB) * AIR 1931 Bom 273 (274, 276) (DB) * (1878) 2 Bom 476 (478) (DB) * AIR 1919 Lah 193 (194) (DB) * AIR 1938 Mad 334 (335) (DB) * AIR 1935 Mad 621 (623) (DB) * AIR 1935 Mad 679 (680) (DB).

[But see (1872) 9 Bom HCR 413 (416).]

(2) A claim for certain temple honours to be shown to first Gurukar of caste is not cognizable by a Civil Court. (1921) 63 Ind Cas 115 (116) (Mad) * AIR 1933 Mad 264 (265).

(3) A claim to precedence of worship at religious festivals cannot be enforced in a Civil Court. (1884) 7 Mad 91 (92) * (1886) 10 Bom 233 (237) * ('09) 33 Bom 278 (292).

(4) Claim to man-pan — Not cognizable by Civil Court. (1882) 6 Bom 116 (121) * (1907) 3 Nag LR 131 (133) * (1913) 37 Bom 442 (446).

(5) Claim to neota — Not cognizable by Civil Court. AIR 1933 Lah 317 (317).

(6) A suit does not lie to establish a claim for adavi palki. AIR 1921 Bom 140 (142): 45 Bom 590.

(7) A civil Court cannot entertain a claim to hold a lighted torch inside the chariot during a car festival. AIR 1953 Mad 701 (703).

(8) A claim to receive prasadam when deity is taken out in procession is not cognizable in a Civil Court. ILR (1954) Trav-Co 1338 (1341).

(9) The right to obtain theertham or honours in a particular order of preced

**Section 9 — Note 39 (contd.)**
ence in a temple is not a civil right which can be enforced or declared in a Civil Court. AIR 1936 Mad 973 (975).

(10) Where the honours are claimed as attached inseparably to an office as part of its emoluments a civil suit for such honours will lie. (1909) 32 Mad 291 (297, 298) * (1913) 19 Ind Cas 257 (265) (Mad) * AIR 1937 Mad 403 (404) * AIR 1961 SC 1720 (1727): (1962) 2 SCR 509.

(11) Honours attached inseparably to office — Such honours can be protected by injunction. (1912) 15 Ind Cas 409 (411) (Mad).

**39. Suits relating purely to religious rites or ceremonies.** — (1) It is not the province or duty of the Court to pronounce on the truth of religious tenets nor to regulate religious rites or ceremonies. AIR 1929 Mad 526 (527) * AIR 1935 Bom 361 (362) (DB) * AIR 1939 Mad 494 (495) * AIR 1915 Mad 877 (882) (DB) * AIR 1917 Low Bur 43 (51) (DB).

(2) The protection of the law in religious matters is confined to the protection of religious property or a religious office. The Court will not decide questions of religious rites or ceremonies, nor will it pronounce on any religious doctrine unless it is necessary to do so in order to determine rights to property. AIR 1921 Bom 338 (355).

(3) A suit by the worshipper of an idol, not based on any right to the property in the idol or to an office, against its custodians to locate it in a particular temple instead of another is not cognizable by a Civil Court. AIR 1954 Manipur 20 (22) * AIR 1949 Orissa 1 (11) (DB) * (1905) 32 Cal 1072 (1076) (DB).

(4) Suit to adorn an idol at certain seasons does not lie. (1881) 5 Bom 80 (82) (DB).

(5) A suit to establish a right to recite sacred texts in a temple without a claim to any office or emoluments is not cognizable by a Civil Court. (1905) 28 Mad 23 (25) (DB) * (1877) 2 Mad 62 (65): 6 Ind App 120 (PC).

(6) Appointment of hereditary Pujari of public temple — Emoluments attached to Pujari's office — Right to such office is right to property. 1961 Raj LW 209 (213).

(7) Where a right to property, office or other civil right is in question, the suit is cognizable by the Court even though it has to decide incidentally questions relating to religious rites or ceremonies. AIR 1961 SC 1720 (1724): (1962) 2 SCR 509 * AIR 1947 PC 53 (57, 59): 73 Ind App 156: ILR (1947) Mad 436 * AIR 1953 Orissa 151 (152): ILR (1953) Cut 423 * (1889) 13 Bom 548 (550, 551) (DB) * (1890) 17 Cal 906 (909, 910) (DB) * (1883) 9 Cal 75 (76, 77) (DB) * (1907) 30 Mad 15 (16) (DB) * AIR 1914 Low Bur 178 (178): 8 Low Bur Rul 145 (DB).

(8) A suit for an injunction restraining the defendants from obstructing the plaintiff from entering the temple bare-headed and worshiping bare-headed is maintainable. AIR 1952 Punj 163 (165).

**40. Suits expressly barred.** — (1) A suit is said to be "expressly" barred when it is barred by any enactment for the time being in force. AIR 1956 Cal 317 (320) (DB) * AIR 1956 Pat 161 (164) (DB) * AIR 1953 All 729 (730) (DB) * AIR 1953 Orissa 300 (302) (DB) * AIR 1952 Mad 273 (275): ILR (1952) Mad 540 (DB) * 1952 Raj LW 37 (40) (DB) * AIR 1951 Punj 74 (79): ILR (1951) Punj 165 (DB) * AIR 1950 East Punj 204 (207) (DB) * AIR 1935 PC 5 (7) * AIR 1935 Bom 91 (93) (DB) * AIR 1936 Oudh 67 (70): 11 Luck 486 (DB) * 1966-1 Andh WR 244 (245): (1961) 1 Andh LT 77 * AIR 1966 Assam 48 (49): ILR (1965) 17 Assam 275 (DB). (Suit for declaration that transfer of shares by Company is illegal — Filing of in civil Court — Not barred expressly or impliedly by Companies Act (1913).) * AIR 1965 Andh Pra 337 (339): ILR (1967) Andh Pra 202 (DB). (AIR 1964 SC 1256, Relied on.) * AIR 1965 Bom 185 (187): 67 Bom LR 45 (FB). (Application under Section 15, Payment of Wages Act for recovery of wages barred by limitation prescribed by that Act — Civil Court has no jurisdiction to entertain suit to recover wages in view of the bar created under Section 22.) * AIR 1965 Cal 517 (522). (Adjudications under Sections 182 and 188, Sea Customs Act.) * ILR (1965) Cut 539 (545) (DB) * (1961) 2 Guj LR 564 (570). (Case under Bom. Pub. Trusts Act (1950), Sections 79, 80.)

(2) The words "expressly or impliedly" mean barred by an Act of the Legislature. A rule made by the executive is incompetent to deprive the Civil Court of its jurisdiction conferred by statute. AIR 1967 All 134 (135).

(3) It is open to a State Legislature to bar the jurisdiction of Civil Courts with respect to a particular class of suits of a civil nature, provided that it does not contravene any provision of the Constitution. AIR 1955 Pat 1 (27): 33 Pat 690 (SB) * AIR 1957 Bom 42 (44) (DB) * ILR (1955) Mys 360 (362, 363) (DB) * AIR 1940 All 272 (277): ILR (1940) All 455 (FB) * AIR 1942 FC 27 (30): ILR (1942) Kar (FC) 40: ILR (1942) Lah 623 * AIR 1941 FC 16 (26, 29): ILR (1941) Kar (FC) 72: 1940 FCR 110 * AIR 1960 SC 796 (800): (1960) 3 SCR 106 * AIR 1959 Orissa 144 (145): 25 Cut LT 381 (DB) * AIR 1952 Mad 106 (106, 107): 1951-2 Mad LJ 333.

(4) Where a Civil Court's jurisdiction is barred by any statute, or for that matter where it is not expressly barred and the question arises whether the remedy of a civil suit is open to an aggrieved person to challenge an illegal order made under the statute, the alternative remedy provided by the Act must be taken into consi-

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deration. Where elaborate provisions are made in the statute for alternative and adequate remedies, including provision for recording evidence and for determining facts civil Court's jurisdiction is barred. AIR 1967 Andh Pra 338 (346, 347): (1967) 2 Andh LT 141 (DB). (Appeal against order of excise authority imposing duty is not adequate alternative remedy.)

(5) The mere fact that an enactment provides another remedy or a summary remedy will not constitute a bar to a suit in a civil Court. AIR 1955 Andhra 29 (30): ILR (1955) Andhra 47 * AIR 1953 Trav-Co 253 (256): ILR (1952) Trav-Co 625 (DB) * AIR 1952 Cal 58 (61): ILR (1953) 1 Cal 1 (DB) * AIR 1946 Pat 385 (387, 388): 25 Pat 7 (DB) * (1887) 14 Cal 644 (648) (DB) * AIR 1932 Mad 724 (726, 729): 56 Mad 134 (DB) * (1890) 12 All 409 (418) (FB) * AIR 1917 Lah 75 (76, 77): 1917 Pun Re No. 22 (DB) * AIR 1964 SC 322 (324): (1964) 1 SCR 752 * AIR 1964 SC 1598 (1617): (1964) 7 SCR 503. (Section 57-A Electricity Supply Act (1948).) * AIR 1964 SC 322 (324): (1964) 1 SCR 752 * 1968 BLJR 476 (486): ILR 46 Pat 1154 (DB) * AIR 1966 Assam 48 (49): ILR (1965) 17 Assam 275 (DB). (Existence of summary remedy under Section 38, Companies Act for rectification of register.) * (1968) 2 Mys LJ 207: 16 Law Rep 13 (DB) * AIR 1961 Orissa 156 (157): 26 Cut LT 468 * AIR 1961 Punj 8 (11): 63 Punj LR 107. (Section 145, Civil P. C. does not expressly bar the suit against the surety.) * (1960) 1 Guj LR 5 (DB). (Saurashtra Prohibition of Leases of Agricultural Lands Act (23 of 1958), Sections 8 and 17 — Lease — Termination by efflux of time — Right of occupant to evict tenant by law — Civil suit not barred.) * AIR 1959 Cal 519 (525) (DB). (The existence of special procedure of correcting errors in the award by a reference under S. 18, Land Acquisition Act (1894) is no bar to the maintainability of the suit challenging the award as a nullity.) * AIR 1959 Orissa 144 (147): 25 Cut LT 381 (DB).

(6) The jurisdiction of the civil Court will not be ousted unless the entire suit, as brought, is barred. The mere fact that a portion of a claim is excluded from the jurisdiction of Civil Courts is no bar to the trial, by them, of another portion of the same suit which is not so excluded. AIR 1953 Sau 133 (135) (DB) * AIR 1958 Mad 360 (363): ILR (1958) Mad 614 (DB)* AIR 1935 All 594 (597): 57 All 949 (DB) * AIR 1935 Oudh 96 (106) (DB) * AIR 1965 SC 1570 (1573): (1966) 2 SCJ 175 * 1968 Raj LW 376 (378) * (1966) 1 Andh WR 352 (354): (1966) 1 Andh LT 424 * AIR 1964 Pat 13 (22) (DB): ILR 44 Pat 105 * AIR 1964 Pat 116 (126) (DB) * AIR 1963 All 482 (483, 484): 1963 All LJ 75 * (1959) 72 Mad LW 249. (Question coming within jurisdiction of Civil Court — Another question falling within jurisdiction of tribunal constituted under Madras Act 30 of 1956 —Trial of suit by Civil Court rather than by special tribunal held proper.) * AIR 1952 Cal 195 (196): 55 Cal WN 399. (Claim partly within jurisdiction of regular Court and partly within jurisdiction of Small Cause Court.)

[See also (1968) 1 Mad LJ 386: 81 Mad LW 8. (AIR 1962 MP 19, Not foll. — Composite claim for injuries to person and damages to property under Motor Vehicles Act — Claim not severable, distinct and different — Entire claim would be within purview of Civil Court — If claims are severable, distinct and different, Civil Court can try suit in so far as it relates to claim of compensation for damage to property.)]

(7) Where in a suit for injunction the relief of recovery of possession was sought in the alternative but admittedly the suit for the latter relief was not cognizable by Civil Court in view of the provisions of U. P. Zamindari Abolition and Land Reforms Act it was held that the suit was liable to be dismissed when it was found that the relief of injunctions could not be granted in the circumstances of the case. AIR 1966 All 367 (FB): 1965 All LJ 549.

(8) Where a jurisdiction which is vested in the Court is attempted to be ousted, there must be a clear provision or a clear intendment by the Legislature. If there is any doubt about the ousting of the jurisdiction of an existing Court, the Court will lean to such an interpretation which would maintain the existing jurisdiction. AIR 1955 SC 576 (581): (1955) 2 SCR 67: ILR (1955) Punj 1108 * (1951) 4 Sau LR 148 (150) (DB) * 1955 Mad LJ 1. (Suit disputing fact and validity of adoption by Istimrardar's widow — Civil Court's jurisdiction not barred by Ajmer Land and Revenue Regulations.) * AIR 1959 Orissa 144 (145): 25 Cut LT 381 (DB).

(9) Where the schemes of two Acts are different and the very contents or relevant sections are different, in construing section dealing with bar on Civil Courts under one Act, the Courts should not be guided by provisions of a bar under relevant section in other Act. (1963) 4 Guj LR 387.

(10) Where the question of the exclusion of the civil Court's jurisdiction is pleaded, the matter has to be considered in the light of the words used in the statutory provision on which the exclusion is rested. AIR 1967 Mad 318 (323): (1966) 2 Mad LJ 226 * AIR 1969 SC 78 (89): (1968) 2 SCA 479.

(11) Any legislation which takes away the existing jurisdiction of a forum, unless it has been made specifically applicable to pending actions, will not affect the jurisdiction of that forum to try pending actions properly entertained by it at the time of their institution. AIR 1953 Madh B 13 (15) * AIR 1964 Punj 462 (464): 66

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Punj LR 518 * (1965) Ker LR 252 (DB) * AIR 1966 SC 1738 (1739): (1966) 3 SCR 582. (Section 23-A, Travancore-Cochin General Sales Tax Act does oust jurisdiction of Civil Court to try a pending suit.) * AIR 1965 SC 1570 (1594): (1966) 2 SCJ 175. (Section 93, Madras Hindu Religious and Charitable Endowments Act (19 of 1951).) * AIR 1967 Bom 92 (94): 68 Bom LR 180 (DB). (Application to sue in forma pauperis in respect of compensation pending in civil Court before constitution of Tribunal under Section 110, Motor Vehicles Act (1939) — Jurisdiction of Civil Court is not ousted in respect of such pending proceeding by constitution of Tribunal.) * AIR 1964 Madh Pra 133: 1962 MPLJ 876 (DB) * (1963) 4 Guj LR 400 * AIR 1961 Madh Pra 295 (297): 1961 MPLJ 587 (DB). (Express ouster of Civil Court's jurisdiction provided by Section 110-F, Motor Vehicles Act is not retrospective — Therefore, Section 110-F has no application whatsoever to claims pending in Civil Courts at the time of the Constitution of Claims Tribunal.)

[See AIR 1960 Raj 215 (215, 216): ILR (1960) 10 Raj 287 (DB). (Money suits pending against agriculturists at the commencement of Rajasthan Relief of Agricultural Indebtedness Act, 28 of 1957 are saved from the operation of the Act but are to be tried by Debt Relief Court according to old law and not civil Court.)]

(12) Where an authority is, by statute, vested in another tribunal with exclusive powers over any subject-matter a Civil Court, of course, cannot interfere with it. But, if the authority purports to exercise these powers on what is not that subject-matter, the Civil Court has jurisdiction to question the said proceeding. AIR 1952 All 346 (349): ILR (1952) 1 All 97 (DB) * AIR 1952 Bom 387 (394, 395): ILR (1952) Bom 1019 (DB) * AIR 1922 Pat 361 (361) * AIR 1966 SC 893 (896): (1966) 2 SCR 533 * AIR 1966 Pat 29 (31, 32): 1965 BLJR 594 (DB) * AIR 1965 Pat 172 (174): 1964 BLJR 887 (DB) * (1963) 67 Cal WN 138 (DB). (Jurisdiction to levy cess assumed on wrong construction of provision — Civil suit questioning the imposition is not barred.) * (1960) 26 Cut LT 179 (180): (1960) 2 OJD 80.

[See also AIR 1964 Bom 241 (243): 64 Bom LR 38. (Notice served under S. 2 Administration of Evacuee Property Act (1950) defective and bad in law — Defect not such as to vitiate jurisdiction of Authority under Act — Authority can pass order under S. 7 of the Act — Civil Court cannot interfere.) * AIR 1964 SC 322 (324, 325): (1964) 1 SCR 752. (Suit by assessee to recover sales-tax illegally recovered from him involves setting aside or modifying order of assessment under Act — Suit is not maintainable in view of the bar under Section 18-A of Madras General Sales Tax Act (1964).)]

(13-14) Authority with exclusive powers over any subject-matter exercising those powers illegally — Civil Court has jurisdiction to question proceedings of authority. AIR 1957 Mad 110 (113) (DB) * AIR 1958 Madh Pra 393 (396) * AIR 1957 Mad 110 (113) (DB) * AIR 1956 Vindh Pra 16 (17) * AIR 1954 All 121 (122) (DB) * AIR 1953 Orissa 300 (303) (DB) * AIR 1952 Mad 273 (275): ILR (1952) Mad 540 (DB) * AIR 1952 Punj 340 (342) * AIR 1942 Lah 179 (186) * (1913) 37 Bom 542 (550) (DB) * AIR 1926 Cal 1064 (1064, 1065): 53 Cal 561 (DB) * AIR 1966 SC 893 (896): (1966) 2 SCR 533 * (1968) 70 Pun LR 163 (166, 167): 1967 Punj LJ 290 * AIR 1959 Punj 417 (419): 61 Punj LR 451 * (1964) 5 Guj LR 847 (860) * AIR 1963 SC 1547 (1551, 1552): (1964) 2 SCR 273 * 1968 Raj LW 376 * AIR 1967 All 134 (134) * AIR 1967 Andh Pra 338 (346, 347): (1967) 2 Andh LT 141 * AIR 1967 Andh Pra 281 (284): (1967) 1 Andh WR 20 (DB). (Suit for refund of illegally levied excise duty — Not barred by Section 40 (1) of Central Excises and Salt Act (1944).) * 1966 All LJ 771 (775): 1966 All WR (HC) 401 (DB) * AIR 1966 Andh Pra 240 (244, 246): (1965) 1 Andh WR 233 * (1963) 65 Bom LR 119: 1963 Mah LJ 325 (DB). (Illegal taxation.) * (1962) 64 Bom LR 29: 1962 Nag LJ 118 (DB). (A rate-payer would be entitled to bring a suit against a Municipal Corporation challenging its illegal and ultra vires acts.) * AIR 1961 Andh Pra 540 (543): (1961) 1 Andh WR 367. (Illegal levy of excise duty — Suit for refund.) * AIR 1959 Cal 477 (478): ILR (1959) 2 Cal 623. (Bengal Municipal Act (15 of 1932), Section 148 — Assessment can be challenged in civil Court if hearing and determination is not by competent authority.) * AIR 1959 Orissa 144 (148): 25 Cut LT 381 (DB). (Suit for refund of stamp duty and penalty illegally realised not barred.)

(15) Authority with exclusive powers over any subject-matter — Authority exceeding its powers — Civil Court can interfere. AIR 1948 PC 33 (34): 74 Ind App 319: ILR (1947) Lah 741 * AIR 1954 Bom 239 (241): ILR (1954) Bom 364 (DB) * AIR 1954 Pepsu 34 (35): ILR (1953) Patiala 557 (DB) * ILR (1954) Punj 687 (689) * AIR 1952 Madh B 21 (24) (DB) * AIR 1951 Bom 440 (446, 447): ILR (1952) Bom 378 (DB) * AIR 1951 Madh B 63 (65) (DB) * AIR 1941 Lah 225 (227, 228) (DB) * (1890) 17 Cal 590 (604): 17 Ind App 40 (PC) * AIR 1926 Lah 461 (461) * AIR 1966 SC 893 (896): (1966) 2 SCR 533 * AIR 1964 SC 1268 (1270, 1272): (1964) 5 SCR 148. (Civil suit for refund of wharfage and demurrage charges collected by railway challenging the vires of rules empowering the railway to collect such amounts and alleging excess realisation than legally leviable under rules — Sec-

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tion 26 of Railways Act does not bar Civil suit.) * (1969) 71 Pun LR 41 * AIR 1966 Madh Pra 24 (27 to 30): 1965 MPLJ 716 (DB) * AIR 1961 All 145 (148, 149): ILR (1959) 2 All 541 (DB) * AIR 1959 All 675 (680): 1959 All LJ 704 (DB). (U. P. Land Revenue Act (III of 1911). Sections 233 (m) and 183 — Suit in Civil Court questioning proceedings under Chap. VIII on allegation of mala fides or lack of power — Suit not barred.) * (1959) 2 Andh WR 69 (72). (Suit challenging order of allotment under Rent Control Act (U. P. 3 of 1947) as ultra vires.)

(16) Authority with exclusive powers — Civil Court given supervising power — Latter can interfere within its power. AIR 1951 Madh B 63 (65) * AIR 1941 Nag 226 (230): ILR (1941) Nag 279 (DB) * AIR 1967 Pat 153 (154): 1966 BLJR 463 (DB).

(17) Where a statute provides that a Civil Court shall not entertain a particular claim except as provided therein and also lays down the conditions under which the Civil Court may take cognizance, then unless those conditions are complied with the Civil Court will not be competent to entertain the suit. But it cannot be said that in such cases the Civil Court's jurisdiction is entirely excluded. AIR 1956 Sau 119 (120) (DB) * AIR 1957 Bom 42 (44) (DB) * AIR 1953 Trav-Co 462 (463) * AIR 1952 Mad 273 (275): ILR (1952) Mad 540 (DB) * AIR 1968 Delhi 162 (163). (Suit for rendition of account of rent received by Custodian — Section 20 (1), Evacuee Interest (Separation) Act (1951) is not attracted — Civil Court not barred from entertaining the suit.) * AIR 1963 Pat 350 (352): 1963 BLJR 361 (DB) * AIR 1968 J & K 79 (82): 1968 Kash LJ 224 * AIR 1965 Orissa 76 (78): 30 Cut LT 112 (DB). (Reliefs asked falling under Section 25, Orissa Hindu Religious Endowments Act (1952) — Direct approach to Civil Court ignoring Section 73, is barred.) * AIR 1965 Madh Pra 4 (5): 1964 MPLJ 362 * AIR 1963 Cal 225 (250) * AIR 1963 Ker 3 (5): 1962 Ker LT 251 (FB). (If a suit is competent under the provisions of Section 50, Bombay Public Trusts Act (1950), it cannot be said that such a suit is barred by reason of Section 80 of the Act. (1962) 3 Guj LR 843.)

(18) Under Section 34 of the Arbitration Act, 1940, it is open to a party to set up an arbitration agreement to have the matter decided by a tribunal of their own choice for the purpose of asking the Court to stay its hands and to refuse to exercise its jurisdiction until the dispute between the parties is heard by that tribunal. AIR 1947 Lah 215 (218) * AIR 1955 Punj 113: (114): ILR (1956) Punj 177 (DB) * AIR 1959 J & K 59 (62) (FB).

(19) The powers of the High Court in hearing an appeal from the decision of a lower Court are the same as those of the lower Court and if the law bars the jurisdiction of the Civil Courts from entertaining any suit, the High Court's power to decide the appeal is also affected. AIR 1954 All 362 (377) (FB).

(20) Where the defendant does not avail of the remedy provided by Section 34 of the Arbitration Act, but files a written statement, there is no provision which bars the suit and the Court has no option but to entertain the suit. 1956 All L Jour 846 (849).

(21) Sections 31, 32 and 33 of Arbitration Act do not, by express language or by implication, provide that a suit on the original cause of action after an abortive or incomplete arbitration would not lie. AIR 1959 Bom 549 (550): 61 Bom LR 364 (DB). (AIR 1952 Nag 65, Diss.)

(22) Petition for declaring suit temple as private temple — Compromise decree providing that suit lands were private properties of defendants — Suit by worshipper for declaring compromise decree invalid and not binding on temple — Suit held not barred by Section 93, Madras Hindu Religious and Charitable Endowments Act (1951). AIR 1964 Andh Pra 118 (122) (DB).

(23) Suit by a trustee of a public temple for possession of temple properties from defendant who had been removed from trusteeship by Endowment Board — Defendant when removed not following remedies under Madras Hindu Religious and Charitable Endowments Act, 1951 to dispute correctness of plaintiff's appointment — Suit instead of following remedies under the Act filed by the plaintiff on advice of Board — Suit is not barred by S. 93 of that Act. AIR 1966 Andh Pra 197 (200): (1964) 2 Andh WR 457 (DB).

(24) A Court may have jurisdiction over a suit if certain circumstances existed, but its jurisdiction may be excluded if certain other circumstances existed. If the plaint alleges the former circumstances the Court would be bound to take cognizance of the suit. It would then be for the defendant to prove the latter set and if he succeeds the Court would be divested of its jurisdiction and would be bound to dismiss the suit. AIR 1958 All 48 (51) (DB).

(25) The finality given to decisions of Insolvency Court under Section 4, Provincial Insolvency Act, does not confer exclusive jurisdiction on the Court to deal with such questions. Hence a suit by the creditors for a declaration that the property purchased by them in execution of a decree against the insolvent is not liable to attachment and sale as insolvency proceedings pending against him, will not be barred if the question raised in the suit has not been decided by the insolvency Court. AIR 1959 Bom 10 (11): 60 Bom LR 1017.

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(26) Where a Wakf has not been enrolled under the provision of Section 44, Bengal Wakf Act (1934), the jurisdiction of the Civil Court to decide the dispute whether the disputed lands form part of Wakf estate or not would not be barred under Act. ILR (1959) 2 Cal 206.

(27) Dealer appointed as wholesaler under Madras Foodgrains (Procurement) Order, 1947 — Madras Foodgrains (Intensive Procurement) Order, 1950 — Relationship between dealer and Government is that of principal and agent — Government is bound to indemnify dealer — Suit by dealer for indemnity — Neither the order nor the agreement executed pursuant to it, impugned in the suit — Jurisdiction of Civil Court to entertain it is not barred. AIR 1963 Andh Pra 394 (401): (1962) 2 Andh WR 390.

(27-A) After the Constitution every person has a right to carry on his trade or business anywhere he likes but that right is subject to reasonable restriction that may be imposed. Section 121 (2) of the Punjab Municipal Act, 1911 imposes a reasonable restriction and the judge whether such a restriction is reasonable or not is the Court. ILR (1966) 2 Punj 495: 68 Punj LR 842 (843).

**41. Exclusive jurisdiction of Revenue Courts.** — (1) A Civil Court is not competent to set aside a decree of a Revenue Court on a matter exclusively within its jurisdiction. AIR 1954 Pepsu 33 (33, 34): ILR (1953) Patiala 375 (DB) * ILR (1953) Patiala 563 (567, 570) * AIR 1943 Oudh 106 (109) * AIR 1941 Oudh 223 (224) * (1896) 18 All 270 (282, 283) (FB) * AIR 1965 Punj 321 (325): 67 Pun LR 226 (FB) * (1968) 2 Mad LJ 367: AIR 1969 Mad 172 (173). (Writ petition challenging order of Tribunal — Dismissal on ground that proper remedy is by suit — Order cannot confer jurisdiction on Civil Court by invoking principle of res judicata.) * (1968) 70 Pun LR 473 (480) (DB): 1968 Cur LJ 302 * 8 Guj LR 907: ILR (1967) Guj 882 (887, 889) * (1966) 1 Mad LJ 190 (192): 78 Mad LW 561 * AIR 1964 Punj 487 (490): 66 Pun LR 890 (DB) * 1962 All LJ 918: 1962 All WR (HC) 801. (Decree on basis of award by Revenue Court having exclusive jurisdiction.) * 1962 MPLJ 884 (888) * 1961 Jab LJ 153: 1961 MPLJ 235 (236) * 1960 Jab LJ 332 * AIR 1960 Raj 196 (200, 201): ILR (1959) 9 Raj 614 * 1959 MPC 304 (306) * 1951 All WR (HC) 407.

(2) Where exclusive jurisdiction is conferred on the Revenue Court, the bar of jurisdiction of Civil Court cannot be limited to cases where adjudication of Revenue Court has actually occurred but also extends to cases where such adjudication could have been obtained. 1962 Mad WN 334 (338) (DB).

(3) Whether a particular suit is exclusively triable by a revenue Court or not has to be decided on the allegations made in the plaint. ILR (1960) 10 Raj 1589 (1591) * 1968 Raj LW 376 (378) * ILR (1958) 8 Raj 659 (662).

(4) A Civil Court cannot grant a declaration that particular rights passed to the parties under a decree of a Revenue Court. AIR 1924 Oudh 69 (75) (DB).

(5) A Civil Court is not competent to give a declaration that a rent sale is or is not valid. AIR 1933 Mad 384 (385) * (1968) 34 Cut LT 1313.

(6) A Civil Court cannot execute the decree or order of a Revenue Court. AIR 1947 Oudh 232 (233): 22 Luck 207 (DB).

(7) A Civil Court is not competent to question the action of revenue authorities falling within their jurisdiction. ILR (1955) Trav-Co 899 (906) * AIR 1953 Mad 583 (587): ILR (1953) Mad 722 (DB) * AIR 1952 Punj 139 (139) * AIR 1935 Mad 725 (725) * AIR 1966 MP 24 (27 to 30): 1965 MPLJ 716 (DB) * (1963) 4 Guj LR 387 * 1962 All WR (HC) 801: 1962 All LJ 918 * 1962 Cur LJ 287 (290) (Punj) * AIR 1960 Assam 59 (60, 61, 62): ILR (1957) 9 Assam 315 (DB).

[See also (1965) 1 Andh LT 352 (353) (DB).]

(8) Where the matter is exclusively within the jurisdiction of a Revenue Court but for its decision the Court has to decide a question falling within the jurisdiction of the Civil Court, the Revenue Court can decide the incidental question though it cannot grant the relief based on it. But its decision on the incidental question does not operate as res judicata and does not preclude the Civil Court from deciding that dispute and granting relief upon it. AIR 1960 Mys 209 (209): 33 Mys LJ 165. (1958 Mad WN 603, Dissented.) * (1962) 28 Cut LT 311 (315) (DB). (Decision of Revenue authority on a preliminary point of relationship of landlord and tenant does not take away the jurisdiction of Civil Court to decide the question finally.)

(9) Where the proceedings of a Revenue Court are tainted by fraud, irregularity, illegality or other fundamental defects, the jurisdiction of the Civil Court to question them remains. AIR 1956 Him Pra 53 (55) * (1958) 24 Cut L Tim 433 (439) * 1956 BLJR 70 (77) (DB) * AIR 1955 Cal 415 (416) (DB) * (1955) 59 Cal WN 592 (595) (DB) * AIR 1954 Bom 239 (241): ILR 1954 Bom 364 (DB) * AIR 1954 Pepsu 34 (35, 36): ILR (1953) Patiala 557 (DB) * AIR 1953 Pepsu 151 (153): ILR (1953) Patiala 415 (DB) * AIR 1952 Bom 387 (394, 395): ILR (1952) Bom 1019 (DB) * AIR 1952 Mad 865 (868): ILR (1953) Mad 262 (DB) * AIR 1952 Pepsu 119 (124): ILR (1952) Patiala 281 (DB) * AIR 1951 Him Pra 51 (52) * AIR 1950 Assam 141 (145): ILR (1950) 2 Assam 355 (DB) * AIR 1948 Nag 299 (300): ILR (1947) Nag 812 * AIR 1940 Pat 161 (162, 163): 18 Pat 854 (DB) * (1890) 12 All 409 (414, 415, 418) (FB) * (1898) 25 Cal 833 (842): 25 Ind App

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151 (PC) * AIR 1967 Cal 172 (174): 70 Cal WN 462 * 1964 Jab LJ 123 (126): 1964 MPLJ 265 (DB) * 1960 Jab LJ 1183 * 1961 MPL Jour 92 (93) * ILR (1960) 2 All 425 (428, 429). (Suit for declaration that decree of Revenue Court in matter exclusively triable by that Court having been obtained by fraud is not binding on plaintiff is cognizable by Civil Court. Fact that consequential relief of possesison is triable by Revenue Court cannot oust jurisdiction of Civil Court — 1957 AWR 41, Rel. on.) * ILR (1958) Mys 620 (623) (DB) * 1957 All WR (HC) 41. (Compromise decree passed under Section 175, U. P. Tenancy Act — Suit for cancellation of decree on the ground of undue influence and coercion.) * AIR 1952 Bom 387 (395): 54 Bom LR 405 (DB). (Order of Prant Officer void — Civil Court has jurisdiction to set aside the order.)

[See however AIR 1939 All 446 (447) (DB) * AIR 1929 Bom 267 (268) (DB).]

(9-A) The jurisdiction of the Civil Court remains in all matters not falling within the exclusive jurisdiction of the Rent and Revenue Courts under the various Provincial Acts. AIR 1956 All 639 (640) * AIR 1958 SC 725 (730) * AIR 1957 Bom 239 (240): ILR (1957) Bom 720 (FB) * AIR 1958 Andh Pra 100 (102) * AIR 1958 Pat 589 (595): 37 Pat 339 (DB) * AIR 1957 Andh Pra 869 (870): (1955) Andhra 428 (DB) * AIR 1957 Pat 564 (570) (DB) * AIR 1957 Pat 37 (38) (DB) * AIR 1956 Him Pra 61 (63) * AIR 1956 Hyd 192 (192): ILR (1956) Hyd 374 (DB) * AIR 1956 Pepsu 80 (81): ILR (1956) Patiala 141 * 1956 Andh WR 314 (318) * 1956 Andh WR 28 (29) * ('55) AIR 1955 Ajmer 54 (55) * AIR 1955 Andhra 15 (17) * AIR 1955 Hyd 271 (272): ILR (1955) Hyd 695 (DB) * AIR 1955 Hyd 58 (66): ILR (1954) Hyd 836 * AIR 1955 Mad 252 (258): ILR (1955) Mad 1151 (DB) * AIR 1955 Orissa 64 (64) (DB) * ILR (1955) 5 Raj 654 (655) (DB) * AIR 1954 All 768 (768) (DB) * AIR 1954 Mys 5 (6, 7): ILR (1953) Mys 303 * AIR 1954 Nag 241 (244): ILR (1954) Nag 589 (DB) * AIR 1954 Punj 271 (274): ILR (1955) Punj 440 (DB) * 1954 All L Jour 505 (506) (DB) * (1954) 56 Bom LR 638 (642) * AIR 1953 Ajmer 38 (39) * AIR 1953 Hyd 79 (87): ILR (1952) Hyd 791 (DB) * AIR 1953 Mad 912 (914) * AIR 1953 Nag 219 (220): ILR (1954) Nag 147 * AIR 1953 Punj 250 (252): ILR (1954) Punj 372 * AIR 1952 Nag 271 (273): ILR (1952) Nag 318 (DB) * AIR 1947 Mad 276 (277): ILR (1947) Mad 505 (FB) * AIR 1942 Lah 217 (219, 223): ILR (1943) Lah 191 (FB) * AIR 1941 All 61 (63, 64): ILR (1941) All 250 (FB) * AIR 1969 SC 439 (446): (1969) 1 SCJ 792 * AIR 1968 SC 466 (470): (1968) 1 SCR 617 * AIR 1967 SC 1196 (1199): (1967) 1 SCR 167. (Decree for eviction against tenant before commencement of Delhi Rent Act — Sub-tenancy not determined by decree — Suit by sub-tenant for permanent injunction against landlord and the tenant not barred by Section 50 of the Act.) * AIR 1967 SC 801 (807): (1967) 2 SCR 56. (Bar of jurisdiction of Civil Court contained in Section 4 (d) of Bihar Act XXX of 1950 — Relates only to matters which form subject of claim or adjudication under the Act which gives jurisdiction to authorities only in respect of properties vested in the State.) * 1966 SC 1718 (1719, 1720): (1966) 3 SCR 617. (Bhopal State Land Revenue Act (4 of 1932), Sections 71 and 200 (1) — Question of title is a matter foreign to scope of Section 71 — Civil suit for declaration of title and possession by Khatedar against trespasser falls outside scope of Sec. 200 (1) and is not barred.) * AIR 1963 SC 361 (363): (1963) 2 SCR 693. (Suit for possession against person claiming to be tenant — Status not admitted by plaintiff landlord — Suit not barred from cognizance of Civil Court under Section 77 (3) of Punjab Tenancy Act (16 of 1887).) * AIR 1962 SC 547 (550): (1962) 3 SCR 673. (Ordinarily a dispute as to existence of relationship of landlord and tenant between parties is of a civil nature and would fall within competence of Civil Court. Such a dispute does not fall to be determined under Section 7 (1), Orissa Tenants Protection Act and therefore the jurisdiction of Civil Court to determine such dispute is not barred by Section 7 (1) — AIR 1957 Orissa 17, Reversed.) * AIR 1969 J & K 9 (10): 1968 Kash LJ 127 (FB) * AIR 1968 All 403 (406): 1968 All LJ 117 * AIR 1968 Madh Pra 57 (67): 1967 MPLJ 904 (FB) * AIR 1963 Pat 79 (80, 81): 1963 BLJR 95 (FB) * AIR 1963 Pat 412 (421): 1963 BLJR 802 (FB). (Section 4 (d) of Bihar Land Reforms Act (30 of 1950) does not operate as a bar to a suit to recover mortgage money by sale of mortgaged lands.) * AIR 1967 Punj 21 (24): 68 Pun LR 638 (FB). (East Punjab Rent Restriction Act.) * AIR 1961 Raj 85 (87): 1961 Raj LW 178: ILR (1960) 10 Raj 1808 (FB) * 13 Law Rep 94: (1968) 1 Mys LJ 129 * AIR 1968 Orissa 217 (218): 34 Cut LT 993 (DB) * 1968 BLJR 476 (486): ILR 46 Pat 1154 (DB). (Question as to who is intermediary.) * 1967 Cur LJ 548: ILR (1968) 1 Punj 97 (100) * AIR 1967 All 358 (359): 1966 All LJ 1084 (DB) * AIR 1967 All 118 (120): 1967 All LJ 111. (Suit based on several and distinct causes of action in respect of some of which revenue Court can grant relief but not in respect of the others — Bar under Sec. 242, U. P. Tenancy Act (17 of 1939) does not apply. (Obiter). 1963 ALJ 1064 and 1965 ALJ 1137 and 1953 ALJ 399, Dissent. from.) * 1968 Mah LJ 30: (1967) 69 Bom LR 699 (704) (DB) * AIR 1967 Cal 354 (355) * 11 Law Rep 338: (1967) 2 Mys LJ 84 (85) * (1967) 33 Cut LT 177: ILR (1967) Cut 94 * ILR (1966) 16 Raj 691: 1967 Raj LW 21 (24) (DB) * 1967 Raj LW 217 (218) * ILR (1966) 2 Cal 48. (Suit for

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declaration that plaintiff is tenant of disputed land — Jurisdiction of Civil Court to entertain suit is not barred by Sections 16 to 21 of W. B. Land Reforms Act (10 of 1956.) * AIR 1966 Madh Pra 24 (27 to 30): 1965 MPLJ 716 (DB) * (1966) 1 Mys LJ 37: (1966) 5 Law Rep 404 * AIR 1966 Orissa 1 (3, 4): 31 Cut LT 996 (DB) * ILR (1966) 16 Raj 629: 1966 Raj LW 305 (308) * 1965 All LJ 677: 1965 All WR (HC) 367. (U. P. Zamindari Abolition and Land Reforms Act (1 of 1951) (as amended by Act 28 of 1961), Sections 331, 229-B.) * 1965 All WR (HC) 461: 1965 All LJ 777 * 1965 All LJ 1137: 1965 All WR (HC) 688. (U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Sections 209, 331 — Suit for possession of agricultural land after demolition of unauthorised construction on it — Civil Court cannot take cognizance — Cognizance of suit merely for demolition of unauthorised construction made on agricultural land be taken by Civil Court.) * AIR 1965 Cal 328 (332): 69 Cal WN 210. (Suit for declaration that a person is bargadar or tenant.) * AIR 1965 J and K 118 (121): 1965 Kash LJ 244 (DB). (Civil Court has no jurisdiction to try pure suit for correction of revenue records — Plaintiff filing suit for declaration that they were owner of certain land — Correction only incidental to result of suit — Suit held maintainable — See under J and K Land Revenue Act (12 of 1996.) * AIR 1965 J & K 56 (57, 58): 1964 Kash LJ 234 * (1965) 2 Mad L J 204 : 78 Mad L W 390 * (1965) Cut 539 (548) (DB) * AIR 1965 Punj 372 (373): 67 Pun LR 449. (The question of title as to whether the tenants are entitled to get possession of any area of land and, if so, how much, can be tried only by a Civil Court, there being no provision either in the Land Revenue Act, Punjab Tenancy Act or Section 44 of the Consolidation Act prohibiting the jurisdiction of the Civil Court in this matter.) * 1964 All WR (HC) 118 * (1964) 2 Andh WR 465 * (1964) 1 Andh WR 349 (351): (1964) 1 Andh LT 378 * (1964) 1 Andh WR 96. (Mysore Hereditary Village Offices Act (3 of 1895), S. 21.) * ILR (1964) Bom 80: 1963 Mah LJ 633 * (1964) 5 Guj LR 786: ILR (1964) Guj 775 (794) (797) * AIR 1964 Him Pra 5 (8) * AIR 1964 Punj 462 (464): 66 Punj LR 518. (Jurisdiction of Civil Court not excluded if question of title was raised.) * AIR 1963 Andh Pra 208 (209): (1963) 1 Andh WR 51 (DB). (Suit for arrears of rent and eviction against shikmidar — Jurisdiction of Civil Court not barred.) * ILR (1963) 13 Raj 1122: 1963 Raj LW 516 * ILR (1963) Andh Pra 853: (1962) 2 Andh WR 1 (3) (DB) * (1963) 1 Andh WR 60. (Suits relating to service inam lands as per provisions of Section 102 (c) of the Hyderabad Tenancy Act.) * (1963) 4 Guj LR 308 * (1963) 2 Mys LJ 47 * 1962 All LJ 419 (420). (Part of relief obtainable from revenue Court and relief relating to grove can be granted only by Civil Court — Suit as a whole maintainable in Civil Court.) * 1962 All LJ 193 (195) (DB) * (1962) 40 Mys LJ 979 (DB) * (1962) 40 Mys LJ 561 * 1962 BLJR 218 (220) * AIR 1962 Punj 204 (217): 64 Punj LR 1 (DB) * ILR (1962) 1 Punj 365: (1962) 64 Punj LR 282 (283) * AIR 1962 Tripura 58 (61) * 1961 Jab LJ 175: 1961 MPLJ 120 (DB) * (1961) 39 Mys LJ 237. (Madras Hereditary Village Offices Act (3 of 1885) — Suit by plaintiff as owner of village service inam land attached to his office for recovery of possession against a trespasser — Civil Court has jurisdiction to try suit.) * (1961) 2 Mad LJ 490 * (1961) 27 Cut LT 453 (456, 457) * ILR (1961) 2 Punj 279 (292) * (1961) 63 Punj LR 71 (75) * (1961) 63 Punj LR 777 (780) * 1960 All LJ 676: 1960 All WR (HC) 517. (A suit for declaration is essentially of a civil nature.) * AIR 1960 Assam 59 (60, 61, 62) * ILR (1957) 9 Assam 315 (DB). (Jurisdiction of Civil Court to decide status of tenant finally is not barred by Section 10 of Assam Act 12 of 1948.) * (1960) 1 Andh WR 13. (Suit for ejectment and rent involving determination of validity of resumption proceedings not covered by Madras Estates (Abolition and Conversion Into Ryotwari Act.) * AIR 1960 Madh Pra 138 (139): 1960 MPLJ 405 * AIR 1960 Mys 211 (211): 37 Mys LJ 744 * (1960) 26 Cut LT 245 (247) * (1960) 2 Orissa JD 203: (1960) 26 Cut LT 574 (576). (Defendant alleged to be trespasser — Orissa Tenants Protection Act.) * AIR 1960 Punj 11 (14): 61 Punj LR 932 (DB) * ILR (1960) 10 Raj 619 (620, 621) * ILR (1960) 10 Raj 848 (851). (Dispute relating to right of way — Section 251 of Rajasthan Tenancy Act does not oust jurisdiction of Civil Court to decide dispute.) * 1960 Raj LW 248 (250). (Suit for declaration that villagers have exclusive right to graze their cattle and for perpetual injunction restraining State Officials from selling grass.) * ILR (1960) 10 Raj 848: 1960 Raj 1950) for eviction of trespassers.) * (1959) 2 Andh WR 61. (Section 98, Hyderabad Tenancy and Agricultural Lands Act (21 of 1950) for eviction of trespasses.) * (1959) 2 Andh WR 75 * (1959) 2 Andh WR 201. (Contention that because an enquiry is to be made by a revenue authority in regard to certain matters relating to inam lands, the Civil Court must be deemed to have no jurisdiction in those matters was not tenable.) * ILR (1959) Bom 1308 * AIR 1959 Madras 199 (202): (1960) 1 Mad LJ 183 * (1959) 37 Mys LJ 127 * 1959 BLJR 71 (74) * AIR 1959 Punj 206 (208): 61 Pun LR 208 * ILR (1959) 9 Raj 271 (275) (DB) * 1959 Raj LW 304. (Suit for declaration that defendant lost her right in Biswedari on her remarriage is of civil nature.) * (1958) 60 Bom LR 374 (376) * ILR (1958) Mys 490 (494) * ILR (1958) 8 Raj 664

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(665, 666) * 1958 Raj LW 87 (88) * (1957) 61 Cal WN 349.

[See also AIR 1966 SC 166 (168): (1966) 1 SCR 145. (Bombay Tenancy and Agricultural Lands Act (67 of 1948), Ss. 85-A, 70, 85 — Suit triable by Civil Court — Issue whether defendant is a tenant must be referred to Mamlatdar for decision).]

(9-B) Where the matters to be gone into by the Civil Court and that to be scrutinised by the Revenue Tribunals are by and large different, Civil Court has jurisdiction, even though the Court incidentally has to consider certain matters coming within the jurisdiction of the Tribunals. (1968) 2 Mad LJ 463: ILR (1968) 2 Mad 432.

(9-C) The Central Excises and Salt Act, 1944, and rules thereunder do not provide an adequate alternative remedy. A Civil suit is maintainable to challenge an order of Excise authority imposing duty: (AIR 1964 SC 1873, Rel. on.) * AIR 1967 Andh Pra 338 (347): (1967) 2 Andh LT 141 (DB).

(10) The jurisdiction of the High Court to issue a writ of certiorari in order to ascertain if the proceedings of Revenue Officers and Courts have been conducted in due compliance with the provisions of the statute is not effected by the exclusive jurisdiction conferred on Revenue Courts by such statute. AIR 1940 Rang 84 (86, 88): 1940 Rang LR 325 (SB) * AIR 1957 Mad 376 (379) (DB).

(11) Where a plaint partly cognizable by a Civil Court and partly by a Revenue Court is presented to either Court, it should be ordered to be amended so as to bring it within the jurisdiction of the Court of presentation. ILR (1955) Patiala 74 (76) (DB) * ILR (1951) 1 Raj 81 (85) * AIR 1943 Oudh 307 (307, 308): 19 Luck 381 (DB) * 1904 Pun Re No. 81, p 299 (302) * (1892) 1892 Pun Re No. 19, p. 91, (92) * ('32) AIR 1932 Lah 595 (596).

(12) Where though the relief arises out of the same cause of action if one part of it could be granted by the Civil Court and another part by the Revenue Court, in such a case it is the Civil Court alone that will have jurisdiction to entertain the suit. AIR 1952 All 274 (274): 1951 All WR (HC) 203 * 1965 All WR (HC) 214. (Suit whether cognizable by Civil Court or Revenue Court — Substance of relief should be looked into.) * AIR 1964 J and K 34 (37): 1963 Kash LJ 279 (DB).

[See also (1968) 1 Mys LJ 570: 15 Law Rep 87. (Section 112, Mysore Land Reforms Act (10 of 1962) confers on Tribunal restricted jurisditcion.) * (1968) 2 Mys LJ 207: 16 Law Rep 13 (DB). (Tribunal under Mysore Act 14 of 1965 cannot decide whether person is tenant otherwise than under Section 4).]

(13) If in a suit which initially lies in a Civil Court a question which is within the exclusive cognisance of a Revenue Court arises, the plaint ought to be returned for presentation to the revenue Court in accordance with the provisions of O. 7, Rule 10 of C. P. C. as provided in Section 111 (4) of the H. P. Abolition of Big Landed Estates Act (1953). It cannot be dismissed. AIR 1963 Him Pra 49 (52).

(14) If during the pendency of a suit rightly instituted in a Civil Court the law is amended so as to make it cognizable by a Revenue Court alone, the Civil Court does not lose its jurisdiction to try the suit and the plaint should not be returned for presentation to the Revenue Court. 1954 All L Jour 762 (764, 765) (DB). (AIR 1952 All 188 and AIR 1953 All 254, Overruled.) * (1967) 71 Cal WN 506 (506-507) * AIR 1966 Guj 253 (256, 264): (1966) 7 Guj LR 311 (FB). (A suit property instituted in a Civil Court before Act 13 of 1956 was not liable to be dismissed merely because the rights acquired by tenants under Act 67 of 1948 were retrospectively restored.) * 1964 All WR (HC) 560 * ILR (1958) Mys 508 (519) * ILR (1958) Mys 597 (602).

[See also AIR 1966 All 166 (168): 1965 All LJ 413. (Suit filed in Civil Court for injunction restraining defendants from interfering with possession of agricultural lands — Civil Court acquiring jurisdiction over suit after enforcement of U. P. Zamindari Abolition and Land Reforms Act during pendency of trial — Held, civil Court had jurisdiction to entertain suit and it was not affected by U. P. Land Laws (Second Amendment) Act 28 of 1961.) 1962 All LJ 918: 1962 All WR (HC) 801 (804). (Dispute not pending in any Court — Power to enforce award vests in Civil Court alone even though subject-matter of dispute is within exclusive jurisdiction of Revenue Court — But if dispute is pending in Revenue Court, that Court alone has jurisdiction to enforce award.)]

[But see AIR 1957 All 257 (258, 259): ILR (1957) 1 All 287 (DB). (AIR 1953 All 219, Overruled.)]

(15) Suit for redemption pending when Rajasthan Revenue Court Act came into force — Suit is exclusively triable by Revenue Court — Civil Court must transfer case to Revenue Court. ILR (1954) 4 Raj 767 (772).

(16) Suit for profits of agricultural land or for share therein —Exclusive jurisdiction of Revenue Court — Suit pending in Civil Court at commencement of Rajasthan Tenancy Act (1955) — Suit must be transferred to Revenue Court. 1963 Raj LW 284 (286, 287).

(17) The defendant, in a suit for possession in the Mamlatdar's Court, cannot oust the jurisdiction of the Mamlatdar by merely filing a suit in the Civil Court. Under Section 26 of the Bombay Mamlatdars' Courts Act, it is for the Mamlatdar to decide if he is to proceed with the suit or not. AIR 1930 Bom 184 (185) (DB).

(18) Where the Revenue Court (Financial Commissioner) holds that a suit is

**Section 9 — Note 41 (contd.)**
not cognizable by Revenue Court and on institution of the suit in Civil Court the High Court holds that the suit is triable only by the Revenue Court, the only course open to the High Court is to dismiss the suit with a remark that it is open to the plaintiff to apply for review of the order by the Financial Commissioner. ILR (1954) Patiala 628 (638).

(19) Jurisdiction of the Civil Court is not barred by virtue of S. 242, U. P. Tenancy Act in respect of suit filed under Section 9 of the Specific Relief Act for obtaining possession over agricultural land from which the plaintiff alleged his illegal dispossession within six months of the date of the suit. AIR 1959 All 1 (4): 1958 All LJ 628 (FB). (AIR 1958 All 48, Overruled; AIR 1950 All 407, Approved.) * 1963 Jab LJ 72 (73).

[See also 1962 MPLJ 738. (Suit under Section 9 Specific Relief Act is saved by Section 257 of M. B. Land Revenue Code.)]

(20) A suit under Sec. 9 of the Specific Relief Act is maintainable with regard to an agricultural holding and the Civil Court has jurisdiction to entertain such a suit even though the plaintiff could have also instituted a suit under Section 183, Rajasthan Tenancy Act for the ejectment of the defendant as trespassers. ILR (1962) 12 Raj 188: 1961 Raj LW 636 (637).

[But see AIR 1967 Madh Pra 14 (17): 1964 MPLJ 822 (DB). (Remedy of suit under Section 9 of Specific Relief Act is not available to dispossessed Bhumiswami — 1962 MPLJ 738 and 1963 MPLJ (SN) 45 and 1963 MPLJ 292, Overruled.)]

(21) Various Rent and Revenue Acts expressly provide that the Civil Courts shall not have jurisdiction in respect of matters dealt with by those Acts. AIR 1958 Andh Pra 100 (102) * AIR 1956 Bom 208 (208) * ILR (1956) 6 Raj 323 (325) (DB) * AIR 1955 Punj 63 (65) (DB) * ILR (1955) Mys 557 (560) (DB) * AIR 1953 Punj 264 (266): ILR (1953) Punj 659 (DB) * AIR 1947 Oudh 232 (233): 22 Luck 207 * AIR 1940 Pat 161 (162): 18 Pat 854 (DB) * AIR 1957 Mad 671 (673) (DB) * AIR 1957 Orissa 17 (20): ILR (1956) Cut 677 (DB) * (1957) 2 Mad L Jour 628 (629) (DB) * AIR 1958 Pat 80 (82): 36 Pat 1075 (DB) * AIR 1968 SC 1328 (1330): (1968) 2 SCR 848. (Revenue Courts have powers to deal with and decide disputes pending on date of the Act and subsequent ones relating to succession to jagirs estates.) * AIR 1965 SC 338 (342): (1964) 3 SCR 763. (Jurisdiction of Civil Court to try a suit to recover rent and to eject ryot barred under second para. of Section 189 (1) of Madras Estates Land Act (1 of 1908).) * AIR 1961 SC 148 (149): (1961) 1 SCR 665. (Determination of fair rent under M. B. Accommodation Control Act, 1960.) * AIR 1967 All 59 (61): 1963 All LJ 265 (FB) * AIR 1958 Pat 630 (646): 1958 BLJR 559 (FB) * AIR 1968 Andh Pra 311 (314): (1968) 1 Andh WR 413 (DB) * 14 Law Rep 368: (1968) 1 Mys LJ 491 * 13 Law Rep 504: (1968) 1 Mys LJ 208 * 1968 Cur LJ 511 (515) (Punj) * 1968 Raj LW 376 (378) * AIR 1967 All 118 (120): 1967 All LJ 111 * AIR 1967 Andh Pra 331 (337): (1967) 1 Andh LT 345 (DB) * AIR 1967 Mad 306 (311): (1962) 2 Mad LJ 538 * (1967) 2 Mad LJ 158: 80 Mad LW 636 * (1967) 10 LR 666 (Mys) (DB) * (1967) 33 Cut LT 655: ILR (1967) Cut 712 (DB) * 1967 Raj LW 253 (255) * 1969 All LJ 222: 1966 All WR (HC) 278 (281). (Suit under Section 209 U. P. Zamindari Abolition and Land Reforms Act (1951) is cognizable only by a Revenue Court.) * (1966) 70 Cal WN 371 (373) (DB) * AIR 1966 Orissa 198 (199): 32 Cut LT 295 * AIR 1966 Orissa 29 (31, 32): 31 Cut LT 901 * AIR 1965 All 116 (120): 1964 All LJ 442 (FB) * AIR 1965 Guj 131 (132, 133, 134): (1965) 6 Guj LR 99 (DB) * AIR 1965 Him Pra 64 (67). (Section 12 (2) (c) read with Section 12 (4) H. P. Abolition of Big Landed Estates and Land Reforms Act bars jurisdiction of Civil Court to question correctness of decision of Compensation Officer in proceeding under Section 11.) * (1965) 1 Mad LJ 459: ILR (1964) 1 Mad 992 * AIR 1965 Orissa 138 (142): 31 Cut LT 951 (DB). (Claim by widow for past and future maintenance under Section 18 (1) (b) of Orissa Estates Abolition Act pending before Claims Officer — Suit in Civil Court for reduction of amount of maintenance under Section 14 (2) of Madras Impartible Estates Act is barred in view of Sec. 39 of Orissa Act.) * ILR (1965) 1 Punj 717: 67 Pun LR 558 (564) (DB). Property let by Auction purchaser of evacuee property— Letting is valid even in the absence of sale certificate — Civil Court has no jurisdiction to pass an ejectment decree.) * 1965 Cur LJ 91: 67 Punj LR 243 (247) (DB). (Tenancy created by Custodian under Section 10. Evacuee Interest (Separation) Act (64 of 1951).) * AIR 1964 Assam 60 (62, 63, 64): ILR (1963) 15 Assam 402 (DB). (Assam Land and Revenue Regulation (1 of 1886), Rules under, Rule 18 — Proceedings in respect of encroached lands — Held, Deputy Commissioner could act under the rule — Order of removal of construction — Suit for declaring it illegal held not maintainable.) * ILR (1964) Guj 294. (Bombay Tenancy and Agricultural Lands Act (67 of 1948), Sections 85, 85-A — Question of tenancy in dispute — Question cannot be dealt with by Civil Court.) * AIR 1964 J and K 34 (36): 1963 Kash LJ 279 (DB). (A claim by a co-sharer against other co-sharers for a share of the profits from the agricultural land in dispute, clearly comes under Section 85 Group 1 sub-clause (i), J. and K. Tenancy Act.) * ILR (1963) Andh Pra 392 (DB) * (1963) 2 Mys LJ 288 (290) * 1963 Raj LW 310 (312) * ILR (1962) Cut 437 (441) * 1961 Raj LW 613 (616) * (1960) 2 Andh

**Section 9 — Note 41 (contd.)**
WR 215 * (1960) 1 Mad LJ 490 (DB). (Suit for recovery lands attached as emoluments to office of Karnam — Jurisdiction of Civil Court is barred.) * ILR (1960) 10 Raj 1589 (1593) * (1959) 37 Mys LJ 485 (DB) * 1959 Raj LW 402 (402, 403) * 1958 All WR (HC) 64 * (1958) 60 Bom LR 782: ILR (1958) Bom 334 (DB) * (1958) 24 Cut LT 439 * ILR (1958) 8 Raj 659 (661) * ILR (1958) 8 Raj 100 (104, 105).

[See also 1967 All LJ 975: 1967 All WR (HC) 864. (Bar of civil suit under Section 331, U. P. Zamindari Abolition and Land Reforms Act — Does not apply to suit for declaration of plaintiff a sirdar and not liable to ejectment under Section 211 or for possession after dispossession under order under Section 211-A of that Act.) * AIR 1965 All 514 (515, 516): 1965 All LJ 70. (Suit by plaintiff for declaration of right as tenant and that leases in favour of defendants and decree passed by Revenue Court were not binding on him — Held leases and decrees without any legal force cannot oust jurisdiction of revenue Court nor is it conferred on Civil Courts even if particular relief is claimed.) * 1955 All LJ 314. (Suit of the nature of Section 180, U. P. Tenancy Act — Lies in Civil Court after the passing of U. P. Zamindari Abolition and Land Reforms Act.)

(22) If on the allegations in the plaint the suit is properly instituted in a Civil Court, the jurisdiction of the Court will not be barred simply because the plaintiff could have, by alleging additional facts, obtained relief from the Revenue Court. It is for the plaintiff to determine his own cause of action. AIR 1960 All 573 (577): 1960 All LJ 314. (AIR 1963 All 729, held, impliedly overruled by AIR 1959 All 1 (FB).) (Note. — AIR 1960 All 573 is itself overruled on another point in AIR 1962 All 248 (DB).)

(23) In order to determine whether the suit is entertainable by the Civil Court or not, the Court has to see whether the suit related to a decision or order in respect of any matter which the different authorities under the Act have the power to determine and not whether any order passed under the Act is wrong or against the provision of the Act. 1968 Cur LJ 940 (942) (Punj).

(24) Bhopal State Land Revenue Act (4 of 1932), Sections 89, 93 and 95 — Entry in regard to right to hold land — Correctness of such entry, can be questioned in suit based on title — Not only Section 95 does not by necessary implication bar a suit but also assumes that in such a suit the correctness of such an entry could be questioned subject to the presumption under Section 95. AIR 1966 SC 1718 (1720): (1966) 3 SCR 617.

(25) The question whether a person is a permanent holder is to be decided by the State Government, or by its officer as contemplated in proviso to Section 2 (4) of Bombay Merged Territories and Areas (Jagir Abolition) Act (1953). But there is nothing in the Act which says that, the jurisdiction of the Civil Court is taken away in respect of any such land merely because a question such as the one contemplated under Section 2 (4) is raised by the defendants in the suit. The jurisdiction of a Civil Court, however, can be said to have been taken away by implication since such a question is to be determined by a specified authority, and more particularly as the decision of that authority is made final. But that would be only with regard to any such question and not of a suit which can be instituted in a Civil Court. What is therefore taken away is the jurisdiction of a Civil Court from determining any such plea or question falling under S. 2 (4). (1967) 8 Guj LR 297.

**42. Bar by the Criminal Procedure Code.** — (1) A suit will not lie to set aside the orders passed under any of Ss. 133, 136, 137, 139 and 142 of the Criminal P. C. (1903) 31 All 371 (373) (DB) * (1869) 11 Suth WR 434 (435) (DB) * (1872) 18 Suth WR 284 (285) (DB).

(2) Order passed under Section 133 or Section 137 Cr. P. C. — Suit by person affected by order for declaration of his rights — Injunction to prevent operation of order cannot be directly issued by Civil Court. 1958 All WR (HC) 3 * (1968) 2 Mad LJ 589: 1968 Mad LW (Cri) 175.

(3) Orders under Ss. 133, 136, 137, 139 and 142 of the Criminal P. C. are not conclusive on the question of title to property vested in a person and do not exclude the jurisdiction of Civil Courts to enquire into such matters. (1888) 15 Cal 460 (470) (FB) * (1893) 17 Bom 293 (299) (DB).

(4) A suit under Section 9 of the Specific Relief Act on the ground of dispossession within six months but before the date of the order under Section 145, Criminal P. C., is not barred. (1902) 26 Bom 353 (358, 360) (DB) * (1873) 20 Suth WR 12 (12) (DB).

(5) No suit will lie on the basis of dispossession as a result of the Magistrate's order itself passed under Section 145, Criminal P. C. (1908) 12 Cal WN 696 (699) (DB).

(6) Where the claim of the plaintiff is based upon injury to the property and the interference with the exercise of the property rights and there is no claim for damages for malicious prosecution, the suit is maintainable, though there is provision for award of cost in respect of the proceeding under Section 145, Cri. P. C. in which the property was attached giving rise to the cause of action of the litigation. AIR 1968 Pat 248 (253): 1969 BLJR 411 (DB).

**Section 9 — Note 42 (contd.)**

(7) Land attached pending proceeding under Sec. 145 — Proceeding under Section 145 decided — Magistrate passing order directing supurdar to deposit certain amount towards profits, utilized by him, arising out of attached land — Order is without jurisdiction — Amount due can be determined only in civil Court. 1968 Cr LJ 1531 (2) (1532): 1966 All LJ 792.

(8) An order refusing to grant maintenance under Section 488 of the Criminal Procedure Code is no bar to a civil suit for maintenance. (1905) 32 Cal 479 (481) (DB) * AIR 1963 All 143 (146): 1963 (1) Cri LJ 394: 1962 All LJ 786.

(9) Illegitimate child — Civil suit for declaration that petitioner is illegitimate child of respondent — Decision of Civil Court is binding on criminal Court and cannot be ignored. AIR 1963 All 143 (146): 1962 All LJ 786.

(10) The power under Section 514, Criminal Procedure Code, to determine whether a bond should or should not be forfeited vests only in a Criminal Court. If the Criminal Court has exercised the powers conferred upon it, it is open to the person aggrieved by the order to seek redress at the hands of a superior Criminal Court. He cannot secure the intervention of a Civil Court. AIR 1959 Punj 81 (82): 59 Pun LR 112. (This is so even where the Criminal Court has permitted the plaintiff to seek a remedy in the Civil Court.) * (1968) 2 Mad LJ 586: (1968) Mad LJ (Cri) 751. (AIR 1958 AP 403 and AIR 1963 Bom 83, Rel. on.)

(11) A civil suit lies to contest an order of disposal passed by a Magistrate under Section 524 of the Criminal Procedure Code. AIR 1920 Pat 182 (183, 185): 5 Pat L Jour 321 * (1885) 9 Bom 131 (135).

(12) A suit is maintainable for recovery of the proceeds of the sale of the property attached and sold under Section 524, Criminal P. C. AIR 1915 Bom 227 (227): 40 Bom 200 (206).

(13) A suit to recover the expenses ordered by a Criminal Court to be paid to a witness will lie in a Civil Court. AIR 1926 Cal 289 (289, 290).

(14) Where a civil suit and a criminal complaint raise the same issues between the same parties, the judgment of one Court is not binding on the other and there is the unavoidable risk of conflict of decisions. AIR 1932 Mad 254 (255, 256): 55 Mad 346.

(15) No right of appeal having been provided against an order under Sec. 517, Criminal P. C. there is no bar to the maintainability of a civil suit for recovery of the amount confiscated, with interest. AIR 1958 Andh Pra 403 (405): 1958 Cri L Jour 739.

(16) The existence of a bona fide claim of civil right may in certain cases exclude the jurisdiction of the Criminal Court to proceed with the trial but the converse of that proposition is not true. (1957) 61 Cal WN 789 (792) (DB).

**43. Matters dealt with by a special tribunal.**—(1) Where a special tribunal is created by an Act of Legislature for determining questions as to rights which are the creation of the Act, the jurisdiction of that tribunal is, unless provided otherwise, exclusive and the civil Courts cannot take cognizance of such matters. AIR 1954 SC 520 (522) : 1955-1 SCR 267 * AIR 1954 SC 210 (212) : 1954 SCR 892 * AIR 1952 SC 64 (69) : 1952 SCR 218 * AIR 1950 Pat 50 (59, 75) : 29 Pat 71 (FB) * AIR 1958 Mad 230 (232) (DB) * ILR (1958) Andh Pra 396 (405) (DB) * AIR 1957 Andh Pra 489 (491) (DB) * AIR 1957 Cal 333 (334) (DB) * AIR 1957 Cal 135 (138) (DB) * AIR 1957 Madh Pra 98 (101) (DB) * AIR 1957 Raj 35 (36) : ILR (1957) 7 Raj 74 (DB) * AIR 1957 Trav-Co 202 (205) : ILR (1955) Trav-Co 1242 (DB) * AIR 1956 All 232 (233) * AIR 1956 Bom 656 (658) : ILR (1956) Bom 405 (DB) * AIR 1956 Hyd 10 (12) : ILR (1955) Hyd 737 (DB) * AIR 1956 Mad 388 (389, 390) * AIR 1956 Pepsu 39 (40) : ILR (1955) Patiala 696 (DB) * AIR 1955 Bom 89 (92) (DB) * AIR 1955 Nag 81 (84) : ILR (1954) Nag 973 (DB) * 1955 Ker LT 818 (820) (DB) * AIR 1954 Him Pra 63 (64, 65) * ILR (1954) Mys 174 (175, 176) * AIR 1953 Cal 720 (720) * AIR 1953 Nag 136 (138) : ILR (1953) Nag 433 (DB) * AIR 1953 Orissa 300 (305) (DB) * AIR 1953 Sau 133 (134) * AIR 1952 Pepsu 119 (124) : ILR (1952) Patiala 281 (DB) * AIR 1951 Bom 423 (424): ILR (1952) Bom 1 (DB) * (1951) 4 Sau L R 239 (242) (DB) * AIR 1950 Madh B 8 (8) * AIR 1947 Pesh 53 (55) (DB) * AIR 1940 Lah 401 (407) : ILR (1941) Lah 71 (FB) * AIR 1925 All 253 (261) : 47 All 434 * (1907) 31 Bom 604 (610) * AIR 1938 Rang 392 (393) : 1939 Rang LR 50 (FB) * AIR 1929 Sind 69 (82) : 26 Sind LR 435 * AIR 1968 SC 169 (174) : (1967) 3 SCR 736 * AIR 1966 SC 1738 (1740, 1741) : (1966) 3 SCR 582. (Travancore Cochin General Sales Tax Act (11 of 1125 M. E.) — Suit for refund of tax paid in excess of amount lawfully due — Jurisdiction of civil Court is barred. AIR 1964 SC 1873, Overruled.) * AIR 1966 SC 1438 (1440) : (1966) 3 SCR 214 * AIR 1966 SC 893 (896) : (1966) 2 SCR 533. (Statutory provision must expressly provide for such exclusion or must necessarily and inevitably lead to that inference — Jurisdiction of civil Court is excluded in relation to matters covered by orders included within provisions of S. 3(4) and S. 16, U. P. (Temporary) Control of Rents and Eviction Act (1947)) * AIR 1966 SC 210 (211, 212) : (1966) 1 SCR 128. (Suit by sub-tenant for declaration that he had become direct tenant by virtue of Section 16 (2) — Civil Court's jurisdiction to entertain

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suit is barred under S. 45, Madhya Pradesh Accommodation Control Act (41 of 1961.) * AIR 1964 SC 807 (816) * AIR 1963 SC 1547 (1551, 1552): (1964) 2 SCR 273. (Punjab Municipal Act (3 of 1911), Ss. 61 (2), 84 and 86 — Levy of terminal tax on salt — Committee imposing tax — Dispute as to — Person aggrieved has remedy of appeal under S. 84 — Without availing of this remedy suit brought for refund of tax recovered — Suit is barred under S. 86.) * AIR 1968 Punj 40 (43) : 70 Pun LR 41 (FB) * AIR 1969 Bom 151 (163) : 70 Bom LR 632 * AIR 1968 All 232 (239). (Administration of Evacuee Property Act (31 of 1950), S. 46.) * AIR 1968 Andh Pra 311 (314): (1968) 1 Andh WR 413 (DB) * (1968) 2 Mad LJ 41 * 1968 Lab IC 1571 : 17 Fac LR 281 : 34 FJR 385 : (1968) 2 Mys LJ 194 * AIR 1968 Raj 123 (126) : 1968 Raj LW 75 * AIR 1967 All 218 (220) * 1967 All LJ 336 : 1967 All WR (HC) 337 * AIR 1967 Andh Pra 126 (128) : ILR (1964) Andh Pra 1102 (DB) * AIR 1967 Cal 105 (107) * (1967) 8 Guj LR 337 * AIR 1967 Mad 318 (323) : (1966) 2 Mad LJ 226 * (1967) 2 Mad LJ 287 : (1966-67) 31 FJR 73 (Mad) * AIR 1967 Mys 111 (115) : (1966) 1 Mys LJ 77 (DB) * 1967 Raj Lw 28 (29) * AIR 1966 All 182 (185): 1965 All LJ 814 * AIR 1966 Bom 237 (239) : 68 Bom LR 10. (Hyderabad Atiyat Enquiries Act (10 of 1952), Ss. 2 (1)(a) and (b), 3A. 12 and 13(1) — Civil Court has no jurisdiction to decide claims to right, title and interest in Atiyat grants or matters ancillary thereto except regarding questions of succession, legitimacy, divorce or other questions of personal law.) * AIR 1966 MP 286 (290): 1966 MPLJ 335 (DB) (Per Dixit C. J. Contra.) * (1966) 1 Mys LJ 279: (1966) 5 Law Rep 619. (AIR 1958 Punj 384, Not foll.) * AIR 1966 Pat 29 (31, 32): 1965 BLJR 594 (DB) * (1965) 67 Bom LR 904 (907) (DB) * AIR 1965 Ker 185 (186): 1964 Ker LT 406. (Claim for enhanced pension — Jurisdiction of civil Courts barred by Section 4, Pensions Act.) * AIR 1965 Mad 149 (151): (1965) 1 Mad LJ 203 * (1965) 2 Mad LJ 285 : 78 Mad LW 263 * AIR 1965 Punj 311 (313) : 67 Pun LR 367 * AIR 1965 Punj 24 (25) : 66 Pun LR 749 * 1965 Cur LJ 506 (507) (DB) (Punj) * 1964 All LJ 819 (822). (Deposit of rent in Munsif's Court — Dispute about ownership of house — Munsif not competent to decide dispute.) * AIR 1964 Bom 85 (87-88) : 65 Bom LR 712 (DB) * ILR (1964) Cuttack 111 (117) * 1964 BLJR 701 (705) (DB) * 1963 All LJ 894. (Tribunals of limited jurisdiction have to act strictly within four corners of statute creating them.) * AIR 1963 Cal 225 (250) (FB). (Tests to be borne in mind in deciding cases, where the question of exclusive jurisdiction of a tribunal is raised, stated.) * AIR 1963 Cal 114 (115, 116) : (1963-64) 24 FJR 25 (DB). (Section 36-A of Industrial Disputes Act has vested Government with power to get award of Industrial Tribunal interpreted by Labour Court, Tribunal or National Tribunal as mentioned therein — Suit for declaration of parties' rights under award, even though it might involve question of its interpretation would, therefore, lie in Civil Court only after steps or attempts under Section 36-A have proved infructuous.) * AIR 1963 Him Pra 12 (15). (Motor Accidents Claims Tribunal — Jurisdiction of civil Courts barred on constitution of Tribunal.) * 1963 Jab LJ 958 (959) * ILR (1963) Cut 308 (312) * AIR 1963 Pat 11 (14, 15) : 1963 BLJR 11 (DB) * ILR (1962) 2 All 359 (363) (DB) * AIR 1962 Madh Pra 310 (311): 1962 MPLJ 343. (Payment of Wages Act (1936) S. 22; AIR 1945 Lah 195, Dissented from.) * AIR 1962 Mad 7 (15): (1962) 1 Mad LJ 92 (FB). (AIR 1954 Mad 454, Overruled on another point.) * (1962) 28 Cut LT 60 (63) * ILR (1962) Cut 533 (538, 540) (DB). (Orissa Hindu Religious Endowments Acts (4 of 1939) and (2 of 1952), Sec. 73 — Civil Court's jurisdiction barred in respect of any matter in dispute for determining or deciding which provision is made under the Act.) * (1962) 28 Cut LT 391 (398) : ILR (1962) Cut 533 (DB) * AIR 1962 Punj 389 (393) : 64 Punj LR 530 (FB) * (1961) 63 Pun LR 880 (881) : ILR (1962) 1 Punj 267 * AIR 1961 Andh Pra 502 (504, 505) : (1961) 2 Andh WR 339 * ILR (1961) 1 Andh Pra 384 * AIR 1961 Cal 31 (38, 39): 64 Cal WN 842 (DB). (Court's jurisdiction in regard to declaration of results of university examination.) * AIR 1961 Ker 258 (259): 1960 Ker LT 1288. (Cognizance of civil suits by past members claiming money from Co-operative Society is impliedly barred by Ss. 60 and 61, T. C. Co-operative Societies Act which provide for decision by the Registrar.) * 1961 Jab LJ 635 : 1961 MPLJ 184 (190) (DB) * AIR 1961 Mad 423 (426): (1961) 1 Mad LJ 188 * AIR 1960 All 68 (70): 1959 All LJ 472 (DB). (Application under S. 5 of the Displaced Persons (Debts Adjustment) Act (1951) — Consequences laid down in S. 15 of the Act ensue — Jurisdiction of Civil Court is ousted under S. 9 of the Act.) * AIR 1960 Punj 163 (164) : 61 Punj LR 915 (DB) * AIR 1960 Raj 148 (150): 1959 Raj LW 484 * (1959) 2 Mad LJ 415: (1959) 10 STC 323 * AIR 1959 Mys 145 (146): 36 Mys LJ 552 * AIR 1959 Pat 17 (19): 1958 Pat LR 343 (DB) * AIR 1959 Punj 64 (66): 60 Punj LR 592 (DB) * (1959) 61 Punj LR 277 (280) * AIR 1959 Raj 162 (166) : 1959 Raj LW 459 * (1958) 1 Andh WR 420 (DB) * (1956) 58 Bom LR 300 (313) : ILR (1956) Bom 465 (DB) * ILR (1958) Bom 771 * (1958) 60 Pun LR 602 (604) (DB).

(2) Suit for declaration that plaintiffs had a share in the claim property — De-

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fendant alleged to have practised fraud in getting the claim verified in his own and another's name to the exclusion of the plaintiffs — Suit held cognisable by Civil Court as a question of title was invoked and the claim was based on fraud of the defendant. The Civil Courts in such a situation must assume jurisdiction — Jurisdiction of Civil Courts in the circumstances held not barred by Section 36 of the Displaced Persons (Compensation and Rehabilitation) Act. AIR 1964 Pun 447 (449) : 1964 Cur LJ 91.

(3) Special tribunal exercising jurisdiction — Party receiving as result of such exercise — Method of redress pointed out by statute creating jurisdiction — Jurisdiction of civil Court is ousted. AIR 1956 Mad 388 (389) * ILR (1958) Andh Pra 396 (405) (DB) * 1958-1 Mad L Jour 73 (75) * AIR 1957 Andh Pra 894 (896) (DB) * AIR 1953 Bom 209 (211) * AIR 1953 Orissa 300 (305) (DB) * AIR 1951 Punj 74 (79): ILR (1951) Punj 165 (DB) * AIR 1950 East Punj 204 (207) (DB) * AIR 1949 Mad 780 (784) (DB) * AIR 1946 Cal 435 (436, 437) (DB) * AIR 1943 All 123 (150): ILR (1943) All 317 (FB) * (1889) 12 Mad 105 (108) * AIR 1937 Sind 305 (306) (DB) * AIR 1965 SC 1942: (1966) 1 SCR 64. (Sales tax recovered from dealer under mistake of fact and law — Suit to recover tax so recovered is barred by Section 20 of Bombay Sales Tax Act (V of 1946).) * AIR 1966 Pat 305 (313): ILR 44 Pat 22 (DB) * (1966) 1 Mad LJ 190: 78 Mad LW 561 * AIR 1962 Assam 98 (101, 103): ILR (1962) 14 Assam 359 (DB) * ILR (1961) 2 Ker 745 (752). (Madras General Sales Tax Act (1939), Section 18-A — Suit to set aside or modify assessment is barred.)

(4) It is well settled that even in a case where a statute created a liability and provided a remedy, the civil Court's jurisdiction is not completely ousted. A suit in a civil Court will always lie to question the order of a tribunal created by a statute, even if its order is, expressly or by necessary implication, made final, if the said tribunal abuses its power or does not act under the Act but in violation of its provisions. (1968) 70 Pun LR 412 (414, 415). (AIR 1963 SC 1547, Foll.)

(5) In all cases where the tribunal has acted within its jurisdiction the jurisdiction of the civil Courts is barred in the absence of mala fides or fraud. ILR (1956) Madh B 246 (258) * AIR 1957 Andh Pra 894 (896) (DB) * AIR 1954 All 487 (489) (DB) * AIR 1954 Pat 393 (396) * ILR (1954) Nag 667 (668) * AIR 1953 Punj 3 (12, 13): ILR (1953) Punj 140 (DB) * 1953 BLJR 586 (588, 589) * AIR 1952 Vindh Pra 32 (34) * AIR 1951 Hyd 163 (167): ILR (1951) Hyd 670 * AIR 1951 Pat 529 (532): 30 Pat 366 (DB) * AIR 1950 East Punj 324 (325) * AIR 1948 All 179 (181, 182): ILR (1948) All 91 (DB) * AIR 1945 Sind 21 (29, 30): ILR (1944) Kar 364 * AIR 1943 Bom 9 (10): ILR (1943) Bom 1 * AIR 1941 Lah 234 (236): ILR (1941) Lah 524 (FB) * AIR 1940 Nag 174 (175) * (1902) 26 Bom 294 (297) (DB) * (1899) 26 Cal 811 (815, 817) (DB) * AIR 1967 SC 1766 (1771): (1967) 3 SCR 490 * ILR (1967) Guj 117 * AIR 1966 Madh Pra 24 (27 to 30): 1965 MPLJ 716 (DB).

(6) Tribunal acting within its jurisdiction — There can be no interference on merits with the decision of tribunal. AIR 1953 Bom 284 (285): ILR (1953) Bom 827 (DB) * ILR (1967) Guj 117 * AIR 1964 Bom 241 (243): 66 Bom LR 38. (Every tribunal or authority has jurisdiction to decide case rightly or wrongly.) * AIR 1963 Assam 62 (73) (FB). (Reversed on another point in AIR 1968 SC 271.) * (1961) 2 Mad LJ 585 * AIR 1961 Pat 142 (146): 1961 BLJR 3 (FB) * AIR 1953 All 167 (170): 1952 All WR (HC) 297 * ILR (1951) 1 Cal 404 (409). (Commissioner's orders under Section 6 subsections (2) and (3) of the Bengal Suppression of Immoral Traffic Act, 1933.)

(7) Where the subject-matter of the suit falls outside the exclusive jurisdiction of the special tribunal, the jurisdiction of the Civil Court always remains provided the suit is of a civil nature. AIR 1954 All 607 (608) (FB) * AIR 1958 Ker 178 (183): ILR (1958) Ker 389 (FB) * AIR 1958 Andh Pra 670 (675) (DB) * AIR 1958 J and K 51 (52) (DB) * 1958 Andh LT 385 (393) * AIR 1957 Andh Pra 489 (491) (DB) * AIR 1957 Ker 16 (17): ILR (1957) Ker 26 * AIR 1957 Mad 674 (675) (DB) * 1957-1 Mad L Jour 5 (5) (DB) * AIR 1956 Bom 737 (738, 739): ILR (1957) Bom 15 (DB) * AIR 1956 Mad 146 (148): ILR (1957) Mad 631 * AIR 1956 Nag 132 (134): ILR (1955) Nag 983 * AIR 1956 Punj 163 (164) * AIR 1957 Andhra Pra 498 (499) (DB) * AIR 1955 Kutch 8 (8) * AIR 1955 Mad 597 (598, 599) * AIR 1955 Pat 320 (325): 34 Pat 487 (DB) * AIR 1953 Him Pra 89 (90, 91) * AIR 1952 All 346 (349): ILR (1952) 1 All 97 (DB) * AIR 1952 All 333 (334) (DB) * AIR 1952 Assam 147 (148) * AIR 1952 Mad 767 (769) (DB) * AIR 1952 Vindh Pra 74 (75, 76) * AIR 1951 Bom 423 (426): ILR (1952) Bom 1 (DB) * AIR 1951 Bom 136 (137): ILR (1951) Bom 393 (DB) * AIR 1950 East Punj 338 (344, 346) (DB) * AIR 1950 Mys 62 (63) * AIR 1947 Sind 31 (32) * AIR 1969 SC 204 (209): (1969) 1 SCJ 538 * AIR 1968 SC 271 (276): (1968) 1 SCR 260 * AIR 1966 SC 1412 (1414, 1415): (1966) 2 SCR 279. (Suit for refund of advance sales tax paid under mistake of law — Not barred expressly by S. 20 or impliedly by Section 13, Bombay Sales Tax Act.) * AIR 1964 SC 1348 (1352, 1353): (1964) 3 SCR 214 * AIR 1962 SC 70 (72) * AIR 1969 Mad 14 (15): 81 Mad LW 350 * AIR 1969 Pat 8 (10, 11) (DB) * AIR 1969 Mad 108 (110, 111): ILR

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(1968) 3 Mad 638 (DB) * (1968) 2 MLJ 41 * AIR 1968 Cal 59 (62): 1968 Lab IC 127: 14 Fac LR 140. (Industrial Disputes Act does not bar suit to obtain relief for wrongful dismissal in violation of statutory award.) * AIR 1968 Cal 91 (95): 72 Cal WN 717 * AIR 1968 J and K 79 (82): 1968 Kash LJ 224 * (1968) 1 Mys LJ 391: 14 Law Rep 204 * 1968 BLJR 476 (485): ILR 46 Pat 1154 (DB) * (1968) 70 Pun LR (D) 202 (223) (DB) * 1967 All LJ 336: 1967 All WR (HC) 337. (U. P. Consolidation of Holdings Act (V of 1954), Ss. 5 and 49 (as amended by Act XXII of 1966) — Consolidation proceedings — Powers of Consolidation authorities — They are tribunals of limited jurisdiction only and are not civil or revenue Courts — They are concerned only with the rights of tenure holders, viz., Bhumidars, Sirdars or Assamis — They are not competent to decide questions of proprietorship and civil rights of a party cannot be decided under the Act.) * 1967 All LJ 799 (800) * (1967) 1 Andh WR 239. (Suit for refund of excess amount paid by tenant to landlord after fixation of fair rent.) * AIR 1967 Mad 318 (325): (1966) 2 Mad LJ 226. (Workmen's Compensation Act (1923) does not purport to exclude jurisdiction of Civil Courts generally in all matters relating to compensation.) * (1967) 2 Mad LJ 302: 80 Mad LW 44 * (1966) 2 Andh WR 200 * ILR (1966) Andh Pra 1305 * (1966) 1 Mad LJ 361 (363): (1966) 79 Mad LW 173 * (1966) 7 Law Rep 151 (158) * AIR 1966 Orissa 96 (98): ILR (1965) Cut 794 * ILR (1966) 2 Punj 844 (850) * AIR 1965 Mys 68 (70): (1964) 34 Com Cas 566 * AIR 1965 Pat 3 (6). (Section 43 of the Bihar Hindu Religious Trusts Act does not bar the institution of a suit directly in the civil Court for a declaration that the suit property is the personal property of the plaintiff and not one governed by the provisions of that Act.) * AIR 1965 Pat 311 (313) (DB) * (1965) 2 Andh WR 183. (Suit for recovery of "Paditharam" expenses incurred at Temple is not for perquisites or emoluments — Civil Court's jurisdiction not barred by Section 93, Madras Hindu Religious and Charitable Endowments Act, 1951.) * AIR 1964 Mad 453 (454): (1964) 2 Mad LJ 239 * 1964 BLJR 701 (704, 705) (DB) * AIR 1964 Guj 22 (23, 24): (1964) 5 Guj LR 265 * AIR 1964 Mys 247 (249, 250): (1964) 1 Mys LJ 183 * AIR 1964 Mys 216 (217): (1964) 1 Mys LJ 128 * ILR (1964) Cuttack 111 (118) * 1964 BLJR 122 (128) (DB) * (1964) 30 Cut LT 199 (DB): ILR (1964) Cut 40 * AIR 1963 All 459 (466): 1963 All LJ 152 (FB) * (1963) 5 Orissa JD 254: ILR (1963) Cut 308 * (1963-64) 24 FJR 189 (194) (Punjab) (DB) * AIR 1963 Punj 405 (407): 65 Pun LR 674 * (1963) 65 Punj LR 337 (339) * (1962) ILR 41 Pat 338 (346) (DB) * AIR 1962 Assam 98 (101): ILR (1962) 14 Assam 359 (DB) * (1962) 64 Bom LR 229 (232) (DB): ILR (1962) Bom 463 * AIR 1962 Cal 488 (490) * AIR 1962 Andh Pra 247: (1962) 1 Andh WR 110. (Suit for declaration that plaintiff is a citizen of India.) * 1961 Ker LT 852: 1961 Ker LJ 1075 * 1961 Ker LT 395 (397): 1961 Ker LJ 338 (DB) * AIR 1961 Punj 16 (16, 17): ILR (1959) Punj 2074 (Allotment of property in lieu of property left in Pakistan — Dispute between two rival heirs — It has not the remotest connection with matters which the authorities under Administration of Evacuee Property Act are called upon to decide — Civil Court's jurisdiction to decide dispute is not excluded.) * 1962 All LJ 193 * (1931) 2 Mad LJ 490. (The bar of jurisdiction contemplated by Section 10 of Madras Estate (Supplementary) Act (30 of 1956), was not intended to be operative beyond the period when the Tribunal could be properly seized of the matter.) * ILR (1960) Bom 482 (DB). (Suit for ejecting trespasser — Suit is maintainable in city civil Court, though defendant claims to be a tenant. S. 28, Bombay Rents, Hotel and Lodging House Rates Control Act does not apply.) * AIR 1960 Mad 374 (376, 377): (1959) 2 Mad LJ 446 * AIR 1960 Mad 8 (8, 9): (1959) 10 STC 207 * AIR 1960 Punj 599 (602): 62 Punj LR 684 * ILR (1960) Cut 358 (DB) * 1960 Raj LW 403 (405): ILR (1960) 10 Raj 981 * AIR 1960 Raj 283 (285, 287): ILR (1960) 10 Raj 641 * ILR (1959) 1 Cal 84 (88) * AIR 1959 Ker 356 (357): 1958 Ker LT 573 * (1959) 2 Mad 415: (1959) 10 STC 323 * ILR (1959) 9 Raj 242 (246) * (1956) 69 Mad LW 816.

(8) Challenge to the provisions of a particular Act as ultra vires cannot be brought before Tribunals constituted under that Act or even before the High Court on a revision or reference from the decision of the tribunals. A civil suit is maintainable to challenge the provision of the Act. AIR 1969 SC 78 (89): (1968) 2 SCA 479.

(9) If a special tribunal is created and that tribunal has brought into existence certain rights and there is no provision specifically made for enforcing those rights the common law rights are still available. ILR (1954) Nag 667 (669) * AIR 1967 Mad 318 (325): (1966) 2 Mad LJ 226.

(10) Where a liability not permissible by statute is sought to be imposed by an authority and its recovery is threatened by coercive machinery in the hands of that authority and no machinery is provided for determination of the question of such liability a remedy in a Civil Court can lie and it will not be correct to say that he should pay and sue for refund where such a provision has not

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specifically been made in the statute which applies to the circumstances of the case. 1968 MPWR 748 (DB).

(11) Where the special tribunal acts ultra vires or refuses to exercise its jurisdiction, the civil Court has power to interfere and set matters right. AIR 1954 Mad 103 (106): ILR (1953) Mad 1047 (FB) * AIR 1958 Cal 65 (66) (DB) * AIR 1958 Orissa 197 (200): ILR (1958) Cut 417 (DB) * AIR 1958 Pat 189 (190) (DB) * AIR 1958 Pat 512 (517) (DB) * 1958-2 Mad L Jour 505 (506) * (1958) 24 Cut L Tim 390 (393) * AIR 1956 Vindh Pra 26 (28) * ILR (1956) Madh B 176 (177) * ILR (1956) Punj 115 (119) * AIR 1955 Ajmer 29 (31) * AIR 1955 Punj 92 (93): ILR (1955) Punj 480 * (1955) 57 Pun LR 440 (441) * AIR 1954 Mad 454 (458): ILR (1953) Mad 1204 (DB) * AIR 1954 Orissa 224 (225): ILR (1954) Cut 488 (DB) * ILR (1954) 2 All 311 (313) * (1954) 58 Cal WN 925 (927) * AIR 1953 All 531 (532): ILR (1954) 1 All 198 (DB)* AIR 1953 All 458 (459) (DB) * AIR 1953 All 167 (170) * AIR 1953 Pepsu 41 (42) * ILR (1953) 1 Cal 173 (175) * AIR 1952 All 418 (419) * AIR 1952 Madh B 21 (24) (DB) * AIR 1952 Mad 273 (275): ILR (1952) Mad 540 (DB) * AIR 1952 Pepsu 119 (124): ILR (1952) Patiala 281 (DB) * AIR 1952 Vindh Pra 32 (34) * AIR 1951 Bom 440 (445): ILR (1951) Bom 378 (DB) * AIR 1951 Madh B 63 (65) (DB) * AIR 1945 Lah 223 (226) (FB) * AIR 1943 Lah 176 (181): ILR (1944) Lah 1 (FB) * AIR 1943 All 123 (152, 153): ILR (1943) All 317 (FB) * AIR 1941 Lah 234 (236): ILR (1941) Lah 524 (FB) * 1940 Nag L Jour 256 (259) * AIR 1940 Lah 401 (407): ILR (1941) Lah 71 (FB) * AIR 1940 PC 105 (110): 67 Ind App 222: ILR (1940) Mad 599: ILR (1940) Kar PC 194 * (1908) 35 Cal 82 (89, 93, 101) (FB) * AIR 1938 Mad 608 (611): ILR (1938) Mad 1040 (DB) * AIR 1968 SC 271 (278): (1968) 1 SCR 260. (Suit by employer challenging correctness of decision given by Authority under Section 20 of Minimum Wages Act (1948) as to applicability of notification under Act to certain class of workers without following provision as to hearing and enquiry contained in Act — Civil Court's jurisdiction is not excluded: AIR 1963 Assam 62 (FB), Reversed.) * AIR 1966 SC 1089 (1100, 1101): (1966) 2 SCR 229. (Suit for refund of sales tax assessed under provisions which are declared to be ultra vires — Suit maintainable — AIR 1961 Mad 322. Reversed — (Per majority; Shah and Ramaswami JJ. Contra).) * AIR 1964 SC 1598 (1605, 1617): (1964) 7 SCR 503 * 1969 BLJR 63 (69) (DB) * (1968) 2 Andh WR 192: (1968) 1 Andh LT 278. (Authority under Madras Co-operative Societies Act (1932), acting without jurisdiction and in violation of provisions of Act and Rules.) * (1968) 2 An WR 94. (Express provision of Madras District Municipalities Act, contravened.) * AIR 1967 All 301 (302). (Cantonment Board imposing tax on Government buildings contrary to prohibition in Section 99 (2) of Cantonments Act.) * AIR 1967 All 218 (220) * AIR 1967 Cal 172 (174): 70 Cal WN 462 * 1967 BLJR 259 (261): ILR 46 Pat 15 (DB) * (1967) 69 Pun LR (D) 362 (368) * AIR 1966 Madh Pra 104 (107): 1966 MPLJ 100 * AIR 1966 Madh Pra 24 (27 to 30): 1965 MPLJ 716 (DB). (Revenue authorities in setting aside sale certificate acting without and in excess of jurisdiction and against provisions of Constitution — Suit in Civil Court for declaring their action as illegal is not barred.) * (1966) 2 Mys LJ 230: (1966) 7 Law Rep 595 * 1966 BLJR 375 (378) * AIR 1965 Punj 232 (234): 67 Pun LR 134 * AIR 1965 Punj 168 (169, 170): 67 Pun LR 184 * (1964) 30 Cut LT 509 * AIR 1964 Pat 338 (343) (DB) * AIR 1964 Pat 168 (172). (Railway servant, disciplinary proceedings against — Order of suspension passed as penalty — Substantial non-compliance with procedure laid down in Rule 1711, Railway Establishment Code and Article 311, Constitution of India — Civil Court has jurisdiction to set aside suspension order.) * (1964) 66 Punj LR 361 (363) (DB) * AIR 1963 Cal 225 (250) (FB). (Tribunal must act within scope of its powers given by statute.) * 1963 All LJ 180 * 1963 MPLJ 599 (DB) * AIR 1962 Cal 488 (490) * AIR 1962 Punj 426 (430): 64 Punj LR 405 (DB) * AIR 1961 Andh 313 (316): (1961) 1 Andh WR 167 * ILR (1961) 1 Punjab 141 (149) * AIR 1960 Bom 196 (198): 61 Bom LR 1388 * AIR 1960 Madh Pra 223 (226, 227): 1960 MPLJ 54 (DB) * AIR 1960 Punj 561 (564): ILR (1960) 2 Punj 589 (DB) * AIR 1959 Cal 519 (525) * 1959 Jab LJ 220 (222): 1959 MPC 119 * AIR 1959 Mys 204 (208). ILR (1958) Mys 897 (DB) * AIR 1953 All 167 (170): 1952 All WR (HC) 297.

[See also AIR 1963 Pat 11 (14, 15) 1963 BLJR 11.]

[But see (1876) 1 Cal 409 (411) (DB) * AIR 1934 Pat 670 (675): 14 Pat 24 (FB).]

(12) Civil Courts still have the jurisdiction to examine into cases where the provisions of the Act have not been complied with or where the proceedings are taken under colour of an Act which does not apply to the facts of the case or where the Tribunal has failed to act in conformity with the fundamental principles of judicial procedure. (1968) 2 An WR 192: (1968) 1 Andh LT 278 * AIR 1966 SC 1738 (1741) : (1966) 3 SCR 582 * AIR 1964 SC 1873 (1877): (1964) 5 SCR 517 * AIR 1967 All 218 (220) * AIR 1966 Andh Pra 240 (244 to 246): (1965) 1 Andh WR 233. (Seizure of movables by officers of co-operative

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society in contravention of Rules — Act amounting to trespass and illegal seizure — Act held not done under provisions of the Act — Jurisdiction of civil Court not excluded.) * ILR (1961) 1 Punj 141 (149).

(13) Special tribunal acting mala fide or arbitrarily — Civil Court's jurisdiction is not barred for setting matters right. AIR 1953 Mad 689 (690, 691) * AIR 1953 Orissa 121 (145): ILR (1952) Cut 529 (DB) * AIR 1952 Bhopal 16 (19) * AIR 1952 Cal 103 (106, 108) * AIR 1941 Lah 200 (208, 209): ILR (1941) Lah 278 (DB) * AIR 1939 All 394 (396, 397): ILR (1939) All 345 (DB) * AIR 1939 Lah 372 (373) * AIR 1919 Bom 30 (31): 43 Bom 221 (DB) * AIR 1938 All 110 (112) * (1911) 11 Ind Cas 509 (510, 511) (PC) * (1902) 26 Bom 294 (297) (DB) * (1899) 26 Cal 811 (815) (DB)* AIR 1924 Lah 690 (700) (DB) * (1907) 1907 Pun Re No. 58 p. 270 (273) * AIR 1921 Mad 92 (93): 44 Mad 156 (DB) * AIR 1919 Mad 159 (159): 42 Mad 668 (669, 672) (DB) * (1910) 6 Nag LR 53 (64) * AIR 1916 Sind 17 (19): 9 Sind LR 126 (130) (DB) * AIR 1965 Andh Pra 326 (327, 328): (1965) 2 Andh WR 88 (DB) * AIR 1964 Bom 241 (243): 66 Bom LR 38 * AIR 1963 Punj 405 (407): 65 Pun LR 674 * 1959 MPC 119 (120, 122).

[See also (1960) 2 Andh WR 45 (50): 1960 Andh LT 1073 (DB).]

(14) Where an authority or tribunal acts in excess of the jurisdiction given to it or abuses the authority, its action can be challenged by an appropriate action taken in civil Court. AIR 1964 Bom 241 (243): 66 Bom LR 38 * AIR 1966 SC 893 (896): (1966) 2 SCR 533 * 1963 All LJ 894.

(15) Special tribunal acting in violation of principles of natural justice — Civil Court has jurisdiction to interfere. AIR 1956 Hyd 164 (165): ILR (1966) Hyd 1 (DB) * 1958-2 Mad L Jour 439 (441) * AIR 1956 Mad 388 (390) * AIR 1955 Mad 187 (197): ILR (1955) Mad 1248 (DB) * 1952 Bur LR 248 (251) * AIR 1951 Bom 440 (446): ILR (1952) Bom 378 (DB) * 1968 Lab IC 742: 1967 Ker LT 1089 (1092) * AIR 1967 Mys 111 (114, 115): (1966) 1 Mys LJ 77 (DB) * AIR 1965 Pat 172 (174): 1964 BJLR 887 (DB) * AIR 1961 Andh Pra 313 (316): (1961) 1 Andh WR 167 * AIR 1961 Punj 166 (167): ILR (1960) 1 Punj 633. (Order of authorities under Displaced Persons (Compensation and Rehabilitation) Act (1954) in violation of principles of natural justice and statutory provisions.)

(16) Where a condition precedent to the vesting of jurisdiction in a special tribunal has not been fulfilled, the proceedings before the tribunal are null and void. AIR 1952 Nag 278 (282): ILR (1952) Nag 444 (FB) * AIR 1954 Pat 299 (300): 1954 Cri L Jour 951 (DB) * AIR 1952 Mad 589 (590): ILR (1953) Mad 47 (DB) * AIR 1952 Punj 383 (385, 386) * AIR 1952 Raj 184 (186): ILR (1952) 2 Raj 415 (DB) * AIR 1952 Trav-Co 249 (251): ILR (1952) Trav-Co 432 * AIR 1951 Bom 390 (391) (DB) * (1950) 8 J & K LR 191 (197) (DB) * AIR 1933 Rang 124 (127): 11 Rang 125 * 1963 All LJ 180. (Tenants never vacating but continuing all along as tenants — Order of ejectment of tenants under S. 7 (2) of U. P. (Temp.) Control of Rent and Eviction Act (3 of 1947) — Order is without jurisdiction and nullity — Suit to set aside that order is maintainable.)

(17) In all proceedings under special Acts, the special tribunal has jurisdiction to decide questions which are necessary for the purpose of giving or refusing relief under the particular statute. AIR 1956 Cal 668 (668) * AIR 1958 Bom 62 (63, 64): ILR (1957) Bom 818 (DB) * AIR 1958 Orissa 197 (199, 200): ILR (1958) Cut 417 (DB) * ('52) AIR 1952 Cal 103 (108) * AIR 1951 Bom 68 (70) (DB)* AIR 1969 Goa 16 (25): 1968 Lab IC 151: (1968) 2 Lab LJ 536. (Industrial Tribunal can decide whether dispute relates to major port or whether the reference is by appropriate Government.) * 1967 BLJR 172 (174): ILR 46 Pat 595 (DB) * AIR 1967 Punj 235 (236): 68 Pun LR 744 * AIR 1965 Mad 450 (450, 451): (1965) 2 Mad LJ 150 (DB) * AIR 1959 Madh Pra 13 (15, 17): 1959 MPLJ 566 (DB)* ILR (1958) Mys 911 (913) (DB). (Administration of Evacuee Property Act (1950) — Question relating to validity of deed or instrument on which property is found to be evacuee property — Custodian has jurisdiction to decide that question — Hence Section 46 (a) of the Act would bar jurisdiction of Civil Court to determine whether deed was a valid one.)

(17-A) There are two classes of cases dealing with the power of a tribunal: (1) where the legislature entrusts a tribunal with the jurisdiction including the jurisdiction to determine whether the preliminary state of facts on which the exercise of its jurisdiction depends exists and (2) where the legislature confers jurisdiction on such tribunals to proceed in a case where a certain state of facts exists or is shown to exist. The difference is that in the former case the tribunal has power to determine the facts giving it jurisdiction and in the latter case it has only to see that a certain state of facts exists. AIR 1959 SC 492 (497): (1959) Supp (1) SCR 733.

(18) The tribunal cannot by a wrong decision with regard to the state of facts on which its jurisdiction depends, give itself jurisdiction and the superior Court may by means of proceeding for certiorari inquire into the correctness of the decision. AIR 1953 Madh B 197 (203): ILR (1954) Madh B 76 (DB) * AIR 1958

**Section 9 — Note 43 (contd.)**

Pat 105 (107) (DB) * AIR 1969 Goa 16 (22): 1968 Lab IC 151: (1968) 2 Lab IC 536. (Industrial tribunal.) * AIR 1967 Andh Pra 370 (376): (1966) 2 Andh WR 55 * ILR (1965) Cut 574 (580) (DB) * AIR 1964 Andh Pra 318 (322, 323, 324, 325): (1964) 1 Andh WR 379 (DB) * 1963 All LJ 894: (1963) 67 Cal WN 138 (DB). (Jurisdiction to levy cess assumed by the authorities under Bengal Cess Act (9 of 1880) on wrong construction of provisions of the Act—Civil suit questioning the imposition of cess is not barred.) * AIR 1961 Pat 142 (144): 1961 BLJR 3 (FB) * AIR 1960 Assam 59 (61): ILR (1957) 9 Assam 315 (DB) * AIR 1960 J. & K. 29 (33, 34).

(19) No Tribunal can confer jurisdiction upon itself by misconstruing a section. AIR 1969 Goa 16 (25): 1968 Lab IC 151: (1968) 2 Lab LJ 536.

(20) If the tribunal has reached a wrong conclusion on facts on which its jurisdiction depends the whole proceeding is coram non judice. Madh BLJ 1955 SCR 233 (237) * ILR (1954) Madh B 58 (60, 61).

(21) If the tribunal is given jurisdiction to determine certain facts and those facts form a part of the very issue which the tribunal has to decide and the Act constituting the tribunal gives it the power to come to a final decision on that matter then the decision of the tribunal cannot be treated as one going to its jurisdiction and cannot, therefore, be questioned in any Court. AIR 1953 Madh B 197 (203): ILR (1954) Madh B 76 (DB) * AIR 1958 Punj 490 (495): ILR (1958) Punj 854 (DB).

(22) Whenever the question arises whether the special tribunal has or has not jurisdiction, the Civil Court is the final authority as to whether the cause is or is not within the jurisdiction of the special tribunal. AIR 1954 All 362 (376) (FB) * AIR 1952 Nag 278 (282): ILR (1952) Nag 444 (FB) * AIR 1955 Pat 320 (325): 34 Pat 487 (DB) * ILR (1955) Nag 698 (700, 701) * AIR 1954 Punj 139 (140): ILR (1953) Punj 446 (DB) * AIR 1953 All 167 (170) * AIR 1952 Bhopal 16 (19) * AIR 1952 Mad 589 (590): ILR (1953) Mad 47 (DB) * AIR 1952 Punj 340 (342) * AIR 1952 Vindh Pra 74 (75, 76) * AIR 1951 Pat 529 (530): 30 Pat 366 (DB) * AIR 1942 Lah 179 (186)* AIR 1941 Lah 234 (236): ILR (1941) Lah 524 (FB) * (1968) 1 MLJ 153: ILR (1968) 2 Mad 792 * AIR 1967 Mys 111 (114, 115): (1966) 1 Mys LJ 77 (DB) * 1967 BLJR 259 (261): ILR 46 Pat 15 (DB) * AIR 1963 All 574 (577) * AIR 1963 Assam 49 (52, 53): ILR (1963) 15 Assam 173 (SB) * AIR 1963 Cal 225 (250) (FB) * 1963 MPLJ 599 (DB) * 1962 Ker LT 450 * AIR 1961 Pat 142 (144, 146, 147) : 1961 BLJR 3 (FB) * AIR 1960 Madh Pra 127 (128) : 1959 MPLJ 1061 * AIR 1959 Mys 129 (134): ILR (1958) Mys 677 (DB).

(23) Where the authority or tribunal, though constituted under an Act, has not been given power to conclusively determine the existence or non-existence of conditions on which the authority depends, the jurisdiction of the civil Court is not barred to examine the correctness or otherwise of the decision of the authority on the point. AIR 1963 Assam 62 (70) (FB). (Reversed on another point in AIR 1968 SC 271.)

(24) Where the special tribunal is invested by the Legislature with exclusive jurisdiction to determine its own authority in certain matters, the jurisdiction of the Civil Court must be deemed to have been taken away to that extent. AIR 1951 SC 115 (117) : 1951 SCR 145 : 30 Pat 329 * AIR 1955 Bom 89 (91) (DB) * AIR 1955 Punj 197 (212, 214, 215) (FB) * AIR 1953 Mys 1 (4): ILR (1952) Mys 286 (DB) * AIR 1953 Pat 112 (117): 32 Pat 131 (DB) * AIR 1953 Pepsu 133 (138, 139): ILR (954) Patiala 1 (DB) * AIR 1953 Pepsu 88 (95, 96): ILR (1953) Patiala 451 (DB) * AIR 1952 Mad 589 (590): ILR (1953) Mad 47 (DB) * AIR 1951 Pat 529 (530): 30 Pat 366 (DB) * AIR 1947 Bom 413 (423): ILR (1949) Bom 766 * AIR 1946 Cal 435 (436, 437) (DB) * AIR 1964 Mys 107 (109): (1965) 2 Mys LJ 403 (FB) * 1964 BLJR 122 (DB).

(25) Even where jurisdiction is given to the statutory tribunal to determine certain facts so as to give itself jurisdiction, it will be for the Court of general jurisdiction to adjudicate as to what are the powers which the statute has given to such an authority or tribunal. AIR 1963 Cal 225 (250) (FB).

(26) Even where the special tribunal provided for by a statute is not constituted or does not function, the jurisdiction of the Civil Courts is ousted where the right is purely a creature of the statute and it is the intention of the statute that the right must only be exercised or enforced in the manner provided for by the statute. AIR 1956 Cal 497 (498) (DB) * (1955) 59 Cal WN 658 (660) (DB) * AIR 1949 Lah 131 (158, 159, 160): Pak LR (1949) Lah 215: 50 Cri L Jour 598 (FB) * AIR 1962 Mad 7 (11, 14, 15) (1962) 1 Mad LJ 92 (FB). (AIR 1954 Mad 454, Overruled.)

(27) Where the right is a common law right and the statute only entrusts to a special tribunal the disputes relating to the right, or a certain aspect of the right the failure of the special tribunal to function will not affect the jurisdiction of the ordinary Civil Courts. AIR 1949 Lah 131 (158): 50 Cri L Jour 598: Pak LR (1949) Lah 215 (FB) * 1962 Jab LJ 156 (160) (DB) * AIR 1961 Punj 133 (135, 136): ILR (1959) Punj 940.

**Section 9 — Note 43 (contd.)**

(28) It cannot be said that under Section 57 of the Cochin Education Code the Director of Public Instruction has been constituted as a special tribunal having exclusive jurisdiction to adjudicate upon the civil rights of teachers wrongfully dismissed from service. The civil Court's jurisdiction is in no way affected by the provisions of the Education Code and the aggrieved party can seek his redress in the ordinary Courts of the land in respect of any infringement of their civil rights. AIR 1954 Trav-Co 104 (106, 107): ILR (1953) Trav-Co 482 (DB).

(29) Where under the Rent Control legislation a landlord is required to obtain a certificate from the Rent Controller granting permission to evict the tenant on ground of bona fide requirement of the premises, the grant of the certificate only removes the bar to the suit and does not furnish the landlord with a document which would shut out the civil Court from going into the question as to bona fide requirement. 1955 Raj LW 117 (119) * AIR 1949 Cal 65 (66, 67): ILR (1949) 1 Cal 72.

[See also 1958 Ker LT 1047 (1048).]

(30) A section in a statute for making rules with a possibility that such rules will contain suitable provisions for the adjudication of the existence of disputed rights cannot oust the jurisdiction of the civil Courts to decide the question. 1954 Ker LT 929 (930) * AIR 1952 Mad 106 (106, 107): 1951-2 Mad LJ 333.

(31) A tribunal functioning under a special enactment has got its jurisdiction circumscribed by the provisions of the Act creating it but this delimitation of jurisdiction is only with regard to matters to be decided and adjudicated upon by it. It cannot relate to the mode of the enquiry which the tribunal can conduct to enable it to function under the special enactment, untrammelled by strict rules of procedure or evidence AIR 1960 Mad 401 (403) : (1960) 2 Mad LJ 63.

(32) If jurisdiction to act exists under the law, it will not be affected merely because the tribunal under some misconception of law adopts a somewhat irregular procedure. AIR 1957 Assam 103 (106): ILR (1957) 9 Assam 249 (DB).

[See also ILR (1961) Mys 366 (381) (DB). (Board not following procedure prescribed under Ss. 7 and 8 of Kolhapur Debt Conciliation Act (1939) — Civil Court has jurisdiction to entertain suits challenging validity of procedure followed by Board.) ]

(33) Where the constitution of the tribunal is held to be defective or improper, the proceedings taken before it and the orders passed therein can be successfully challenged in a civil Court and it is not necessary to show prejudice. AIR 1957 SC 425 (431) : 1957 SCR 575 * AIR 1964 Andh Pra 36 (42) : (1963) 2 Andh WR 364 (FB). (State Transport Authority hearing appeal, not constituted and composed as provided by S. 44(2) of Motor Vehicles Act (1939) ) * 1963 All LJ 894. (Constitution of Tribunal under Supression of Immoral Traffic in Women and Girls Act (1956) — Magistrate not calling five respectable persons as required by S. 17(3) of the Act — No proper constitution of Tribunal — Judgment of Magistrate is nullity.)

**44. Domestic Tribunal** — (1) The jurisdiction of Courts in regard to domestic tribunals is of a limited nature. AIR 1949 PC 313 (316) * AIR 1963 SC 1144 (1147) : (1964) 1 SCR 1 * AIR 1969 Cal 224 (229) * AIR 1961 Cal 31 (38, 39) : 64 Cal WN 842 (DB).

(2) Domestic Tribunals are the committees of associations like trade unions, social clubs etc. Some times such tribunals are also set up by a statute e. g. Medical Council, Bar Council or the like which should strictly be called "statutory Tribunals" A material difference between the two is (i) in case of non-statutory "domestic tribunals" certiorari cannot lie though other remedies such as declaration, injunction or damages may be available in proper cases (ii) where domestic tribunal is created by statute a certiorari would lie against it in the same manner as in the case of other statutory tribunals. AIR 1969 Manipur 41 (44).

(3) Where a special tribunal or public body is created by or under the authority of an Act of the Legislature for the purpose of determining rights which are the creation of the Act, then the jurisdiction of that tribunal or of that body is, unless provided otherwise, exclusive and Civil Courts cannot take cognisance of such matters. (1959) 2 Andh WR 412.

(4) There is a wide difference between the principles applicable to Courts of justice and those applicable to domestic tribunals. AIR 1952 Orissa 359 (383) (DB) * AIR 1954 Bom 351 (355, 356) : 56 Bom LR 172 (DB) (Overruled on another point in AIR 1963 SC 375).

(5) A domestic tribunal is not bound by the rules of evidence. AIR 1969 Cal 224 (229).

(6) A party appearing before a domestic tribunal when it fails to make a point where the tribunal has not followed a correct procedure it can be inferred that it has waived its right. AIR 1969 Cal 224 (231).

(7) Where a party appearing before a domestic tribunal alleges dishonesty or mala fides on the part of the tribunal the civil Court will need first rate evidence to arrive at so serious a finding. AIR 1969 Cal 224 (231).

(8) The High Court has no power to act as a Court of appeal and sit in judg-

**Section 9 — Note 44 (contd.)**
ment on the judgment of a domestic tribunal on merits, nor can it go into the matter of appreciation of evidence. AIR 1952 Bom 37 (42, 43) : ILR (1952) Bom 269 (DB) * AIR 1966 Cal 42 (49) : (1968) 2 Lab LJ 617 (DB) * AIR 1962 Guj 197 (200) : (1962) 3 Guj LR 492 (DB).

(9) The only grounds on which the Court may interfere are (1) lack of jurisdiction, (2) absence of good faith, (3) disregard of the principles of natural justice. AIR 1952 Bom 37 (46, 47 and 50) : ILR (1952) Bom 269 (DB) * AIR 1952 Orissa 359 (383) (DB) * AIR 1963 SC 1144 (1147) : (1964) 1 SCR 1 * AIR 1969 Cal 224 (229) * 1968 Lab IC 1145 (1149) (Manipur) * AIR 1966 Cal 42 (49) : (1968) 2 Lab LJ 617 (DB) * AIR 1965 Cal 531 (533, 534) * AIR 1964 Pat 102 (109) : 1964 BLJR 523 (DB) * AIR 1962 Guj 197 (200) : (1962) 3 Guj LR 492 (DB) * AIR 1961 Cal 31 (34) : 64 Cal WN 842 (DB).

(10) Where a congress member filed a suit for declaring certain elections to certain organisation bodies void on the ground of certain irregularities alleged to have been committed by the election officer and for restraining the election officer from holding election, Held that the civil Court had jurisdiction to decide the dispute regarding the organisational matters of the congress which was an association having its own domestic forums at least for the purpose of determining whether the defendants had acted mala fide. Prima facie the Court had jurisdiction to entertain the suit as there was allegation of want of good faith and jurisdiction as well as violation of principles of natural justice. AIR 1966 All 305 (311): 1966 Cri LJ 632.

(11) Where the arbitrators act within their authority and according to principles of natural justice their award is not subject to review by a Court of law. Where, however, the arbitrators act beyond their authority, the award is open to question. AIR 1954 Pat 336 (337) * (1964) 1 Lab LJ 500 (510) (Mad) * ILR (1950) 1 Cal 418.

(12) A defence to the effect that an agreement containing a provision for reference to arbitrator was never entered into or that it was void for some reason is a matter exclusively for the determination of the Court and not of the arbitrator. AIR 1958 All 26 (27) (DB).

(13) Application by Insurance Co. under Section 34 for stay of suit — Insurance policy containing arbitration clause with endorsements that arbitration proceedings contemplated in policy and suit for enforcing any claim on policy shall be institued only in Court situated in City of Madras — Held, question whether endorsements form part of arbitration agreement or not was not the only question which affected jurisdiction of Arbitration but was also such as to affect jurisdiction of Calcutta High Court and Calcutta High Court ought and not Arbitrator to adjudicate upon the question. AIR 1968 Cal 340 (341).

(14) Requisitioning and Acquisition of Immoveable Property Act (1952), Ss. 19, 8 (1) (f) — Suit for declaration that plaintiffs are entitled to one-half of compensation money allowed in land acquisition proceedings in respect of land acquired under Section 9 of Defence of India Act (1939) — Civil Court is not competent to entertain such suit — Arbitrator in his award keeping open question of title of plaintiffs' ancestors to be decided in title suit — That fact cannot confer jurisdiction on civil Court. AIR 1968 Pat 500 (503): ILR 47 Pat 113 (DB).

**45. Suits on judgments.** — (1) In cases which fall outside the bar imposed by Section 47 of this Code or where a decree becomes, owing to subsequent events, inexecutable, a suit on the judgment will be maintainable as the language of Section 9 is wide enough to cover such cases. AIR 1946 Oudh 1 (5): 29 Luck 517.

(2) Act taking away decree-holder's right — Judgment-debtor filing suit for declaration that decree became null and void and incapable of execution instead of filing objection under Section 47 — Suit not maintainable. 1962 All WR (HC) 643.

**46. Suits impliedly barred.** — (1) A suit is said to be impliedly barred when it is barred by general principles of law or on grounds of public policy. AIR 1956 Pat 205 (208) * AIR 1953 Pepsu 41 (42) * AIR 1936 Bom 250 (252): 60 Bom 645 * AIR 1956 SC 15 (16, 17): 1956 SCC 62 * 1962 All LJ 162 (DB) * AIR 1961 Punj 8 (10): 63 Punj LR 107.

(2) Where the special Act sets up a special set or hierarchy of tribunals specially empowered to adjudicate upon the rights and obligations created by the special Act the jurisdiction of the Civil Court is impliedly barred, even if no express bar is stated in the Act. AIR 1959 Mys 145 (146): 36 Mys LJ 552.

(3) Where the Legislature has acted within its powers, it is not open to the Municipal Courts to question the legality of the provisions of the enactment. AIR 1925 Mad 837 (838): 49 Mad 237.

(4) Two proceedings or remedies being concurrently available does not per se and by itself show that one of them operates, as a matter of abstract rule of law in derogation of the other. AIR 1961 Punj 8 (10, 11): 63 Punj LR 107. (Section 145 does not expressly bar the suit against the surety.) * AIR 1968 All 369 (373): 1968 All LJ 595 (FB). (U. P. Act 13 of 1959 does not exclude Civil Court's jurisdiction by implication.)

(5) A Court will not interfere with the internal management of companies

**Section 9 — Note 46 (contd.)**

acting within their powers and in fact has no jurisdiction to do so. AIR 1924 Cal 598 (599) (DB) * AIR 1923 Bom 305 (316): 47 Bom 809 * AIR 1926 Sind 295 (296) * AIR 1950 PC 81 (85): 77 Ind App 128: ILR (1951) 1 Cal 305 * AIR 1927 Bom 603 (606) (DB) * AIR 1959 All 598 (604). (Reversed an another point in AIR 1962 All 610.)

(6) Held, Court was wrong in going into the question relating to internal management of Trusts. 1964 Cur LJ 449 (Punj).

(7) The decision of the Government on a political question cannot be canvassed by Municipal Courts. (1893) 17 Bom 431 (456): 20 Ind App 50 (PC) * (1906) 33 Cal 219 (253): 33 Ind App 1 (PC) * AIR 1923 PC 6 (8): 50 Ind App 49: 47 Bom 327 * (1903) 27 Bom 189 (211, 220) * AIR 1928 Cal 74 (81): 54 Cal 969 * AIR 1915 Cal 59 (59) (DB) * (1912) 39 Cal 615 (661, 662): 39 Ind App 31 (PC) * AIR 1916 Mad 1157 (1159): 39 Mad 781 (788, 792) (DB) * AIR 1929 Pat 22 (27): 8 Pat 95 (DB) * AIR 1924 Pat 616 (623): 3 Pat 673 (DB).

(8) Where a civil right is in question, the civil Court can try such question though a political question is involved. (1869) 12 Moo Ind App 523 (535) (PC) * (1876) 25 Suth WR 404 (405, 407) (DB).

(9) Claim by villagers to customary prescriptive right to tank water— Assignment of portion of tank by Government to political sufferers — Civil Court can go into question whether remaining portion after assignment is sufficient for the exercise of that right and determine the reasonableness of assignment. AIR 1963 Andh Pra 67 (68): (1962) 1 Andh LT 303.

(10) Sections 34 to 37 of the Travancore Nayar Act, 2 of 1100 do not deal with the jurisdiction of the Civil Court to entertain a suit for partition by one or more members of a Nayar tarwad. AIR 1958 Ker 158 (160) (DB).

(11) The Industrial Disputes Act impliedly excludes the jurisdiction of the civil Court to try industrial disputes. AIR 1964 Mad 81 (82): (1964) 1 Lab LJ 217.

(12) Jaipur Co-operative Societies Act (1943), S. 54 — Suit for recovery of advances to the secretary of the society — Dispute is between society and its servant concerning its business — Jurisdiction of Civil Courts is barred impliedly. 1962 Raj LW 41 (44).

(13) Fact that special jurisdiction is vested in the Collector under Madras Act 30 of 1947 to decide a particular fact, cannot by implication take away jurisdiction of Civil Court to decide a similar question incidentally to grant a relief which it otherwise has. (1962) 2 Mad LJ 368.

(14) Section 27 (3) of Santhal Parganas Settlement Regulation (1872) does not bar jurisdiction of civil Court to grant relief against invalid transfer. AIR 1963 SC 605 (611): (1963) Supp 1 SCR 13.

(15) Courts have no jurisdiction to interfere with discretion of Principal which relates to internal affairs of the college e.g. promotion of student to higher class. AIR 1962 All 207 (208).

[See also AIR 1961 Cal 31 (38, 39) : 64 Cal WN 842 (DB).]

**46-A. Political questions.** — (1) Irregularities caused by deviation from the rules of procedure framed by the State Government in the matter of darkhast grants can be examined and corrected only by the authorities to whom the task is entrusted. The Civil Courts have no power to cure the ills caused by administrative lapses in cases where no civil rights are involved. Thus where a lessee from Government is dispossessed of the land as a result of a grant from Government to B as a political sufferer, the grant cannot be challenged in the Civil Court. AIR 1962 Mad 417 (419, 420): (1961) 2 Mad LJ 217.

(2) Trust created by foreign sovereign in Bombay City and registered under Bombay Public Trust Act — Trustees, beneficiaries and assets within jurisdiction of Bombay City — Suit for removal of trustees and appointment of new trustees — City Civil Court has jurisdiction to entertain the suit. AIR 1959 Bom 275 (280): 60 Bom LR 660.

(3) Meaning of word "political" does not rule out possibility of political right being also considered as civil right. Exercise of right of franchise, though resulting in electing members to legislative bodies having political power, is essentially of civil nature. AIR 1959 All 607 (608, 609): 1959 All LJ 727 (DB). (AIR 1958 Andh Pra 642, Dissented from.)

**47. Acts of State.** — (1) An act of State may generally be defined as an act done or adopted by a State in its sovereign capacity and injurious to the person or property of some person who is not, at the time of that act, a subject of that State. ILR (1953) 3 Raj 525 (532) * AIR 1959 SC 1383 (1387): (1960) 1 SCR 537. (As to what amounts to act of State under different systems of jurisprudence, stated.) * AIR 1965 SC 316 (319): (1963) 2 SCR 421 * AIR 1967 Raj 24 (29): 1966 Raj LW 550 (DB) * 1959 All LJ 845 * AIR 1959 Cal 506 (515): 63 Cal WN 485. (An Act of State operates extra-territorially.) * ILR (1957) Bom 218: 60 Bom LR 279.

(2) Act of State includes all acquisitions of territories by a sovereign State for the first time whether by conquest, treaty or by cession or otherwise. 1962 Mys LJ (Supp) 99 (DB) * AIR 1964 SC 1043 (1056): (1964) 6 SCR 461. (Integra-

**Section 9 — Note 47 (contd.)**

tion of Indian States with Dominion of India.) * AIR 1962 SC 1288 (1299): 1962 Supp (1) SCR 405 * AIR 1966 Goa 38 (43) (FB). (Conquest by military action over territory of Goa, Daman and Diu was an act of State — True view of an act of State is that it is a catastrophic change constituting a new departure.) * AIR 1965 Guj 293 (298) ILR (1965) Guj 145 (DB) * AIR 1961 Guj 151 (163, 164): (1961) 2 Guj LR 343 (DB). (Sant State — Instrument of Accession with Dominion of India — Ruler of Sant State continued to be sovereign Ruler within limits imposed by Instrument — Subsequent cession by Merger agreement is an act of State.)

(3) No State Government has a right to do anything in the nature of an act of State. AIR 1954 SC 447 (455): 1955 SCR 415.

(4) As between the sovereign and his subjects or between the sovereign and foreigners resident in his Dominions under the protection of law there can be no such thing as an act of State. ILR (1953) 3 Raj 525 (532) * AIR 1958 SC 816 (823) * AIR 1954 Bom 129 (130): ILR (1953) Bom 1157 (DB) * AIR 1953 Sau 94 (96) * (1873) 18 Suth WR 349 (359) (PC) * (1869) 13 Suth WR (PC) 4 (6) (PC) * 1908 Pun Re No. 105, p. 487 (490) * AIR 1954 SC 447 (452): 1955 SCR 415 * AIR 1967 Raj 24 (29): 1966 Raj LW 550 (DB) * ILR (1965) 15 Raj 503 (514): 1966 Raj LW 21 (DB). (Mewar Ke Karidar Jagirdaron Ka Kanoon. (Smt. 1994), Sec. 17 — Mortgagee in possession of mortgage security deprived of his possession, under direction of Mewar Government — Suit for recovery of possession — Dispossession did not amount to an act of State — Mortgagee was justified in seeking his redress in ordinary Courts of law.) * AIR 1960 Punj 644 (646): ILR (1959) Punj 2341 * 1959 All LJ 845. (Where a personnel of the Army, while in the course of his employment. while driving a motor truck, drives it negligently and injures another, the act cannot be defended as an act of State.) * AIR 1959 Cal 506 (515): 63 Cal WN 485 * ILR (1955) 2 Cal 109 (DB).

[See also AIR 1964 Kerala 123 (123, 124): 1963 Ker LJ 323. (An act of State does not ordinarily occur within the jurisdiction.)]

(5) An act of State is not a matter dealing with civil rights at all and the Municipal Courts have no jurisdiction to deal with such questions. AIR 1956 Cal 66 (69) * AIR 1958 Madh Pra 97 (99) (DB) * AIR 1957 Cal 617 (622) (DB) * AIR 1954 Pat 529 (533, 534) (DB) * AIR 1943 Bom 427 (429, 430): ILR (1943) Bom 534 (DB) * AIR 1941 PC 64 (67, 68): ILR (1941) Kar (PC) 94: 68 Ind App 109 * AIR 1941 PC 109 (113) * ('05) 32 Cal 1 (4, 5): 31 Ind App 239 (PC) * (1872) 18 Suth WR 389 (392): 1872 Pun Re No. 2 (PC) * (1872) 2 Ind App 38 (47): 1875 Pun Re No. 1 (PC) * (1859) 7 Moo Ind App 476 (530) (PC) * AIR 1932 Bom 206 (207): 56 Bom 349 * AIR 1916 Mad 116 (117) (DB) * AIR 1915 Mad 993 (998): 39 Mad 351 (354, 355) (DB) * AIR 1930 Pat 357 (368) (DB) * AIR 1926 Pat 305 (311): 5 Pat 595 (DB) * AIR 1965 SC 1798 (1802): (1965) 3 SCR 201 * AIR 1954 SC 447 (452): 1955 SCR 415 * AIR 1962 SC 1288 (1300): 1962 Supp (1) SCR 405 * AIR 1962 SC 445: (1962) 3 SCR 970 * AIR 1959 SC 1383 (1387): (1960) 1 SCR 537 * AIR 1969 Goa 76 * AIR 1968 Goa 17 (20): 1968 Cri LJ 316. (Question of sovereignty is an act of State and this act being essentially an exercise of sovereign power it cannot be challenged, controlled or interfered with by municipal Courts.) * AIR 1965 Punj 354 (355) (DB) * AIR 1960 Punj 644 (645): ILR (1959) Punj 2341. (No act of State — Municipal Court has jurisdiction.) * AIR 1960 Raj 138 (141, 142, 143): ILR (1959) 9 Raj 1217 (DB).

(6) It is erroneous to treat the covenants entered into by the Rulers of the former States in India with the Union of India as legal documents conveying rights and titles in property. No Court can determine the legal capacity of the rulers of the Indian States to perform the kind of acts they were performing when the original Covenant or the Supplementary Covenant was signed. The Courts have to accept them as such without being able to pronounce on their validity. All that the Courts have to do is to register the fact. AIR 1959 Punj 440 (443): ILR (1959) Punj 1384 (DB).

[Reversed in AIR 1963 SC 222.]

(7) Municipal Courts have the jurisdiction to find out whether the new soverign has or has not recognized or acknowledged the rights in question either expressly or by implication. AIR 1965 Punj 354 (355) (DB) * AIR 1962 SC 1288 (1300): 1962 Supp (1) SCR 405.

(8) A Court has always power to decide whether a particlar act is an act of State or not. (1911) 38 Cal 754 (766, 767) (DB).

(9) In the case "acts of State" i.e. acts done by a Government servant under the authority of the Government with respect to a non-resident foreigner and which are not justiciable in the ordinary Courts of law the Government would not be liable e.g. making war or treaty, annexation of property belonging to an enemy country or national. AIR 1965 Andh Pra 457 (462): (1965) 1 Andh WR 183 (DB).

(10) Treaty obligations cannot be enforced in Municipal Courts. AIR 1954 Cal 591 (597): 1954 Cri L Jour 1722 (DB) * AIR 1965 SC 1798 (1802): (1965) 3 SCR 201 * AIR 1962 SC 1288 (1300): 1962 Supp (1) SCR 405 * AIR 1968 Mad 298 (303): (1967) 2 Mad LJ 85 (DB).

**Section 9 — Note 47 (contd.)**

(1) Any rights purporting to be conferred by the treaty of cession cannot be enforced in Municipal Courts, except in so far as they have been incorporated in Municipal laws. AIR 1955 Pepsu 3 (14): ILR (1955) Patiala 215 (DB) * AIR 1958 SC 816 (823) * AIR 1957 SC 286 (291): 1956 SCR 889: ILR (1957) Punj 819 * AIR 1962 Orissa 60 (63) (DB). AIR 1958 SC 816. Foll. * AIR 1961 Ker 52 (53): 1960 Ker LT 891 (DB). (Covenant of integration of Travancore and Cochin — Integration of services — Officer held could not claim any relief based on provisions of covenant.)

(12) Where an act of the Government is clearly referable to some Municipal law, the sanction for the act is not that of sovereign power but that of the particular law, and consequently immunity from having to justify such an act in a Municipal Court cannot be claimed by the State. AIR 1954 Him Pra 6 (8, 9) * AIR 1957 Cal 617 (622) (DB).

[See also AIR 1964 Pat 338 (344) (DB). (Suit for declaration that the order is without jurisdiction is maintainable — There cannot be estoppel against order passed without jurisdiction.) ]

(13) Where the President, in whom Article 53 of the Constitution vests all the executive power of the Union, has entered into a treaty, the Municipal Courts cannot question the validity of the treaty. AIR 1954 Cal 615 (617) (DB).

(14) Where Government does anything under colour of a legal title and a claim is made in derogation of such title, that claim would prima facie be cognizable by Municipal Courts. AIR 1955 Pepsu 170 (172): 1955 Cri L Jour 1625: ILR (1955) Patiala 688 (DB) * AIR 1958 Madh Pra 97 (99) (DB) * AIR 1954 Cal 591 (597): 1954 Cri L Jour 1722 (DB) * AIR 1953 Assam 116 (126) (DB) * (1871) Ind App (Sup Vol) 10 (17, 18): 1872 Pun Re No. 1 (PC) * (1904) 28 Bom 314 (325) (DB) * (1871) 6 Bom LR 131 (139) (DB) * (1870) 6 Beng LR 392 (444, 456) * (1884) 7 Mad 466 (472) (FB) * (1872) 5 Mad 273 (279, 283) (DB).

(15) Doctrine of State immunity does not extend to a non-government non-sovereign activity. 1966 Raj LW 141 (146): ILR (1966) 16 Raj 454.

(16) The Union of India is liable to be sued for all acts arising out of breaches of Municipal law in the same way as a private individual except for acts of State properly so called. AIR 1952 Assam 141 (145): ILR (1951) 3 Assam 279 (DB) * AIR 1958 SC 816 (823) * AIR 1957 Cal 617 (622) (DB) * 1957 All WR (HC) 19 (24) * AIR 1967 Delhi 98 (100) (DB) * (1967) 69 Pun LR (D) 125 (DB).

(17) An act of State is distinct from an executive act. AIR 1935 Bom 439 (443) (DB).

(18) Any inhabitant of the territory, the governance of which has been taken over by a sovereign State, can only make good in the Municipal Courts established by the new Sovereign such rights as that Sovereign has through his officers, recognized. AIR 1951 Him Pra 36 (49) * AIR 1964 SC 1043 (1051, 1056, 1069, 1071, 1093): (1964) 6 SCR 461. (Conclusion reached in AIR 1954 SC 447 in respect of effect and continuity of act of State held not correct.) * AIR 1962 SC 1288 (1300): 1962 Supp (1) SCR 405. (Municipal Courts have jurisdiction to find whether new sovereign has or has not recognised rights in question.) * AIR 1961 SC 1361 (1364): (1962) 1 SCR 205 * AIR 1966 Madh Pra 95 (100): 1965 MPLJ 809 (DB) * AIR 1966 Madh Pra 32 (34): 1967 MPLJ 658 (DB). (AIR 1964 SC 1043, Rel. on.) * AIR 1965 Guj 293 (298): ILR (1965) Guj 145 (DB) * AIR 1962 All 425 (429, 430) (DB). (Agreement between company and former Ruler is not binding on Government of India.) * AIR 1962 Him Pra 43 (51). (Reversed on another point in AIR 1964 SC 1658.)

* AIR 1962 Madh Pra 348 (353, 354): 1962 MPLJ 692 (DB) * AIR 1962 Orissa 60 (63, 64, 65) (DB). (Merger of former State in Indian Union — Effect on grant by former Ruler — Grant of land and cash allowance for maintenance to younger brother — Union Government refusing to recognise cash allowance — Act amounts to act of State.) * 1962 Mys LJ (Supp) 99 (DB) * AIR 1961 Bom 11 (17): 62 Bom LR 735 * AIR 1959 Madh Pra 27 (29): 1958 MPLJ 763 (DB). (Contract entered into by Ex-Ruler — Repudiation by successor State Government — No suit lies.)

[See also AIR 1964 Ker 123 (123, 124): 1963 Ker LJ 323 (DB). (Formation of State of Travancore-Cochin was an act of State but not formation of Kerala State — Plaintiffs' claim to annuity recognised by State of Travancore-Cochin — Suit for such claim against Kerala State entertainable by municipal Court.)]

(19) Integration of former Indian State — Rights in property created prior to integration — Necessity of their recognition by new Sovereign — Right in forest created by Ruler of Indian State by Tharao — Right not recognised by Government after merger of State — Right cannot be enforced in municipal Court — Right held was not protected by Section 299 (1) of the G. I. Act — Tharao held was not law. AIR 1964 SC 1043 (1046, 1075, 1082, 1092): (1964) 2 SCA 563: (1964) 6 SCR 461. (AIR 1961 Guj 151 Reversed.)

(20) Agreements between the Governor-General of India and the rulers of the erstwhile states, by which the governance of the States is taken over by the Government of India are not enforceable at the instance of the subject

**Section 9 — Note 47 (contd.)**
of the State in a municipal Court because the agreements are only for the High Contracting Parties. AIR 1959 Madh Pra 136 (139): 1959 MPLJ 257 (DB).

(21) Administration of the State of Junagadh taken over by the Dominion of India on 9-11-1947. The State of Jungadh was not treated as part of India till the administration of the State was taken over by the Saurashtra Government on 20-1-1949. The people of the State had not become the citizens of India before that date. Held that the resumption by the administrator of lands granted to a person in the State by the former Nawab was an act of State and not justiciable in the municipal Courts. AIR 1959 SC 1383 (1390): (1960) 1 SCR 537. (AIR 1953 Sau 180, Reversed. AIR 1953 Sau 190, impliedly overruled)
[But see AIR 1953 Sau 190.]

(22) Executive order depriving subject of his property and giving it to Gurdwara Committee — Civil Court held had no jurisdiction to question legality of order. AIR 1953 Pepsu 1 (7, 16, 20): ILR (1952) Patiala 461 (FB).

(23) The directions in the Durbar policy of his late Highness Maharaja Madhorao Scindia, were nothing more than directive principles and were not enforceable in the Courts of law. In pursuance of these directive principles a Jagirdar could be exempted from the cess but it was for the Government to grant it or not. AIR 1964 Madh Pra 231 (232): 1964 MPLJ 527 (DB).

(24) Act of officer of Central Government shown to be beyond authority — Act ceases to be act of Central Government and is open to correction by Civil Court. AIR 1953 Sau 190 (192) (DB).

(25) An order passed by the Maharaja of Jammu and Kashmir suspending an employee of Darmarth Department cannot be said to be passed as a sovereign and can be impugned in a court of law. AIR 1958 J and K 41 (43) (DB).

(26) So far as the internal administration was concerned, the State of Kolhapur before its merger was a sovereign State. The Civil Courts were precluded from entering upon the question and giving a decision on the validity or otherwise of the orders passed by him as an executive head of the State. AIR 1959 Mys 129 (131, 133, 134, 136): ILR (1958) Mys 677 (DB).

(27) No provision under Baroda B Class Municipalities Act (32 of 1983 Svt.), for grant of exemption from payment of Octroi duty — Ruler of Baroda making Tharav granting such exemption — Ruler an absolute monarch — His will is law — Tharav has binding effect. AIR 1965 Guj 293 (297): ILR (1965) Guj 145 (DB).

(28) Where the transaction of sale is between two private parties and is a private affair, simply because one party is from India while the other is from Pakistan, will not make it an act of State. It does not become an act of State because it is recognised by the respective Governments. AIR 1957 Manipur 25 (32).

(29) Acts of Courts and acts of judicial officers would come within the purview of the expression "Act of the State". Courts are established by the Government of India and by the States referred to in the Constitution of India. Courts exercise their functions as organ of the State. They rely on the State for their operation and for enforcing their orders. Courts are limbs of the State. The State includes the State Legislature, the State Executive and the State Judiciary. None of them can act in contravention of the Constitution. AIR 1964 Guj 215 (218): (1963) 2 Lab LJ 522.

**48. Suits barred on the ground of public policy.** — (1) The principle is that a Court ought not to countenance matters which are injurious to, and against, the public weal. (1873) 17 Suth WR 283 (284) (PC).

(2) A suit for costs incurred in a criminal prosecution will not lie. ('90) 12 All 166 (168) (SB) * (1907) 32 Cal 429 (430) (DB) * 1887 All WN 104 (104) (DB) * (1890) 14 Bom 100 (101) (DB).
[But see (1882) 4 All 97 (99) (DB).]

(3) Suit for damages of a breach of contract which is illegal is not maintainable. AIR 1969 SC 504 (513): (1969) 1 SCC 255.

(4) No suit will lie in respect of privileged statement. (1888) 10 All 425 (434) (DB) * (1900) 22 All 234 (237) * (1901) 25 Bom 230 (239, 242) (DB) * (1895) 19 Bom 340 (349) (DB) * (1901) 28 Cal 794 (797) (DB) * (1888) 15 Cal 264 (268) (DB) * (1873) 17 Suth WR 283 (284) (PC) * (1908) 31 Mad 400 (401, 402) (DB) * (1887) 10 Mad 28 (35, 36) (FB).

(5) A suit does not lie in respect of a privileged communication (1903) 27 Bom 585 (590) (DB) * (1899) 26 Cal 53 (71) (SB).

(6) The Government cannot be sued in respect of acts done by its servants in the exercise of its sovereign powers. AIR 1965 Andh Pra 457 (462) : (1965) 1 Andh WR 212 (DB).

(7) Government servants acting within their authority are not liable for their acts done within such authority. (1897) 21 Bom 754 (772) (FB) * (1903) 27 Bom 590 (596) (DB) * (1907) 30 Mad 270 (273) (DB) * AIR 1962 Mad 417 (419, 420): (1961) 2 Mad LJ 217.

(8) Collection of land revenue is a sovereign function. Fact that it is delegated to certain specified authorities under the Revenue Recovery Act is immaterial. State is not liable for the illegal and malicious acts of Revenue Officers. AIR 1967 Andh Pra 41 (42): (1966) 2 Andh WR 196.

(9) Judges are protected for acts done in the course of their duties. (1871) 6

**Section 9 — Note 48 (contd.)**
Mad HCR 423 (439, 441, 448) (DB) * (1870) 5 Mad HCR 345 (354, 357) (DB) * (1900) 10 Mad L Jour 232 (234) (DB).

(10) A suit by a military servant that his discharge from military service is illegal, though of a civil nature, is impliedly barred. AIR 1955 Punj 166 (169, 172): ILR (1955) Punj 840 (DB).

(11) A Government servant dismissed illegally from service can institute a suit for recovery of arrears of salary. AIR 1955 SC 600 (601): 1955-2 SCR 391.

(12) No suit would lie to declare a right of Government servant to a pension as he does not have a legal right thereto. AIR 1963 Mad 49 (50) * AIR 1959 All 769 (770, 771): 1959 All LJ 855.

(13) Civil Court's jurisdiction to entertain claims relating to pensions is ousted by the provisions of the Pensions Act (1871). ILR (1963) Cut 431 (DB).

(14) Claim for pension — Claim accruing before commencement of Constitution — Claim not justiciable by civil Court. AIR 1966 Madh Pra 327 (329): 1966 MPLJ 949.

**49. Barrister, if can sue for his fees.** — (1) Per Mukherji Ag. C. J. — Apart from the Legal Practitioners Fees Act, 1926, a barrister is entitled to sue for any fee due to him. AIR 1933 All 417 (419, 424): 55 All 570 (FB).

(2) A barrister will not be exempt from liability to the client for injury caused to the client by reason of his negligence. AIR 1915 All 34 (35): 37 All 267 (DB).

**50. Fraud.** — (1) Fraud vitiates the most solemn transactions. (1890) 17 Cal 769 (784) (FB) * AIR 1963 Ker 26 (27): 1962 Ker LT 1019.

(2) A suit will lie to set aside a contract or a conveyance or even a decree obtained by fraud. AIR 1953 Manipur 1 (2) * AIR 1957 Cal 242 (243) (DB) * AIR 1953 Pepsu 151 (153): ILR (1953) Patiala 415 (DB) * AIR 1952 All 923 (924) * (1894) 21 Cal 612 (617) (DB) * (1910) 32 All 145 (147) (DB) * AIR 1915 PC 99 (101): 37 All 485: 42 Ind App 171 * (1885) 11 Ind App 211 (216, 217): 11 Cal 61 (PC) * AIR 1926 Cal 1 (37) (DB). (Mere non-service of summons will not constitute fraud but non-service coupled with other circumstances may constitute fraud.) * AIR 1926 Cal 167 (168) (DB). (Decree obtained by fraud is only voidable.) * (1902) 29 Cal 395 (400) (PC). (Ex parte decree.) * (1901) 28 Cal 475 (478) (PC). (Do.) * (1901) 5 Cal WN 559 (562) (DB). (Do.) * (1900) 27 Cal 11 (17, 24) (DB). (Defendant is entitled to show that compromise decree relied on by plaintiff was obtained by fraud.) * (1900) 27 Cal 197 (200) (DB) * (1899) 26 Cal 891 (907, 918, 919) * (1897) 24 Cal 546 (549, 550) (DB) * (1897) 1 Cal WN cc (cci) (DB). (No suit if not tainted by fraud.) * (1894) 21 Cal 605 (609) (DB) * (1893) 20 Suth WR 86 (88) (DB) * (1892) 19 Cal 341 (345) (DB) * (1890) 17 Cal 769 (772) (FB) * (1886) 12 Cal 156 (159) (DB) * (1884) 10 Cal 357 (365) (DB). (Fraudulent withdrawal of minor's suit entitles minor to sue to set aside judgment founded upon withdrawal.) * (1884) 10 Cal 611 (615) (DB). (Consent decree.) * (1883) 9 Cal 810 (812, 813) (DB) Do. * (1881) 6 Cal 687 (707) (DB) * (1874) 22 Suth WR 213 (214) (DB) * AIR 1928 Lah 766 (768). (Where decree is passed by competent Court and remedies open for getting it corrected are not availed of a separate suit for declaration to set aside proceedings in execution of such decree is not maintainable.) * AIR 1925 Mad 640 (643). (No suit lies on the ground that the case of the plaintiff in a previous suit was false to his own knowledge.) * AIR 1919 Mad 1044 (1046): 41 Mad 743 (FB). (No suit lies on the ground that decree was obtained by perjured evidence — Overruling (1906) 29 Mad 179.) * AIR 1916 Mad 364 (365): 38 Mad 203 (DB) * (1894) 17 Mad 384 (389): 21 Ind App 93 (PC) * AIR 1963 Ker 26 (27): 1962 Ker LT 1019. (Fraud must be external and collateral to adjudication and must be of person who secured judgment.) * AIR 1962 Andh Pra 274 (299): (1963) 33 Com Cas 966 (DB) * AIR 1961 Orissa 73 (74) * AIR 1959 Andh Pra 212 (214, 215): ILR (1958) Andh Pra 129.

[See however AIR 1953 Mad 544 (544) (DB).]

(2a) It is a fundamental principle that an order or a decree can be displaced on the ground of fraud only where it is extrinsic or collateral to anything which has been adjudicated upon. AIR 1964 Punj 487 (491): 66 Pun LR 890 (DB).

(3) Wherever fraud is alleged and one person has derived benefit by his fraud and another has lost, the jurisdiction of the Civil Court arises. AIR 1952 All 922 (922, 923) * AIR 1929 All 845 (845).

(4) Where the question mentioned in Section 46, Bihar and Orissa Public Demands Recovery Act, 4 of 1914, is raised not between the certificate-holder on the one hand, and the certificate-debtor, on the other, or their representatives, but between one certificate debtor and the other certificate debtors the general jurisdiction of the civil Court to entertain suits of a civil nature on the ground of fraud is not barred. AIR 1956 Pat 161 164 (DB).

(5) A suit by parties to a collusive decree to set it aside will not lie. (1897) 20 Mad 333 (338) (DB) * (1896) 23 Cal 962 (966) (DB) * (1887) 11 Bom 708 (713, 714, 715, 716) (DB) * (1882) 6 Bom 708 (712) * (1886) 23 Cal 460 (475, 476) (DB) * (1897) 20 Mad 323 (325, 329) (DB) * (1897) 20 Mad 326 (328, 329) (DB) * (1894) 18 Mad 378 (387, 388, 389).

(6) A party to a fraudulent document cannot sue to set it aside where the

**Section 9 — Note 50 (contd.)**
fraudulent purpose has been carried out. (1900) 27 Cal 231 (238) (DB) * (1896) 23 Cal 962 (966) (DB) * (1896) 23 Bom 406 (409, 412) (DB) * (1901) 28 Cal 370 (379, 380) (DB).

[But see (1874) 21 Suth WR 422 (423, 424) (DB).]

(7) Where, the fraud has not been carried out a suit will lie. (1905) 8 Oudh Cas 278 (280) * (1906) 33 Cal 967 (969, 984) (DB) * (1878) 1 All 403 (412) (DB) * 1906 Pun Re No. 3, p. 7 (8) (FB).

(8) A defendant setting up defence that the plaintiff is guilty of fraud, must himself be free from the taint. (1900) 27 Cal 11 (20) (DB) * (1882) 6 Bom 703 (713).

(9) A consent decree, unlike other decrees, can be set aside not only on the ground of fraud but also on any ground which would be a sufficient reason for invalidating the agreement upon which the decree was based. AIR 1928 Oudh 418 (421, 422, 423): 4 Luck 76 (DB).

**51. Bar of general remedy of suit.** — (1) Where a right of action exists, a suit is maintainable to enforce that right independently of the special remedies provided by the law. AIR 1955 Mad 187 (197): ILR (1955) Mad 1248 (DB) * AIR 1953 Cal 613 (617) * AIR 1940 Bom 188 (190) * AIR 1940 Cal 67 (72) (DB) * AIR 1936 Mad 421 (422) * AIR 1968 SC 271 (277): (1968) 1 SCR 260 * AIR 1964 SC 322 (324): (1964) 1 SCR 752.

(2) When a statute creates special rights and obligations it may or may not say anything about courts in which such rights and obligations are to be litigated upon. If it says nothing on the subject, then if the rights created are civil rights the ordinary Civil Courts will have the general jurisdiction to try suits relating to such rights under Section 9 of the Code of Civil Procedure. AIR 1959 Mys 145 (146): 36 Mys LJ 552.

(3) Where a statute does not create a new right or obligation but provides a special procedural machinery for its enforcement there is no justification for inferring a necessarily implied exclusion of the ordinary, usual and well-recognised remedies. AIR 1968 All 369 (374): 1968 All LJ 595 (FB).

(4) Where a right is created by statute and a method of enforcing the right or of redressing grievance caused in the exercise or enforcement of the right is pointed out by the statute creating such right, then the general remedy of suit will be impliedly barred. AIR 1956 Pat 205 (208) * AIR 1958 Pat 370 (371) * Madh BLJ 1955 HCR 107 (112) * AIR 1954 Orissa 87 (91): ILR (1953) Cut 659 (DB) * AIR 1953 Mad 544 (545) (DB) * AIR 1953 Orissa 300 (303) (DB) * AIR 1952 Mad 266 (267) * AIR 1952 Vindh Pra 32 (34) * AIR 1950 East Punj 204 (207) (DB) * AIR 1947 Pesh 53 (55) (DB) * AIR 1945 Mad 370 (379) : ILR (1946) Mad 330 * AIR 1942 Mad 127 (128) * AIR 1941 Mad 530 (531): ILR (1941) Mad 850 (FB) * AIR 1922 Cal 4 (5) (DB) * AIR 1969 SC 78 (89): (1968) 2 SCA 479. (Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.) * AIR 1966 SC 1438 (1440): (1966) 3 SCR 214 * AIR 1964 SC 807 (816) * AIR 1968 All 369 (374): 1968 All LJ 595 (FB) * AIR 1964 Kerala 68 (75): 1963 Ker LT 635 (FB). (Setting aside sale in execution — Sale void for non-compliance with Order 21, Rules 84, 85 — Suit for declaration that such sale was void and for recovery of properties does not lie — Question relates to matters mentioned in Section 47.) * AIR 1962 Mad 7 (15): (1962) 1 Mad LJ 92 (FB). (AIR 1959 Mad 454 overruled on another point.) * AIR 1967 Mys 111 (115): (1966) 1 Mys LJ 77 (DB) * AIR 1965 Mad 149 (151): (1965) 1 Mad LJ 203 * (1961) 65 Cal WN 1206 * AIR 1960 Mad 8 (9): (1959) 10 STC 207 * AIR 1960 Punj 465 (466): 62 Punj LR 610.

(5) A filed a suit under Section 33 of City of Bombay Municipal Act against the Municipal Commissioner of Bombay to have it declared that the general elections of Councillors by the Justices on a particular date were invalid and that by virtue of Section 34 (1) of the Act he may be deemed to be re-elected; it was held that no such suit lay as a special remedy was provided by the Act, namely, an application under Section 33. (1907) 31 Bom 604 (610) (DB).

(6) An affirmative statute giving a new right does not by itself and of necessity destroy a previously existing right, such as, invoking the jurisdiction of the Civil Court but if the apparent intention of the Legislature is that the two rights should not exist together, the previous existing right will be taken as destroyed 1964 BLJR 122 (128) (DB).

(7) U. P. Co-operative Societies Rules (1936), Rules 115 and 134 — Bar of jurisdiction under Rule 134 — Effect — Election dispute falling under Rule 115 — Dispute should be referred to Registrar or arbitration — Jurisdiction of Civil Court is barred. AIR 1967 All 218 (220).

**52. Summary and concurrent remedies.** — (1) A regular suit is not barred by the fact that a summary and concurrent remedy is also provided for. (1887) 14 Cal 644 (648) (DB) * AIR 1958 Madh Pra 393 (396) * (1890) 12 All 409 (418) (FB) * AIR 1969 All 278 (285): 1968 All LJ 339 (FB) * (1963) 2 Andh WR 279: (1963) 2 Andh LT 408 * AIR 1963 Bom 40 (41) : 64 Bom LR 532 * AIR 1961 Punj 8 (11): 63 Punj LR 107. (Section 145, Civil P. C. does not bar a remedy by civil suit to enforce liability of surety.)

**10. Stay of suit.**—No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in [a][India] having jurisdiction to grant the relief claimed, or in any Court beyond the limits of [a][India] established or continued by the [b][Central Government [c][° ° °]] and having like jurisdiction, or before [d][the Supreme Court.]

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**Section 9 — Note 52 (contd.)**

* 1961 MPLJ 959 (962). (It would be the choice of the party to resort to summary remedy or enforce its rights by a common law right.)

(2) A stranger purchaser at an auction sale in execution of a decree is not bound to apply for possession of the property purchased but may institute a regular suit for possession. (1887) 14 Cal 644 (648) (DB) * (1907) 29 All 463 (466) * (1912) 36 Bom 373 (378) (FB) * (1884) 8 Bom 602 (608) (DB) * (1891) 18 Cal 520 (525) (DB) * (1889) 16 Cal 530 (534) (FB) * (1883) 9 Cal 602 (603) (DB) * (1886) 10 Mad 53 (56) (DB) * AIR 1931 Pat 241 (246): 10 Pat 670 (FB).

(3) Section 38, Companies Act, does not deprive a person of his ordinary remedy of suit for rectification of share register. AIR 1953 Trav-Co 253 (256): ILR (1952) Trav-Co 625 (DB) * AIR 1966 Assam 48 (49): ILR (1965) 17 Assam 275 (DB).

(4) Madras Hindu Religious Endowments Act, 19 of 1951 — Provision giving power to Deputy Commissioner to enquire into disputes described in Section 57 — Civil Court cannot be said to have lost its jurisdiction in respect of these disputes. 1953-1 Mad L Jour 682 (683).

(5) The remedy of the transferee of a share is not limited to an application under Section 38, Companies Act — He has a right to bring a suit to get his name registered. AIR 1952 Cal 58 (61): ILR (1953) 1 Cal 1 (DB).

(6) Execution sale set aside — Suit by auction-purchaser for refund of purchase money is not barred by Order 21, Rule 93. AIR 1950 All 461 (463, 464).

(7) A suit to recover arrears of income-tax lies in a Civil Court in spite of Section 46 of the Income-Tax Act AIR 1942 Pat 87 (89) (DB).

(8) Where a person has elected to pursue his remedy under one provision, he cannot, on his failing therein, proceed under the other provision. AIR 1952 Mys 99 (101): ILR (1952) Mys 259 (DB) * AIR 1919 All 274 (275) (DB) * AIR 1918 All 346 (347): 39 All 626 (629, 631) (DB) * AIR 1919 Mad 648 (649): 40 Mad 1173n.

(9) The remedy provided in Section 9 of the Hindu Marriage Act (1955) is not a summary remedy but is a regular suit between the parties. The jurisdiction of the regular Civil Courts to entertain suits regarding matters which have been specially provided for in the Act has been taken away under Section 4 of the Act. AIR 1959 Madh Pra 410 (411): 1959 MPLJ 928.

**53. Alternative Courts.** — (1) A stranger to the bankruptcy whose property has been wrongfully seized by the receiver in bankruptcy is not confined to the remedy under the Insolvency Act but may sue in the Civil Court. But if he chooses to avail himself of the remedy under the Insolvency Act, he cannot begin again and raise the same question in a civil suit. AIR 1919 All 229 (230): 41 All 378 (DB) * AIR 1918 Mad 489 (490): 40 Mad 1173 (1174) (DB) * AIR 1918 All 346 (347): 39 All 626 (DB).

[But see AIR 1917 Lah 75 (78): 1917 Pun Re No. 22 (DB) * AIR 1921 Lah 58 (58, 59): 2 Lah 147 (DB).]

(2) Panchayat Courts given concurrent jurisdiction to try certain suits — Jurisdiction of ordinary Civil Courts not excluded — Party invoking jurisdiction of Civil Court — Its decree is not nullity for want of jurisdiction. AIR 1956 Pepsu 78 (79).

(3) The scope of the proceedings under Article 226 of the Constitution and by a regular suit does not differ — Proceedings under Article 226 of the Constitution are proceedings by way of an alternative remedy which is more efficacious than the ordinary remedy of a suit with this difference that remedy under Article 226 is discretionary whereas that is not the case in a suit. (1967) 69 Pun LR 179 (181): 1967 Cur LJ 70.

**54. Acts of Legislature — Powers of Civil Court to question.** — (1) The Courts can consider and determine whether an Act passed by the Legislature is within their powers but, if an Act so passed is within the powers of the Legislature the Courts cannot consider the propriety of such legislation. AIR 1932 Cal 753 (755): 60 Cal 364 (DB) * AIR 1969 SC 78 (90): (1968) 2 SCA 479 * 1967 All LJ 21: 1966 All WR (HC) 637.

## SECTION 10 — SYNOPSIS

1. Scope and object.
2. Section only bars trial.
3. Matter in issue must be same.
4. "Previously instituted suit."
5. Previously instituted suit must be pending.
6. Pendency of suit in foreign Court.
7. Suit, meaning of.
8. Cross-suits.

Explanation.—The pendency of a suit in a foreign Court does not preclude the Courts in [a][India] from trying a suit founded on the same cause of action.

[1882 and 1877, S. 12.]

[a] Substituted for the words "the States" by the Code of Civil Procedure (Amendment) Act. 1951 (2 of 1951), S. 3 [1-4-1951].

[b] Substituted for the words "Governor-General in Council" by the Government of India (Adaptation of Indian Laws) Order, 1937 [1-4-1937].

[c] The words "or the Crown Representative" are omitted by A. C. A. O., 1948 [23-3-1948].

[d] Substituted for "His Majesty in Council" by A. L. O., 1950 [26-1-1950].
See also S. 10 of the Abolition of the Privy Council Jurisdiction Act, 1949 (C. A. Act V of 1949).

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**Section 10 — Synopsis (contd.)**

**9. Same parties.**
**10. Litigating under the same title.** See Notes on Section 11.
**11. "Court having jurisdiction to grant the relief."**
**12. Interlcoutory orders.**
**13. Decree contrary to S. 10.**
**14. Inherent power to grant stay.** See Note 1 and Notes on Section 151.
**15. Forum of application for stay.**
**16. Letters Patent Appeal.**
**17. Appeal.**
**18. Revision.**

**TOPIC INDICATOR**

Applicability to appeals, miscellaneous proceedings or arbitration proceedings — See Note 7.
Contract providing for place of suing — See Notes 1 and 6 Explanation — See Note 5.
Evidence of pendency of prior suit — Dnus —See Note 5.
Inherent powers, resort to — See Note 1.
Same cause of action — See Note 3.
Same plea — See Note 3.
Same relief — See Note 3.
Stage for invoking Section — See Note 2.
Subject-matter of suits whether must be same — See Note 3.

**1. Scope and object.**— (1) Object of Section 10 is to prevent Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two paralled litigations in respect of same cause of action, same subject-matter and same relief. AIR 1953 Bom 117 (119, 120): ILR (1953) Bom 416 (DB) ° AIR 1953 Hyd 55 (56): ILR (1952) Hyd 763 ° AIR 1951 Punj (Simla) 275 (277) * ('88) 11 All 148 (155) (SB) ° AIR 1917 Cal 637 (637): 43 Cal 144 (147) (DB) ° AIR 1962 All 108 (109, 110).

[See however AIR 1960 All 184 (188, 189). (The words 'no Court shall proceed with the trial of any suit' do not apply to the simultaneous hearing of a later and an earlier suit, after consolidation of the two, if the matter in issue in both, is directly and substantially the same.) ]

(2) Conditions for attracting Section 10 are, (i) in the later suit the matter in issue is also directly and substantially in issue in the previous suit; (ii) the suit must be between the same parties, or between the parties under whom they or any of them claim; and, (iii) they should be litigating under the same title. It is immaterial whether both suits are laid in the same Court or pendng in different Courts. AIR 1963 Andh Pra 14 (14, 15): (1962) 2 Andh WR 257 ° AIR 1966 Cal 382 (385): 70 Cal WN 375 (DB).

(3) The rule in Section 10 forms no part of the rule of res judicata. ('89) 11 All 148 (154) (SB). (Per Mahmood J.)

(4) Subject-matter and causes of action in two suits need not be the same. AIR 1947 Nag 154 (155): ILR (1947) Nag 141. (AIR 1932 Cal 751, Foll.)

(5) One test of applicability of Sec. 10 is whether, on the final decision being reached in the previous suit, such decision would operate as res judicata in subsequent suit. AIR 1954 Punj 113 (113): ILR (1953) Punj 266 (DB) ° AIR 1953 Bom 117 (120): ILR (1953) Bom 416 (DB) ° AIR 1947 Nag 154 (155). ILR (1947) Nag 141 * 1962 Jab LJ 371 ° 1962 Jab LJ 120.
[But see AIR 1958 All 207 (209) (DB).]

(6) Provisions of Section 10 are mandatory. AIR 1955 All 309 (313): ILR (1955) 1 All 295 (FB) ° AIR 1954 Mad 320 (320) ° AIR 1954 Punj 113 (114): ILR (1953) Punj 266 (DB) ° AIR 1952 Pat 373 (374) (DB) ° AIR 1962 SC 527 (536): 1962 Supp (1) SCR 450 ° AIR 1966 Andh Pra 14 (14, 15): (1965) 2 Andh WR 101.

(7) Under Section 10 previously instituted suit alone should be proceeded with and the subsequent suit must be stayed. AIR 1934 All 131 (132).

(8) Delay in applying for stay is no ground for refusing stay. AIR 1942 Bom 314 (315).

(9) Where parties have agreed that any suit as to a particular matter must be brought in Court x but one of them files a suit in Court y and then the other party sues in Court x, the suit in y, though earlier, may be stayed and the suit in x may be proceeded with in spite of this section. AIR 1955 Madh B 145 (146) ° AIR 1940 All 241 (241): ILR (1940) All 232 (DB) ° AIR 1928 Bom 175 (176) (DB) ° AIR 1959 Cal 669 (671, 672). (Mercantile contract —

**Section 10 — Note 1 (contd.)**

Bill of lading limiting jurisdiction in respect of dispute to Italian Court — Suit for short delivery in India — Stay could be granted.) * AIR 1967 Cal 24 (25): ILR (1960) 2 Cal 85.

(10) When there is a special provision in the Code of Civil Procedure for dealing with the contingencies of two suits being instituted recourse to the inherent power under Section 151 is not justified. AIR 1962 SC 527 (536): 1962 Supp (1) SCR 450 ° AIR 1955 Bom 266 (268) : 57 Bom LR 228 ° AIR 1967 Orissa 172 (173, 174): ILR (1967) Cut 321.

(11) The provisions of Section 10 cannot be circumvented by the device of a temporary injunction, issued under inherent power at the instance of the plaintiff in the later suit, against the plaintiff in the earlier suit, restraining him from continuing such suit, the reason being that a Court ought not to achieve indirectly what it cannot do directly. AIR 1962 SC 527 (536): 1962 Supp (1) SCR 450.

(12) Section 10 does not become inapplicable on a Court holding that the previously instituted suit is a vexatious suit or has been instituted in violation of the terms of the contract. Hence, even in such cases resort to Section 151 to restrain the prosecution of the earlier instituted suit is not jusifiable. AIR 1962 SC 527 (536). (AIR 1954 Bom 176, Overruled.)

[**Note:** In view of the Supreme Court decision as stated in points (10), (11) and (12) above, the undermentioned cases holding that the Court may stay earlier suit on grounds of convenience and avoidance of an abuse of the process of the Court, apart from the question of any agreement between parties, must be treated as no longer good law.—Ed. 1962 All LJ 464 ° AIR 1953 Raj 184 (184): ILR (1952) 2 Raj 254 * AIR 1941 Cal 670 (671, 672): ILR (1941) 1 Cal 490.]

[See also, the undermentioned cases holding that Section 10 does not apply when previously instituted suit is an abuse of process of Court and that Court will decline to stay subsequently instituted suit in exercise of its inherent power must be treated as no longer good law — Ed. AIR 1957 Assam 120 (122): ILR (1955) 7 Assam 560 (DB).]

[See AIR 1952 Punj 247 (248).]

[See also AIR 1953 Bom 117 (118): ILR (1953) Bom 416 (DB) ° AIR 1941 Cal 434 (435): ILR (1941) 1 Cal 373.]

(13) Stay under Section 10 is one imposed by a Court upon itself; it is not imposed by any outside authority. AIR 1939 Cal 435 (449): ILR (1939) 2 Cal 93 (DB).

(14) A plea under Section 10 does not constitute a defence to the suit. AIR 1955 All 309 (313): ILR (1955) 1 All 295 (FB).

(15) Provisions in Civil P. C. regarding stay of suit were never intended to be exhaustive — Section 4, M. B. Maufi and Inam Tenants and Sub-tenants Protection Act (32 of 1954) is not repugnant to this section. AIR 1957 Madh B 63 (63).

(16) Section 10 does not prohibit partial stay of suit against partner who had already instituted suit and directing that as against rest of defendants suit should proceed. AIR 1964 Cal 373 (373, 374).

(17) Connected election petitions — Tribunal can try subsequent petition first — Procedure laid down under Section 10 need not be followed. AIR 1965 Madh Pra 55 (59): 1965 Jab LJ 1176 (DB).

(18) A defendant in a summary suit is entitled to apply for stay of subsequently instituted suit. AIR 1969 Bom 40 (46, 47): 70 Bom LR 195 (DB).

**2. Section only bars trial.**—(1) Institution of the second suit is not barred though the trial thereof may not be proceeded with. AIR 1925 Pat 201 (206, 207) (DB) ° AIR 1936 All 485 (486) (DB) ° AIR 1931 PC 263 (264).

[See also AIR 1954 Punj 94 (96): ILR (1954) Punj 757 (DB).]

(2) Section 10 authorises stay and not dismissal of suit. AIR 1952 All 546 (548) ° AIR 1925 Pat 201 (207) (DB).

(3) Court bound to stay later suit if conditions of Section 10 are satisfied. AIR 1917 Cal 637 (637): 43 Cal 144 ° AIR 1935 Sind 225 (226) ° AIR 1916 Nag 70 (71): 12 Nag LR 174.

(4) Court has power to grant stay at any stage. AIR 1935 Cal 1 (10): 61 Cal 670 (DB) ° AIR 1920 All 70 (72): 42 All 290 (DB).

[See AIR 1964 Cal 373 (374). (Though normally Court would not allow party to move application under Section 10 unless he has filed written statement, the Court would entertain it where defendant had annexed copy of plaint in previously instituted suit and from that it could be found out what was the dispute between parties.)]

[See however AIR 1964 Manipur 2 (3). (All the preliminaries prior to the trial upto the stage of framing the issues should be gone through in both the suits before Section 10 is sought to be applied. Where that stage has not arrived, stay of subsequent suit under Section 10 is premature.)]

(5) The words 'no Court shall proceed with the trial of any suit' do not apply to the simultaneous hearing of two suits, after their consolidation, if the matter in issue in both suits is directly and substantially the same. AIR 1960 All 184 (188, 189) ° 1961 Raj LW 473: ILR (1961) 11 Raj 1173. (Distinction between stay and consolidation.)

**3. Matter in issue must be same.**—(1) Identity of reliefs not necessary for applicability of Section 10. AIR 1953 Bom 117 (120): ILR (1953) Bom 416 (DB) ° AIR 1919 Pat 491 (492): 4 Pat L Jour 557 (DB)° AIR 1935 Cal 1 (6): 61 Cal 670 (DB).

**Section 10 — Note 3 (contd.)**

[See AIR 1960 Madh Pra 169 (170): 1960 Jab LJ 61. (Identity of subject-matter in both suits is a condition precedent.)

(2) Every matter in dispute should be directly and substantially in issue in the two suits. AIR 1956 Assam 112 (112) (DB) ° AIR 1954 All 141 (142) (DB) ° AIR 1954 Punj 114 (114) (DB) ° AIR 1953 Hyd 55 (56): ILR (1952) Hyd 763 ° AIR 1947 Bom 84 (85). (AIR 1942 Bom 314, Foll.) ° AIR 1941 Cal 434 (435): ILR (1941) 1 Cal 373 ° AIR 1929 Oudh 341 (345): 4 Luck 573 (DB) ° AIR 1920 Bom 296 (297): 44 Bom 283 (DB) ° AIR 1917 Cal 248 (249) (DB) ° AIR 1962 All 108 (109, 110). (Any matter common to two suits will not attract provisions of S. 10.) ° ('62) 1962 Jab LJ 120. (Merely because the prayer in both the suits was for ejectment of the tenant, it could not be said that the matter in issue was directly and substantially the same in both the suits.) ° 1962 Jab LJ 377. (Test is that decision in previous suit when given should operate as res judicata.)

[See however AIR 1948 Nag 297 (298, 299): ILR (1948) Nag 403.]

**(3) Subject matter of two suits not same.** —Section 10 will not apply merely because main issue is common. AIR 1955 All 384 (384) (DB) ° AIR 1954 Pat 10 (10) (DB) ° ('53) ILR (1953) 3 Raj 141 (143) ° AIR 1929 Ondh 341 (345): 4 Luck 573 (DB) ° AIR 1929 All 805 (806): 51 All 1017 (DB). ° AIR 1968 Manipur 42 (43, 44, 45). (Claim in former suit based on prescriptive right — Claim in later suit based on customary rights — Subject-matter of two suits not same — Section 10 will not apply.) ° 1965 All LJ 302 ° AIR 1966 Cal 382 (385): 70 Cal WN 375 (DB) ° (1966) 68 Pun LR 172 (174). (Suit at X for rendition of accounts and recovery of amount — Subsequent suit by defendant for damages for breach of contract filed at Y — Matter in issue in suit filed at Y held not directly and substantially in issue in suit filed at X — Stay could not be granted under S. 10.) ° 1960 Ker LT 898.

(4) Subject-matter in dispute and matter in issue in two suits need not be identical in every particular. It is enough if the matters in controversy in two suits are substantially the same. AIR 1953 Bom 117 (119, 120): ILR (1953) Bom 416 (DB). (AIR 1947 Bom 84, Dissented from.) ° AIR 1958 All 207 (208, 209) (DB) ° AIR 1967 Andh Pra 185 (185). (First suit for recovery of rent — Defendant's suit for specific performance of contract — Question in first suit being whether defendant was tenant of plaintiff — Question in other suit being whether defendant had paid money in part satisfaction of amount received by him from plaintiff — Issues in two suits are not common though decision in later suit will have some bearing on first suit.) ° AIR 1963 Madh Pra 59 (60): 1961 Jab LJ 1216 ° 69 Punj LR 516: 1967 Cur LJ 232. (Application by husband for judicial separation at Bombay — Subsequent application by wife for same relief in Court at Amritsar — Husband alleging that his wife was immoral and had deserted him — Wife alleging that her husband had deserted her and had also been cruel to her — Held, matter in issue was directly and substantially same and between same parties — Proceedings in wife's application should therefore be stayed till disposal of application of husband. AIR 1962 SC 527, Foll.) ° (1968) 70 Pun LR 955: 1968 Cur LJ 382. (Two applications filed one after another before two different Rent Controllers — Questions to be determined same — Fact that period, in respect of which rent is not paid, is different, does not mean that substantial question between the parties is any different.) °1963 Kash LJ 10. (Parties also different.)

(5) Suit for rent for certain period — Subsequent suit for rent falling due afterwards — Section 10 does not apply. AIR 1954 Pat 11 (11, 12) ° AIR 1954 Punj 114 (114, 115) (DB). (Relief for damages.) ° AIR 1919 Pat 491 (492): 4 Pat L Jour 557 (DB) ° AIR 1923 Cal 716 (717) ° ('89) 11 All 148 (155) (FB) ° AIR 1929 Mad 785 (786) (DB) ° AIR 1966 Tripura 19 (20) ° 1966 Ker LJ 768: 1966 Ker LT 841 (841). (Suit for ejectment in civil Court — Defendants filing application before Land Tribunal for purchase of petitioner's right under Section 54 Land Reforms Act — Question to be decided in civil suit not same as to be decided before Land Tribunal — Stay of proceedings before Land Tribunal could not be granted under Section 10.) ° AIR 1966 Madh Pra 186 (188, 189): 1965 Jab LJ 1012. (Where after the demarcation of a strip of land in a regular civil suit and the delivery of possession to the plaintiff decree holder in first suit, the defendants judgment-debtors asked for a remeasurement and correction of boundaries or the area of the strip, such proceedings would not call for a stay of the subsequent suit brought by the plaintiff decree-holder for mesne profits.) ° AIR 1963 Madh Pra 59 (60): 1961 Jab LJ 1216. (Suits in which causes of action and reliefs were different — Section will not apply).

(6) Two suits on two different promissory notes against same defendants — Stay of trial of subsequent suit is not fair to plaintiff especially where the contest in subsequent suit is by only one of the defendants to previous suit. AIR 1933 Lah 34 (34).

(7) For applicability of section all the issues in the prior instituted suit need not also be issues in the later suit. AIR 1920 All 70 (71, 72): 42 All 290 (DB).

(8) Giving of any security before a stay is granted in the later suit is not necessary. AIR 1926 Lah 304 (305).

**Section 10 — Note 3 (contd.)**

(9) Matter in issue in two suits not same — Court has inherent power to stay hearing of a suit pending disposal of another suit in same Court. AIR 1954 Pat 10 (11) (DB) ° AIR 1954 Punj 114 (115) (DB).

[See however AIR 1965 J and K 99 (100). (Application to Revenue Officer for partition of certain land — Suit by defendant for declaration of title and injunction on grounds of adverse possession — Proceedings in the Civil suit could not be stayed either under Section 10 or Section 151.) ]

(10) The matter in issue in two suits may be substantially the same though different reliefs may have been claimed. The fact that one is a suit under the agreements entered into by the parties and other is a suit de hors the agreement does not make a substantial identity of the subject-matter per se impossible. AIR 1957 Cal 727 (734) (DB).

**4. "Previously instituted suit."**—(1) Rival probate proceedings must be taken to be instituted on the dates on which the applications are made and not on the dates on which they become contentious. AIR 1940 Ondh 113 (116): 15 Luck 290.

[See also AIR 1941 Cal 417 (423).]

(2) For the purpose of Section 10, it is the date of the actual institution of the suit that is crucial and material. (1967) 2 Andh WR 442 * AIR 1952 Vindh Pra 12 (13). (Date of institution of suit — Proper way of ascertaining, indicated.)

(3) Suit in forma pauperis — Application for permission to sue in forma pauperis allowed — Date of application is date of plaint — That fixes priority of suit for purpose of Section 10. 1962 Jab LJ 120.

**5. Previously instituted suit must be pending.**—(1) Section applies only when previously instituted suit is pending. AIR 1936 Lah 589 (591) ° (1961) 63 Pun LR 777 (780) (Proceedings before Revenue Officer ordered to be consigned to record-room — Suit filed in civil Court cannot be stayed.)

(2) Pendency of previous suit — Onus is on the defendant in the later suit to establish this. AIR 1917 Pat 196 (198) (DB).

(3) A suit allowed to be withdrawn with liberty to bring a fresh suit on payment of defendant's costs must be regarded as pending until the costs are paid. AIR 1914 Cal 207 (208) (DB) ° AIR 1925 Oudh 696 (697): 28 Oudh Cas 212 (DB).

(4) Mere application for, or obtaining leave to appeal cannot, of itself, amount to pendency of an appeal till such appeal is actually filed. ('98) 21 Mad 18 (22, 26) (DB). (Followed in AIR 1929 Rang 67: 6 Rang 775.)

(5) Suit must be deemed to be pending till the decree is drawn up. ('40) 71 Cal L Jour 190 (191).

(6) Stay of a subsequently instituted suit directed by High Court, till disposal of previously instituted suit pending disposal in first appeal — Stay should be extended till disposal of previously instituted suit in second appeal in the High Court. AIR 1932 Cal 751 (752).

[See also AIR 1931 PC 263 (264).]

(7) Previous suit instituted in Court having no jurisdiction — Not effective for purpose of Section 10 if presented in proper Court after institution of second suit. AIR 1933 Sind 117 (117) (DB) ° AIR 1964 J and K 65 (66): 1964 Kash LJ 82.

**6. Pendency of suit in foreign Court.**—(1) Prior suit pending in a foreign Court — Section 10 does not bar trial of subsequent suit in Indian Court. ('07) 1 Sind LR 166 (167).

[See also AIR 1954 Punj 94 (96): ILR (1954) Punj 757 (DB).]

(2) High Court has power to restrain a party to a suit within its jurisdiction from continuing action in the foreign Court based on the same cause of action, if the prosecution of such action is opposed to equity. AIR 1920 Bom 309 (310): 44 Bom 272 (DB) ° AIR 1927 Bom 135 (137, 138) (DB) ° AIR 1928 Nag 56 (57, 58): 23 Nag LR 170.

[See also AIR 1928 Mad 491 (492) (DB). (Subordinate Court has no similar power.)]

(3) Agreement that in case of dispute suit to be filed in Italy — Suit brought in Indian Court — Agreement cannot oust jurisdiction of Indian Court to try suit properly instituted. AIR 1960 Cal 155 (156, 157): 1960 Cal LJ 18 (DB).

[See however AIR 1960 Cal 45 (46, 47): 64 Cal WN 269. (Bill of lading — Clause providing that disputes arising would be decided by certain foreign Courts — Suit for damages filed in Calcutta High Court — Stay refused.)]

(4) Suit on overdraft account in Bank of Calcutta — Defendant carrying on business in West Bengal and having assets in East Pakistan — Calcutta High Court has jurisdiction even if a suit had been filed in Pakistan Court. AIR 1960 Cal 779 (783, 784): 64 Cal WN 161.

**7. Suit, meaning of.**—(1) Section 10 applies only to suits and cannot apply where one of the two proceedings is not a suit. AIR 1953 Hyd 55 (56): ILR (1952) Hyd 763 ° ('56) 1956 All L Jour 845 (846). (Restitution proceedings under S. 144.) ° AIR 1953 Punj 226 (227) ° AIR 1947 Cal 386 (386, 387).

(2) 'Suit' includes appeal. AIR 1954 Punj 113 (113): ILR (1953) Punj 266 (DB) ° AIR 1939 Sind 329 (330): ILR (1940) Kar 15 (DB) (Obiter.) ° AIR 1916 Mad 732 (732) ° AIR 1931 Cal 779 (779) (DB) ° AIR 1966 Cal 382 (385, 386): 70 Cal WN 375 (DB).

(3) Original matters in the nature of a suit such as proceedings in probate, guardianships and so forth — Procedure prescribed by S. 10 will become applicable by virtue of S. 141. ('94) 17 All 106 (111) : 22 Ind App 44 (PC) * AIR 1946 Oudh 83 (85):

**Section 10 — Note 7 (contd.)**
21 Luck 124. (Liquidation proceedings under Chap. V, U. P. Encumbered Estates Act, 1934.) ° AIR 1943 Cal 19 (20) : ILR (1942) 2 Cal 194. (Application for letters of administration.)

[But see (1955) 8 Sau LR 110. (Probate proceedings — Validity of will in question — Same question in another suit — Probate proceedings should not be stayed till decision in latter suit.) ]

(4) Section 10 will not apply to execution proceedings. AIR 1929 Lah 694 (695).

(5) Section 10 does not apply to an application for leave to appeal. ('88) 21 Mad 18 (22, 26) (DB).

(6) Proceedings before Rent Controller for fixation of fair rent is not a 'suit' — Earlier money suit by landlord for arrears of rent cannot be stayed. AIR 1967 Orissa 172 (173, 174): ILR (1967) Cut 321.

[See However (1968) 70 Pun LR 955: 1968 Cur LJ 382. (Two applications filed one after another before two different Rent Controllers — Questions to be determined same—Second application must be stayed.) ]

(7) Application for permission to file suit in forma pauperis cannot be regarded as suit within meaning of S. 10 till matter of pauperism is decided first and registered as suit. AIR 1962 Punj 16 (17).

**8. Cross-suits.**— (1) Suit by A against B under S. 9 of the Specific Relief Act — Cross suit by B against A in the same Court, for declaration of his title to the land — Court should, in the exercise of its inherent power, stay the hearing of the suit for possession until the question of title to the land in suit was decided in the other suit. AIR 1935 Rang 355 (356).

(2) Cross suits filed for nullity of marriage and for dissolution of marriage — Nullity suit should be tried first. ILR (1959) 1 Cal 84.

**9. Same parties.** — (1) For application of Sec. 10 substantial identity of parties is enough. AIR 1948 Nag 297 (299): ILR (1948) Nag 403 ° AIR 1957 Cal 727 (734) (DB) ° AIR 1920 Bom 296 (297): 44 Bom 283 (DB) ° AIR 1964 Manipur 2 (3). (Parties in two suits need not be same. It is enough if previously instituted suit is between parties under whom they or any of them claim litigating under same title.) ° (1967) 2 Andh WR 442.

(2) Fact that some parties are not parties in both suits will not stand in the way of the application of the section. AIR 1920 All 70 (72): 42 All 290 (DB) ° AIR 1957 Cal 727 (734) (DB) ° AIR 1964 J and K 65 (66, 67): 1964 Kash LJ 82.

**10. Litigating under the same title.** — See Notes on Section 11.

**11. "Court having jurisdiction to grant the relief."** — (1) Section 10 can be applied even though the Court in which the previously instituted suit is pending has no territorial jurisdiction over the subject-matter of the later one. AIR 1920 Low Bur 24 (25, 26): 10 Low Bur Rul 150 (DB) ° AIR 1919 Low Bur 10 (10): 10 Low Bur Rul 154 (DB).

[See also AIR 1943 Bom 206 (208): ILR (1943) Bom 286.]

(2) Court in which the first suit is pending must be competent to grant relief claimed in that suit, and also relief claimed in the subsequent suit. AIR 1954 Pat 314 (318) (DB) ° AIR 1948 Cal 19 (21): ILR (1942) 2 Cal 194 ° AIR 1940 Oudh 440 (441): 16 Luck 188 (DB) ° AIR 1938 Mad 602 (603) ° AIR 1925 All 677 (678): 47 All 915 (DB) °AIR 1929 Oudh 341 (346): 4 Luck 573 (DB).

(3) Suits must be pending in Courts of concurrent jurisdiction. AIR 1919 Lah 3 (3): 1919 Pun Re No. 114 ° AIR 1916 Nag 70 (71): 12 Nag LR 174 ° AIR 1925 Mad 1051 (1052): 48 Mad 750 (DB).

(4) Previous suit pending before Privy Council — Later suit must be stayed if other conditions of S. 10 are satisfied. AIR 1920 Oudh 222 (223): 23 Oudh Cas 214.

[See also AIR 1928 All 366 (367).]

(5) Both the Civil Courts and Revenue Courts are subordinate to the High Courts and both will be governed by the salutary principles laid down in this section. ('58) 1958-2 Mad L Jour 505 (508).

(6) Relief claimed by way of set off given up by defendant who failed to pay requisite Court-fee — Suit in respect of that claim filed by defendant during pendency of appeal in first suit — Stay of subsequent suit by defendant in respect of that claim is without jurisdiction. AIR 1963 All 601 (602).

(7) Suit for declaration that estate cannot be considered as jagir — Compensation proceedings in respect of estate — Civil Court has no power to grant relief of compensation — S. 10 has no application. (1965) 6 Guj LR 391.

(8) Section 10 has no application where one suit is in matrimonial Court and the other in Civil Court; for, Civil Court is not competent to grant reliefs asked for in matrimonial suits and matrimonial Court has no jurisdiction to entertain civil suit for declaration of nullity of marriage. ILR (1959) 1 Cal 84 (89).

**12. Interlocutory orders.** — (1) Court can pass interlocutory orders such as for a receiver or an injunction or an attachment before judgment notwithstanding an order for stay of suit. AIR 1922 Bom 276 (276): 46 Bom 431 (DB).

(2) Stay of suit — Court can refer matter in dispute to arbitration on agreement of parties. AIR 1951 All 335 (337).

(3) Stay of suit — Court cannot fix further date for appearance unless moved by party. AIR 1928 Lah 751 (752).

[See also AIR 1944 Nag 335 (336): ILR (1944) Nag 408 (DB).]

**13. Decree contrary to Section 10.** — (1) A decree passed contrary to this section is not a nullity and cannot be disregarded

11. **Res judicata.**—No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subseqently raised. and has been heard and finally decided by such Court.

Explanation I.—The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.—For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

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**Section 10 — Note 13 (contd.)**

in execution proceedings. AIR 1919 Lah 294 (295): 1919 Pun Re No. 22.

(2) Rule in S. 10 is a rule of procedure pure and simple. AIR 1937 Nag 132 (132): ILR (1937) Nag 6 * 1962 Jab LJ 371.

[See also AIR 1938 Rang 130 (134): 1938 Rang LR 176 (FB).]

[But see AIR 1933 Bom 85 (87): 57 Bom 364 (DB).]

(3) Rule in S. 10 can be waived by the consent of the parties. AIR 1937 Nag 132 (132): ILR (1937) Nag 6.

**14. Inherent power to grant stay.**— See Note 1 and Notes on Section 151.

**15. Forum of application for stay.**— (1) Application for stay has to be made, in the first instance, to Court in which subsequent suit is instituted. AIR 1941 All 27 (28): ILR (1940) All 737 (DB) ° AIR 1941 Bom 160 (160): ILR (1941) Bom 325 (DB) ° AIR 1931 Cal 779 (779) (DB).

(2) Court will not grant to a plaintiff an injunction restraining defendant from prosecuting his suit in another Court, if plaintiff can apply under S. 10 to that Court for stay. ('45) 49 Cal WN 58 (63).

**16. Letters Patent Appeal.** — (1) Order granting or refusing stay of suit is judgment within Cl. 15, Letters Patent. AIR 1953 Bom 117 (120): ILR (1953) Bom 416 (DB) ° AIR 1957 Cal 727 (732) (DB) ° AIR 1935 Cal 1 (9): 61 Cal 670 (DB).

(2) Order granting or refusing stay of suit is not a judgment within Cl. 15, Letters Patent. AIR 1954 Mad 1057 (1064, 1070): ILR (1954) Mad 1052 (FB) ° AIR 1957 Andh Pra 491 (492) ° AIR 1935 Rangoon 73 (73) (DB).

**17. Appeal.** — Application under S. 10 for stay of proceedings of a case under Hindu Marriage Act — Order refusing stay is not appealable. AIR 1967 Punj 148 (152): ILR (1967) 1 Punj 695.

**18. Revision.** — An order under S. 10, is not an order dealing with procedure; it is an order dealing with jurisdiction of the Court and revision lies against it. (1968) 70 Punj LR (D.) 80. (Fact that suit against person making revision petition was already decreed, was no bar to his getting order from High Court.) * AIR 1962 All 108 (110).

[See however. AIR 1955 Assam 111 (DB). (Application for stay under Sec. 10 — Order insisting that written statement should be filed before question of stay could be decided — Order not final — No revision would lie against it.)]

(2) Order under S. 10 is, a "case decided" and is subject to revision. AIR 1952 Vindh Pra 12 (12).

[See also ILR (1964) Mys 314. (No interference in revision with decision of Court under S. 10.) (AIR 1962 Mad 447, Rel on.)]

(3) Consolidation of suits in violation of Section 10 — Revision is maintainable. AIR 1960 All 184 (186 to 189).

## SECTION 11 — SYNOPSIS


1. SCOPE.
2. Section if exhaustive.
3. Res judicata and estoppel.
4. Res judicata and lis pendens.
5. Essentials of res judicata.
6. Plea of res judicata.
7. DIRECTLY AND SUBSTANTIALLY IN ISSUE.
8. Issue of fact.
9. Mixed question of law and fact.
10. Issue of law.
11. Matter not in issue.
12. Collaterally and incidentally in issue.
13. Suit for rent.
14. Suits for recurring liability.
15. Suits for maintenance.
16. Suits relating to rate of rent or area.
17. Ex parte decree.
18. Former suit.
19. "Suits" meaning of.
20. Interlocutory orders.
21. Execution proceedings.
22. Application for amendment of decree.
23. Order rejecting memorandum of appeal.

Explanation IV.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

[1882, 1877, S.13; 1859, S. 2.]

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24. Application for review.
25. Arbitration Proceedings.
26. Miscellaneous proceedings.
27. Two suits or appeals tried together — Appeal from decision in one.

**28. Explanation IV — General.**

29. "Might".
30. "Ought".
31. Grounds of attack.
32. Grounds of defence.

**33. Mortgage suits.**

**34. FORMER SUIT MUST BE BETWEEN SAME PARTIES.**

**35. "Same parties".**

36. Jus tertii.
37. Intervenors.
38. Co-defendants.
39. Co-plaintiffs.

**40. "Parties under whom they or any of them claim".**

**41. Parties claiming under parties in previous suit.**

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43. Co-heirs.
44. Co-owners.
45. Co-tenants.
46. Transferor and transferee.
47. Mortgagor and mortgagee.
48. Auction-purchaser.
49. Lessor and lessee.
50. Miscellaneous.

51. Explanation VI.

52. Suits under O. 1, R. 8 and S. 91.
53. Shebaits and trustees.
54. Manager of a Hindu family.
55. Karnavan of Malabar Tarwad.
56. Hindu widow.
57. Hindu reversioners.
58. Legal representatives.
59. Administrators.
60. Benamidar or agent.
61. Miscellaneous.
62. Judgments in rem.
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**64. LITIGATING UNDER SAME TITLE.**

**65. Identity of subject-matter and cause of action.**

**66. COMPETENCY OF COURT TRYING FORMER SUIT.**

**67. "Court" meaning of.**

**68. Court of exclusive jurisdiction.**

**69. Court deciding former suit must be a Court of concurrent jurisdiction.**

70. Pecuniary jurisdiction.
71. Jurisdiction as regards subject-matter.
72. Competency must be of trial Court in former suit.
73. Competency if affected by existence of another Court with preferential jurisdiction.
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75. Competency must have existed at date of former suit.
76. Fraud, if affects competency.
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**78. HEARD AND FINALLY DECIDED.**

**79. Matter left undecided.**

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82. Decision on preliminary or technical points.
83. Dismissal for non-prosecution or default.
84. Plea of set-off.

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**1. Scope.** — (1) Section 11 embodies the doctrine of res judicata or the rule of conclusiveness of judgments as to the points decided, in every subsequent suit between the same parties. AIR 1960 SC 941 (943): (1960) 3 SCR 590. (Principle explained — Need to give finality to judicial decisions.) * AIR 1943 Cal 76 (84): ILR (1942) 2 Cal 299 (DB).

(2) The rule of res judicata enacted in S. 11 is based on the principle that a decision once rendered by a competent authority on a matter in issue between the parties after a full enquiry should not be permitted to be re-agitated. AIR 1957 SC 38 (43): 1956 SCR 781 ° AIR 1961 SC 1457 (1463): (1962) 1 SCR 574 ° AIR 1960 SC 941 (943): (1960) 3 SCR 590 * AIR 1966 Andh Pra 269 (271): (1966) 1 Andh WR 50 ° AIR 1963 All 210 (212): 1962 All LJ 1153 ° 1960 All WR (HC) 475: 1960 All LJ 620.

(3) Section 11 is intended not only to prevent a new decision but also to prevent a new investigation so that the same person cannot be harassed again and again in various proceedings upon the same question. AIR 1942 All 302 (305) (DB).

(4) The general principles of res judicata do not qualify in any way the provisions of Sec. 11. AIR 1926 Cal 568 (573, 574) (DB) ° AIR 1933 Lah 614 (614).

(5) Case falling within terms of S. 11 — S. 11 must be applied and not any general principles of res judicata. AIR 1947 Nag 39 (42): ILR (1946) Nag 630 (DB) ° AIR 1926 Cal 568 (573) (DB) ° AIR 1926 Lah 670 (671) (DB) ° AIR 1928 Mad 840 (845) (DB) ° AIR 1962 SC 633 (641): 1962 Supp (1) SCR 206 ° AIR 1967 All 28 (30): 1966 All LJ 481 (DB). (Both proceedings being civil suits—General principles of res judicata not applicable.) * AIR 1969 Andh Pra 76 (78): (1968) 1 Andh LT 72 (DB) ° 1964 Kash LJ 207 ° AIR 1960 Raj 304 (308): 1960 Raj LW 116 (DB) ° AIR 1959 Pat 319 (322, 323): 1959 BLJR 181 (DB).

(6) Section 11 itself cannot be extended to cases not strictly covered by it. ('07) 1907 Pun Re No. 57, p 238 (FB) ° ('03) 25 All 138 (141) (DB).

**Section 11 — Note 1 (contd.)**

(7) Where there has been an executable judgment between the parties, the rule of res judicata will prevent a fresh suit between them for the same relief. AIR 1946 Sind 158 (159, 160): ILR (1946) Kar 140 ° AIR 1925 PC 34 (35): 52 Ind App 79: 52 Cal 314 ° AIR 1923 Cal 252 (255) (DB) ° AIR 1929 Oudh 172 (178): 4 Luck 603 (FB).

[But see ('41) 45 Cal WN 420 (426).]

(8) A judgment operates as a bar as regards all findings which are essential to sustain the judgment. AIR 1948 Nag 358 (360): ILR (1948) Nag 747 ° AIR 1940 PC 116 (123): 67 Ind App 251: ILR (1940) Kar PC 251: ILR (1940) Lah 493 ° AIR 1924 Cal 600 (605) (DB) ° AIR 1967 Pat 191 * AIR 1963 SC 385 (388): (1963) 2 SCR 285. (Final decision based on findings on more than one issue — Decision on each issue by itself sufficient for ultimate decision — Decision on each issue operates as res judicata.)

[But see AIR 1924 All 927 (928).]

(9) It is really the ground of the decision of the suit that operates as res judicata. AIR 1948 Nag 358 (360): ILR (1948) Nag 747 ° AIR 1930 Mad 471 (473) ° AIR 1925 Cal 530 (531) (DB) ° ('06) 29 Mad 42 (43, 44) (DB) ° AIR 1963 Cal 483 (499): 67 Cal WN 662 (SB).

[See also AIR 1962 Madh Pra 139 (140): 1961 Jab LJ 1441. (Decision of High Court in suit between A and Government that recovery of certain forest dues as land revenue from A is illegal — Ratio of decision is binding on Government and they cannot collect similar dues from B on ground that B was not party to decision in suit between A and Government.)]

(10) A decree without a judgment will not operate as res judicata. AIR 1925 Cal 1116 (1118).

(11) Decision and not the reasoning on which it is based operates as res judicata. AIR 1954 Bom 1 (27): ILR (1953) Bom 1081 (FB) * AIR 1954 Cal 8 (12) (DB) ° AIR 1963 SC 1128 (1134): 1963 Supp 2 SCR 127 ° AIR 1966 Mad 319 (320): (1965) 2 Mad LJ 551 ° AIR 1963 Pat 16 (23, 24): 1963 BLJR 73 ° AIR 1962 Cal 608 (610): 66 Cal WN 414.

(12) What is conclusive is not merely decision in earlier litigation, but also decision of such points as formed the groundwork of that decision; what is in substance ratio and fundamental to decision is also res judicata. AIR 1967 Raj 272. (AIR 1954 All 215 and AIR 1954 Cal 8, Dissent from.)

(13) Where a decree is passed on the footing of facts admitted, res judicata extends not merely to the actual decision in the case but to the common facts admitted by both the parties and made the foundation of the decree. AIR 1942 Oudh 354 (356) (DB) * AIR 1932 Mad 519 (521) (DB).

(14) The section does not create any right or interest in property but only operates as a personal bar. AIR 1921 Mad 306 (308): 44 Mad 514 (DB).

(15) Section 11 does not compel the Court trying the later case to hold that the previous decision is correct. ('11) 9 Ind Cas 686 (686) (DB) (Mad).

(16) An erroneous decision will be as much res judicata as a correct decision. AIR 1953 SC 65 (73): 1953 SCR 377. (AIR 1931 All 454 : 53 All 560 held not correctly decided; AIR 1950 Cal 287, Reversed.) ° AIR 1952 Trav-Co 316 (317) : ILR (1951) Trav-Co 639 (DB) ° AIR 1947 Cal 393 (398) (DB) ° AIR 1945 All 121 (126, 128, 129, 134): ILR (1945) All 75 (DB) ° AIR 1928 Cal 717 (718) (DB) ° AIR 1968 SC 1328 (1331): (1968) 2 SCR 848 ° AIR 1966 SC 1061 (1066): 1966 Cri LJ 805: (1963) Supp 2 SCR 542 ° AIR 1965 Tripura 1 (5) ° AIR 1963 Punj 178 (181): 1963 Cri LJ 326 ° AIR 1963 Bom 263 (265): 65 Bom LR 436 ° AIR 1965 Ker 153 (153, 154): (1964) 1 Ker LR 158. (Erroneous decree extinguishing right of redemption—Right though wrongly extinguished subsequent redemption suits cannot be maintained.) ° 1962 Mys LJ (Supp) 310 * 1958 Andh LT 809.

[See also 8 Guj LR 986: ILR 1967 Guj 795 (818). (Decision illegal but not nullity — It governs parties).]

(17) A decision will not cease to be res judicata merely because the view of law on which it is based ceases to represent the correct law owing to a later judicial decision or legislative enactment. ('54) ILR (1954) 1 Cal 408 (411) ° AIR 1928 Cal 777 (780, 781): 56 Cal 723 (FB): (32 Cal 749, Overruled.) * (1969) 1 Mad LJ 407: 81 Mad LW 512.

(18) Section 11 must be construed as it stands. ('04) 6 Bom LR 98 (103) (DB).

(19) Section 11 must be construed as to avoid an anomalous result if possible. ('85) 9 Bom 75 (81) (DB).

(20) In interpreting S. 11 the fundamental principles of the rule to which the section gives expression must not be ignored unless the words of the statute clearly contradict those principles. ('86) 8 All 324 (334) (DB) ° AIR 1927 Lah 280 (294): 8 Lah 384 (FB).

(21) Application of the doctrine of res judicata by the Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law. AIR 1956 Orissa 136 (140): ILR (1956) Cut 174 (DB) ° AIR 1946 Oudh 33 (34): 20 Luck 339 (FB) • AIR 1916 PC 78 (81): 43 Cal 694: 43 Ind App 91 ° AIR 1930 PC 22 (23): 57 Ind App 24.

(22) The section does not deal with the question of jurisdiction as it does not affect the cognizability of suits but only bars their trial. AIR 1921 Mad 306 (309): 44 Mad 514 (DB) * AIR 1969 Mad 172 (176, 177): (1968) 2 Mad LJ 367. (Court whose juris-

**Section 11 — Note 1 (contd.)**

diction is expressly taken away by statutory provision cannot get jurisdiction by having recourse to principle of res judicata.)

(23) A decision, although it may not be res judicata, may still be a binding precedent. AIR 1955 SC 481 (485): 1955-2 SCR 22: ILR (1955) 2 All 177 ° AIR 1954 Bom 1 (27): ILR (1953) Bom 1081 (FB). (Distinction between precedent and res judicata pointed out.) ° AIR 1965 Andh Pra 177 (181): (1965) 1 Andh WR 159 (FB).

**2. Section if exhaustive.**— (1) Section 11 is not exhaustive of the general doctrine of res judicata. AIR 1956 Pat 489 (491) ° AIR 1957 Andh Pra 841 (843) ° ('55) 95 Cal L Jour 5 (22) ° AIR 1954 Bom 139 (141): ILR (1953) Bom 991 (DB) ° AIR 1954 Raj 4 (7, 8): ILR (1953) 3 Raj 505 (DB) * AIR 1952 Mad 384 (386) ° AIR 1948 Lah 195 (198) (DB) ° AIR 1947 Nag 248 (251): ILR (1947) Nag 691 (DB) ° AIR 1932 PC 161 (164): 10 Rang 322: 59 Ind App 247 ° AIR 1931 PC 114 (117): 53 All 103: 58 Ind App 158 ° ('84) 6 All 269 (274): 11 Ind App 37 (PC) ° AIR 1965 SC 1153 (1155, 1167): (1965) 2 SCR 547: (Per Sarkar, Raghubar Dayal, N. Rajagopala Ayyangar and Mudholkar, JJ. (Subba Rao, J. Contra). 65 Pun LR 945, Overruled.) ° AIR 1961 SC 1457 (1462): (1962) 1 SCR 574 * AIR 1960 Raj 304 (308): 1960 Raj LW 116 (DB) ° AIR 1959 Pat 319 (322, 323): 1959 BLJR 191 (DB) ° AIR 1968 Guj 257 (259): 9 Guj LR 1002 * 1964 Andh WR 75 ° ILR (1963) Madh Pra 347 (358).

(2) Doctrine of res judicata is much wider in terms than S. 11. AIR 1956 All 237 (239) ° AIR 1957 Andh Pra 841 (843) ° AIR 1954 All 801 (811) (DB) ° AIR 1928 Oudh 359 (361): 3 Luck 487 (DB) ° AIR 1964 SC 993 (999, to 1003): (1964) 5 SCR 946 ° AIR 1969 Andh Pra 76 (78): (1968) 1 Andh LT 72 ° AIR 1967 All 125: 1966 All WR (HC) 782 ° AIR 1959 Pat 319 (322, 323): 1959 BLJR 191 (DB).

(3) Doctrine of res judicata remains apart from S. 11. AIR 1921 PC 11 (13): 48 Cal 499: 48 Ind App 187 ° AIR 1956 Hyd 146 (149): ILR (1956) Hyd 535 (DB).

(4) Principle of res judicata may be invoked when a case does not fall within the terms of S. 11. AIR 1956 All 237 (239) ° AIR 1954 Raj 4 (7, 8): ILR (1953) 3 Raj 505 (DB) ° AIR 1947 Nag 248 (251): ILR (1947) Nag 691 (DB) ° AIR 1942 All 19 (35): ILR (1942) All 45 (FB) ° 1960 SC 941 (943): (1960) 3 SCR 590 ° AIR 1969 Andh Pra 76 (78): (1968) 1 Andh LT 72 (DB).

(5) Recourse can be had to decisions of English Courts, for ascertaining general principles governing the application of the doctrine. AIR 1932 PC 161 (164) : 10 Rang 322 : 59 Ind App 247.

(6) Section is exhaustive in respect of all cases which fall within its terms. AIR 1956 Trav-Co. 161 (163) : ILR (1956) Trav-Co. 87 (FB) ° AIR 1954 Raj 4 (7, 8) : ILR (1953) 3 Raj 505 (DB) ° ('02) 29 Cal 707 (716): 29 Ind App 196 (PC) ° AIR 1962 SC 633 (641): 1962 Supp (1) SCR 206. (Where the Court is dealing with a suit the only ground on which res judicata can be urged against such a suit can be provisions of S. 11 and no other.)

(7) A previous order in a proceeding finally adjudicating a matter cannot be canvassed by the parties thereto in subsequent stages of the same proceeding. AIR 1956 Hyd 43 (45): ILR (1956) Hyd 69 (DB) ° AIR 1958 All 54 (58) (DB) ° AIR 1955 Cal 251 (253) (DB) ° AIR 1921 PC 11 (12, 13): 48 Cal 499: 48 Ind App 187 ° ('84) 6 All 269 (274): 11 Ind App 37 (PC) ° AIR 1964 SC 993 (999 to 1003): (1964) 5 SCR 946 ° AIR 1969 Pat 16 ° AIR 1960 SC 941 (943): (1960) 3 SCR 590 * AIR 1966 Andh Pra 210: (1964) 2 Andh WR 219 ° AIR 1968 Delhi 13 (14): 1968 Cri LJ 50: 69 Punj LR (D) 279 (SB). (Decision given with respect to part of matter in controversy betwen parties by Court of competent jurisdiction — Decision would be binding in subsequent stage of the same proceedings.) ° AIR 1966 Assam 41 (42, 43): ILR (1965) 17 Assam 26. (Death of Defendant 1 — Court holding that suit could continue against defendants 2 and 3 — Court cannot subsequently hold that Court cannot proceed without heirs of defendant 1.) ° AIR 1961 All 386 (393, 394). (Question of limitation raised before trial Court and decided against defendant — Plaintiff appealing against part of decree — Defendant filing no appeal — Appellate Court cannot reverse decision of trial Court on question of limitation — Principle of res judicata prevails.) * (1966) 70 Cal WN 324 (329) ° AIR 1962 Him Pra 43 (51) ° (1961) 2 Ker LR 636: 1961 Ker LT 998 (1000). (Substantive right available to defendant not claimed before decree — Right is lost in subsequent execution proceedings.)

[See however AIR 1947 Nag 248 (251, 252): ILR (1947) Nag 691 (DB).]

(8) A final order in a previous proceeding, not a suit, will bar a subsequent suit between the same parties on the same matter. AIR 1953 SC 33 (40): 1953 SCR 154 ° AIR 1957 Andh Pra 841 (843). (Proceeding for scaling down decree under Madras Act 4 of 1938 not a suit.) ° AIR 1956 All 237 (240) * AIR 1946 Mad 509 (510): ILR (1946) Mad 566 (DB) ° AIR 1922 PC 80 (84): 45 Mad 320: 49 Ind App 129. * AIR 1965 SC 1153 (1155, 1167): (1965) 2 SCR 547. (65 Pun LR 945, Overruled.) ° AIR 1967 All 442 (444): 1967 All LJ 32 (DB). (In cases in which neither of the two proceedings or only one of them is a civil suit the general doctrine, shorn of the limitation of section, is to be applied.) * AIR 1967 All 28 (30): 1966 All LJ 481 (DB) ° AIR 1964 Cal 452 (454, 459): 68 Cal WN 586. (Application under S. 53, Arbitration Act dismissed — Subsequent suit held barred.) ° AIR 1963 Cal 140 (147, 148).

**Section 11 — Note 2 (contd.)**

(9) General principles of res judicata cannot be used in such a way as to practically render provisions of S. 11 nugatory. AIR 1953 Cal 765 (766) ° AIR 1941 Cal 104 (106) ° AIR 1929 Lah 781 (782) (DB).

**3. Res judicata and estoppel.**—(1) Doctrine of res judicata really differs in essential particulars from the doctrine of estoppel. AIR 1942 Cal 92 (98): ILR (1942) 1 Cal 169 (DB) ° AIR 1922 Pat 63 (65): 1 Pat 174 (DB).

(2) The rule of constructive res judicata is really a rule of estoppel. AIR 1960 All 519 (521).

(3) Doctrine of res judicata results from a decision of the Court while estoppel results from the acts of parties themselves. Rule of res judicata proceeds on grounds of public policy, while rule of estoppel proceeds upon the doctrine of equity. AIR 1947 Mad 5 (15): ILR (1947) Mad 190 (DB) ° AIR 1942 Cal 92 (98): ILR (1942) 1 Cal 169 (DB).

(4) Rule of res judicata prohibits an inquiry in limine and ousts jurisdiction of Court to try the case while an estoppel is only a rule of evidence. AIR 1942 Cal 92 (98): ILR (1942) 1 Cal 169 (DB) ° ('86) 8 All 324 (333) (DB).

[See also (1967) 2 Andh WR 349 (352): (1967) 2 Andh LT 283. (Previous judgment not res judicata — Still it would be valuable piece of evidence under S. 40 Evidence Act and party would be estopped from contesting its correctness.) ]

(5) Theory of res judicata is to presume conclusively the truth of the former decision, while the rule of estoppel prevents a person from setting up what he calls the truth. AIR 1942 Cal 92 (98) : ILR (1942) 1 Cal 169 (DB).

(6) Estoppel by record in English law corresponds to the rule contained in this section. AIR 1956 All 225 (228): ILR (1956) 1 All 313 (FB).

**4. Res judicata and lis pendens.**—(1) In case of conflict doctrine of res judicata will prevail over that of lis pendens. ('51) ILR (1951) Trav-Co. 32 (39) ° AIR 1949 Bom 367 (373) (DB) ° AIR 1934 Cal 552 (553) : 61 Cal 494 (DB).

(2) Suit by A against B — B transferring suit property to C pendente lite — In another suit between same parties regarding same property decree passed in favour of B before decision of first suit — Such decree would operate as res judicata and notwithstanding the doctrine of lis pendens affecting transfer in favour of C, C as a person claiming under B would be entitled to rely on doctrine of res judicata and claim the property. AIR 1949 Bom 367 (373) (DB).

**5. Essentials of res judicata.** — (1) In order that the doctrine of res judicata may apply it is essential that the former judgment must be that of a Court of competent jurisdiction. But it is not necessary that the Court which is competent to decide the former case and decides that case has jurisdiction to hear the later suit AIR 1953 SC 33 (40) : 1953 SCR 154 ° AIR 1968 SC 1370 (1372): (1968) 2 SCR 887 ° AIR 1961 SC 1457 (1462, 1463): (1962) 1 SCR 574 ° AIR 1967 Andh Pra 143 (144, 145): (1966) 1 Andh WR 241 ° 1966 Ker LT 711:1966 Ker LJ 624 ° (1963) 65 Pun LR 188.

(2) Another essential is that former judgment must be between the same parties. AIR 1942 Nag 107 (108): ILR (1942) Nag 779.

(3) To constitute res judicata it is not necessary that the suit need be one which the plaintiff was bound to institute. The usefulness or otherwise of a suit is a question which is entirely beside the point. AIR 1925 Lah 160 (162, 163) (DB).

(4) A plea of res judicata can only be founded on a valid decree and not on one which is void. AIR 1954 Trav-Co 43 (45) ° ('51) ILR (1951) 1 Cal 168 (177) (DB) ° 1956 MBLJ 1302. (Decree against dead person — No bar to suit against legal representative.)

(5) It is not necessary that the former proceeding and the subsequent suit should have the same subject-matter. AIR 1968 SC 1370 (1372): (1968) 2 SCR 887.

**6. Plea of res judicata.**— (1) Plea of res judicata is not confined to S. 11 but may be invoked under the general principles of law. AIR 1926 Lah 603 (604): 8 Lah 15 (DB).

(2) Plea of res judicata will prevail even where the result of giving effect to it will be to sanction what is illegal or prohibited by law. AIR 1930 Bom 135 (138): 53 Bom 676 (DB) ° ('09) 33 Bom 479 (482) (DB).

[See however AIR 1939 Pat 636 (636).]

(3) Plea of res judicata must be clearly established and the judgment which is pleaded in bar strictly construed. AIR 1952 All 618 (621) ° AIR 1917 Mad 689 (689) (DB) ° 1966 All WR (HC) 740: 1966 All LJ 987 (990).

(4) Party setting up plea must show from the record that the Court had found in his favour in another proceeding. AIR 1951 Pat 348 (349): 28 Pat 974 (DB).

(5) Party sought to be affected by the bar of res judicata should have notice of the point which is likely to be decided against him and should have an opportunity of putting forward his contentions against such a plea. AIR 1952 Trav-Co 452 (453): ILR (1953) Trav-Co 319 (DB) ° AIR 1924 Mad 1 (5, 6): 46 Mad 768 (FB) ° AIR 1936 PC 258 (259).

(6) The plea of res judicata is not one of jurisdiction of the Court. AIR 1929 Cal 163 (164) (DB) ° AIR 1917 Mad 950 (950) (DB) ° 1959 Andh LT 156 (165) (DB).

(7) Plea of res judicata — Plea is one of law which concerns jurisdiction of Court

**Section 11 — Note 6 (contd.)**

trying the proceedings. AIR 1966 SC 153 155: (1966) 1 SCR 102.

(8) Plea of res judicata can be waived. AIR 1952 Trav-Co 452 (453): ILR (1953) Trav-Co 319 (DB) ° AIR 1929 Cal 163 (164) (DB) ° AIR 1917 Mad 950 (950) (DB) ° AIR 1935 All 645 (647) ° AIR 1963 Punj 9 (14): 64 Punj LR 782 (FB) * (1967) 69 Pun LR 1062 (1063) ° 1959 Andh LT 156 (165) (DB).

[But see AIR 1947 Mad 5 (15): ILR (1947) Mad 190 (DB).]

(9) A plea of limitation is not unoften based on questions of fact and if a party which raised a plea of limitation gives it up, it is not necessary for the other party to prove meticulously the questions of fact which brought the case within limitation. ILR (1957) 2 All 182.

(10) If a party does not raise the plea when he ought to have done so, the party will be taken to have waived it. AIR 1952 Trav-Co 452 (453): ILR (1953) Trav-Co 319 (DB) ° AIR 1936 Cal 454 (455) (DB) * AIR 1967 All 423 (425) ° AIR 1965 Andh Pra 177 (180): (1965) 1 Andh WR 159 (FB). (Plea of res judicata — Not raised by pleadings or in the issues — Plea held could not be raised in appeal for the first time.)

(11) The principle of res judicata will be applied if it is pleaded or brought to the notice of the Court. If it is not pleaded and the Court proceeds to a decision the decree is not illegal nor a nullity. 1965 All WR (HC) 518: 1965 All LJ 1095.

(12) Where all the facts and papers necessary for ascertaining the point were before the Court and the parties had admitted the fact of the previous suit, a party cannot be considered to have given up the plea of res judicata. AIR 1929 All 724 (725) (DB).

(13) Even a party who has waived the plea in the lower Court may revive it in the appellate stage of the same case where the other party has appealed from the decree. AIR 1932 Bom 15 (18) (DB) ° AIR 1933 Oudh 104 (106) (DB).

(14) Where, at the appellate stage of one suit, a former suit is decided, the plea of res judicata can be raised at that stage. AIR 1946 Lah 387 (388, 389) (DB) ° AIR 1929 Pat 173 (175, 176): 8 Pat 107 (DB).

(15) Question of res judicata depending on material in the very record — Can be raised at appellate stage for first time. (1960) 2 OJD 359.

(16) Whether or not to allow a party to raise a plea of res judicata on appeal would depend on the facts and circumstances of each case. The plea can be allowed to be raised only if it would promote the cause of justice. AIR 1965 Punj 342 (344): 1965 Cur LJ 104.

(17) The plea of res judicata being a pure question of law can be raised at any stage provided the necessary evidence is on record. AIR 1966 Pat 235 (240) (DB).

(18) When a plea of res judicata raised by the appellant is not substantiated by cogent documentary evidence and is not substantially raised by him in the pleadings, he is not entitled to raise it for the first time in second appeal. AIR 1957 Tripura 11 (13) ° AIR 1963 Pat 412 (424, 425): 1963 BLJR 802 (FB) ° AIR 1960 All 519 (521).

(19) The question of res judicata is a mixed question of law and fact and can be agitated at any stage of the proceeding even in second appeal, if it does not involve fresh investigation of facts. AIR 1967 Pat 124: ILR 44 Pat 87 ° ILR (1958) Mys 432.

(20) A plea of res judicata is only a plea of estoppel by judgment and if a party is unable to make out one species of estoppel he can still make out a case of another species of estoppel. AIR 1948 East Punj 26 (29) (DB).

(21) If the decree is a nullity and non-existent in the eye of law, no plea of res judicata can be founded upon it. AIR 1954 Trav-Co 43 (45) ° ILR (1951) 1 Cal 168 (177) (DB).

**7. Directly and substantially in issue.**—(1) For the applicability of Section 11 the matter must be directly and substantially in issue. AIR 1925 Cal 985 (988) * AIR 1958 Mad 148 (149) (DB) ° AIR 1951 Assam 62 (63): ILR (1950) 2 Assam 297 (DB) ° ('05) 27 All 37 (52, 53): 32 Ind App 17 (PC) ° AIR 1928 Cal 777 (781): 56 Cal 723 (FB) ° (1964) 5 Guj LR 786: ILR (1964) Guj 775 ° AIR 1960 Ker 127 (130): 1950 Ker LT 1110 (DB) ° ILR (1960) Mys 120 ° AIR 1959 Bom 396 (399): 60 Bom LR 1273 ° AIR 1969 Orissa 171 (174): 34 Cut LT 1227.

(2) Where the matter decided in previous suit is not in issue either directly or substantially, it will not be res judicata in the subsequent suit. AIR 1951 SC 155 (156): 1951 SCR 138: 30 Pat 310 ° AIR 1957 SC 577 (587): 1957 SCR 775 * AIR 1958 All 207 (209) (DB) ° AIR 1954 All 123 (123, 124): ILR (1954) 1 All 559 (DB) ° AIR 1954 Cal 8 (12) (DB) ° AIR 1937 PC 256 (259): ILR (1938) 1 Cal 66: 31 Sind LR 637: 64 Ind App 302 ° AIR 1925 PC 63 (69, 70): 47 All 250: 52 Ind App 145 ° AIR 1962 Raj 57 (68): 1962 Raj LW 7 (FB) ° AIR 1967 All 28 (29): 1966 All LJ 481.

(3) A matter cannot be "directly in issue" unless it has been alleged by one party, and either denied or admitted expressly or impliedly, by the other. AIR 1951 Trav-Co 32 (34) (DB) ° AIR 1947 Cal 200 (206, 207): ILR (1944) 2 Cal 542 (DB) ° ('01) 26 Bom 25 (32) (DB) ° AIR 1918 Mad 751 (753) (DB).

(4) It is not necessary that a distinct issue should have actually been framed. AIR 1926 Cal 1022 (1027) (DB) ° ('94) 21 Cal 430

**Section 11 — Note 7 (contd.)**

(433) (DB) ° AIR 1968 Raj 94: 1967 Raj LW 532 * AIR 1966 Punj 354. (Matter indirectly touched in issues — Parties leading evidence thereon and Court deciding it — Plea cannot be raised again.)

(5) A matter alleged on one side and not denied or admitted on the other cannot be said to be directly in issue. AIR 1949 East Punj 213 (217) ° AIR 1935 Cal 792 (798) (DB).

(6) The words "directly in issue" have been used in Section 11 in contradistinction to the expression "collaterally or incidentally in issue'. ('98) 25 Cal 136 (139, 140) (DB) ° AIR 1962 Andh Pra 160 (161): (1962) 2 Lab LJ 207 (DB) * AIR 1962 Cal 616 (619, 620, 621).

(7) A matter directly in issue in the previous suit will not operate as res judicata in the subsequent suit unless it was also substantially in issue in such former suit. AIR 1953 SC 33 (36): 1953 SCR 154.

(8) A matter is substantially in issue if it is of importance and value for the decision of the case. AIR 1927 Mad 643 (644) (DB) ° AIR 1957 Hyd 23 (24): ILR (1956) Hyd 760 (DB).

(9) Unnecessary or irrelevant issue, the decision of which either way will not affect the decision of the suit, cannot be said to be substantially in issue. AIR 1951 Him Pra 54 (55) ° AIR 1957 Hyd 23 (24): ILR (1956) Hyd 760 (DB) ° AIR 1947 Cal 221 (226): ILR (1944) 2 Cal 513 (DB) ° AIR 1919 Bom 81 (82, 83): 43 Bom 568 (DB) ° AIR 1927 Mad 643 (645) ° 1967 Ker LJ 237.

(10) When a Court cannot go into a question at a particular stage, it cannot be said that the matter is then substantially in issue. AIR 1935 Cal 641 (642) (DB) ° AIR 1932 Mad 233 (233, 234).

(11) A sues B for maintenance for certain years on the basis of a maintenance deed in his favour. Suit is dismissed on ground that the document is ineffectual between parties and did not bind the estate in dispute. A again sues B for maintenance for other years based on the same document. The suit is barred as the issue as to the binding nature of the document as between the parties was directly as well as substantially in issue in the previous suit. ('12) 14 Ind Cas 463 (466) (PC).

(12) A executes four bonds in favour of B. B sues on two of these bonds and A contends that the said bonds as well as two other bonds were all satisfied by payment. The suit is decreed on the ground that none of the four bonds were satisfied. A subsequently sues B for recovery of all the four documents alleging satisfaction of the debt. The suit is barred by res judicata in respect of the two bonds sued on in the former suit, but is not so barred in respect of the other two bonds as the satisfaction thereof was not directly and substantially in issue in the first suit. ('85) 7 All 247 (251, 252, 253).

(13) The question whether a matter has been directly and substantially in issue in the former suit is one of fact to be decided with reference to the circumstances of each particular case. AIR 1954 Pat 443 (445) (DB) ° ('55) ILR (1955) Mys 163 (168) ° AIR 1952 Punj 252 (253, 254) ° ('41) 45 Cal WN 854 (856) * AIR 1919 Bom 81 (82): 43 Bom 568 (DB).

(14) The question whether a matter was directly and substantially in issue in the former suit has to be decided (a) on the pleadings in the former suit, (b) the issues struck therein, and (c) the decision in the suit. Further it depends upon whether a decision on such an issue will materially affect the decision of the suit. AIR 1965 SC 948 (949-950-951): (1966) 1 SCJ 475.

(15) If the parties and the Court have dealt with the matter as if it formed a direct and principal issue, it must be taken to have been directly and substantially in issue though in the first instance it was not raised properly or was raised only as an ancillary or incidental issue. AIR 1952 Trav-Co 383 (385): ILR (1952) Trav-Co 175 (DB) ° AIR 1957 Trav-Co 13 (14): ILR (1955) Trav-Co 1071 (DB) ° AIR 1949 Nag 311 (313): ILR (1949) Nag 147 ° AIR 1924 PC 144 (149): 51 Cal 631: 51 Ind App 293. (Affirming AIR 1921 Cal 368.) ° AIR 1932 PC 50 (51) ° AIR 1937 Mad 709 (710). ° AIR 1968 Raj 94: 1967 Raj LW 532 ° 1959 Ker LJ 1076: 1959 Ker LT 132.

[See also AIR 1961 Bom 97 (103): 62 Bom LR 360 (DB). (If a relief is claimed and an issue raised on it, the principle of res-judicata would apply.)]

(16) Question raised and decided at the express request of the parties must be taken to have been directly and substantially in issue. (1964) 5 Guj LR 786: ILR (1964) Guj 775 ° AIR 1961 Cal 422 (430) ° AIR 1956 Pat 489 (492) ° AIR 1932 Cal 894 (896): 59 Cal 1250 (DB) ° AIR 1932 PC 50 (51) ° AIR 1930 Cal 810 (813)' 57 Cal 872 (DB).

(17) Court granting reliefs not asked for — Parties availing of such reliefs — They cannot later retrace their steps and seek the reliefs prayed for originally by them. AIR 1968 Mad 374 (377): 81 Mad LW 160.

(18) To constitute a matter directly and substantially in issue it is not necessary that a distinct issue should have been raised upon it; it is sufficient if the matter was in issue in substance. AIR 1956 Pepsu 69 (72) ° AIR 1934 Cal 179 (185) (DB).

(19) A finding which is the real ground of the decision will operate as res judicata even though there may have been other issues on which the case might equally well have been decided. AIR 1961 Bom 218 (219, 221): 63 Bom LR 152 ° AIR 1956 Pat 489 (492) ° AIR 1928 All 62 (64) (DB).

(20) Where the judgment is based on the findings on two issues one of which by

**Section 11 — Note 7 (contd.)**

itself is sufficient to sustain the judgment, the decision on both the issues will be res judicata. 1968 Raj LW 412 * AIR 1961 Bom 218 (219, 221): 63 Bom LR 152 ° AIR 1956 All 128 (129) ° AIR 1958 Him Pra 17 (20) ° AIR 1942 Cal 1 (13): ILR (1941) 2 Cal 434 (DB) ° AIR 1932 Cal 385 (387) (DB) * ('85) 7 All 606 (616, 617) (FB) ° AIR 1924 Cal 600 (605, 606) (DB) ° ('13) 21 Ind Cas 979 (982) (DB) (Cal) ° AIR 1944 Oudh 321 (326): 20 Luck 64 (DB) * ('97) 24 Cal 900 (907) (DB). (17 All 174, Dissented.)

[But see ('95) 17 All 174 (195) (DB) ° AIR 1925 Oudh 386 (387) ° ('13) 16 Oudh Cas 178 (183, 185) (DB).]

(21) Per Desai, C. J.—When a Court decides a case on two alternative findings, each one of them operates as res judicata and is a binding authority. AIR 1963 All 172 (177, 178): 1962 All LJ 938 (FB).

(22) A matter directly and substantially in issue in a suit may be so either actually or constructively. ('98) 25 Cal 136 (139) (DB).

(23) A sues B for possession of certain properties on basis of a sale deed in his favour. B impugned the deed as fictitious. Deed held fictitious and suit dismissed. Subsequent suit by A against B for certain other properties on basis of same sale deed. The suit was held barred. AIR 1923 All 613 (614): 45 All 515 (DB).

(24) A decision as to whether a particular issue arises in a suit is as much res judicata as the decision of the issue on the merits. AIR 1921 Cal 368 (375) (DB).

(25) The section does not require that the entire subject-matter of the two suits should be identical. Hence even if one of the issues is common to both the suits the rule of res judicata may apply so far as that issue is concerned. (1966) 70 Cal WN 670 (674, 675) (DB) * AIR 1956 Pepsu 69 (72) ° ('41) 45 Cal WN 420 (424).

[See also AIR 1968 Delhi 13 (14): 1968 Cri LJ 50: (1967) 69 Pun LR (D) 279 (SB). (Decision given with respect to part of matter in controversy between parties by Court of competent jurisdiction — Decision would be binding in subsequent stage of the same proceedings.)]

**8. Issue of fact.**—(1) A decision on an issue of fact, however, erroneous it may be, constitutes res judicata between the parties to the previous suit. AIR 1966 SC 1061 (1066): 1966 Cri LJ 805: (1963) Supp (2) SCR 542 ° AIR 1951 Mys 36 (37): ILR (1951) Mys 396 (DB) ° AIR 1950 Trav-Co 73 (76) * AIR 1950 Trav-Co LR 532 (DB) * AIR 1928 Cal 717 (719) (DB) ° AIR 1919 Mad 359 (360, 361) (DB).

**9. Mixed question of law and fact.**—(1) A decision on a mixed question of law and fact is as much res judicata as one on a question of fact. AIR 1946 Nag 277 (294): ILR (1946) Nag 159 (DB) ° AIR 1926 Cal 80 (81) (DB) * AIR 1928 Cal 777 (780): 56 Cal 723 (FB).

**10. Issue of law.**—(1) A finding on an issue of law which was directly and substantially in issue in the former suit would be res judicata between the same parties in a subsequent suit, however erroneous it may be. AIR 1967 Pat 254 ° 1966 Cur LJ 96 (97) (Punj) ° AIR 1959 Pat 13 (16): 1957 Pat LR 9 (DB) ° AIR 1955 Andhra 194 (196). (AIR 1933 Mad 925: 57 Mad 73, Rel. on; AIR 1937 Mad 254: ILR (1937) Mad 364 (FB), Distinguished.) * AIR 1958 Cal 453 (455) (DB) ° AIR 1957 All 575 (581) (DB) ° AIR 1957 Andh Pra 1002 (1003) * AIR 1951 Mys 36 (37): ILR (1951) Mys 396 (DB) ° AIR 1947 Nag 48 (52): ILR (1946) Nag 568 (DB) ° AIR 1947 Oudh 74 (77): 21 Luck 586 (DB) * AIR 1943 Bom 288 (291): ILR (1943) Bom 400 (DB) ° AIR 1921 Bom 87 (91): 45 Bom 1260 (FB) ° AIR 1928 Cal 777 (781, 782): 56 Cal 723 (FB). (Overruling 32 Cal 749 and AIR 1925 Cal 1193 and Approving 10 Cal 1087) * AIR 1937 Lah 393 (394) ° AIR 1933 Mad 925 (927): 57 Mad 73 (DB) ° AIR 1918 Mad 1309 (1313) (DB) ° AIR 1924 Pat 265 (265, 266): 2 Pat 771 (DB).

(2) The question whether the cause of action in the first suit is the same as that in the second suit or a different one is not material in determining whether an issue of law is res judicata. ('54) ILR (1954) 1 Cal 408 * AIR 1928 Cal 777 (782): 56 Cal 723 (FB). (Overruling 32 Cal 749 and AIR 1925 Cal 1193 and Approving 10 Cal 1087.) ° AIR 1930 Pat 585 (587): 9 Pat 674 (DB).

[But see AIR 1929 Cal 445 (447) (DB). (Per Jack, J.)]

(3) Construction placed on a document or decree by a competent Court before which the question is directly and substantially in issue is conclusive between the parties. AIR 1947 All 168 (169): ILR (1947) All 218 (DB) ° AIR 1947 Oudh 74 (77): 21 Luck 586 (DB) * ('37) 1937 Mad WN 465 (468) (DB).

(4) Though a decision on a pure question of law would operate as res judicata, yet the doctrine should not be applied so as to nullify a statutory prohibition. AIR 1932 Pat 337 (342): 12 Pat 147 (DB).

(5) A decision on a point of law is res judicata if the cause of action is the same in the two suits but not otherwise. AIR 1942 Bom 322 (325): ILR (1942) Bom 798 (DB) ° AIR 1920 Mad 246 (249) (DB) ° AIR 1934 Cal 60 (62): 62 Cal 1307 (DB) * AIR 1932 All 169 (172) (DB) ° AIR 1931 Bom 570 (574) (DB) ° AIR 1921 Bom 87 (93): 45 Bom 1260 (FB). (Per Fawcett, J.)

(6) Decision given in earlier case on the right of parties vis-a-vis an enactment—Subsequent statute creating new circumstances which render earlier decision inapplicable — Effect is that earlier decision of Court is evaded — Earlier decision ceases to play any part in the altered circumstances —

**Section 11 — Note 11 (contd.)**

There is no res judicata. AIR 1966 SC 1637 (1643): (1966) 2 SCR 40.

(7) An erroneous decision on a question of law cannot operate as res judicata, especially when there has been a change in law made by the Legislature subsequent to that decision. AIR 1946 Lah 419 (423) (DB) * AIR 1930 Lah 907 (910): 12 Lah 52 (DB) ° AIR 1944 Cal 13 (14).

[See also AIR 1948 Oudh 270 (271). (Change of law — Prior decision does not operate as res judicata.)]

(8) A question of jurisdiction can operate as res judicata. AIR 1954 Cal 506 (509) (DB) ° AIR 1952 Punj 265 (265): ILR (1953) Punj 33 * AIR 1947 Mad 410 (411) (DB) ° AIR 1941 Lah 327 (331) (DB) ° AIR 1926 Bom 481 (484, 485, 487) ° AIR 1935 Mad 835 (838): 59 Mad 62 (DB) * AIR 1936 Rang 87 (89): 14 Rang 94 (SB).

[But see AIR 1937 Pesh 62 (63) ° AIR 1941 Cal 493 (494, 495) ° AIR 1929 All 132 (132) ° AIR 1930 All 254 (255) (DB) ° AIR 1936 Pat 198 (200): 14 Pat 633.]

(9) An erroneous decision on the jurisdiction of another tribunal may be called a decision on a point of law, but unless it is altered in appeal, it is res judicata as far as the parties to that suit are concerned. AIR 1951 Vindh Pra 51 (53, 54).

(10) There is a distinction between an abstract and a concrete question of law such as exists between the interpretation of a statute and the construction of a document and that while the decision on the former will not be res judicata, a decision on the latter will be. ('55) 8 Sau LR 326 (329) ° AIR 1921 Bom 87 (90): 45 Bom 1260 (FB). (Per Macleod, J.)

[See aiso AIR 1932 Bom 257 (258, 259).]

(11) An abstract question of law dissociated from and unconnected with such rights in litigation can never be of any importance or value to the parties and to the decision of the case and cannot therefore be deemed to have been substantially in issue. AIR 1968 Bom 229 (245, 246): 69 Bom LR 656 * AIR 1954 Bom 1 (27): ILR (1953) Bom 1081 (FB) ° AIR 1955 Andhra 194 (196) ° ('55) 8 Sau LR 326 (329) * AIR 1954 Cal 8 (12) (DB) ° AIR 1953 Trav-Co 193 (194): ILR (1952) Trav-Co 241 (DB) ° AIR 1951 Vindh Pra 51 (53) ° AIR 1949 Cal 430 (432): ILR (1950) 2 Cal 24 (FB) ° AIR 1946 Nag 277 (293): ILR (1946) Nag 159 (DB).

(12) "There can be no res judicata laying down a wrong rule of law between parties for future guidance also. The decision must be confined to the matter to which it has been applied at the time of the former decision." AIR 1937 Mad 254 (257): ILR (1937) Mad 364 (FB).

[See also AIR 1954 Mad 161 (164). (Obiter.)]

(13) Even an erroneous decision on a question of law, including a decision on a question of jurisdiction, will operate as res judicata between the parties to it. AIR 1953 SC 65 (73): 1953 SCR 377. (Erroneous decision of execution Court that it has jurisdiction.) ° 1968 Raj LW 412 * AIR 1967 Ker 97 (99): 1967 Ker LT 629 (DB) ° AIR 1967 Pat 124: ILR 44 Pat 87 * AIR 1963 Punj 178 (181): 65 Pun LR 26 ° (1960) 1 Ker LR 123: 1960 Ker LT 579 ° AIR 1959 Pat 319 (322, 323): 1959 BLJR 191 (DB).

(14) A decision based on an admission due to an erroneous conception of law is not res judicata inasmuch as the matter of law could not be said to have been heard and decided. AIR 1929 Rang 55 (58): 6 Rang 691 (DB).

[See also AIR 1967 Guj 16 (19): (1966) 17 STC 581 (DB). (Held if requirements of Section 11 were fulfilled the concession made in previous suit which could amount to an expression of opinion could not help in escaping the legal effects.)]

(15) The question whether the raising of objections in application under Order 21, Rule 66, operates as res judicata is a question of law and an admission on a point of law, even if, it is accepted that the party has made it, would not be binding on him, and can be shown to be erroneous at any stage. AIR 1965 Raj 42 (46, 47): 1964 Raj LW 560 (DB).

(16) Previous decisions as to the existence of a particular custom or law among a certain community of persons will not be binding on Courts as res judicata in cases between other persons belonging to that community. AIR 1941 Rang 66 (68): 1940 Rang LR 685 (DB).

(17) A decision given by a Court on a question of law does not bind the same parties when these parties are litigating with regard to an entirely different right. AIR 1954 Bom 1 (28): ILR (1953) Bom 1081 (FB).

**11. Matter not in issue.**—(1) If the matter in issue in the subsequent suit was not in issue at all in the former suit, there is no question of res judicata. AIR 1969 SC 316 (318, 319): (1969) 1 SCJ 373 ° AIR 1953 SC 153 (155): 1953 SCR 930 * AIR 1949 PC 26 (30) ° 1968 Raj LW 412. (No specific issue regarding nature of tenancy.) ° AIR 1963 All 187 (190). (Order passed on the objection in the Encumbered Estates Act proceeding cannot operate as res judicata in suit under Section 92.) ° AIR 1963 Punj 9 (14): 64 Pun LR 782 (FB) ° (1963) 65 Pun LR 593 ° AIR 1961 All 278 (279): 1960 All LJ 593 (DB). (Owing to change in law, question to be decided at subsequent stage depending on different facts. Previous decision not res judicata.) * 1961 MPLJ 1447: 1961 Jab LJ 1417 ° 1955 Nag LJ 76: ILR (1955) Nag 710). ° AIR 1954 Bom 1 (32): ILR (1953) Bom 1081 (FB) * AIR 1956 Cal 525 (528) (DB) ° AIR 1956 Mad 98 (100): ILR (1956) Mad 251 (DB) ° AIR 1955 Pat 393 (396): 34 Pat 324 (DB) * AIR 1925 PC 184 (187): 52 Ind App 294: 52 Cal 971.

**Section 11 — Note 11 (contd.)**

(2) A mere opinion of the Court on a matter not necessary for the decision of the case and not arising out of the issues before it is an obiter dictum and cannot be said to be a decision on any issue, and is not res judicata. AIR 1950 PC 80 (81) ° AIR 1955 Pat 393 (395): 34 Pat 324 (DB) ° AIR 1947 Cal 320 (324, 325) (DB) * AIR 1945 Mad 77 (79) ° AIR 1929 All 521 (525) (DB).

(3) A finding in suit is not binding on a pro forma defendant as res judicata as there can be no issue between him and the other parties. AIR 1949 East Punj 213 (217) ° AIR 1952 Trav-Co 191 (191) (DB) * AIR 1951 Punj 363 (364) ° AIR 1947 Bom 217 (223, 235): ILR (1948) Bom 1 (DB) ° AIR 1928 Lah 493 (494) * ('93) 17 Bom 341 (348): 20 Ind App 1 (PC) ° AIR 1933 Lah 109 (110): 14 Lah 380 (DB) ° AIR 1938 Mad 581 (582) (DB) * AIR 1930 Pat 355 (356) (DB).

[But see ILR (1960) 10 Raj 221 (224) ° AIR 1959 Raj 127 (129, 130, 131): 1959 Raj LW 454 ° AIR 1956 Punj 129 (131): ILR (1956) Punj 1 (FB). (Per Majority, Khosla, J., contra): 12 Cal 580 (FB); AIR 1928 Lah 493; AIR 1935 Lah 942 and AIR 1938 Lah 842 (DB), Dissented from.) * ('55) ILR (1955) 2 Cal 460 (465) (DB) ° AIR 1953 Cal 155 (158) ° AIR 1942 Cal 1 (17): ILR (1941) 2 Cal 434 (DB) * AIR 1918 Mad 967 (968) (DB).]

(4) Where there is no issue to be tried between one of the two plaintiffs and the defendant, the decision as to a matter between the other plaintiff and the defendant will not be res judicata in regard to him. AIR 1938 Mad 581 (582) (DB).

(5) The addition of a pro forma defendant in the subsequent suit would not take it out of the rule of res judicata. ('13) 20 Ind Cas 344 (345) (DB) (Cal) ° AIR 1941 Cal 512 (514).

(6) A matter cannot be said to be not in issue merely because it has been admitted by the party affected. AIR 1949 All 596 (598) ° AIR 1948 Nag 358 (360): ILR (1948) Nag 747 * AIR 1925 Mad 319 (319) (DB).

**12. Collaterally and incidentally in issue.**—(1) Decisions, on matters not alleged and denied or admitted within the meaning of explanation III are decisions on matters incidental and collateral to the main issues in the case and will not operate as res judicata. AIR 1947 PC 1 (8): ILR (1947) Kar (PC) 38 * AIR 1956 Mad 428 (431): ILR (1956) Mad 252 (DB) ° 1950 All LJ 168 (171) (DB) * AIR 1947 Bom 217 (235): ILR (1948) Bom 1 (DB) ° ('80) 2 All 843 (846) (FB) ° AIR 1931 Cal 353 (356) (DB).

(2) Where a shebait of a deity files a suit against his co-shebait for the better management of debutter properties, the decision on the question of the debutter character of the properties is only an incidental issue in the suit. AIR 1925 Cal 996 (1000) (DB).

(3) An order under Order 22, Rule 5, determining that a particular person is or is not the legal representative of a deceased party does not operate as res judicata. AIR 1951 Pat 537 (538): 28 Pat 814 (DB) * AIR 1958 All 573 (574) ° AIR 1946 Nag 424 (428): ILR (1946) Nag 482 (DB) ° AIR 1941 Lah 142 (143) * AIR 1937 Oudh 220 (222): 13 Luck 20 (FB). (Overruling AIR 1933 Oudh 207: 8 Luck 477.) ° AIR 1963 Pat 390 (392): ILR 44 Pat 491 (DB).

(4) When a person claims a right of ownership by adverse possession the question whether the possession is adverse to a private person or the Government has to be decided and if the Court holds that Government was the owner of the property the decision operates as res judicata in a subsequent suit by the person claiming a right of easement. AIR 1943 All 362 (365): ILR (1943) All 792 (DB). (AIR 1942 All 405, Reversed.)

**13. Suit for rent.**—(1) The question whether a previous decision in a suit for rent does or does not operate as res judicata in a subsequent suit on title, depends on the circumstances of each case. AIR 1926 Cal 369 (396) (DB) ° AIR 1947 Cal 393 (396) (DB).

(2) Previous suit for rent— Question of title directly and substantially in issue — Decision operates as res judicata. AIR 1954 Pat 443 (443) (DB) ° AIR 1957 Cal 200 (202) * ('54) ILR (1954) Madh B 44 (49) ° ('51) ILR (1951) 1 Cal 383 (384, 385) (DB) * ('50) ILR (1950) 2 Assam 397 (403) (DB) ° AIR 1947 Cal 393 (397) (DB) ° AIR 1930 PC 224 (225): 57 Ind App 208: 8 Rang 326 * 1961 MPC 136: 1961 Jab LJ 230.

(3) Question of title not in issue or incidentally in issue in previous rent suit — No res judicata. AIR 1956 Madh Pra 166 (168): ILR (1956) Madh B 296 ° AIR 1955 Pat 393 (395): 34 Pat 324 (DB) * AIR 1949 Pat 510 (511) (DB) ° AIR 1938 Bom 291 (294) ° AIR 1930 Cal 579 (581): 57 Cal 371 (DB).

(4) Where A sues B for rent and B contends that C and not A is entitled to the property and C is thereupon impleaded as a party or C himself intervenes as a person claiming title and the question of title as between A and C is clearly raised and decided, the decision will operate as res judicata between the parties. AIR 1948 Pat 130 (133) (DB) ° ('78) 3 Cal 145 (147) (FB).

(5) Suit for rent — Defendant claiming title in himself — Decision on issue of title will operate as res judicata. ('88) 15 Cal 756 (761): 15 Ind App 97 (PC) ° ('06) 10 Cal WN 820 (822) (DB) * ('11) 12 Ind Cas 9 (10) (Cal).

(6) In every suit for rent, or for settling the rent, the question of the existence or non-existence of relationship of landlord and tenant or of the nature of the tenancy is directly and substantially in issue and

**Section 11 — Note 13 (contd.)**
the decision on such a question will be res judicata in subsequent proceedings between the parties. AIR 1949 Pat 510 (512) (DB) ° AIR 1951 Mad 630 (632) ° AIR 1921 All 348 (349): 43 All 191 (FB) * AIR 1925 Cal 427 (430) (DB) ° AIR 1938 Nag 195 (197): ILR (1940) Nag 181.

(7) In a suit for recovery of rent for one year the question was whether the landlord was entitled to claim the market-value of the paddy rent or the amount fixed in the lease-deed. It was held that the decision on the question operated as res judicata on the identical question in a subsequent suit for rent for another year. ('46) 50 Cal WN 473 (476).

(8) Earlier suit between parties — Agreed rent held to be Rs. 50 per month — Later suit for ejectment under S. 3, U. P. (Temporary) Control of Rent and Eviction Act between same parties — Finding in earlier suit as to rent would be binding on parties. 1965 All WR (HC) 161: 1965 All LJ 249.

**14. Suits for recurring liability.**—(1) In judging whether the decision in a previous litigation operates as res judicata or not in a later suit covering the claim for subsequent years, the test is whether it decided a general principle that is applicable to the later years also or whether it was particular or special to that particular year. AIR 1957 Andh Pra 1002 (1004). (Claim for compensation for archaka service.)

(2) Where the liability of a tax for a particular year is considered and decided in considering the question whether the decision for that particular year operates as res judicata in respect of the liability for a subsequent year it may be necessary to distinguish between decision on questions of law which directly and substantially arise in any dispute about the liability for a particular year and questions of law which arise incidentally or in a collateral manner. AIR 1964 SC 1013 (1018, 1020): (1963) Supp 1 SCR 172.

(3) In a suit for rent involving an issue as to the plaintiff's right to receive rent for a particular period, the decision on the plaintiff's right to receive rent will be res judicata so far as the period actually sued for is concerned but will not be res judicata in a suit for rent for a subsequent period. AIR 1954 Assam 177 (182): ILR (1953) 5 Assam 489 (DB) ° AIR 1942 Pat 323 (324) (DB) ° AIR 1930 Pat 585 (586, 587): 9 Pat 674 (DB) ° AIR 1968 Pat 63.

(4) Where in a suit for arrears of rent brought by one co-sharer alone the defendant raises the statutory bar under S. 246 (1), U. P. Tenancy Act (1939), the mere fact that the plaintiff co-sharer suing alone had obtained decrees for arrears of rent for certain years would not be sufficient to enable the plaintiff to found a plea of constructive res judicata against the defendant. AIR 1960 All 519 (521).

(5) Suit for rent for particular period — Issue as to plaintiff's title to receive rent generally for whole period — Decision on operates as res judicata in suit for subsequent period. ('48) ILR (1948) 2 Cal 284 (289) (DB) ° AIR 1930 Pat 585 (587): 9 Pat 674 (DB) * AIR 1929 All 29 (30, 31).

(6) A decision in a suit in which the issue was with reference to the plaintiff's right to receive rent for a particular period only may be presumptive evidence of the rent of future years though such evidence may be rebutted by other evidence showing change of circumstances. AIR 1942 Pat 323 (324) (DB) ° ('07) 5 Cal L Jour 92 (93) (DB) ° AIR 1922 Pat 213 (214) * AIR 1927 Mad 842 (843, 844) (DB).

(7) A decision in a suit for melwaram of one fasli would not estop the defendant, when sued for the melwaram for subsequent years, from contending that he was not in possession of the lands in respect of which the melwaram is claimed. ('04) 14 Mad L Jour 379 (392) (DB).

(8) A decree for rent in a previous suit will not bar an issue as to relationship of landlord and tenant between the same parties in subsequent suit for rent if the old relationship of landlord and tenant has ceased to exist by reason of the holding being sold in execution of the previous decree for rent. AIR 1944 Cal 42 (43, 44) (DB).

(9) A decree in previous suit awarding mesne profits up to the date of that suit cannot be res judicata upon the question of mesne profits for the subsequent period. AIR 1954 Orissa 202 (203): ILR (1954) Cut 232 ° AIR 1939 All 52 (54) * 1966 All LJ 748: ILR (1967) 1 All 43.

(10) Held, that the mesne profits decree would attract the principles of res judicata so far as the quantum of the profits and the period for which they were decreed were concerned but the decree would not affect the essential nature of the rights between the parties. ('57) 23 Cut LT 301.

(11) Preliminary decree for possession directing enquiry into mesne profits from institution of suit till delivery of possession — Judgment-debtor not precluded from contending in appeal from final decree that mesne profits could not be awarded for period exceeding three years from date of decree — Neither S. 11 nor S. 97 applies. AIR 1965 SC 1325 (1330): (1965) 2 SCR 661. (AIR 1959 Andh Pra 607, Reversed.)

(12) Where in a previous suit for arrears of royalty of a mining lease interest has been decreed as damages in the particular circumstances of that suit, it cannot operate as res judicata in a subsequent suit for arrears for a later period. AIR 1943 Pat 327 (345): 22 Pat 220 (DB).

(13) The right to sue for ejectment of an annual tenant accrues every year and so the withdrawal of a previous suit for ejectment does not bar a subsequent suit for ejectment

**Section 11 — Note 14** (contd.)
against the same party on a subsequent cause of action. AIR 1926 All 34 (34).

(14) Dismissal of a suit for enhancement of rent is no bar to the filing of a fresh suit for enhancement of rent in a subsequent year. ('15) 31 Ind Cas 866 (866) (DB) (U P B R).

(15) Where a suit for ejectment is dismissed for failure to serve a proper notice to quit on the tenant, it will be res judicata on the question of the landlord's title in a subsequent suit for ejectment, if the first suit decided the question of title. AIR 1932 Bom 484 (486).

(16) Previous suit relating to octroi duty for a period different from the one in present suit — Exemption certificates in previous suit relating to period covered by that suit — Decision as to legality of those certificates in earlier suit not res judicata in the present suit, though both suits arose out of the same contract. (1962) 64 Pun LR 291.

**15. Suits for maintenance.**— (1) A suit for arrears of maintenance for a particular period will not bar a suit for arrears of maintenance for a different period. ('50) 1950 All L Jour 168 (171) (DB) * ('03) 27 Bom 418 (424) ° AIR 1929 Mad 545 (561) (DB).

(2) Where the right to maintenance is in issue in the former suit, a subsequent suit as to such right will be barred. AIR 1943 Oudh 338 (346): 18 Luck 683 (FB) ° ('12) 14 Ind Cas 463 (465) (PC).

(3) Rate of maintenance fixed by a decree in previous suit is no bar to a suit for maintenance at an enhanced rate for a different period under altered circumstances. ('51) ILR (1951) Bom 652 (656) * AIR 1914 Sind 22 (23): 8 Sind LR 306 ° ('99) 22 Mad 175 (178) (DB).

(4) Where there is a decree merely declaring an annual right to maintenance, a suit to enforce such right will lie. ('84) 7 Mad 80 (82).

(5) A previous decision by the District Munsiff's Court in a maintenance suit that the husband had abandoned his wife and therefore the latter was entitled to maintenance does not operate as res judicata in a subsequent petition for judicial separation filed by the husband under S. 10, Hindu Marriage Act (1955). AIR 1963 Andh Pra 158 (159): (1962) 2 Andh WR 259.

**16. Suits relating to rate of rent or area.**— (1) A decree for rent for a particular period may not be conclusive as to the rate of rent payable for successive periods of the same tenancy. AIR 1949 Oudh 80 (83): 23 Luck 224 ° ('10) 6 Ind Cas 860 (861) (Cal) * AIR 1926 Cal 767 (771) (DB) ° AIR 1929 Mad 673 (674), 675).

[But see ('32) 1932 Mad WN 639 (640).]

(2) Decision on issue in the former suit as to the rate of rent for the whole period of the lease, is res judicata in a subsequent suit for rent. AIR 1941 Oudh 259 (260) ° AIR 1926 Cal 698 (700, 701) (DB) ° ('12) 16 Ind Cas 447 (447, 448) (DB) (Cal).

(3) Question as to annual rate of rent under contract directly and substantially in issue in previous suit — Decision on is res judicata in a suit for subsequent period. AIR 1940 Cal 588 (589) ° ('05) 1 Cal L Jour 248 (255) ° AIR 1923 Cal 361 (361, 362) (DB).

(4) Decision as to area for which rent is payable under the contract of tenancy is res judicata in subsequent suit for rent for remaining period of lease. AIR 1926 Cal 672 (676) (DB) ° AIR 1914 Mad 399 (414): 37 Mad 70 (FB) * AIR 1938 Pat 306 (307): 17 Pat 451 (FB).

(5) Decision on plaintiff's right to claim 'jodi' under the contract of tenancy will be conclusive on the point in subsequent proceedings. AIR 1925 Mad 378 (379).

**17. Ex parte decree.**— (1) In considering whether an ex parte decree is res judicata in a subsequent suit and to what extent, it is necessary to ascertain precisely what matters were involved in such decision. ('11) 12 Ind Cas 329 (330) (Oudh) * AIR 1966 Andh Pra 210 (211): (1964) 2 Andh WR 219. (Preliminary decree — Defendant remaining absent though summons issued — Ex parte decree for sale of land offered as security for loan advanced — Land so offered inalienable under S. 5, Madras Hereditary Village Offices Act, 3 of 1895 — Application for final decree by plaintiff — Defendant raising plea of inalienability of land — Held, he was barred by res judicata.)

(2) In order that a judgment or order passed ex parte may, on the ground of res judicata or on principles analogous to res judicata bar the hearing of a question or issue in a subsequent proceeding or at a subsequent stage of the same proceeding, it is necessary that the pleading and the prayer that led to the passing of the judgment or decree should give express notice to the opposite party that the question or issue would or might be decided by the Court which deals with the matter. AIR 1958 Mad 463 (464).

[See also AIR 1961 Mad 220 (222): (1960) 2 Mad LJ 479 (DB). (Order of attachment before judgment passed ex parte without hearing defendant — Subsequent application under S. 95 Civil P. C. not barred).]

(3) An ex parte decree will operate as res judicata on all grounds of attack in respect of the actual claim made and all matters inconsistent with the plaintiff's claim which might and ought to have been raised by the defendant. AIR 1953 SC 33 (40): 1953 SCR 154 ° AIR 1955 Hyd 232 (233): ILR (1955) Hyd 599 (DB) * ('55) ILR (1955) 1 Cal 122 (123) ° AIR 1954 Cal 506 (510) (DB) * AIR 1953 Hyd 237 (237): ILR (1952) Hyd 57 (DB) ° AIR

**Section 11 — Note 17 (contd.)**

1950 All 488 (489) * AIR 1949 Pat 197 (206): 26 Pat 717 (DB) ° AIR 1948 Bom 232 (233): ILR (1948) Bom 145 (DB) * AIR 1947 All 147 (149): ILR (1947) All 186 (DB) ° AIR 1929 All 346 (346) * AIR 1914 Lah 390 (392): 1915 Pun Re No. 12 (DB) * ('11) 9 Ind Cas 363 (364) (DB) (Cal) ° ('09) 2 Ind Cas 11 (12, 13) (Cal) * ('04) 31 Cal 79 (82) (DB) ° AIR 1920 Cal 814 (815). (Suit for enhancement of rent — Rate of rent is necessarily in issue.) ° ('34) AIR 1934 Nag 33 (34). (Mortgage suit — Some defendants ex parte — Such defendants can plead paramount title in subsequent suit.) * (1968) 2 Andh WR 522 ° 1967 All WR (HC) 827 (828) * AIR 1966 Andh Pra 210: (1964) 2 Andh WR 219 * 1962 Jab LJ 447 ° AIR 1964 Orissa 107 (110, 111): 30 Cut LT 262 ° AIR 1963 Pat 398 (400). (Suit filed in Bombay under provisions of O. 37 — Suit decreed ex parte — Ex parte decree set aside but defendant ordered to deposit sum in Court — On failure to deposit sum ex parte decree passed again — It operates as res judicata.) ° AIR 1959 Pat 31 (33): 1958 BLJR 733 (DB) * AIR 1959 Raj 127 (129, 130, 131): 1959 Raj LW 454 * (1968) 2 Andh WR 522 (DB). (Ex parte decree is decree on merits.)

(4) A sues B for rent for a particular period and mentions the rate at which it is claimed. B remains ex parte. The decision will operate as res judicata on the existence of the relationship of landlord and tenant during the period. AIR 1927 All 552 (553): 49 All 658 (DB) ° AIR 1936 Pat 556 (557) (DB).

[But see AIR 1914 Cal 849 (850) (DB).]

(5) An ex parte decree for rent cannot be ordinarily res judicata on the question of rate of rent unless it is necessary to decide that question. AIR 1947 Mad 299 (300) ° AIR 1944 Cal 118 (119): ILR (1943) 1 Cal 430 ° ('89) 16 Cal 300 (306) (FB). (Overruling 3 Cal 383 (FB).) ° AIR 1947 Cal 21 (23) * ('43) 47 Cal WN 362 (364) ° AIR 1926 Cal 767 (769) (DB).

(6) Ex parte decree for rent — Question whether it was necessary or material to decide the rate of rent must be determined with reference to the special facts of each case. AIR 1947 Mad 299 (300) ° AIR 1929 Mad 673 (674).

(7) Where in the previous suit the only question involved on the construction of a document was whether the defendant was entitled to rent and if rent was not paid he was entitled to possession, the decision in the suit cannot operate as res judicata on the question whether the document is an outright sale or mortgage. AIR 1944 Mad 237 (238).

(8) Section 11 is no bar to a suit to set aside an ex parte decree on the ground of fraud. AIR 1949 All 198 (201): ILR (1949) All 320 * AIR 1960 Ker 38 (39): 1950 Ker LT 516.

(9) Order of dismissal of application to set aside ex parte decree though not appealed against is no bar to suit to set aside ex parte decree on ground of fraud. AIR 1955 Him Pra 63 (63) ° AIR 1957 Cal 242 (243) (DB) ° ('02) 29 Cal 395 (399, 400): 29 Ind App 99 (PC) * ('01) 28 Cal 475 (478) (PC) ° ('97) 24 Cal 546 (549, 550) (DB) ° 1962 All WR (HC) 72): 1962 All LJ 84.

(10) Where the plea of fraud is set up in the application to set aside ex parte decree and is adjudicated upon, a suit on the same would be barred. AIR 1953 Punj 118 (119): ILR (1953) Punj 609 (DB) * AIR 1924 Pat 238 (239): 2 Pat 833 (DB) ° AIR 1924 Rang 119 (122): 1 Rang 500 ° AIR 1969 Pat 228 (230, 231) (DB).

(11) When the ground for relief in the appeal from the ex parte decree is the same as the one in the application for setting aside the ex parte decree which is dismissed, the matter is concluded by the order in the application. AIR 1953 Trav-Co 416 (417).

(12) Where an application under O. 9, R. 13 is allowed to be withdrawn without any adjudication, a subsequent suit to set aside ex parte decree on the ground of fraud independent of and not merely confined to the service of summons is not barred. AIR 1948 Pat 33 (34).

(13) The question as to whether, when ex parte decree in a subsequent suit is set aside, the original suit in which that decree was obtained is revived or not depends upon the pleadings, the issues and the actual decision in the subsequent suit. AIR 1961 Pat 88 (90).

(14) If the plaintiff positively asserts that the defendant is neither an asami nor has he any other right in the land in suit and wants a declaration to that effect and if the defendant in spite of this challenge keeps away from the contests and allows an ex parte decree to be passed against him, the decree operates as res judicata. 1964 All WR (HC) 252.

**18. Former suit.**— (1) Former suit means previously decided suit though in fact instituted subsequently. ('42) 46 Cal WN 702 (703) (DB) ° AIR 1957 Andh Pra 992 (993) * AIR 1940 All 171 (173) (DB) ° AIR 1929 Pat 173 (176): 8 Pat 107 (DB) ° AIR 1923 Cal 496 (499) (DB) ° AIR 1967 All 442 (444): 1967 All LJ 32. (Suit for ejectment of tenants — Pending this suit real owner establishing her title to same suit property — Plaintiff's suit for ejectment is barred by res judicata.) * AIR 1964 All 82 (83) ° AIR 1964 Ker 244 (248): 1964 Ker LT 252.

(2) A final decision given during the pendency of appeal or revision in another suit can operate as res judicata on the question at issue in the pending appeal or revision. AIR 1923 Cal 496 (499) (DB) ° 1959 Ker LT 1124: 1959 Ker LR 1369.

**Section 11 — Note 18 (contd.)**

[See also AIR 1946 Mad 509 (510): ILR (1946) Mad 566 (DB).]

(3) A decision given pending a suit between the same parties will operate as res judicata for the purpose of the suit. AIR 1949 Bom 367 (373): ILR (1949) Bom 480 (DB).

(3A) In suit for share in estate left by deceased, question of determination of assets of deceased does not arise at the stage of preliminary decree and is not res judicata at subsequent stage. AIR 1961 Andh Pra 335 (337, 338): (1961) 1 Andh WR 241 (FB). (AIR 1938 PC 169 and 16 Dec. LR 194, Rel. on.)

(4) Expression 'former suit', distinctly shows that there must be two suits or proceedings and that the section has no application to orders passed at different stages of the same or simple proceeding, though such orders are binding in all subsequent stages of the same matter on general principles of res judicata. AIR 1943 Cal 1 (9): ILR (1942) 2 Cal 268 (DB) ° AIR 1958 All 54 (58) (DB) ° ('84) 6 All 269 (274): 11 Ind App 37 (PC) * AIR 1968 Raj 81 (84): 1968 Raj LW 62 * AIR 1959 Ker 194 (196): 1959 Ker LT 1 (DB). (Award of interest — Question raised and decided in suit — Cannot be raised in execution.)

(5) Even when there are two suits, a decision given simultaneously cannot be a decision in the former suit. 1968 Raj LW 62: AIR 1968 Raj 81. (AIR 1956 Orissa 68, Dissented from.) ° (1963) 1 Ker LR 400.

**19. "Suits", meaning of.—** (1) The word 'suit' in S. 11 means proceedings in action in Courts of the first instance as distinguished from proceedings in Appellate Courts, though the general principles of res judicata may apply to appellate proceedings. AIR 1947 Nag 248 (251): ILR (1947) Nag 691 (DB) * AIR 1927 Lah 289 (294, 310): 8 Lah 384 (FB) ° ('89) 11 All 148 (159) (FB) * 1959 Ker LT 1124: 1959 Ker LR 1369.

(2) If it is possible to treat the entire cause of action upon which the later suit is founded as divisible and if in the earlier suit one of the component parts of the cause of action was relied on, then the previous decision will stand as a bar to the extent of the matter involved in the earlier suit. AIR 1945 Bom 45 (49) (DB) * AIR 1943 Oudh 338 (346): 18 Luck 683 (FB) ° AIR 1935 Cal 792 (797) (DB) ° AIR 1938 Nag 401 (405): ILR (1938) Nag 496 (DB) * (1959) 1 Mad LJ 346.

(3) The word 'suit' means a valid suit. A suit against a dead man is not a valid suit at all and cannot be regarded as a suit for purposes of Section 11. ('07) 9 Bom LR 274 (279).

[See however AIR 1942 Pat 226 (230): 20 Pat 841 (DB).]

**20. Interlocutory orders.—** (1) An order on an interlocutory application at one stage of the case is binding in all subsequent stages of the same proceeding under general principles of law. AIR 1952 Trav-Co 316 (317): ILR (1951) Trav-Co 639 (DB) ° AIR 1951 Nag 212 (214): ILR (1950) Nag 690 ° AIR 1924 PC 202 (206) * AIR 1925 PC 280 (287): 52 Ind App 418: 5 Pat 135 ° AIR 1921 Cal 699 (701) (DB) * AIR 1963 Punj 187 (191, 192): 65 Pun LR 236 (DB) ° 1963 BLJR 779 (DB).

[But see AIR 1924 All 804 (805) (DB).]

(2) As the interlocutory orders do not impinge upon the legal rights of parties to the litigation the principles of res judicata does not apply to the findings on which these orders are based, though if applications were made for relief on the same basis after the same has once been disposed of, the Court would be justified in rejecting the same as an abuse of the process of Court. AIR 1964 SC 993 (999 to 1003): (1964) 5 SCR 946.

(3) Order on interlocutory application leaving matter open for reconsideration at later stage cannot operate as res judicata. AIR 1925 Cal 1010 (1011) (DB) ° ('86) 8 All 172 (176, 177) (FB) ° (1968) 72 Cal WN 805: (1968) 1 Com LJ 311 (DB). (Order under O. 39, R. 1.)

(4) Order on interlocutory application not an adjudication but a mere expression of opinion not necessary for disposal of application — No res judicata. AIR 1926 Mad 162 (163): 48 Mad 688 (DB).

(5) Claim of privilege of document upheld by trial Court and affirmed on appeal by Judicial Commissioner by an interlocutory order — Appeal by special leave to Supreme Court against final decree in suit — Plea that Courts below were in error in upholding claim of privilege is open to appellant and is not barred by res judicata. AIR 1964 SC 1658 (1661): (1965) 1 SCJ 243.

(6) Where the High Court in an appeal against preliminary decree in a partition suit directed that the final decree proceedings shall go on but there shall be stay restricted only to the passing of the final decree, every step taken by trial Court up to the passing of the final decree will be binding on the parties. AIR 1963 Mad 428 (430, 431): (1963) 2 Mad LJ 220 (DB).

(7) Suit for partition — Decree setting aside certain alienations subject to payment of some amount to alienees within four months — Payment not deposited in time — Application to extend time dismissed — Subsequent application for making decree final on depositing the amount — Previous order held did not operate as res judicata order being one in an interlocutory proceeding could not be considered as res judicata in an appeal against the final decree. 1963 Mys LJ (Sup) 81 (86) (DB).

(8) Interlocutory application rejected by trial Court but allowed by High Court in revision — Special leave to appeal to

**Section 11 — Note 20 (contd.)**
Supreme Court refused — Suit decreed — Appeal against decree before High Court —Order in revision held had become final and could not be challenged before High Court in appeal. AIR 1964 Madh Pra 288 (293, 294): 1964 Jab LJ 736.

**21. Execution proceedings.**— (1) Decision in execution of one decree can operate as res judicata in execution of another decree if other conditions of S. 11 are satisfied. ILR (1963) Cut 85. (Fact that party affected had no necessity to file an appeal against the order does not prevent the operation of res judicata which applies to execution proceedings also.) ° AIR 1954 Bom 139 (141): ILR (1953) Bom 991 (DB) ° AIR 1948 Pat 192 (194) (DB).

(2) Section 11 does not in terms apply to execution proceedings in the same suit. AIR 1954 Mad 1 (3) * ('84) 6 All 269 (274). 11 Ind App 37 (PC) ° AIR 1924 Pat 265 (265): 2 Pat 771 (DB) ° AIR 1926 All 71 (73): 48 All 201 (DB) * AIR 1937 Mad 511 (513) (DB) ° AIR 1931 Mad 381 (396) (DB) ° ('82) 8 Cal 51 (61): 8 Ind App 123 (PC).

(3) General principles of res judicata apply to execution proceedings. AIR 1949 PC 302 (304) * AIR 1969 Bom 84 (87): 70 Bom LR 373. (Previous order of High Court dismissing notice under O. 21, R. 16 on ground that application was not made to Court which passed decree — No appeal filed against order — Order operates as res judicata.) * ILR (1963) 2 All 976: 1963 All LJ 832 ° AIR 1962 Andh Pra 129 (130) ° AIR 1960 Andh Pra 631 (632, 633): (1960) 1 Andh WR 417 (DB) * AIR 1960 Orissa 197 (199): 26 Cut LT 311 ° AIR 1959 Pat 319 (322, 323): 1959 BLJR 191 (DB) ° AIR 1958 Andh Pra 1 (3): ILR (1957) Andh Pra 326 (FB) * AIR 1954 Bom 139 (141): ILR (1953) Bom 991 (DB) ° AIR 1953 Mad 929 (930) (DB) ° AIR 1942 Lah 153 (158): ILR (1942) Lah 559 (FB) ° AIR 1941 Mad 440 (441) (DB) ° AIR 1936 All 21 (23): 58 All 313 (FB) ° AIR 1937 Mad 511 (514) (DB) ° AIR 1969 Orissa 147 (148, 149): 35 Cut LT 181.

[But see AIR 1932 All 392 (393) (DB).]

(4) Final decision between the parties in execution proceedings operates as res judicata in a subsequent suit or in subsequent execution proceedings or at a subsequent stage of the same execution proceedings. AIR 1969 Madh Pra 35 (38) : 1969 MPLJ 17 (DB) * AIR 1968 Pat 77 ° ILR (1967) 3 Mad 408 (451) ° 1966 Jab LJ 232 (237) ° AIR 1965 Tripura 1 (5) ° AIR 1961 All 436 (437) : 1962 All WR (HC) 94. (Objection to attachment under S. 60 (1) (c).) ° AIR 1961 Orissa 86 (87). (Objection petition under S. 47 by judgment-debtor dismised for default in presence of decree-holder and restoration petition also rejected — Fresh objection petition on self-same ground barred by priniciple of res judicata. AIR 1950 Pat 354, Diss. from.) * AIR 1960 Orissa 197 (199): 26 Cut LT 311 (FB). (Objection as to jurisdiction.) ° 1959 Pat 319 (322, 323): 1959 BLJR 191 (DB) ° (1957) 23 Cut LT 301 * (1955) Ker LT 574 ° AIR 1954 Bom 139 (144): ILR (1953) Bom 991 (DB) ° AIR 1957 Andh Pra 207 (210): ILR (1956) Andhra 66 (DB) ° AIR 1957 Punj 92 (95): ILR (1957) Punj 938 * ('58) 1958-1 Andh WR 313 (315) ° AIR 1950 Mad 2 (6): ILR (1950) Mad 39 (DB) ° AIR 1922 PC 341 (344) * AIR 1954 Bom 273 (277): ILR (1954) Bom 873 (DB) ° AIR 1954 Pat 502 (506) (DB) ° AIR 1942 Bom 134 (136): ILR (1942) Bom 190 * AIR 1942 Lah 87 (88) (DB) ° AIR 1924 All 34 (37): 45 All 735 (DB) ° ('84) 6 All 269 (274): 11 Ind App 37 (PC) * AIR 1956 Hyd 7 (10): ILR (1955) Hyd 797 (FB) ° AIR 1954 Mad 237 (239) (DB) ° AIR 1953 Pat 242 (245) (DB) * AIR 1952 Trav-Co 316 (317): ILR (1951) Trav-Co 639 (DB).

(5) A decision in claim proceedings will not operate as res judicata in proceedings in execution of another decree. AIR 1948 Mad 118 (119) ° (1969) 1 Mad LJ 386: 81 Mad LW 523.

(5A) A person who omits to prefer a claim under O. 38, R. 8 Civil P. C. does not run the risk of being prevented from raising an objection under S. 47. His failure to do so does not entail the penalty contemplated by principle underlying S. 11 Expln. IV C. P. C. AIR 1964 Andh Pra 99 (100, 101) (DB).

(6) A decision construing a decree in a particular way will be conclusive in all subsequent applications for execution. AIR 1949 Mad 62 (64) (DB) ° ('85) 7 All 102 (106) (PC).

(7) A claim proceeding under O. 21, R. 58 is not a suit on a proceeding analogous to a suit. An order under O. 21, R. 58 does not operate as res judicata. It is because of O. 21, R. 63 that the order becomes conclusive. AIR 1967 SC 1390 (1392, 1393): (1967) 3 SCR 125. (AIR 1923 Mad 562, Overruled AIR 1922 PC 341, Overruled on point of applicability of O. 21, R. 58).

[But see AIR 1929 Lah 470 (470).]

(8) Claim proceedings with respect to attached properties — Earlier claim for house alone — On dismissal another petition covering all items filed — House being same property — In both proceedings claim for it held barred on general principles of res judicata — But principles of constructive res judicata held did not apply to other items because any reference to them was not necessary to support claim for house in earlier proceedings. (1960) 2 Orissa JD 359 (362).

(9) Decision that an execution application is or is not barred by limitation is conclusive in subsequent execution proceedings. AIR 1946 Sind 103 (107): ILR (1945) Kar

**Section 11 — Note 21 (contd.)**

445 ° AIR 1921 PC 23 (24): 48 Ind App 45 * ('82) 8 Cal 51 (59, 60): 8 Ind App 123 (PC) ° AIR 1926 Oudh 291 (293): I Luck 171 (DB) ° AIR 1932 Sind 116 (119): 26 Sind LR 91 (DB).

(10) Execution proceeding — Executing Court after hearing parties holding that execution was not barred by limitation — Order not challenged — Execution case transferred to another Court — Subsequent objection on ground of limitation is barred by res judicata. AIR 1955 Trav Co 191 (191) (DB).

(11) It is only when the point of limitation is concluded by proceedings in a previous execution that the judgment-debtor is not allowed to raise the question of limitation in a subsequent execution of the decree. AIR 1920 Pat 570 (574) (DB) * AIR 1930 Pat 330 (331): 9 Pat 306 (DB) ° AIR 1954 Pat 502 (506) (DB).

(12) Where it is held expressly or impliedly that an application for execution is maintainable and execution is directed to proceed, the decision will be res judicata although the application is subsequently dismissed for non-prosecution. AIR 1950 Hyd 15 (17): ILR (1951) Hyd 84 (DB) ° AIR 1943 Mad 449 (451): ILR (1943) Mad 804 (DB) * ('13) 10 Ind Cas 359 (360, 361) (DB) (Cal) ° AIR 1928 Mad 1052 (1953, 1954) (DB).

(13) The principle of constructive res judicata is applicable to execution proceedings. ('53) AIR 1953 SC 65 (72): 1953 SCR 377 ° AIR 1968 Orissa 183 (185, 186): 34 Cut LT 758 * AIR 1968 Pat 270. (The principle of constructive res judicata applies to an execution proceeding under S. 144 in respect of a matter which was decided expressly or by implication in a proceeding.) ° AIR 1967 Delhi 119 (120) ° AIR 1967 Orissa 38 (38): ILR (1964) Cut 494 * AIR 1964 Orissa 107 (110, 111): 30 Cut LT 262 ° AIR 1963 Guj 1 (2, 3, 5, 6): (1962) 3 Guj LR 1032 ° AIR 1962 Pat 72 (76, 77, 79, 86): 1962 BLJR 110 (FB). (Statutory provision making certain transaction void — Plea of transaction as to whether the sale of the judgment-debtor's land was prohibited under a valid statute, not raised by party at proper stage is void — Party will be barred from raising the plea subsequently — I Pat LJ 33; AIR 1916 Pat 183; 34 Ind Cas 733 and ILR 7 Pat 178; AIR 1928 Pat 227; 107 Ind Cas 145 and ILR 14 Pat 52: AIR 1934 Pat 666; 153 Ind Cas 183 (FB), Overruled.) * AIR 1959 Ker 206 (207): 1958 Ker LT 1021 (DB). (The extension of the principle of constructive res judicata to matters in execution must be cautiously undertaken.) ° AIR 1959 Pat 319 (322, 323): 1959 BLJR 191 (DB) ° AIR 1958 Andh Pra 1 (3): ILR (1957) Andh Pra 326 (FB) * 1958 Andh LT 809. (The objection which could be taken and had not been taken in a suit would be res judicata and could not be agitated in execution proceedings.) ° 1958 Ker LT 357 ° ('58) 24 Cut LT 451 * AIR 1957 Assam 127 (129) (DB) ° AIR 1957 Punj 92 (95): ILR (1957) Punj 998 * (1955) 8 Sau LR 401.

(14) Failure to raise all his objections to application in execution which ought to have been raised by the judgment-debtor would be deemed to have been impliedly decided against him. 1968 BLJR 602: AIR 1969 Pat 21 * AIR 1968 Andh Pra 94 (97): 1957-1 Andh WR 171 ° ILR (1967) 2 Ker 128: 1967 Ker LT 806 * AIR 1967 Pat 124 ° 1967 BLJR 606 (DB) ° (1966) 68 Pun LR 791 * AIR 1965 Ker 16 (17): 1964 Ker LT 1101 ° AIR 1965 Orissa 2 (3) ° AIR 1965 Pat 86 (87): 1964 BLJR 885 * AIR 1965 Raj 155 (158): 1964 Raj LW 59 ° AIR 1965 Tripura 1 (5) * 1964 BLJR 617. (Objection to execution on basis of execution petition — Objection not raised before passing of order under R. 23 (1) — Objection is barred by res judicata.) * 1963-2 Mys LJ 135 (DB). (No objection to attachment and sale of the decree as being in contravention of R. 53 of Order 21 raised — Sale confirmed — Defendants are estopped from raising objection to sale of the decree by principle of res judicata.) ° 1963 BLJR 151 ° AIR 1962 Orissa 54 (55, 59, 60): ILR (1961) Cut 356 (DB) * 1961 Jab LJ 450: 1961 MPLJ 148 ° AIR 1960 Assam 16 (17): ILR (1959 11 Assam 95 ° AIR 1960 Raj 280 (282): 1960 Raj LW 149 (DB) * AIR 1959 Pat 31 (33, 34): 1958 BLJR 733 (DB) ° AIR 1956 Pat 4 (7): 34 Pat 746 ° AIR 1955 Bom 239 (239): ILR (1955) Bom 546 ° AIR 1955 Pat 423 (424) (DB) ° AIR 1953 Cal 765 (766) (DB) ° AIR 1952 Punj 300 (300) (DB) ° AIR 1951 Mad 844 (850) (DB) * AIR 1951 Mys 118 (119): ILR (1952) Mys 24 (DB) ° AIR 1950 Pat 465 (467): 29 Pat 732 (DB) ° AIR 1940 Pat 251 (251) (DB) * AIR 1937 Mad 511 (514) (DB) ° AIR 1931 Mad 381 (395) (DB) ° 1967 All WR (HC) 511. (Decree-holder in money suit purchasing half share of judgment-debtor's property and bringing suit for partition against other joint owner — No objection raised by judgment-debtor at any stage of execution proceeding — Suit by judgment-debtor for declaration that sale in execution of money decree was null and void, brought three days before delivery of half share in property to decree-holder. Held, that judgment-debtor's suit, even if it was recorded as application under S. 47, was barred under principle of constructive res judicata.)

(15) Where execution could not have been ordered without implied decision on objection raised, it would be barred by constructive res judicata. AIR 1937 Mad 511 (514) (DB) * AIR 1959 Pat 319 (322, 323): 1959 BLJR 291 (DB) ° AIR 1958 Pat 270.

(16) Objections that— (a) Decree is not executable. 1968 Ker LJ 360: 1968 Ker LT 447. (Objection that decree was nullity). ° AIR 1960 Orissa 197 (199): 26 Cut LT 311 (FB) * AIR 1959 Bom 221 (223): 60 Bom

**Section 11 — Note 21 (contd.)**

LR 715 ° AIR 1955 Bom 239 (239): ILR (1955) Bom 546 ° AIR 1954 Mad 1070 (1073, 1074) (DB) * AIR 1943 Mad 449 (451): ILR (1943) Mad 804 (DB) ° AIR 1922 All 27 (28): 44 All 350 (DB).

[But see AIR 1934 Pesh 64 (67) (DB) ° AIR 1935 Pesh 119 (121) (DB).]

(b) Application is barred by limitation. AIR 1966 Raj 44 ° ('65) 69 Cal WN 734. (AIR 1936 All 21 (FB) held no longer good law in view of AIR 1953 SC 65: 54 CWN 900 (DB).) ° AIR 1964 Madh Pra 285 (286): 1965 Jab LJ 835 ° AIR 1963 Andh Pra 409 (410, 412): (1963) 1 Andh WR 225 ° AIR 1960 Orissa 197 (199): 26 Cut LT 311 (FB) ° AIR 1960 Mys 193 (196, 197): 38 Mys LJ 27 (DB) ° AIR 1959 Ker 384 (385): 1958 Ker LT 1 * Madh Bha LJ 1952 HCR 587 ° AIR 1956 Hyd 7 (10): ILR (1955) Hyd 797 (FB) ° AIR 1957 Assam 127 (129) (DB) ° 1958-2 Mad L Jour 526 (527) (DB) ° AIR 1954 Cal 295 (297). (8 Cal 51: 8 Ind App 123 (PC); AIR 1921 PC 23: 48 Ind App 45; 10 Ind Cas 359 (Cal); AIR 1948 Cal 165: ILR (1948) 1 Cal 331 and AIR 1950 Cal 493: ILR (1951) 2 Cal 240, Rel. on; Contrary observations in AIR 1950 Cal 513, held obiter; AIR 1915 Cal 350 (DB) Held, no longer good law.) ° AIR 1952 Trav-Co 478 (478) (DB) ° ('52) ILR (1952) Madh B 274 (280) (DB) * AIR 1951 Assam 75 (76, 77): ILR (1950) 2 Assam 215 (DB) ° AIR 1951 Mad 844 (850) (DB) ° AIR 1950 Cal 493 (495): ILR (1951) 2 Cal 240 (DB) * AIR 1941 Mad 440 (443) (DB) ° AIR 1933 Cal 855 (856, 857) (DB).

[But see AIR 1959 Punj 521 (522) (DB) * AIR 1943 Oudh 385 (386).]

(c) Properties are not saleable. AIR 1962 Punj 379 (381): 64 Pun LR 383 (FB) ° AIR 1961 All 178 (180) ° AIR 1960 Mad 377 (382 to 385): 1960-2 Mad LJ 30 (FB) ° AIR 1954 Mys 41 (42): ILR (1953) Mys 406 ° AIR 1949 East Punj 94 (101): ILR (1949) East Punj 143 (FB) * AIR 1942 Lah 153 (158, 160): ILR (1942) Lah 559 (FB) ° ('40) 1940-2 Mad L Jour 487 (487) ° ('05) 27 All 684 (686) (FB) * AIR 1916 Bom 138 (139): 40 Bom 675 (678) (DB) ° AIR 1926 Mad 12 (14) (DB).

(d) Application is not one in accordance with law. AIR 1965 Raj 155 (158): 1964 Raj LW 59 ° AIR 1928 Cal 861 (862) (DB) * AIR 1921 Bom 260 (261): 45 Bom 952 (DB) ° ('91) 15 Bom 242 (244) (DB).

[But see AIR 1937 Mad 760 (762).]

(e) Executing Court has no jurisdiction. AIR 1953 SC 65 (71): 1953 SCR 377 ° AIR 1962 Ker 15 (16): 1961 Ker LT 448 * AIR 1961 Mys 54 (55): 38 Mys LJ 783 * AIR 1956 Pat 4 (7): 34 Pat 476.

[See also AIR 1961 All 287 (287). (Judgment-debtor can raise objection during execution that decree cannot be executed having been passed by Court having no jurisdiction even though he had not raised it during suit).]

(f) Application is not maintainable: Held was barred by constructive res judicata. AIR 1955 All 569 (572) (DB) * AIR 1942 Cal 369 (369) (DB) ° AIR 1942 Pat 68 (69) (DB) ° ('91) 13 All 564 (566, 568) (DB) * AIR 1929 Bom 279 (281) (DB) ° AIR 1934 Cal 472 (473) (DB) * AIR 1926 Nag 476 (478).

(17) Previous execution application filed after 12 years — No plea as to its being barred, raised — Subsequent execution application — Judgment-debtor is not precluded by doctrine of constructive res judicata from contending that this application is barred under S. 48. AIR 1963 Andh Pra 1 (5) (FB): (1962) 2 Andh WR 160. (AIR 1950 Hyd 15, Overruled.)

(18) Where the properties are admittedly not saleable in execution, the failure to raise objection as to non-saleability will not operate as a bar. AIR 1950 Pat 465 (469): 29 Pat 732 ° AIR 1955 Pat 423 (424) (DB) ° 1966 Cur LJ 921: ILR (1967) 1 Punj 821 (DB) ° 1964 BLJR 550 (DB).

(19) Where the decision has not become final an objection at a subsequent stage would not be barred. AIR 1935 Cal 306 (307) (DB).

[See also AIR 1954 Cal 295 (297).]

(20) An objection by the judgment-debtor would not be res judicata unless there is an express or implied decision overruling the objection or unless the prior execution proceeding had fructified in partial satisfaction of the decree. AIR 1953 All 139 (140, 141) (DB) ° AIR 1957 Raj 398 (399): ILR (1957) 7 Raj 134 * AIR 1951 All 398 (400) (DB) ° AIR 1936 All 21 (29): 58 All 313 (FB) ° AIR 1937 All 446 (448) (DB) * AIR 1939 Rang 245 (247): 1939 Rang LR 152 ° AIR 1939 Rang 296 (297, 298): 1940 Rang LR 82 (DB) * AIR 1942 Oudh 219 (220): 17 Luck 449 (DB) ° AIR 1951 Pepsu 96 (98, 99): 2 Pepsu LR 314 ° AIR 1952 Madh B 9 (11).

[But see AIR 1944 Mad 420 (420) * AIR 1944 Mad 193 (194) ° AIR 1941 Mad 440 (443) (DB) ° ('52) ILR (1952) Madh B 274 (288) (DB).]

(21) Although an objection may not be barred by res judicata, the judgment-debtor may be precluded by estoppel from raising such objection. AIR 1936 All 21 (32): 58 All 313 (FB). (Per Niamatullah J.)

(22) Decree as passed not providing that property will be sold subject to any encumbrance — Still property sold subject to encumbrance in favour of defendant without specific notice to judgment-debtor — Order in execution cannot operate as res judicata. AIR 1966 Mad 430 (432): (1966) 2 Mad LJ 448.

(23) Judgment-debtor in response to notice under O. 21, R. 22 showing cause against decree-holder's right to execute decree — Objection overruled — Judgment-debtor can subsequently raise objection as to

**Section 11 — Note 21** (contd.)

mode of execution sought. AIR 1933 Lah 826 (826).

(24) An additional objection raised by the surety in the execution proceeding before any order is passed by the Court on her original objection is not hit by the principles of constructive res judicata. AIR 1962 Orissa 54 (55, 59, 60): ILR (1961) Cut 356 (DB).

(25) Where on receipt of the execution petition, the Court, instead of ordering notice under O. 21, R. 22, orders notice on the question of limitation to the judgment-debtors (instead of to the decree-holder in accordance with the practice prevailing in the State of Travancore), and, after the judgment-debtors had failed to raise at that stage the plea of limitation, the Court issues notice under R. 22 when the objection is raised, the failure to raise the plea of limitation on receipt of the earlier notice does not preclude the judgment-debtors from contending that execution was barred by limitation. 1963 Ker LJ 546: 1963 Ker LT 388.

(26) Judgment-debtor failing to show cause why he is not liable to be arrested — Ex parte decision adverse to him given by executing Court. Subsequent objection in the same proceedings by the judgment-debtor is barred. ('40) 42 Pun LR 374 (377).

(27) If a judgment-debtor fails to appear in answer to a notice under O. 21, R. 66 he cannot plead his status as an agriculturist on the date fixed for sale by the Court after issuing proclamation. AIR 1949 Bom 79 (79): ILR (1948) Bom 517.

(28) In order to apply doctrine of constructive res judicata to execution proceedings, it must be shown that party affected had clear notice of the nature of the claim made against him. 1963 BLJR 589 * 1962 Ker LJ 668: 1962 Ker LT 675 ° AIR 1960 Anlh Pra 631 (632, 633, 634): (1960) 1 Andh WR 417 (DB) ° AIR 1954 Mad 1 (3, 4, 5) * AIR 1952 Trav-Co 508 (509): ILR (1952) Trav-Co 358 (DB) ° AIR 1950 Cal 513 (514) (DB) ° AIR 1943 Bom 252 (254) (DB) ° AIR 1943 Mad 667 (669): ILR (1944) Mad 118 (DB) ° ('10) 5 Ind Cas 89 (91, 92) (DB) (Cal) ° ('10) 8 Ind Cas 22 (24, 25) (DB) (Cal) * AIR 1918 Mad 1167 (1172): 40 Mad 1016 (DB) * AIR 1969 Pat 251 (255) (DB).

(29) Constructive res judicata in execution — Party affected must have opportunity of contesting claims. AIR 1960 Andh Pra 631 (632, 633, 634): (1960) 1 Andh WR 417 (DB) * AIR 1943 Bom 252 (254, 255) (DB) ° ('06) 10 Cal WN 209 (212) (DB) * AIR 1916 All 42 (43) ° ('39) 43 Cal WN 374 (378) (DB) * ('11) 9 Ind Cas 213 (214) (DB) (Cal) ° ('94) 21 Cal 784 (788): 21 Ind App 89 (PC).

(30) Where notice of execution application is not served on judgment-debtor personally and the Court does not make an order declaring that the service is sufficient it cannot be held that the judgment-debtor has had an opportunity of contesting the claim. AIR 1950 Mad 341 (343) * AIR 1957 Trav-Co 40 (42): ILR (1956) Trav-Co 727 (DB) ° AIR 1942 Lah 153 (159): ILR (1942) Lah 559 (FB) ° AIR 1937 Mad 84 (87) (DB).

(31) Where the application is not one for execution of something which has been directed to be done by any decree or order so as ipso facto to carry information as to what the claim made or the relief prayed for is, notice to the judgment-debtor must specify the claim made. A notice without such specification is not 'due notice' and failure to object to the points mentioned in the application will not make the rule of constructive res judicata applicable. ('07) 30 Mad 255 (263) (DB) * AIR 1957 Trav-Co 40 (43): ILR (1956) Trav-Co 727 (DB).

(32) Notice of execution not indicating that the Court was going to decide any question regarding the settlement of the amount for which the decrees were executable and the properties liable to be sold in execution is not proper so as to make decision thereon binding on judgment-debtor. AIR 1924 Mad 518 (520) (DB) * AIR 1928 Mad 746 (758, 759) (DB).

(33) Notice of application for execution without apprising the judgment-debtor of the fact that interest not granted by the decree was claimed, is not a proper notice sufficient to make decision on those points binding on the judgment-debtor. ('06) 17 Mad L Jour 311 (312) (DB) ° ('05) 28 Mad 355 (357) (DB).

(34) Where a notice is for settlement of terms of the proclamation of sale, the judgment-debtor cannot be deemed, by absenting himself, to have attended and raised the question whether the property is that of the judgment-debtor. AIR 1950 Mad 341 (343) * AIR 1924 Mad 1 (5, 6): 46 Mad 768 (FB).

[But see ILR (1960) 10 Raj 510 (516).]

(35) Failure to raise objection in application under Order 21, Rule 66 — Failure cannot operate as bar from raising them in proceedings under Order 21, Rule 90. AIR 1965 Raj 42: 1964 Raj LW 560 (DB).

(36) Where judgment-debtor fails to appear in response to a notice under O. 21, R. 22 he cannot be precluded from contending that there has been a partial adjustment of the decree. AIR 1943 Bom 252 (254, 255) (DB) ° AIR 1963 Guj 1 (2, 3, 5 6): (1962) 3 Guj LR 1032. (Notice to judgment-debtor issued under O. 21, R. 22 — On his remaining absent, decree ordered under O. 21, R. 23 to be executed — No appeal preferred — Any contention against execution of decree is barred by res judicata.)

(37) If the judgment-debtor after service of notice under Order 21, Rule 22 fails to appear and plead that the application is barred by time and the execution is allow-

**Section 11 — Note 21 (contd.)**

ed to proceed, he is barred by res judicata. AIR 1967 Pat 124: ILR 44 Pat 87.

(38) Objection not taken on service of notice under Order 21, Rule 22, cannot be subsequently raised. AIR 1969 Pat 21.

(39) Where a judgment-debtor fails to appear in response to a notice under O. 21, R. 16 he is not precluded from questioning the assignee's right to proceed with execution of the decree by reason of any bar imposed by law. AIR 1933 Cal 919 (922): 60 Cal 1181 (DB).

(40) Application for transfer of decree for execution to another Court. Judgment-debtor on receiving notice is bound to prefer his objections to the executability of the decree and, if he fails to do so, cannot raise it in the Court to which the decree is transferred. AIR 1947 Mad 305 (305, 306) (DB) ° AIR 1929 Mad 199 (200) (DB) * AIR 1924 Mad 673 (675): 47 Mad 641 (DB) ° AIR 1960 Mad 343 (344): 73 Mad LW 230.

[But see AIR 1927 Pat 170 (171) (DB) ° AIR 1923 Mad 487 (487) (DB) * ('44) 48 Cal WN 419 (419, 420).]

(41) A plea which could not be allowed to be raised in execution proceedings cannot be barred in a subsequent suit. ('07) 30 Mad 402 (405) (DB).

(42) Applicant under O. 21, R. 100 claiming joint possession with judgment-debtors — Claim not raised, when land attached before judgment — Application is not barred by constructive res judicata. AIR 1965 Pat 509.

(43) If judgment-debtor at time of receipt of notice is not aware of facts entitling him to object, he will not be precluded, from raising the objection subsequently. ('51) 3 Pepsu LR 45 (50, 51) ° ('38) AIR 1938 Oudh 106 (106) (DB).

[See also AIR 1957 Orissa 274 (276): ILR (1957) Cut 446.]

(44) Instalment decree — Prior application for enforcement of default clause — Dismissal as time barred — Subsequent application for recovery of earlier instalment would be barred by constructive res judicata but not so in regard to instalment subsequently falling due. AIR 1957 All 353 (354).

(45) Judgment-debtor's failure to raise an objection to executability of decree when an application for transfer of decree is made will not preclude him from raising objection in the transferee Court. AIR 1956 SC 359 (363): 1956 SCR 62: 35 Pat 347.

(46) Where it is incumbent on the judgment-debtor to raise an objection to the execution and he does not do so, he cannot challenge the decision afterwards. AIR 1921 PC 23 (24): 48 Ind App 45.

(47) A previous order deciding a point must, in order to be conclusive in subsequent proceedings, be in force at the time of the subsequent proceedings. AIR 1948 Pat 192 (194, 195) (DB) * AIR 1916 Mad 886 (886).

(48) Previous order in order to operate as res judicata must not be collusive or fraudulently obtained. AIR 1924 Mad 189 (191) (DB).

(49) A previous order in execution in order to be conclusive must satisfy the fundamental essentials of the general principles of res judicata. AIR 1921 Mad 248 (254): 44 Mad 778 (FB) * AIR 1962 Punj 293 (296): 64 Pun LR 203. (Issue as to adjustment of decree — Neither heard nor finally decided by transferee Court — Does not operate as res judicata.)

[See also AIR 1963 Punj 178 (181, 182): 63 Pun LR 26 (DB). (Decree for possession of specific field numbers — Execution — Judgment-debtor found to be in possession of different numbers reallotted to him in consolidation proceedings — Oral request by decree-holder to give possession of such reallotted land — Dismissal of execution by ambiguous order that it could not be entertained in law — Subsequent execution for delivery of fields reallotted to judgment-debtor — Held not barred by res judicata.)]

(50) Where the order of the execution court in the State of Bombay only amounts to a decision that in view of the Bombay Agriculturists Debtors Relief Act being in force in the State of Bombay, the decree of the Saurashtra Court sent for execution was not executable in the State of Bombay, the decision does not operate as bar to the execution of the decree in the State of Saurashtra where the Act is not in force. (1955) 8 Sau LR 401.

(51) The fact that at one stage the decree-holder had exempted the properties of a judgment-debtor in an earlier execution case, is no bar to the properties of that judgment-debtor being proceeded against afresh. AIR 1965 Pat 296 (297).

(52) Execution dismissed for default— Question of limitation though raised by judgment-debtor and decided by Court will not be res judicata as issue was not substantial one. ('36) 40 Cal WN 510 (511) (DB) ° AIR 1932 Pat 357 (358): 11 Pat 607 (DB).

(53) Where a decree of a trial Court has become merged in an appellate decree, an order of executing Court passed in execution of original decree construing certain words in decree in a particular way cannot operate as res judicata in construing same words in proceedings in execution of appellate decree. AIR 1932 All 288 (288): 54 All 444 (DB) ° AIR 1933 Lah 352 (353): 14 Lah 591.

(54) Where the previous execution has not been disposed of on merits it will not be conclusive.

Dismissal for default of appearance: AIR 1950 Pat 354 (355) (DB) ° AIR 1941 Nag 152 (153) ° AIR 1929 Bom 217 (219) (DB) * AIR 1935 Cal 664 (665, 666) (DB) ° AIR 1968 Pat 270 * AIR 1962 Madh Pra 295 (296): 1961 Jab LJ

**Section 11 — Note 21 (contd.)**

920 ° AIR 1961 Raj 59 (63): 1961 Raj LW 506 ° 1955 Ker LT 301.

Dismissal for non-prosecution: AIR 1951 Nag 210 (211) ° AIR 1948 Pat 192 (194) (DB) * ('90) 12 All 539 (541) (DB).

Execution struck off for the present: ('95) 17 All 106 (111, 112): 22 Ind App 44 (PC) ° ('93) 15 All 198 (205) (DB) * ('93) 15 All 84 (101) (FB). (Overruling 15 All 49.) * ('06) 3 Cal L Jour 240 (244).

Execution allowed to be withdrawn with liberty to apply afresh: AIR 1942 Nag 1 (3): ILR (1942) Nag 118 (DB) * ('97) 23 Bom 35 (38, 39) (DB) ° ('95) 17 All 106 (111, 112): 22 Ind App 44 (PC).

Execution rejected on preliminary grounds: ('81) 6 Cal 203 (205, 206) (DB) ° ('78) 3 Cal 47 (58) ° ('78) 178 Pun Re No. 7: 4 Ind App 127 (PC) ° AIR 1937 Cal 226 (229).

(55) Application by party that notice issued by decree-holder under Order 21, Rule 63-A be withdrawn — Application dismissed for default — Second application for same relief held barred by res judicata. AIR 1962 Pat 123 (124): 1961 BLJR 661 (DB).

(56) Where an objection raised by the judgment-debtor to the execution of a decree is dismissed for default or for some other reason without going into the merits, the dismissal cannot operate as res judicata. AIR 1948 Bom 229 (230): ILR (1947) Bom 687 (DB) ° AIR 1958 Punj 339 (339) * AIR 1947 Pat 298 (299): 25 Pat 595 (DB) ° AIR 1945 Oudh 21 (24): 20 Luck 93 ° AIR 1940 Lah 67 (67) * ('98) 20 All 428 (430) (DB) ° AIR 1923 Cal 287 (288) (DB) ° AIR 1936 Lah 930 (931) * AIR 1962 Cal 272 (274): ILR (1962) 2 Cal 254 (DB).

[But see AIR 1967 Orissa 38 (38): ILR (1964) Cut 494. (Prior application filed under S. 47, read with Section 151, C. P. C. dismissed for default of petitioner in presence of opposite party — Subsequent petition on almost identical terms filed only under Section 151 — Principle of constructive res judicata would apply.) ° AIR 1964 Orissa 107 (111): 30 Cut LT 262. (Even in mere dismissal of an execution application for non-payment of process fee or failure to procure attendance of witnesses, the case may be treated to have been decided on merits provided there has been such an adjudication on the materials on record.) ° AIR 1936 All 21 (29): 58 All 313 (FB) * AIR 1942 Lah 71 (72) ° AIR 1935 Lah 966 (966) ° AIR 1935 Cal 816 (817) (DB).]

(57) Where a decree-holder files an execution application which is in accordance with law to constitute a step-in-aid and then get it dismissed for non-prosecution after appearance of the judgment-debtor, on getting notice under Order 21, Rule 22, when the judgment-debtor raises no objection to the executability of the decree in any manner a second application is not hit by res judicata. AIR 1964 Orissa 107 (110, 111): 30 Cut LT 262.

(58) Decision on a question of procedure in prior execution will not operate as res judicata in a subsequent proceeding when the procedure itself has been changed subsequently by statute law. AIR 1916 Mad 728 (730): 39 Mad 923 (DB).

(59) Executing Court holding certain property as not saleable under the law—Subsequent amendment of law making property saleable — Decision cannot operate as res judicata in subsequent execution — But right acquired by judgment-debtor being substantive right cannot be affected by subsequent amendment. AIR 1937 All 48 (50) (DB).

(60) Failure of judgment-debtor to object in previous execution proceedings to the amount for which execution was taken out, will not preclude him from taking objection to it in subsequent execution proceedings. AIR 1954 Mad 1070 (1073) (DB) * AIR 1953 Mad 948 (950) ° AIR 1933 Mad 844 (847) ° AIR 1915 All 344 (345): 37 All 589 (DB) * AIR 1937 Mad 511 (514) (DB) ° AIR 1929 Mad 903 (906) (DB) ° (1967) 69 Punj LR 984: 1967 Cur LJ 870 (DB) * AIR 1961 Raj 227 (230): 1961 Raj LW 588.

(61) A proceeding under O. 21, R. 66 for settlement of sale proclamation being a summary one, a decision in such a proceeding has been held not to operate as res judicata in subsequent proceedings. AIR 1924 All 480 (480) ° AIR 1925 Pat 500 (502): 4 Pat 731 (DB).

(62) The judgment-debtor cannot be required to raise an objection as to the saleability of the property in answer to a notice under Order 21, Rule 66 and the principle of constructive res judicata can have no application to a case where he had no notice of the point to be decided, namely, as to the liability of the property to be sold. AIR 1960 Andh Pra 631 (632, 633, 634): (1960) 1 Andh WR 417 (DB).

(63) Notice to judgment-debtor issued under Order 21, Rule 66 — Objections dismissed in default — Even so applicability of rule of constructive res judicata cannot be excluded. (1968) 70 Punj LR (D) 185 (DB).

(64) Execution of a portion of a decree — Fresh application for balance not barred by constructive res judicata. AIR 1936 Lah 246 (247).

(65) Application for setting aside an execution sale cannot be met by the plea that the objection ought to have been taken in the sale proceedings themselves. AIR 1944 Pat 392 (392).

(66) Suit for ejectment of tenant — Bar of Section 11, Bihar Buildings (Lease, Rent and Eviction) Act (3 of 1947) not raised — Tenant not debarred by constructive res judicata from pleading the bar in execution of decree for ejectment. AIR 1950 Pat 354 (355, 356) (DB).

**Section 11 — Note 21 (contd.)**

(67) When a judgment-debtor fails to raise the question of scaling down the debts in an earlier application for execution he is not subsequently precluded from applying under Section 19, Madras Agriculturists Relief Act for scaling down the debt by principle of res judicata. AIR 1953 Mad 188 (189): ILR (1953) Mad 152 (DB) ° AIR 1965 Andh Pra 346 (348): (1965) 1 Andh WR 435. (Section 19 of Hyderabad Agricultural Debtors Relief Act (16 of 1956) — AIR 1953 Mad 188, Foll.)

(68) Application for restitution under Section 144 — It is application for execution of decree — Principle of res judicata applies to it. AIR 1966 SC 1194 (1196): (1966) 3 SCR 479.

**22. Application for amendment of decree.** —(1) Although applications for amendment of decrees are not "suits" a decision on an application on the merits will operate as res judicata. AIR 1937 Oudh 246 (247): 13 Luck 186 (DB) * ('12) 39 Cal 265 (272) (DB) ° AIR 1915 Cal 696 (697) (DB) ° ('10) 5 Ind Cas 119 (120) (DB) (Mad).

(2) Where the subsequent application for amendment is materially different from the previous application it is not barred. AIR 1927 Rang 57 (57): 4 Rang 347 (DB).

**23. Order rejecting memorandum of appeal.**—(1) Order rejecting a memorandum of appeal presented by an unauthorised person cannot operate as res judicata in a subsequent proceeding in which an appeal has been filed in proper form. AIR 1930 All 112 (113) (DB).

**24. Application for review.**—(1) Application for review dismissed on merits — Fresh suit for setting aside decree on same grounds is barred. AIR 1915 Cal 161 (161) (DB) * ('05) 2 Cal L Jour 508 (510) (DB).

[But see AIR 1955 Andhra 215 (218) ° ('13) 40 Cal 541 (543) (DB) ° AIR 1930 Oudh 112 (112) * ('09) 2 Ind Cas 129 (134) (DB) (Cal).]

**25. Arbitration proceedings.**—(1) An award operates to merge and extinguish all claims embraced in the submission, and, after it is made, the submission and award furnish the only basis by which the rights of the parties can be determined and constitute a bar to any action on the original demand. ('06) 33 Cal 881 (888) (DB) * AIR 1920 Sind 124 (125, 126): 1 Sind LR 193 ° AIR 1923 All 518 (519): 45 All 472 (DB) * ('85) 11 Cal 386 (393): 12 Ind App 67 (PC).

(2) When a private reference is made to arbitrators, but before any award is given, one of the parties to the reference files a suit in respect of the subject-matter of the reference, the arbitrators become functus officio and any award passed thereafter is a nullity and will not operate as a bar to the suit. AIR 1918 Mad 719 (719): 41 Mad 115 (DB).

(3) An award which is made a rule of the Court operates as res judicata in subsequent suit on the same matter, unless the arbitrators had acted without jurisdiction. AIR 1947 All 88 (88) (DB) ° AIR 1958 Pat 603 (606) (DB) ° ('07) 34 Ind App 125 (131): 29 All 519: 10 Oudh Cas 343 (PC).

[See also (1967) 10 Law Rep 805 (DB) ° AIR 1947 Mad 410 (410) (DB).]

(4) Objection to jurisdiction of arbitrator to make award decided by court — Subsequent suit to set aside award on same ground is barred. AIR 1932 Lah 378 (380) * AIR 1932 Sind 20 (22).

(5) General principle of res judicata will apply to an application for filing an award. AIR 1921 Bom 389 (391): 45 Bom 329 ° AIR 1925 Sind 42 (46): 10 Sind LR 360 ° ('97) 21 Bom 465 (467) (DB) ° AIR 1937 Nag 132 (134): ILR (1937) Nag 6.

(6) Decree on award in Small Cause Court — Competence of Court for res judicata not altered by reason of decree being on award. AIR 1932 Pat 105 (111): 11 Pat 50 (DB) * AIR 1959 Cal 8 (12, 13): 1959 Cal LJ 169 (DB).

(7) Where an award does not replace but merely ascertains and defines the original rights of the parties, it does not bar a suit on the original rights. AIR 1927 Bom 237 (238) (DB) ° AIR 1960 Mys 193 (196, 197): 38 Mys LJ 27 (DB).

(8) Application for filing of award — Court holding that it has no jurisdiction to entertain application — Decision given on other issues not binding on Court competent to entertain application. AIR 1961 Assam 148 (149).

(9) Arbitration agreement being part of contract between parties — Contention that arbitration agreement is invalid because contract itself is invalid — In application under Section 33, Arbitration Act, Court can decide such question — Party cannot agitate same question in a subsequent suit. AIR 1963 Cal 140 (147 to 149).

(10) If the arbitrator, in determining his own jurisdiction, considers a particular dispute sought to be raised by one party to be not within the reference, and therefore he has no jurisdiction to decide it, then the subsequent reference of the dispute is not bad. AIR 1964 Cal 545 (546, 547).

(11) Party filing application under Section 14, Arbitration Act — Application dismissed as not maintainable on the ground that the arbitrator alone could make the application — Subsequent application by arbitrator — No bar of res judicata can be pleaded by reason of the dismissal of the earlier application. 1962 Mys LJ (Supp) 250.

(12) Where an ex parte award given by the arbitrator has been set aside by the Court on the ground that the arbitrator had not allowed full opportunity to the petitioner to present his case, it cannot be said that the decision was given on merits and consequently a second award on the merits

**Section 11 — Note 25 (contd.)**

would not be barred by the principle of res judicata. (1962) 64 Punj LR 411.

(13) Award consisting of severable valid and invalid portions — Decree on basis of award — Decree will stand so far as valid portion of award is concerned and decision as to valid portion will operate as no res judicata between parties to arbitration agreement. AIR 1962 Punj 412 (415).

(14) Suit for damages on breach of agreement — Dispute regarding interpretation referred to arbitration as per clause in agreement — Award interpreting agreement in favour of plaintiff — Decree on award — Decree in main suit in favour of plaintiff — Appeal by defendant — Defendant seeking to reopen question of interpretation on ground of Court in former suit having no jurisdiction to try subsequent suit — Held decree operated as res judicata. AIR 1964 Madh Pra 101 (104): 1964 Jab LJ 57.

(15) The same dispute once referred and embodied in an award cannot be the subject matter of fresh reference. But when the subject matter of reference is different there can be no res judicata. AIR 1969 Tripura 19 (24).

**26. Miscellaneous proceedings.**— (1) A plea of res judicata on general principles can be successfully taken in respect of judgments of Courts of exclusive jurisdiction like revenue Courts, Land acquisition Courts, administration Courts, etc. AIR 1953 SC 33 (40): 1953 SCR 154 * 1959 Andh LT 156 (DB).

**Probate proceedings.**— (2) A decision as to the proof of the will given by any Civil Court can under no circumstances operate as res judicata in probate proceedings taken out in the Probate Court. AIR 1955 Bom 447 (447, 448): ILR (1955) Bom 821 (DB).

(3) General principles of res judicata apply to probate proceedings. AIR 1930 PC 22 (23): 57 Ind App 24. (Affirming on appeal AIR 1927 Cal 421.)

(4) By an agreement B agreed to pay Rs. 50 in cash, every month during the lifetime of A in consideration of A having proposed to make a bequest of a life interest to his wife and the remainder in favour of B and his sons. A executed the will accordingly, but B failed to make any payment. After the death of the testator the heirs of B were on 7-5-1937 granted by their Lordships of the Privy Council letters of administration with the will annexed. In a suit brought by the heirs of A against the heirs of B it was held by their Lordships of the Supreme Court that the question of animus testandi was barred by res judicata but in regard to the question whether the bequest in favour of B could take effect by reason of default in payment, the decision of the Privy Council did not constitute res judicata. AIR 1953 SC 205 (208): 1953 SCR 913: ILR (1953) 2 All 716.

(5) The rule of res judicata applies to the decisions of Probate Courts given in cases not only where the seeking of probate or letters of administration is obligatory, but also when it is optional. AIR 1956 Nag 209 (211): ILR (1956) Nag 549 (DB).

(6) Probate proceedings — Question as to construction of will not raised — Such questions are outside jurisdiction of Probate Court and hence can be raised in subsequent suit. AIR 1946 Oudh 193 (204): 21 Luck 314 (DB).

(7) Probate proceedings — Caveat discharged on ground of no interest on footing that prima facie no subsequent will was in existence — Probate granted — Subsequent application by caveator for revocation of probate on ground of subsequent will held hit by res judicata. AIR 1959 Cal 277 (278, 279): ILR (1959) 2 Cal 54.

(8) Questions of title are not decided in proceedings for the grant of probate or letters of administration. Whatever therefore might have happened in these proceedings would not operate as res judicata on the question of title. AIR 1962 SC 1471 (1475): (1962) Supp 3 SCR 294.

(9) A decision on the question of title given by a Munsiff's Court in a prior suit for declaration of title, challenging a will as fraudulent, and subsequently affirmed by the High Court in second appeal does not operate as res judicata in subsequent probate proceedings under Sec. 276, Succession Act. AIR 1962 Orissa 224 (224): 28 Cut LT 521 (DB).

(10) Direction of Probate Court for grant of probate subject to furnishing security within specified period — Non-compliance — Case consigned to record — Second petition for probate not barred by res judicata. AIR 1962 Raj 139 (141, 142): 1962 Raj LW 203 (DB).

**Insolvency proceedings.**— (11) A decision on merits in an insolvency proceeding is final and binding on the parties as res judicata. AIR 1946 Mad 141 (143) * AIR 1929 Lah 761 (762) (DB) * 1905 Pun Re No. 75, p. 239 (241) (FB). (Overruling 1884 Pun Re No. 145 and 1886 Pun Re No. 62.) * AIR 1918 All 346 (349): 39 All 626 (DB) * AIR 1936 Rang 393 (394): 14 Rang 529 (DB) * AIR 1965 All 248 (249, 250, 251): 1964 All LJ 1035. (General principles of res judicata apply to proceedings under the Provincial Insolvency Act.)

[But see AIR 1933 Cal 673 (674) * AIR 1921 Lah 58 (58, 59): 2 Lah 147 (DB) * AIR 1917 Lah 75 (76): 1917 Pun Re No. 22 (DB),]

(12) Prior decision in suit between the parties will operate as res judicata in a subsequent insolvency proceeding. AIR 1950 Mad 184 (185) * AIR 1937 Lah 4 (5).

**Section 11 — Note 26 (contd.)**

(13) Dismissal of an application for insolvency for default will not bar a second application for insolvency. AIR 1921 Pat 472 (472) (DB) * ('12) 10 All L Jour 51 (51) (DB) * AIR 1928 Pat 116 (117) (DB).

(14) Decision in insolvency proceedings between a creditor and the insolvent does not operate as res judicata in a subsequent suit between the insolvent and his surety. AIR 1932 All 610 (613): 54 All 1007 (DB).

(15) Dismissal of insolvency petition — Second application on ground of change of circumstances not barred. AIR 1935 Pesh 25 (25).

(16) Successive writ applications — First application dismissed summarily on hearing petitioner — Second application on same grounds and for same reliefs is barred — Principle of res judicata applies. AIR 1963 Cal 6 (7) (DB).

(17) A finding arrived at by the Insolvency Court while adjudging a person as an insolvent is not res judicata in a subsequent annulled proceeding. AIR 1963 Orissa 37 (38): 28 Cut LT 343.

(18) Withdrawal of insolvency petition prior to adjudication with leave of Court as result of compromise among creditors including minor creditors — Compromise whether beneficial to minors neither considered nor certified — Order not res judicata regarding question whether compromise was binding on minors. AIR 1956 Trav-Co 27 (29): ILR (1955) Trav-Co 909 (FB).

(19) Execution sale of insolvent's estate in possession of interim receiver — Application by interim receiver that sale should not be confirmed — Application rejected — Held, in absence of evidence to show what powers were conferred on interim receiver he cannot be held entitled to represent debtor's estate — Insolvency Court can consider question of title to properties sold — Matter is not res judicata by reason of executing Court's rejection of application. AIR 1947 Nag 76 (77): ILR (1946) Nag 937.

(20) Decision in summary inquiry under Section 24, Provincial Insolvency Act, as to whether debtor is entitled to present petition for adjudication is not covered by Section 4 and does not operate as res judicata. AIR 1938 Lah 490 (491): ILR (1938) Lah 535 (DB).

(21) Insolvency proceeding is a suit. AIR 1930 Pat 588 (592): 9 Pat 664 (DB) * AIR 1918 All 346 (349): 39 All 626 (DB). [But see AIR 1937 Lah 4 (5) * ('40) AIR 1940 Cal 225 (226). (Point conceded.)]

(22) Adjudication proceedings — No finding that transferee was privy to act of insolvency or that he was not a bona fide transferee — Issue as to bona fides of transfer cannot operate as res judicata in proceeding for avoidance of transfer. AIR 1958 SC 1 (6): 1958 SCR 257.

(23) Adjudication of insolvent by Bombay High Court and also by Bellary District Court — Order made by District Court in proceeding to which deposit-holder was party — Order providing that if Bombay High Court decided that assets and effects of insolvent should be administered from Bombay, the said assets and account books should be handed over to official Assignee at Bombay — Said order, being complete and final, is effective and amounts to res judicata. AIR 1963 SC 754 (759): 1963 Supp (1) SCR 809. (1956 Andh WR 207: AIR 1957 Andh Pra 649, Reversed.)

**Proceedings under the Land Acquisition Act.**—(24) A decision in a proceeding under the Land Acquisition Act by a competent Court will be res judicata in a subsequent litigation, on the general principles of law. AIR 1922 PC 80 (84): 45 Mad 320: 49 Ind App 129 * AIR 1939 PC 133 (136): ILR (1939) All 460: ILR (1939) Kar (PC) 199: 66 Ind App 145 * ILR (1955) Mys 482 (489) * AIR 1932 Bom 386(389): 56 Bom 501 (DB) * AIR 1924 Cal 757 (759) (DB).

(25) Matters relating to title in acquired land not agitated in Land Acquisition Court — Rights of interested persons are not barred by res judicata. AIR 1959 Mys 265 (270): 37 Mys LJ 299 (DB).

(26) A decision as to title in a land acquisition case will be res judicata in subsequent litigations. AIR 1953 SC 33 (39, 40): 1953 SCR 154. (2 Ind Cas 853 (All) and 34 Cal 469 should be held no longer good law in view of the Supreme Court decision.) * 1959 Andh LT 156 (DB).

(27) Portion of land acquired in earlier proceedings — Compensation awarded at certain rate — Subsequent proceedings for another part of the same land — Previous award held not res judicata. AIR 1964 Pat 484 (485, 486).

(28) Decision in land acquisition proceedings recognising the defendant's position as a tenant in respect of the specific property will not operate as res judicata in respect of other properties which were not the subject of land acquisition proceedings. AIR 1961 Ker 298 (299): 1960 Ker LT 1169.

(29) One trial of three references consolidated by District Judge — Disposal by single judgment — Only one appeal filed against the award — Not barred by res judicata. AIR 1965 Him Pra 7 (8, 9).

**Proceedings under the Income-tax Act.**—(30) The principle of res judicata does not apply to proceedings for assessment or imposition of penalty under the Income-tax Act. AIR 1956 Bom 375 (377): ILR (1956) Bom 79: 1956 Cri L Jour 712 (DB) * AIR 1956 Pat 501 (505) * AIR 1955 Mad 588 (590) (DB) * AIR 1954 All 123 (123): ILR (1954) 1 All 559 (DB) * ('52) 1952-21 ITR 548 (555) (DB) (Punj) * AIR 1961 SC 1062 (1065): (1961) 3 SCR 287. (AIR 1956 Pat 501, Affirmed.) *AIR 1968 Madh

**Section 11 — Note 26 (contd.)**
Pra 103 (106): 1968 Jab LJ 253 * 1968 Pat LJR 272: (1968) BLJR 769 * (1967) 1 Andh LT 364: 64 ITR 388 * (1966) 2 ITJ 558: (1966) 61 ITR 214 (All) * (1964) ILR (1964) Andh Pra 707 (DB) * (1963) 2 ITJ 180 (184) (Pat) * AIR 1959 Mad 271 (274): (1959) 2 Mad LJ 78 (DB).

[See also (1959) 37 ITR 271 (276) (SC). (Refusal to register firm under Sec. 26-A of Income-tax Act (1922) — Fresh partnership — Application for registration — Prior decision no res judicata.) * 1965-2 ITJ 740 (All). (Revenue proceedings.)]

(31) Principle of res judicata cannot be applied to assessment orders pertaining to different periods and based on different causes of action. AIR 1966 Mad 220 (223): (1965) 2 Mad LJ 254 * AIR 1959 SC 881 (886): (1959) Sup (2) SCR 547. (Determination of written down value and depreciation under Section 35, Income-tax Act (1922) for particular year not res judicata for subsequent years.) * (1969) 71 ITR 33 (46) (Cal) (DB) * AIR 1967 All 362 (367): (1966) 2 ITJ 126 (DB).

(32) A decision in an assessment year does not ordinarily operate as res judicata in respect of the matter decided in any subsequent year — Income-tax Officer is not a Court. AIR 1967 SC 762: (1967) 1 SCR 913.

(33) Assessment proceedings and penalty proceedings in respect of same year of assessment — Issue actually decided in assessment proceedings — Tribunal should be slow to depart from it in penalty proceedings unless fresh circumstances are brought to light either by material already on record or by additional evidence. (1967) 1 Andh LT 364: 64 ITR 388.

(34) Decision on tax liability for different years — It is necessary to distinguish between decision on question of law directly and substantially arising in dispute about liability for particular year and questions of law arising incidentally or collaterally. AIR 1964 SC 1013 (1018, 1020): (1963) Supp 1 SCR 172.

(35) The doctrine of res judicata does not apply so as to make a decision on a question of fact or law in a proceeding for assessment in one year binding in another year. The assessment and the facts found are conclusive only in the year of assessment. AIR 1968 SC 317 (325): (1968) 1 SCR 65.

(36) Order under Section 33, Income-tax Act — Principle of res judicata does not apply so as to prevent that decision from being reopened in assessments made for subsequent years. AIR 1943 Pat 169 (173): 22 Pat 55 (DB) * AIR 1957 Nag 73 (76) (DB) * AIR 1929 Mad 453 (456) (FB) * AIR 1930 Mad 209 (213): 53 Mad 420 (FB) * AIR 1938 Mad 148 (151): ILR (1938) Mad 183 (SB).

(37) Where any question of right or title not peculiar to the year of assessment has been expressly or impliedly decided by a competent Court the decision will operate as res judicata in subsequent years. AIR 1956 Bom 375 (378): ILR (1956) Bom 79: 1956 Cri L Jour 712 (DB).

(38) During previous assessment year assessee Shebait held not to be trustee — Subsequent assessment year — Entire question of applicability of Sec. 41, I. T. Act raised — High Court can consider whether Shebait can be trustee within meaning of Section 41 of I. T. Act. AIR 1965 Cal 570 (DB).

(39) Determination of depreciation allowance — Original cost accepted for some years — Income-tax Officer can go behind it to find out actual cost for himself — No bar of res judicata or estoppel. AIR 1955 Cal 304 (306): (1954) 25 ITR 558 (DB).

(40) The fact that the assessee had never objected to inclusion of minor's share of profits in his total income or that he had in that respect claimed earned income allowance in earlier assessments will not debar him from contending in later assessments that the share of the minor in the business cannot be regarded as his income under Section 16 (3). AIR 1965 Assam 32 (34): (1964) 52 ITR 392 (DB).

**Proceedings under the Excess Profits Tax Act.** — (41) The refusal of the income tax authorities to register the assessee as a firm is not a bar to a reconsideration of the claim made on his behalf in the proceedings under the Excess Profits Tax Act. The principle of res judicata cannot apply to orders made by taxing officers in assessment proceedings. ('55) 21 Cut LT 166 (169) (DB).

**Proceedings under the Indian Companies Act.** — (42) Proceedings against directors under Section 235, Companies Act, for misfeasance — Subsequent suit against them for compensation, for misfeasance and fraud is incompetent on principle of res judicata. AIR 1938 Lah 577 (578) (DB).

(43) An order in the course of liquidation proceedings settling the list of contributories will become res judicata if not appealed against and cannot be re-opened at a subsequent stage of the same proceedings. AIR 1915 Lah 227 (227).

(44) Creditor's petition for winding up of a Company under Section 162 of the Companies Act (1913) — Winding up order passed without any objection from the company or its directors that the applicant was not a creditor and had no right to bring a winding up petition — Held, that this amounted to a constructive decision of the question of his being a creditor and of the sum claimed by him and the company or its directors would be barred from raising the question at a subsequent stage of the proceeding. AIR 1952 Punj 99 (102, 103).

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(45) Order revoking exemption granted to Company under Section 89 (4), Companies Act, 1956, challenged by company by application — Petitioners, some shareholders of company, applying to get themselves impleaded — Application rejected but petitioners permitted to intervene — Fact that petitioners were permitted to intervene does not make them parties to application and hence decision herein cannot be binding on them. AIR 1968 Delhi 6 (9): (1967) 2 Com LJ 171.

(46) Finding in favour of officer of company in liquidation in proceeding under Section 542 of Companies Act (1956), that impugned transactions were not made to prefer some creditors over others — Decision is decision in 'former suit' and would operate as res judicata in trial of issue as to fraudulent preference in proceeding under Section 531 of Companies Act. AIR 1966 Ker 296 (302, 303): 1966 Ker LT 621 (DB).

[See also (1965) 78 Mad LW 579: (1965) 2 Com LJ 272. (Petitioners believing that company was factually insolvent — It was open to them to get company wound up on that basis — Failure to do so — Petitioners are precluded by principle of constructive res judicata from agitating same ground.)]

(47) Proceedings under Section 397, Companies Act, 1956 — Having regard to exclusive jurisdiction of High Court decision in previous suit against company does not operate as res judicata. AIR 1962 Orissa 202 (222).

(48) The mere fact that the person against whom proceedings have been lawfully taken under Section 235 of the Companies Act (1913) dies during the proceedings (but who is not exonerated) would not take away the right of the Official Liquidator to proceed against his legal representatives in cases where the right to sue survives. The principle of res judicata will not apply in such cases. AIR 1966 Mad 247 (253): (1965) 1 Com LJ 1.

(49) The order of a Company Judge made under Section 60 of the Companies Act, 1913, sanctioning reduction of the capital on conditions relating to conversion of shareholding of displaced persons does not operate as res judicata for the jurisdiction to decide whether there is good ground for refusing to grant the requisition for conversion by a displaced person is vested exclusively in the Tribunal and in no other body. AIR 1963 SC 1707 (1710): (1964) 2 SCR 231.

**Administration proceedings.** — (50) A plea of res judicata on general principles can be successfully taken in respect of judgments of administration Courts. AIR 1953 SC 33 (40): 1953 SCR 154.

(51) Administration suit — Court determining nature of interest of persons interested in the estate, or the relationship of any of the parties to the deceased — Decision is final and conclusive in a subsequent suit. AIR 1922 PC 253 (256): 49 Cal 459: 49 Ind App 100 * AIR 1932 Cal 634 (635) (DB).

**Proceedings under the Oaths Act.** — (52) Decision of a question of title in accordance with the Oaths Act is not an adjudication which can operate as an estoppel when the same question of title is again raised in another suit regarding another property. ('82) 5 Mad 259 (264) (DB).

[See also AIR 1951 Pat 370 (371): 28 Pat 441 (DB).]

(53) A decree arrived at after taking of an oath on a question of fact in the case is none the less a final adjudication and binding as regards the precise question raised in the former suit. ('13) 36 Mad 287: 18 Ind Cas 835 (837) (DB) * AIR 1938 Bom 465 (467).

(54) Evidence under Section 11 is conclusive only in that particular proceeding — Witness taking oath in a prior proceeding becoming a party to subsequent suit — Subsequent suit is not barred by res judicata. 80 Mad LW 593: (1968) 1 Mad LJ 272.

**Cross-objections in appeal.** — (55) Appeal dismissed for default — Restoration of appeal does not ipso facto vacate order on cross-objection — Order on cross-objection operates as res judicata in appeal if it is not vacated. AIR 1944 Lah 174 (175) (DB).

**Writ petitions.** — (56) Even if the provisions of Section 11, Civil P. C., may not strictly apply to successive writ petitions the general principle of res judicata can be applied to them. Hence filing of successive petitions on the same cause of action by the same person on grounds which could have been taken in the earlier petition should be discouraged. AIR 1956 Pat 182 (186) (DB) * AIR 1958 Madh Pra 82 (82, 83) * AIR 1967 SC 908 (910): (1967) 1 SCR 433. (Petitioner's earlier writ petition impugning his detention dismissed and his contention challenging validity of detention rejected — In subsequent writ petition petitioner cannot be permitted to reagitate same contenions when no new circumstances have arisen justifying their re-agitation.) * AIR 1961 SC 1457 (1463): (1962) 1 SCR 574 * AIR 1969 Andh Pra 158 (162) (DB) * AIR 1969 Punj 104 (109) (DB). (Suit filed for permanent injunction — Plaintiff's suit dismissed on statement made by the plaintiff for withdrawal of the suit — Held dismissal disentitled plaintiff to claim same relief on same grounds in a writ petition on general principles of res judicata.) * AIR 1968 Andh Pra 74 (79): (1968) 1 Andh LT 32 (DB) * AIR 1968 Delhi 156 (161): 1968 Cri LJ 1059. (Successive applications for habeas corpus — Decision of Supreme Court on same facts bars a subsequent writ in High Court * 33 Cut LT 1065: (1968) 2 Lab LJ 533 * 1968 Pat LJR 91 (DB) * (1967) 69 Punj

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LR 802. (Dismissal of earlier petition on merits.) * 1966 BLJR 125 (126): ILR 45 Pat 1192. (The principle applies to ex parte decisions.) * 1966 Raj LW 624: ILR (1966) 16 Raj 875 (DB). (Writ petition filed by employee against termination of his services — Petition dismissed on merits — Subsequently suit filed challenging such termination—Suit was barred on the general principle.) * AIR 1965 All 572: 1965 All LJ 88 (FB). (Tenant challenging, by writ petition, Government's power to grant permission to landlord to file ejectment suit — Petition dismissed — Subsequent suit between the same tenant and his landlord — Point in dispute whether State Government had power to grant permission to landlord to file ejectment suit — Decision in writ petition operated as res judicata.) * AIR 1965 Raj 213 (215, 216): 1965 Raj LW 321 (DB). (AIR 1961 SC 1457, Rel. on.) * AIR 1964 Pat 174 (180): 1964 BLJR 167 (FB). (Previous writ petition — Question of vires of Act not raised — Subsequent suit raising this question is barred by constructive res judicata.) * AIR 1964 Tripura 32 (35) * AIR 1960 Bom 196 (200): 61 Bom LR 1388 * AIR 1960 Punj 602 (603): ILR (1960) 2 Punj 660 * 1959 All LJ 310 (313). (A matter which has been finally decided on merits in a writ petition cannot be re-agitated in a subsequent suit on petition.)

[See also 1961 All LJ 606. (Successive petitions — Bar of res judicata not applicable in terms — Rule 7 of Ch. XXII of Rules of Court applies.)]

(57) The doctrine of res judicata and the rules of constructive res judicata are applicable to writs under Article 226 of the Constitution. AIR 1966 All 458 (462): ILR (1966) 1 All 463 * 1968 Lab IC 1333: 34 Cut LT 884 * (1966) 17 STC 128 (129) (AP) * AIR 1965 Punj 342 (344): 1965 Cur LJ 104.

(58) Principle of res judicata applies with equal force to petitions under Articles 226 and 32 of the Constitution. AIR 1966 Ker 110 (119, 120, 121): 1966 Ker LJ 86. (Disciplinary action against Government servant — Writ petition against High Court quashing the order as not sustained under Kerala or T. C. Rules — Subsequent action by Government under Madras Rules on same facts — Held, barred by constructive res judicata.) * AIR 1968 SC 1196 (1198): (1968) 2 SCR 740. (Where a writ petition under Article 226 is disposed of on merits and the order of dismissal of the petition is a speaking order, that would amount to res judicata and would bar a petition under Article 32 on same facts.) * AIR 1967 SC 1244 (1249): (1967) 3 SCR 134. (Relief asked for in writ petition to Supreme Court similar to those asked for in appeal before High Court — Findings in appeal will be binding in writ petition.) *AIR 1965 SC 1153 (1155, 1167): (1965) 2 SCR 547, (Per majority, Subba Rao J., Contra.) * AIR 1962 SC 1563 (1566): (1963) 1 SCR 220 * AIR 1960 SC 1186 (1190): (1961) 1 SCR 96. (Proceedings under Article 32 of the Constitution — Successive writ petitions against Committee of Privileges of State Legislative Assembly — Change in personnel of Committee — Still rule of res judicata applied.) * AIR 1968 Mys 251 (254): (1967) 2 Mys LJ 412. (There can be no objection to invoking rule of res judicata even where fundamental rights are in question.) * AIR 1966 Cal 570 (572) (DB). (The mere addition of a new party on a new ground which might and ought to have been raised in the earlier petition will not exclude the operation of the principles of res judicata.)

(59) The general principle of res judicata applies to writ petitions filed under Article 32 or Article 226. But the application of the doctrine of res judicata to the petitions filed under Article 32 does not in any way impair or affect the content of the fundamental rights guaranteed to the citizens of India. It only seeks to regulate the manner in which the said rights could be successfully asserted and vindicated in Courts of law. AIR 1964 SC 1013 (1018): 1963 Sup (1) SCR 172.

(60) Constructive res judicata which is a special and artificial form of res judicata enacted by Section 11 should not generally be applied to writ petitions filed under Article 32 or Article 226. This principle would be applied to cases where Courts are dealing with cases where the impugned tax liability is for different years. When the question as to whether any law has been declared by the Supreme Court by implication, such implied declaration, though binding, must be held to be subject to revision by Supreme Court on a proper occasion where the point in question is directly and expressly raised by any party before the Supreme Court. AIR 1964 SC 1013 (1018, 1020): 1963 Supp (1) SCR 172.

(61) Plea of res judicata not pressed before Tribunal — Cannot be allowed to be raised for the first time in writ proceeding. AIR 1967 Punj 272.

(62) If a writ petition filed by a party under Article 226 is considered on the merits as a contested matter and is dismissed, the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed. It would not be open to a party to ignore the said judgment and move the Supreme Court under Article 32 by an original petition made on the same facts and for obtaining the same or similar orders or writs. AIR 1961 SC 1457 (1465, 1466): (1962) 1 SCR 574.

(63) Board of Revenue rejecting claim of J to be recognised as adopted son of S, a Jagirdar of Thikana in State of Jaipur — Writ petition — High Court dealing with dispute on merits and holding that because of Jaipur Matmi Rules (1945),

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adoption of J by S without previous sanction of Ruler could not be recognised for purpose of determining succession to Jagir, was erroneous and directing Board to decide case in accordance with law — Held, the direction was superfluous and decision of High Court operated as res judicata. AIR 1968 SC 1328 (1331): (1968) 2 SCR 848.

(64) Basanship of a clan in United Khasi Jaintia Hills District — Competency of executive committee of District Council to decide the matter — Question settled by competent Courts and decision operating as res judicata against parties — Question cannot be raised again in writ petition under Article 226. AIR 1963 Assam 186: ILR (1963) 15 Assam 366 (DB).

(65) Writ petition challenging acquisition of land, under Land Acquisition Act, for public purposes — Order refusing writ for want of evidence — Order does not operate as res judicata in subsequent regular suit raising same question. AIR 1965 Punj 50 (51): 66 Punj LR 759.

(66) Income-tax Officer issuing notice of re assessment to a 'factory' through firm K — K filing writ petition challenging validity of notice — High Court with consent of petitioner's counsel staying recovery of provisionally assessed tax and penalty till completion of proceedings under Section 34/44, Income-tax Act (1922) — K filing another writ petition again challenging validity of notice — Single Judge dismissing petition on ground of res judicata and unjustifiable delay — Held, Single Judge exercised his discretion properly. (1965) 1 ITJ 375: (1965) 57 ITR 765 (All).

(67) Where in a writ application the validity of the levy and collection of certain tax under a State Act is questioned, the decision in a prior writ proceeding about the validity of the levy and collection of similar tax under a prior and different Act of the State Legislature does not operate as res judicata, since the question at issue in the two proceedings is not the same. AIR 1963 Pat 16 (23, 24): 1963 BLJR 73.

(68) Constitution of India Article 226 — Application under — Inamdars and Government parties — Concession made by Advocate-General that inam was estate — Tenants not parties to application — Order does not operate as res judicata against tenant in suit by inamdars that settlement entries were incorrect. ILR (1963) Cut 610.

(69) The scope of the writ petition and the regular civil suits not being the same, the judgment delivered in the writ petition cannot operate as res judicata on the points in dispute between the parties in the civil suit. (1963) 65 Pun LR 945. (Overruled in AIR 1965 SC 1153.)

(70) Decision in writ petition that State Government or Board was competent to revise rates charged for supply of electric energy — Right of petitioners to raise dispute as to revised rates under Sec. 76 of the Electricity (Supply)Act, not barred by principle of res judicata. AIR 1963 SC 1128 (1134): 1963 Supp 2 SCR 127.

(71) Election petition against A and B — Objection to jurisdiction of Tribunal to enquire into corrupt practices alleged against A and B — Objection overruled — Writ petition — Objection upheld by single Judge — Appeal by B alone — Division Bench holding the Tribunal had no jurisdiction — Tribunal, meanwhile holding A guilty of corrupt practice — Writ petition by A — Principle of res judicata held did not apply. (1956-57) 12 Ele LR 453 (Mad).

(72) Writ petition challenging order of termination of temporary service — Dismissal of petition without deciding question of competence of authority ordering termination — Subsequent suit for declaration that termination was by authority lower in rank than competent authority — Suit held was barred. AIR 1968 SC 1370 (1372): (1968) 2 SCR 887. (Regular Second Appeal No. 74-D of 1966, D/- 29-9-1966 (Punj), Reversed.)

(73) Assessment to sales tax for particular year challenged on some grounds by writ petition — Petition dismissed on merits — Subsequent writ petition challenging same assessment order, on additional grounds cannot be entertained. AIR 1965 SC 1150 (1153): (1965) 1 SCR 686.

(74) Order dismissing application under Section 33 (3), Industrial Disputes Act — Writ petition challenging order summarily dismissed — Order becoming final — Held appeal by special leave filed against original order under S. 33 (3) could be heard as no question of res judicata arose, the order summarily dismissing the writ petition not being a speaking order. AIR 1968 SC 985 (987): (1968) 2 SCJ 844. (AIR 1967 SC 1457, Dist.)

(75) Application under Article 226, Constitution of India, dismissed on ground of availability of remedy by way of suit — Observations that provisions of Article 311 were observed — Remarks that merits of case not entered into — Decision is not res judicata in subsequent suit. ('58) AIR 1958 Madh Pra 326 (328).

(76) Where the matter has not been considered on merits such as where the writ petition is dismissed as withdrawn or on the ground of laches or on the ground that the petitioner has an efficacious alternative remedy available to him the decision cannot generally be pleaded in support of the bar of res judicata. AIR 1961 SC 1457 (1464): (1962) 1 SCR 574 * 1967 All LJ 767: (1968) 2 Lab LJ 1 * 1959 All LJ 310 (313).

(77) If the High Court refused to exercise its discretion to issue a direction under Article 226 of the Constitution, the dis-

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missal of the application will not amount to a decree in suit within the meaning of Section 11 and will not have the effect of res judicata in a subsequent suit between the parties. AIR 1961 Manipur 1 (4).

(78) Removal of village headman — Petition before Government against removal — Government without considering validity of removal, directing restoration of headman—Writ petition challenging order of Government on ground of want of jurisdiction in it to entertain petition — Merits of order of restoration or of removal not in issue — Court quashing order of restoration — Suit by headman challenging validity of order of removal — Held, Section 11 did not directly apply and decision in W. P. did not preclude headman, on principle of constructive res judicata, from agitating validity of order of removal by regular suit. ILR (1966) 1 Mad 206.

(79) Writ petition under Article 226 dismissed in limine — It cannot be revived on same allegations — Dismissal in limine not on merits but for laches or on ground of availability of another remedy — Does not bar second petition under Art. 32. AIR 1967 Punj 28 (30, 31) (FB) * AIR 1962 Punj 498 (501): 64 Pun LR 547 (DB). (Dismissal of writ petition in limine.)

(80) Previous writ petition challenging validity of allotment in favour of certain persons stood dismissed as withdrawn -- Held, there was no bar to agitate same point in subsequent writ petition simply because previous writ petition was dismissed as withdrawn particularly in view of undertaking given by Government. 1968 70 Pun LR 743: 1968 Cur LJ 637.

**Passing off actions.** — (81) Trade Marks Act (1940), Section 8 — The considerations relevant in a passing off action are somewhat different from those on an application made for registration of a mark under the Trade Marks Act and the decision of a Court in a passing off action cannot be considered as relevant on the questions that the Registrar has to decide under the provisions of Section 8. AIR 1953 SC 357 (363, 364): 1953 SCR 1028.

**Proceedings under U. P. Agriculturists Relief Act** — (82) Decision in previous proceedings under Section 12 of the U. P. Agriculturists' Relief Act that certain plot did not form part of the mortgaged property operates as res judicata in a subsequent suit. AIR 1956 All 237 (240).

(83) As the decision of the Court under Section 33, U. P. Agriculturists Relief Act, is a decision of a Court of exclusive and competent jurisdiction, a readjudication of the matters which were decided by that Court is barred by the principle of res judicata. AIR 1959 All 764 (766).

(84) Proceedings under U. P. Encumbered Estates Act — Finding that trust deed was valid or not, held, would be beyond scope of enquiry under Section 11 and would not operate as res judicata. ILR (1964) 2 All 191. (Reversed on another point in AIR 1969 SC 135.)

(85) Under Section 6, U. P. Encumbered Estates Act the Collector is not called upon to make any enquiry on the question of title or give any finding on intricate questions of law involved in the case. Such an order cannot operate as a bar in a subsequent civil suit where intricate questions of title and validity of trust are raised and agitated. ILR (1964) 2 All 191. (Reversed on another point in AIR 1969 SC 135.)

(86) Having regard to different scope of a suit under Section 92, Civil P. C. and an objection under Section 11, U. P. Encumbered Estates Act — Held, order passed on the objection in the U. P. Encumbered Estates Act proceedings could not operate as res judicata. AIR 1963 All 187 (190).

(87) Proceedings under U. P. Consolidation of Holdings Act — Principle of res judicata would govern consolidation proceedings. AIR 1965 All 296: 1964 All LJ 1112.

(88) U. P. Consolidation of Holdings Act -- Decisions on questions of title — Final only as regards the preparation of consolidation scheme — Such decisions cannot operate as res judicata so far as applications under Section 12 of U. P. Act (9 of 1949) are concerned. 1961 All WR (HC) 683 (685).

**Proceedings under Bengal Money-lenders Act.** — (89) Section 36, Bengal Money-lenders Act, keeps out the principle of res judicata from suits or proceedings under the Bengal Money-lenders Act, but apart from that the rules of res judicata are applicable with regard to suits or proceedings under the Bengal Money-lenders Act as in other matters and where a Court has considered the question whether the Bengal Money-lenders Act is applicable or not and has decided one way or the other, that decision must be held to operate as res judicata. AIR 1956 Cal 613 (615) (DB).

(90) Having regard to the wording of Section 38 of the Bengal Money-lenders Act and the nature and scope of the proceeding thereunder, when application was dismissed on the finding that the transaction in question was not a mortgage but was really a sale with an independent agreement for re-sale, that finding would not be res judicata between the parties in subsequent suits or proceedings. ('56) ILR (1956) 1 Cal 150 (153).

(91) First suit under Section 36 for re-opening personal decree under Order 34, Rule 6, Civil P. C. — Subsequent suit for re-opening final decree barred. AIR 1961 SC 1419 (1422): (1961) 3 SCR 880.

**Proceeding under Bengal Tenancy Act.**— (92) Section 11 does not in terms apply to proceedings under Section 26-F, Bengal Tenancy Act — Principles analogous to

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those embodied in the said section apply — Decision in proceeding under Section 26-F, Bengal Tenancy Act, that the tenancy in question is an occupancy holding is res judicata in a subsequent suit between the same parties for a declaration that the tenancy is a mokrari mowrashi holding. AIR 1960 Cal 724 (727, 728): ILR (1961) 1 Cal 295 (DB). (Sec. 26-F — Pre-emption proceedings under — Decision on question of title is res judicata.) * (1952) 22 ITR 177 (Cal). (Law as to res judicata applies to proceeding under Section 26-F, Bengal Tenancy Act (1885).) * AIR 1950 Cal 300 (302): ILR (1951) 1 Cal 396 (DB).

**Sales Tax proceedings.** — (93) Order of assessment or order of Appellate Tribunal on appeal fixing liability to tax in a particular year does not operate as res judicata or estoppel so as to prevent that decision being re-opened in assessment for subsequent years. AIR 1957 Andh Pra 130 (133) (FB).

[See also (1969) 1 Andh LT 36: (1968) 2 An WR 404. (Taxation matter — Question of res judicata does not arise — Each year's assessment is final only for that year — It does not govern later years. AIR 1962 SC 53, Foll.)]

**Proceedings under Madras Agriculturists Relief Act (4 of 1938).** — (94) Order scaling down debt under Section 9-A, Madras Agriculturists Relief Act on application of mortgagor — Order operates as res judicata on question of nature of document in suit for redemption between same parties. AIR 1958 Andh Pra 507 (509) (DB).

(95) Debtor's application for declaration of amount due by him on usufructuary mortgage — Court finding debtor as agriculturist but holding that debt could not be scaled down — Dismissal of application held not in accordance with Madras Agriculturists Relief Act — Subsequent suit for redemption held not barred by res judicata. (1963) 2 Mad LJ 338.

(96) Specific issue raised and decided in prior suit that debtor was not agriculturist — Transferee from debtor is not entitled to raise the issue again. AIR 1962 Andh Pra 425 (428) (DB).

(97) Proceedings under Madras Estates (Abolition and Conversion into Ryotwari) Act — Even if Section 11, Civil P. C. does not apply to such proceedings, principles underlying the provisions are applicable. AIR 1965 Andh Pra 12 (13).

(98) Per Subba Rao J. — Where a debtor files an application under S. 6 of the Act for scaling down the debt as an agriculturist, which is rejected on the finding that he is not an agriculturist, his subsequent application for relief under Section 14 of the Act is not barred by the principle of res judicata. AIR 1951 Mad 107 (115): (1951) 1 Mad LJ 153 (FB).

**Proceedings under Industrial Disputes Act.** — (99) Though Section 11 is in terms inapplicable to awards given by an Industrial Tribunal under the Industrial Disputes Act, the principle underlying it is applicable to decisions of Industrial Tribunals. AIR 1957 SC 38 (43): 1956 SCR 781 * (1967) 2 Lab LJ 186: 14 Fac LR 290 (Pat). (Application under Section 33 (2) (b), Industrial Disputes Act, 1947 for approval of dismissal of workman for misconduct — Tribunal refusing approval solely on technical ground that dismissal was ordered by Assistant Chief Mining Engineer and not by Chief Mining Engineer — Chief Mining Engineer passing order of dismissal and applying under S. 33 (2) (b) for approval of dismissal — Held, second application for approval was not barred by res judicata.) * AIR 1965 Raj 213 (215, 216): 1965 Raj LW 321 (DB). (Where the Industrial Tribunal in a previous dispute had given a particular decision on a particular issue, another Industrial Tribunal of co-ordinate jurisdiction would be debarred from giving a fresh decision on the point covered by the previous award.) * AIR 1964 Bom 188 (191): 66 Bom LR 34 (DB) * AIR 1963 Assam 86 (SB). (Award given by tribunal — Civil P. C. (1908), Section 11 is not attracted — Still in the interest of industry it is not open to reagitate matter decided.) * AIR 1963 Cal 275 (276): 65 Cal WN 495 * (1959-60) 17 FJR 26 (33) (Mad). (Dispute as to leave facilities referred in 1954 — Some claims omitted — Fresh reference regarding claim prior to 1954 — Principles of res judicata apply — If workmen omitted to press their claims they could not be allowed to do so in subsequent proceedings.) * (1957) 13 FJR 352 (355) (Punj). (Dispute settled by industrial award — Reference of same dispute to Industrial Tribunal during pendency of award cannot be made on principle of res judicata.) * AIR 1969 SC 513 (522, 524): 35 FJR 207.

[See also AIR 1958 Cal 465 (469, 470).]

**Industrial disputes.** — (100) Though statutory finality is accorded to the award of the Industrial Tribunal as modified by the Appellate Tribunal, that statutory finality is not enough to sustain the claim that a decision on every one of the collateral issues decided in an industrial dispute or in the appeal therefrom will operate as res judicata when the same question arises again as a collateral issue in subsequent proceedings, even in subsequent industrial disputes. The prior decision is relevant in the subsequent proceedings but it is not conclusive. AIR 1957 Mad 60 (64).

(101) Points settled in a previous binding award — Cannot be considered in a fresh reference. AIR 1968 SC 585 (590): (1968) 1 SCR 581.

(102) Reference of dispute to Tribunal — Government has power to review its

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earlier decision — Principle of res judicata not applicable. AIR 1962 All 70 (72): (1961) 1 Lab LJ 686.

(103) Reference of Industrial dispute, once refused — State Government not barred from referring again — Previous refusal to refer does not operate as res judicata or an estoppel. AIR 1964 All 328 (329): 1961 All LJ 42 (DB) * 1963-1 Lab LJ 340 (All).

(104) Revision of wage scales — Technical Rules like res judicata not applicable. AIR 1964 SC 728 (731): (1964) 5 SCR 344.

(105) Hours of work found reasonable in 1950 — Change in 1961 on relevant considerations held justified — Principles of res judicata not applicable to industrial adjudications. AIR 1964 SC 914 (917): 1964-1 SCWR 265.

[See also 1962-1 Lab LJ 275: 1962 Suppl 3 SCR 196. (Case under Section 11, Bombay Industrial Relations Act 11 of 1947).]

(106) Principle of res judicata does not apply to industrial dispute proceedings — Parties to settlement can again raise dispute with regard to subject-matter of settlement. ILR (1956) 1 All 639.

(107) Decision of Tribunal on jurisdictional fact — Tribunal being of limited jurisdiction its decision is not final and conclusive between parties and would not operate as res judicata. AIR 1967 Punj 193.

(108) Decision of Government under Section 12 (2) of Industrial Disputes Act — Is an administrative act — It does not operate as res judicata in referring the dispute under Section 10. AIR 1969 Raj 95 * 1963-1 Lab LJ 340 (All).

(109) Opinion expressed by Industrial Tribunal on merits after declining to entertain reference — It is totally ineffective and cannot be regarded as an adjudication of the dispute. AIR 1964 Madh Pra 20 (23): 1963 Jab LJ 728 (DB).

**Proceedings under Rajasthan (Protection of Tenants) Ordinance, 1949.**— (110) Decision does not operate as res judicata as proceedings are summary. AIR 1958 Raj 74 (77): ILR (1958) 8 Raj 80 (DB).

**Proceedings under Calcutta Municipal Act (3 of 1923).**— (111) A party could not be proceeded against twice in respect of the same encroachments and where the Corporation had failed in the previous proceedings under Section 363 (1) with respect to certain encroachments it could not maintain the subsequent proceedings under Section 363 (1) in respect of the same encroachments. The decision in the previous case operates as res judicata. AIR 1957 Cal 399 (418): 1957 Cri L Jour 722 (FB).

**Proceedings under Minimum Wages Act.** — (112) Application under Section 20 (2) of the Minimum Wages Act (11 of 1948), claiming back wages on the basis of first Notification — Employer not raising the plea of bar of second notification in the first instance — Case sent back by the High Court to decide all outstanding issues after reversing the decision of Authority in regard to the status of the claimants — Bar of second notification raised by employer — Held plea not barred by constructive res judicata. AIR 1961 Assam 154 (156): (1962) 2 Lab LJ 211.

**Proceedings under Payment of Wages Act.**— (113) In the former proceedings the question whether the employees were covered by the agreement was never raised, was not in issue in those proceedings, and was not in fact decided. Those proceedings related to the wages of the employees between October, 1953 and March 1954, whereas the present applications under Section 15 were in respect of a period subsequent to June, 1954.

Held, that the principle of constructive res judicata was not applicable so as to bar the subsequent application. (1958) 2 Lab LJ 300: (1958-59) 15 FJR 89 (Bom).

(114) See also the undermentioned cases for other illustrations: AIR 1960 SC 808 (809): (1960) 3 SCR 221. (Certificate issued by Collector under Sec. 10 of the Bombay Hereditary Offices Act (1874) on previous occasion held by Bombay High Court to be invalid in that it was not addressed to Privy Council which had ultimately passed the decree — Subsequent re-issue of certificate under Section 10 addressed to Supreme Court which was successor of Privy Council — Decision of Bombay High Court cannot operate as res judicata.) * AIR 1969 All 342 (351, 355, 359): 1968 All LJ 144 (FB). (Section 12 (7), U. P. Consolidation of Holdings Act cannot be used to cut down application of doctrine of res judicata.) * AIR 1959 Bom 111 (114, 115): 70 Bom LR 376. (Presidency Small Cause Courts Act (1882) (as it stood prior to amendment by Maharashtra Act 41 of 1963) — Dismissal of ejectment application under S. 41, previously filed by plaintiff, on ground that defendant was sub-tenant — Subsequent suit for possession alleging licence given to defendant was determined not barred by res judicata as the proceeding under Section 41 was not a suit within Section 11.) * AIR 1959 SC 275 (279, 280): 1959 Supp 1 SCR 237. (To a case under Section 19 of Madras Agriculturists Relief Act (4 of 1938) (as amended by Madras Act 23 of 1948) question is not so much of the application of the principle of res judicata as the proper construction thereof.) * (1968) 9 Guj LR 467. (Rejection of application under Section 31 (2), Bombay Tenancy and Agricultural Lands Act (47 of 1948) does not stand in way of certified landlord applying under Section 32-T.) * 1968 Lab IC 836: 1968-1 Mad LJ 208. (Railway Establishment Code, Rule 149 — Misconduct by Railway servant — Departmental enquiry abandoned as workmen could be dismissed under

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Rule 149 — Rule held ultra vires subsequently — Employee reinstated — Enquiry can again be proceeded with — Principle of res judicata or autrefois acquit not applicable.) * AIR 1968 Manipur 64 (65, 67). (Title to suit land by virtue of annual patta granted under Section 11 of the Assam Land Revenue Regulation gone into and decided in earlier proceedings — Parties being the same question cannot be raised in subsequent proceedings.) * AIR 1968 Mys 323 (325, 326): (1967) 2 Mys LJ 85. (Provision under which certain octroi duty was payable decided in earlier litigation — Provisions in the Act and the goods remaining the same, decision bars fresh adjudication on the same contention.) * (1968) 2 Mys LJ 439: 15 Law Rep 118. (Person in possession of the suit property were held to be mulgenidar — Order of Collector which became final, held, operated as res judicata.) * AIR 1968 Pat 476: 1968 BLJR 692. (Petition under Bihar Public Land Encroachment Act 1956, for eviction — Revenue Courts only deciding that it was not a fit case for taking action for eviction under the Act — Held, decision would operate as res judicata only to the extent that fresh petition for eviction under the same Act could not be filed.) * (1968) 70 Punj LR 960: 1968 Cur LJ 323 (DB). (Order under Section 13, East Punjab Urban Rent Restriction Act for eviction is final subject to appeal or revision — In eviction proceedings tenant denying relationship of landlord and tenant — Suit by landlord to recover arrears of rent — Tenand cannot reagitate the relationship between him and the landlord — Decision of the Rent Controller is binding and Civil Court cannot reopen it.) * (1967) 1 An LT 170: (1967) 1 Andh WR 393. (Proceedings under Madras Hindu Religious and Charitable Endowments Act (2 of 1927), Section 27 (prior to and after amendment in 1946) — Scheme framed by Board — Certain lands not included in scheme after holding that they were archakatwam service inam lands as claimed — Held, such determination was final subject to suit in Civil Court — Whether Board's order remained as a result of suit or was modified by decision of Civil Court, it would operate as res judicata on principles of general res judicata.) * AIR 1967 Bom 194 (195): 65 Bom LR 457. (Doctrine of res judicata is essentially confined to decisions of Courts and not to other administrative decisions — Decision under Bombay Public Trusts Registration Act, 1935, as to character of particular trust cannot operate as res judicata irrespective of future legislation.) * ILR (1967) Guj 982 (999): 9 Guj LR 1018. (Civil Court deciding that an issue is to be referred to competent authority under the Bombay Tenancy and Agricultural Lands Act — Decision operates as res judicata.) * ILR (1967) 3 Mad 393 (399). (For Section 64-A, Madras Estates (Abolition and Conversion into Ryotwari) Act to apply the decision must be of a Civil Court and on matters falling within its purview and the parties must be in issue on that very matter in subsequent proceedings. The section cannot take within its scope any constructive res judicata.) * AIR 1967 Punj 272. (Res judicata embodied in Section 11 applies to proceedings under Sikh Gurudwaras Act.) * AIR 1966 Andh Pra 210 (211): (1964) 2 Andh WR 210: (1964) 2 Andh LT 151. (Madras Hereditary Village Offices Act (3 of 1895), Section 5 — Ex parte preliminary decree for sale of washerman service inam — Objection as to inalienability of inam raised at final decree stage — Objection barred by res judicata.) * AIR 1966 Bom 228 (233, 234): 1966 Cri LJ 1239: 67 Bom LR 852 (DB). (Bombay Police Act (22 of 1951), Sections 4 and 25 — Departmental enquiry — Negligence of duty — Exoneration from charges — Order of State Government for further enquiry on same charges — State Government is empowered to order further enquiry on the same charges decided in departmental enquiry.) * ILR (1966) 1 Cal 495 (606) (DB). (Principle of res judicata is not applicable as the issues to be decided and the enquiries under Section 5-A Estates Acquisition Act 1953 (W. B. 1 of 1954) are limited in their very nature.) * (1966) 68 Pun LR 732 (734): 1966 Cur LJ 832 (DB). (Application for fixation of fair rent under Section 4 of East Punjab Urban Rent Restriction Act — Application dismissed on basis of agreement between parties that tenant would pay certain annual rent — Held, second application not barred — No question of res judicata can arise where matter has not been judicially determined.) * AIR 1965 Assam 18: ILR (1964) 16 Assam 254 (DB). (Proceedings under Assam Adhiars Protection and Regulation Act — Application for ejectment of Adhiars — Rejection by Conciliation Board — Second application to the Board — Principle of res judicata not applicable.) * AIR 1965 Guj 145: (1964) 5 Guj LR 1009 (DB). (Bombay Agricultural Debtors Relief Act (28 of 1947), Section 36 — Award alleged to be obtained by fraud — To render award a nullity, fraud must have been practised on Court and not on party — Suit for setting aside award not maintainable.) * 1965 Ker LJ 800: 1965 Ker LT 1012. (Kerala Agriculturists Debt Relief Act (31 of 1958), Sections 4 and 5 (as amended by Act 2 of 1961) apply even to an order passed under Section 7 — Decree amended under Section 7 by applying unamended Section 5 — Executing Court is not precluded by res judicata from making any change.) * ('65) 78 Mad LW 80: ILR (1965) 2 Mad 495. (Proceedings under Madras Estates Land (Reduction of Rent) Act (30 of 1947) — Question of character of land — Pre-

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vious decisions of Civil Courts are binding as between parties thereto and Collector is bound to give effect to them.) * ILR (1965) Cut 539. (Dispute as to relationsrip of landlord and tenant — Controller under Orissa House Rent Control Act (31 of 1958), has jurisdiction to decide though decision neither final not conclusive — Jurisdiction of Civil Court to decide point on merit not barred.) * (1964) 5 Guj LR 847. (Bombay Provincial Municipal Corporation Act (59 of 1949), Schedule, R. 20 (2) and Sections 406 (1), 127 and 413 — Notice under Rule 20 proposing revision of rateable value of premises — Objections overruled and tax recovered — Civil suit for refund on ground that tax was recovered illegally — Jurisdiction of Civil Court — Section 406 (1) is no bar.) * AIR 1964 Madh Pra 136 (136): 1963 Jab LJ 950. (Motor Vehicles Act (1939), Sections 110, 110-A and 110-F — Happening of accident to motor car before constitution of Claims Tribunal — Remedy is by suit and not by claim under Section 110-A — But prior decision of High Court that Claims Tribunal has jurisdiction to entertain claims acts as res judicata.) * AIR 1964 Punj 311 (313): 65 Pun LR 1077. (Eviction order passed under Rent Control Act on basis of admission by tenant of landlord's bona fide requirement of premises for personal use — Order challenged as inexecutable on ground of being passed without jurisdiction — No provision in Act empowering executing Court to consider validity of order under execution — Executing Court cannot entertain objection.) * (1964) 66 Punj LR 713. (Decision on an issue of rate of rent by Rent Control Authority — Is binding on Civil Court under general principles of res judicata.) * AIR 1963 Punj 163 (164): 1962 Cur LJ 139. (Principles of res judicata are applicable to fixation of fair rent in proceeding under East Punjab Urban Rent Restriction Act.) * (1963) 65 Pun LR 188: 1963 Cur LJ 70. (Proceedings under Displaced Persons (Compensation and Rehabilitation) Act (1954) — Decision of Tribunal inter partes as to status of a party — Operates as res judicata.) * AIR 1962 Mad 267 (271): (1962) 2 Mad LJ 241 (FB). (The jurisdiction of the Court under the various provisions of the Guardians and Wards Act (1890) being essentially a parental and administrative one; no finality can attach to the order sanctioning a proposed transfer by guardian. Order under Sec. 31 (2) can be treated as res judicata so as to bind the minor.) * ('62) 40 Mys LJ 321. (Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Section 11 — Standard rent fixed by consent of parties and embodied in decree — Tenant cannot re-agitate matter by separate suit.) * ILR (1962) Cut 897. (Leave to appeal to Supreme Court — Valuation for purposes of appeal — Applicant offering to show that valuation was well above Rs. 20,000 — Value already determined at a lesser amount by trial Court on contest — Held that principle of res judicata applied and that leave to appeal could not be granted.) * 1961 MPLJ 26. (In execution proceedings of a decree for eviction passed after coming into force of M. P. Act, 23 of 1955 it is not open to the judgment-debtor to object to the execution on the ground that the decree was bad as it was passed by the Civil Court even though no ground for eviction under Section 4 of the Act existed.) * AIR 1960 Madh Pra 260 (262): 1960 Jab LJ 822. (Principle of res judicata in the strict sense does not apply to the proceedings under Section 7 of the Administration of Evacuee Property Act.) * AIR 1959 Ker 156 (157): 1958 Ker LT 1005. (Proceedings under Sec. 84 (2), Madras Hindu Religious Endowments Act (2 of 1927), is analogous to a suit, and the decision is one given in proceedings which are in the nature of a suit and would therefore operate as res judicata in a subsequent proceeding such as one under Madras Temple Authorisation Act (5 of 1947) between the same parties.) * (1958) 60 Punj LR 277 (281). (Departmental inquiry — There is no such bar as res judicata.) * AIR 1957 Andh Pra 64 (71): 1958 Andh LT 19 (DB). (It is not open in a mesne profits enquiry to go behind the preliminary decree which was confirmed by High Court. As the decree became final parties were bound by it.) * 1957 Raj LW 288 (289). (Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950), Section 26 — Satisfaction of Court necessary — It is immaterial that Rent Controller was not satisfied on earlier occasion — Principle of res judicata not applicable.) * 1956 BLJR 627 (630). (Bihar and Orissa Co-operative Societies Act — Same dispute — Assistant Registrar has power to go behind award already given by his predecessor — Section 11 does not apply.) * AIR 1954 Mad 149 (152): (1952) 1 Mad LJ 836. (Principles of Section 10, Madras Buildings (Lease and Rent Control) Act are not exactly same as those contained in Section 11.) * (1965) 2 ITJ 740 (All). (Writ petition for quashing recovery proceedings under Section 32 (2) of U. P. Agricultural Income-tax Act — State not pleading that they could or would seek remedy before Civil Court to recover tax dues — Subsequent suit for recovering tax arrears held not barred by res judicata — 'Proceedings' in Section 32 (2) does not include a suit in Civil Court.) * AIR 1965 Orissa 156 (158): ILR (1964) Cut 741 (DB). (Decision as to whether disputed property is in possession, of minor or third party, in summary enquiry under Section 12 (9), Guardians and Wards Act (1890) does not operate as res judicata. (1881) 21 QBD 313, AIR 1950 SC 222, AIR 1952 SC 319, ILR (1950) All 264 Foll.) * AIR 1960

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Assam 59 (61, 62): ILR (1957) 9 Assam 315 (DB). (Assam Adhiar Protection and Regulation Act (12 of 1948) does not confer jurisdiction on Revenue Officer to decide status of tenant finally. Principle of res judicata does not apply.) * AIR 1961 Cal 432: 65 Cal WN 315 (FB). (A second application under Section 17 (2) of W. B. Premises Rent Control (Temporary Provisions) Act (17 of 1950) may be barred by res judicata or principles analogous thereto, but, for that the material circumstances must remain the same.) * AIR 1960 Punj 341 (348, 349): 62 Pun LR 475 (FB). (Case under Section 17 of Administration of Evacuee Property Act (1950), Section 17.) * AIR 1960 Punj 354 (355, 356): 62 Pun LR 191 (DB). (Case under Section 17 of Administration of Evacuee Property Ordinance (27 of 1949).)

**27. Two suits or appeals tried together — Appeal from decision in one.**— (1) A sues B for adjustment of accounts and for recovery of sums found due. A decree is passed in favour of A for Rs. 680. A and B both appeal, A on the ground that more is due and B on the ground that nothing is due to plaintiff but that money is due to him. Both the appeals are tried together and a single judgment is passed, whereby B is granted a decree for Rs. 1,400. A's appeal being dismissed, he prefers a second appeal from the decree in B's appeal but not from the decree in his own appeal. Held that the second appeal was not barred by res judicata by reason of not appealing from the decree in his own appeal. AIR 1928 All 274 (275): 50 All 517 (DB) * AIR 1927 Oudh 575 (575) (DB).

(2) A sues B on a mortgage. B contends that the interest claimed is excessive. The suit is decreed in favour of A as claimed but costs are disallowed. A appeals against the disallowance of costs and B against the award of interest. In a single judgment both appeals are disposed of by which A is given the disallowed costs in his appeal and interest also is reduced in B's appeal. A then prefers a second appeal against the decree in B's appeal. Held that the second appeal was not barred by res judicata by reason of no appeal having been preferred against the decree for costs in his own appeal. AIR 1923 All 490 (492): 45 All 506 (FB). (Overruling 33 All 151.)

(3) Where two suits or two appeals between the same parties and raising the same questions are tried together but separate and independent judgments are given in each or where the two suits or appeals are tried by two different Courts and separate judgments are delivered, and a party appeals from one leaving the other to become final against him, the rule of res judicata will apply and the appeal preferred by him will be barred. AIR 1968 Pat 146 (148): 1968 BLJR 169 * AIR 1939 Sind 329 (331): ILR (1940) Kar 15 (DB) * ('21) AIR 1921 Cal 291 (292) (DB).

(4) Two suits tried together — One for declaration of title and another for partition — Suit disposed of by same judgment but two separate decrees passed — Appeals against both decrees dismissed and second appeal preferred only against decree confirming decision in partition suit — Second appeal, held, was not maintainable as decision in declaratory suit which was based on determination of question of partition operated as res judicata. AIR 1966 Orissa 47 (48, 49): ILR (1966) Cut 36.

(5) Title suits against same defendants — Plaintiffs in one suit, though different from plaintiffs in other prosecuting suit in a representative capacity — Suits tried together and decided by common judgment but separate decrees passed — Appeal against decree in one suit is barred either by Section 11 or by the general principles of res judicata when no appeal is preferred against the decree in other suit or appeal in that suit has been dismissed for default or otherwise. (1962) ILR 41 Pat 581.

(6) Where two suits or appeals in which the respective plaintiffs or appellants raise inconsistent titles are tried together and a single judgment or two judgments one incorporating or dependent on the other are given (whether a single decree or two decrees are drawn up), an appeal against the decree in one suit or appeal will not be barred by not appealing against the decree in the other suit or appeal. (1969) 1969-1 Mad LJ 241 * (1966) 68 Pun LR 871 (874) * AIR 1965 Him Pra 7 (8, 9) * 77 Mad LW 644: ILR (1965) 1 Mad 57 * (1963) 4 Guj LR 282. (Overruled in AIR 1964 SC 1341.) * AIR 1962 Ori 141 (146): ILR (1961) Cut 690 * ('06) 33 Cal 1101 (1116, 1117) (SB) * AIR 1958 Punj 83 (86): ILR (1957) Punj 1080 * AIR 1931 Cal 353 (354) (DB) * AIR 1927 Lah 289 (306, 328): 8 Lah 384 (FB). (This decision must be taken to overrule AIR 1927 Lah 98, AIR 1922 Lah 390: 3 Lah 215: AIR 1921 Lah 346: 1 Lah 368 and AIR 1919 Lah 42: 1 Lah 83 also AIR 1921 Lah 255 and AIR 1921 Lah 271.) * ('28) 109 Ind Cas 564 (566) (Lah) * AIR 1943 Mad 139 (142): ILR (1943) Mad 235 (FB) * ('05) 29 Mad 333 (335) (FB) * AIR 1947 Nag 248 (251, 252): ILR (1947) Nag 691 (DB) * AIR 1941 Nag 199 (200): ILR (1942) Nag 325 (DB) * AIR 1944 Oudh 220 (220, 225): 19 Luck 469 and 583 (DB).

[But see AIR 1959 Ker 75 (77): 1958 Ker LT 616 * AIR 1966 Orissa 68 (70, 72, 73): ILR (1956) Cut 319 (DB).]

(7) Suit for possession of immovable property against two sets of defendants each of whom claimed a third of the property — Suit decreed by trial Court — Both sets of defendants appealing each

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separately — Both appeals allowed and plaintiff's suit dismissed — The appeal disposed of by one judgment but two decrees passed — Plaintiff appealing against both decrees but one appeal found time-barred— Held, that the other appeal was not barred by res judicata. AIR 1953 SC 419 (420): 1950 SCR 754.

[See also AIR 1969 Cal 4 (9) (DB). (AIR 1953 SC 419, Rel. on.) * 1966 Ker LT 1112 (1113): 1966 Ker LJ 542. (AIR 1953 SC 419, Rel. on.) * 1962 All WR (HC) 75: 1962 All LJ (93). (Execution proceedings — Objections in two cases disposed of by single order — Appeal not filed in one — Maintainability of appeal in other unaffected.) * ('56) AIR 1956 Raj 166 (166): ILR (1956) 6 Raj 127 (DB) * ('55) AIR 1955 All 543 (544) * ('55) AIR 1955 Him Pra 46 (48) * ('54) AIR 1954 Raj 58 (63): ILR (1953) 3 Raj 373 (DB).]

(8) Where subject matter of each of the two suits or appeals is different and the decisions in the two proceedings though stated in one judgment really amounts to two decisions and not one decision common to both proceedings an appeal filed against the decision in one proceeding will be barred by rule of res judicata if no appeal is filed against the decision in the other proceeding. AIR 1962 SC 338 (342): (1962) 3 SCR 759.

(9) Two suits having common issues — Suits decided by trial Court on merits — Two appeals filed therefrom — One of them dismissed on ground of limitation or default in printing — Decision of Appeal Court will be res judicata. AIR 1966 SC 1332 (1339): (1966) 3 SCR 300. (AIR 1946 Oudh 33 (FB) and AIR 1927 Lah 1, Overruled.)

(10) Where a decision is given simultaneously in two suits, it cannot be a decision in a former suit. But the moment the decree passed on the basis of that judgment in one suit becomes final either because no appeal is preferred against it, or the appeal filed against it is dismissed, then at that point of time there comes into existence a judgment which must be regarded as final between the parties so as to operate as res judicata in subsequent suits provided the other requisites of Section 11 are also present. AIR 1963 All 210 (212, 213, 214): 1962 All LJ 1153 (FB). (AIR 1957 All 106, Overruled.)

(11) Where two suits raising a common issue against the same defendants were tried together and disposed of by a common judgment and similarly the two appeals in the two suits were also heard together and one judgment followed, a second appeal against the judgment relating to one appeal without any second appeal being preferred against the judgment in other appeal is barred by res judicata. 26 Cut LT 309: ILR (1960) Cut 410.

(12) Two suits X and Y tried together — Common judgment — Matter directly and substantially in issue in two suits different but some issues common — Common issues heard and decided only in suit X and judgment in suit X kept in record of suit Y — Appeal from decision in suit X only — Appeal not barred by res judicata — Decision in suit Y does not atract Section 11 as decision was not given after hearing. AIR 1963 Guj 198 (205, 206, 207).

(13) Two separate suits, one filed earlier and the other later, between the same parties involving common issues — Suits disposed of by a common judgment — Earlier suit dismissed and later suit decreed — Appeal from decision in later suit only — Finding given in earlier suit cannot operate as res judicata in the appeal filed against the later suit because a decision given simultaneously cannot be a decision in former suit. AIR 1954 Trav-Co 235 (236) (DB).

(14) Cross-suits having same subject-matter, parties and issue — Decree in one duplicate of other — Appeal from one only is not barred by res judicata — Case law analysed and classified — Three types of cases pointed out. AIR 1947 Pat 125 (128).

(15) Two title suits against same defendant by two plaintiffs on ground of purchase in respect of different khatas in same village — Suits decreed — Appeal by defendant — Death of respondent in one appeal — Abatement of appeal — Other appeal is not barred by res judicata. AIR 1958 Pat 562 (564).

(16) Where matter litigated in two suits is not the same an appeal in one suit only will not be barred by non-appeal in the other. AIR 1927 All 540 (541) (DB) * 1962 All LJ 604: (1962) Supp 3 SCR 217.

(17) Companies (Court) Rules (1959) (Allahabad), Rule 176 — Official Liquidator rejecting claim for compound interest but admitting claim for principal and calculating simple interest — Appeals against rejection of compound interest, dismissed — Decision in appeal would not operate as res judicata in subsequent application under Rule 176 for expunction of proof admitted by Liquidator. (1965) 1 Com LJ 99: 1965 All LJ 330.

(18) Husband's suit for restitution of conjugal rights under Section 9 of Hindu Marriage Act (1955) — Wife's subsequent petition for judicial separation under Section 10 of the Act — Consolidation of proceedings — Dismissal of both by common judgment — Decrees in two proceedings are separate — Husband not having appealed from dismissal of his suit is barred by res judicata in getting a decree in the favour in wife's appeal against dismissal of her petition for judicial separation. AIR 1965 All 280 (287). (AIR 1959 Kerala 75, Doubted.)

**Section 11 — Note 27 (contd.)**

(19) A filed partition suit against B and C. The trial Court decreed the suit. Two separate first appeals one by C and the other by B were preferred before the Single Judge who upheld the decree of trial Court. Two separate Letters Patent appeals were preferred. The one filed by C was not proceeded with and it stood dismissed.

Held, that there could be no question of the application of the doctrine of res judicata. AIR 1965 Pat 87 (102, 103).

**28. Explanation IV — General.**— (1) The rule of constructive res judicata as embodied in Explanation 4 is part of the general principles of the law of res judicata and, therefore, the explanation cannot be said to have introduced any innovation in the law of res judicata. ('03) 26 Mad 760 (767) (DB).

(2) An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might have litigated and have had decided as incidental to or essentially connected with the subject-matter of the litigation. 1960 All LJ 254 (258): 1960 All WR (HC) 238.

(3) The principle underlying Explanation 4 is that where the parties have had an opportunity of controverting a matter, that should be taken to be the same thing as if the matter had been actually controverted and decided. ILR (1959) Cut 448 * AIR 1939 Mad 818 (824) (DB).

(4) Section 30 of the Patiala Relief of Indebtedness Act (5 of Smt. 1999) allows an objection that the decree-holder was not entitled to realise more than twice the amount of the money advanced, to be taken in execution proceedings though no objection was taken during the trial of the suit, and therefore, the special enactment must have precedence over the principle of implied decision laid down in Explanation 4 to this section. AIR 1952 Pepsu 35 (36): 2 Pepsu LR 674.

(5) Under Section 26 of the Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950), the executing Court has to satisfy itself that one or the other of the conditions mentioned in Section 13 of the Act is satisfied before it executes the decree passed before the Act came into force. If the question whether any of the conditions mentioned in Section 13 existed was not raised in the trial Court, or if raised was not decided by it, the executing Court can decide the question for itself. AIR 1954 Raj 43 (44): ILR (1952) 2 Raj 290.

(6) Distinction between Explanation IV and Order 2, Rule 2 pointed out. ('03) 26 Mad 760 (766) (DB) * (1935) 157 Ind Cas 368 (370) (DB) (Lah).

(7) Where a matter is constructively in issue it cannot, of course, be said to have been actually heard and decided. It could only be deemed to be heard and decided. AIR 1961 Cal 422 (429, 430) * 1960 All WR (HC) 238: 1960 All LJ 254 (258) * AIR 1954 Cal 506 (509) (DB) * ('25) AIR 1925 Cal 427 (429, 430) (DB) * ('14) AIR 1914 Mad 399 (416): 37 Mad 70 (FB).

(8) Where the effect of the decision in the former suit is necessarily inconsistent with the defence that ought to have been, but not raised, that defence must be deemed to have been finally decided against the person who ought to have raised it. AIR 1949 Bom 274 (275): ILR (1949) Bom 256 * AIR 1944 Oudh 94 (95, 98, 99): 19 Luck 428 (DB) * AIR 1942 All 410 (421): ILR (1942) All 624 (DB) * ('35) 157 Ind Cas 381 (382) (Cal) * ('35) 61 Cal L Jour 301 (302) (DB).

(9) A matter constructively in issue will not be deemed to have been decided where the case has not been tried upon the merits, as where the prior suit was dismissed for non-joinder of parties. AIR 1922 Mad 259 (262) (DB).

(10) Explanation IV does not dispense with the other essential requirements of the section such as the sameness of the parties, the competency of the Court, and litigation under the same title. 61 Bom LR 1607: ILR (1960) Bom 154. (Prior suit by plaintiff in a Court having no jurisdiction to try it — Plea that defendant's debts had been extinguished by law not raised therein by plaintiff — As decree in the suit is void, plaintiff is not debarred from raising the plea in a subsequent suit for declaration that defendants' debts had been extinguished.) * AIR 1930 Mad 264 (267) (DB) * AIR 1927 Oudh 341 (344) (DB).

(11) Explanation IV does not apply where the ground of attack or defence has actually been raised but not decided. AIR 1939 Mad 818 (824) (DB) * AIR 1931 Oudh 157 (158) (DB) * AIR 1939 Cal 1 (3) (DB) * AIR 1921 Mad 21 (22, 23) (FB).

[But see AIR 1938 Pat 427 (428) (DB).]

(12) Explanation IV cannot be applied against a person who has been successful in the previous suit. AIR 1943 Oudh 231 (233) (DB).

(13) Plea of non-joinder rejected as having been raised at late stage — Plea will be barred by constructive res judicata if it ought to have been raised at proper time. AIR 1926 Cal 511 (511) (DB).

(14) Plea of constructive res judicata must be found firmly by proving the facts from which a Court can infer that at the critical time the person sought to be barred might and ought to have raised the plea. 1940 Nag L Jour 562 (565) (DB).

(15) The explanation applies to the plaintiff to the same extent as it applies to the defendant. ('92) 1892 All WN 224 (225) (DB) * ('04) 6 Bom LR 594 (597, 598, 599) (DB).

(16) The doctrine of constructive res judicata applies wherever the issues in-

**Section 11 — Note 28 (contd.)**

volved in the two litigations are identical. It is not necessary that the property concerned must be the same. AIR 1953 SC 33 (39): 1953 SCR 154 * AIR 1942 All 410 (421): ILR (1942) All 624 (DB) * AIR 1942 All 267 (287): ILR (1942) All 518 (DB). (AIR 1922 PC 80: 45 Mad 320: 49 Ind App 129, Rel. on.)

[See however AIR 1950 FC 142 (179): 1949 FCR 715.]

(17) Principle of constructive res judicata applies to a proceeding for scaling down of decree debt under Madras Agriculturists Relief Act (4 of 1938). AIR 1957 Andh Pra 841 (843).

(18) Question as to territorial jurisdiction or valuation impliedly decided in a prior suit cannot be re-agitated in a subsequent suit between the same parties. AIR 1938 Mad 257 (262) (DB).

(19) Object of Explanation IV is to compel the plaintiff or defendant to rely upon all grounds of attack or defence which wese open to them. 1965 All WR (HC) 22 * AIR 1956 Pepsu 69 (72) * AIR 1954 Cal 90 (93) (DB) * AIR 1937 Lah 872 (874): ILR (1937) Lah 496.

(20) A party is bound to bring forward his whole case in respect of the matter in litigation, which was open to him upon the points for decision in the suit. He cannot abstain from relying upon, or abandon, a ground of claim which is in question and proper for consideration, and afterwards make it a cause of fresh suit in respect of the same subject-matter. AIR 1953 Madh B 270 (272) * AIR 1953 Mad 914 (915, 916) (DB) * AIR 1949 Pat 197 (206): 26 Pat 717 (DB) * AIR 1934 Mad 68 (70) * (1968) 2 Mys LJ 54: 15 Law Rep 219.

(21) Where a plaintiff might and ought to have urged a question in a former litigation, he would be estopped from raising the same question in a subsequent suit. AIR 1968 J & K 35 (36): 1968 Kash LJ 33. (Revision against interlocutory order — Objection to its maintainability not taken — Case remanded and lower Court taking some decision — Second revision on same grounds — Objection to its maintainability cannot be taken as two contradictory findings might be recorded in the same case.) * 1965 All WR (HC) 348: 1965 All LJ 714 * AIR 1964 Punj 408 (409, 410): 66 Pun LR 1005 * ILR (1955) 2 Cal 460 * AIR 1954 Cal 202 (205) * AIR 1958 Bom 152 (153, 154): ILR (1957) Bom 548 * AIR 1957 Punj 19 (20) (DB) * AIR 1954 Pat 318 (319) (DB) * AIR 1957 Andh Pra 841 (843) * AIR 1950 Hyd 62 (63): ILR (1951) Hyd 70 (DB) * ('87) 11 Bom 708 (723) (DB) * ('93) 20 Cal 79 (85): 19 Ind App 234 (PC).

(22) Defendant, who does not raise all the objections which he might and ought to have raised in answer to the plaint claim, will be barred from raising those defences. (1968) 1 An WR 427 * 1968 MPLJ 301: 1968 Lab LJ 438 * 1967 BLJR 606 (DB) * AIR 1966 Andh Pra 269 (271): (1966) 1 Andh WR 50. (Suit for administration of estate of the testator — Preliminary decree, that the specific bequest be given effect to, confirmed by High Court and Supreme Court — No objection can be raised against it in final decree proceedings both on grounds of res judicata and Section 97.) * 1965 BLJR 452 * (1964) 2 Andh LT 245: ILR (1964) Andh Pra 740 * ('64) 30 Cut LT 278 (280) * 1962 Ker LT 715 * (1961) 2 Ker LR 636: 1961 Ker LT 998 (1000) * AIR 1961 Punj 391 (393): ILR (1961) 2 Punj 151 * AIR 1960 Cal 489 (491): 64 Cal WN 488 * ILR (1960) Mys 120 * 1959 Ker LJ 1227: 1959 Ker LT 1094 * 1959 Ker LJ 419: 1959 Ker LT 364 * AIR 1959 Orissa 74 (77): ILR (1959) Cut 142 * 1958 Andh LT 809 * ('57) 59 Bom LR 610 (615). (Overruled on another point in AIR 1969 Bom 74.) * Madh BLJ 1955 HCR 20 * AIR 1956 Bom 49 (52): ILR (1955) Bom 1021 (DB) * AIR 1957 Cal 128 (131) (DB) * ('55) ILR (1955) 2 Cal 460 (469) (DB) * AIR 1955 Mad 670 (673): ILR (1956) Mad 307 (DB) * AIR 1954 Madh B 89 (93): ILR (1953) Madh B 265 (DB) * AIR 1952 Mys 32 (34): ILR (1952) Mys 139 (DB) * ('50) 1950 Trav-Co LR 425 (431) (DB) * AIR 1949 Pat 340 (342): 27 Pat 835 (DB) * AIR 1945 PC 132 (133): ILR (1945) Kar (PC) 299 * AIR 1930 PC 177 (178): 57 Ind App 181: 52 All 272 * ('13) 40 Cal 1 (20): 39 Ind App 237: 6 Low Bur 119 (PC) * ('89) 16 Cal 682 (691): 16 Ind App 107 (PC) * AIR 1924 Mad 608 (609): 47 Mad 476 (DB).

(23) The Explanation refers to grounds of defence which would have been good and proper grounds of defence. ('04) 26 All 61 (65, 67, 68) (FB).

(24) Explanation refers to the condition of things at the time the former suit was instituted and does not refer to grounds which may come into existence by some act of the plaintiff. ('07) 10 Oudh Cas 145 (153) (SB).

(25) Relief prayed not dependent on adjudication of particular matter — Matter cannot be deemed to have been decided by judgment which does not deal with it. ('41) AIR 1941 Mad 753 (759).

(26) If the question whether the debtor was an agriculturist was not raised during the pendency of the suit and the suit was not got transferred to the Debt Settlement Officer, the question of transferring the execution proceedings to the same officer, that is of permitting the judgment-debtor to raise the contention that he was an agriculturist, was barred by principles of res judicata. AIR 1955 Ajmer 43 (44): 1955 AMLJ 29.

(27) "Suit" in Explanation IV does not include appeal. 1965 All WR (HC) 22.

**Section 11 — Note 28 (contd.)**

(28) Section 11, Explanation 4 cannot apply to a ground of defence which would convert the suit into a suit of a different type cognisable by different type of Courts. (1963) 4 Guj LR 90: ILR (1963) Guj 1.

(29) A suit for partition not only means one for partitioning the properties alone but also of the profits and emoluments arising out of the said properties when such partition is permissible. Hence a separate suit for mesne profits, which more accurately and appropriately should be described as a suit for accounts, cannot lie as hit by Explanation IV to Section 11. ILR (1958) Cut 161 (165).

(30) Application for stay under Section 34, Arbitration Act — Immediately on conclusion thereof application of stay under Section 10, Civil P. C. taken out — If latter application could not be combined with former application, no question of res judicata can arise. AIR 1966 Cal 382 (386): 70 Cal WN 375 (DB).

(31) Omission to plead set-off in former suit — Omission does not take away right of suit. Madh BLJ 1954 HCR 1325.

(32) All grounds of attack and defence must be taken even if they can only be taken up in alternative except in case, when it would be inexpedient for a party to do so. AIR 1959 Raj 197 (199, 200): 1959 Raj LW 367.

**29. "Might".** — (1) Where a party could not have raised a ground of attack or defence, the rule of constructive res judicata will not apply. 1965 All WR (HC) 562: 1965 All LJ 1007 * 1965 All WR (HC) 22 * ('62) 66 Cal WN 692. (Previous suit for partition, damages and mesne profits — Decree silent on the point of damages and mesne profits — Subsequent suit for future damages and mesne profits not barred by actual res judicata.) * AIR 1954 Cal 113 (118): ILR (1956) 1 Cal 1 (DB) * AIR 1954 Kutch 19 (20) * AIR 1954 Mad 477 (479) (DB) * ('50) AIR 1950 All 121 (126) (DB).

(2) A plea not permitted by law cannot be said to be one which might have been raised. AIR 1963 Bom 100 (106): 64 Bom LR 322 (DB). (AIR 1947 Bom 307, Rel. on.) * AIR 1959 Punj 123 (127): 60 Pun LR 528 * AIR 1956 Pat 194 (196) * ('57) 1957 All L Jour 326 (329). (Suit for pre-emption — Defence that transaction was not sale but mortgage could not be taken under U. P. Regulation of Agricultural Credit Act.) * ('55) AIR 1955 Mys 88 (90): ILR (1955) Mys 271 (DB) * ('50) AIR 1950 Hyd 59 (62): ILR (1951) Hyd 112 (DB) * ('42) AIR 1942 Cal 586 (587): ILR (1943) 1 Cal 128 (DB) * ('20) AIR 1920 Cal 888 (889) (SB) * ('17) AIR 1917 PC 111 (114).

(3) Matter which could be raised only with Court's permission is not contemplated by Explanation IV. 1965 All WR (HC) 22.

(4) Suit to establish title under certain transfer — Plea of fraudulent transfer under Section 53, T. P. Act, not permitted by law — Subsequent suit to set aside transfer on that plea is not barred. AIR 1925 Mad 1107 (1107).

(5) In a suit for a declaration that a decree is null and void, the plaintiff could not ask for the relief of restitution as such relief by way of suit is barred by Section 144, sub-clause (2). AIR 1919 Sind 79 (79): 13 Sind LR 153 (DB).

(6) Dismissal of application for declaration as guardian — Subsequent application for appointment as guardian is not barred by constructive res judicata as the applicant could not have made an alternative case that he should be appointed as guardian. AIR 1958 Cal 545 (545) (DB).

(7) Where the facts on which a plea might have been raised by a party were not within his knowledge at the time of the former suit, it could not be said that he might have raised it. AIR 1948 Nag 150 (153): ILR (1947) Nag 985 * ('07) 9 Bom LR 1023 (1023) (DB) * ('88) 15 Cal 800 (808): 15 Ind App 106 (PC) * AIR 1917 Lah 19 (21): 1916 Pun Re No. 94.

(8) Want of knowledge or mistake must be one of fact. A plea not raised owing to a wrong view of the law cannot be said to be one which could not have been raised. AIR 1929 All 400 (402).

(9) Plea not raised for want of knowledge — Fact with due diligence could have been discovered — Plea is barred by res judicata. AIR 1941 Nag 346 (349) (DB).

(10) Plea based on facts which did not exist at time of former suit but which came into existence subsequently cannot be said to be one which might have been raised in former suit. ILR (1967) Guj 408 * AIR 1962 Raj 96 (97): 1961 Raj LW 638 * AIR 1961 All 278 (279): 1960 All LJ 593 (DB). (Owing to change of law question to be decided at subsequent stage depending on different facts — Decision at previous stage not res judicata.) * AIR 1956 Nag 93 (95): ILR (1955) Nag 72 (DB) * AIR 1950 Hyd 62 (63): ILR (1951) Hyd 70 (DB) * AIR 1942 Lah 153 (159): ILR (1942) Lah 559 (FB) * AIR 1931 All 635 (639): 54 All 299 (FB) * ('04) 26 All 61 (65, 67, 68) (FB).

(11) The dismissal of a suit for declaration of title as owner does not bar a fresh suit on basis of his title by adverse possession completed after the decision of the previous suit. AIR 1926 Lah 668 (669) (DB) * ('11) 33 All 463 (465) (DB).

(12) A decree in a previous partition suit where it has not been executed, does not bar a fresh suit for partition on a right to partition arising subsequently to the first suit, as to all points, however, which were or ought to have been decided in the first suit. They will, of course, be bar-

**Section 11 — Note 29 (contd.)**

red. AIR 1959 Pat 331 (334): 1959 BLJR 392 * AIR 1955 Pepsu 28 (29): ILR (1955) Patiala 9 (DB) * AIR 1957 Andh Pra 40 (41) * ('15) AIR 1915 All 1 (2): 37 All 155 (158) (DB) * AIR 1923 Bom 467 (468) (DB) * AIR 1928 Cal 459 (461) (DB).

[See also AIR 1958 Assam 67 (68): ILR (1956) 8 Assam 177 (DB).]

[See however AIR 1946 Sind 158 (159, 160): ILR (1946) Kar 140.]

(13) Refusal to settle scheme in previous suit does not operate as bar to subsequent suit to have a scheme framed when the occasion arises at a later date. AIR 1922 Mad 413 (414, 415) (DB).

(14) Decree for restitution of conjugal rights not executed — Wife returning to house and afterwards deserting — Second suit for restitution not barred. ('94) 18 Bom 327 (329) (DB).

(15) Charge decree for maintenance — Executing Court refusing to execute it on ground that it was declaratory — Second suit to enforce charge — Subsequent transferees of charged property impleaded as parties — Plea by transferees that they being transferees for consideration without notice of charge were not bound by it is not barred. AIR 1951 All 141 (154): ILR (1953) 1 All 284 (DB). (AIR 1940 Nag 163: ILR (1941) Nag 513, Approved.)

**30. "Ought".**— (1) Under Explanation IV a plea must be one which not only might have been raised in the former suit but ought to have been raised therein. ('49) AIR 1949 PC 143 (146): 76 Ind App 85: ILR (1949) Bom 110 * AIR 1964 Andh Pra 99 (100, 101) * (1963) 2 An WR 348 (350). (Attachment before judgment — Failure to raise objection to attachment — Party not barred from raising the same in execution.) * AIR 1962 Punj 147 (149): 63 Pun LR 716 * ILR (1957) Bom 403 (409). (The plea that the judgment debtor is an agriculturist and the house is not liable to be sold can be raised at any time before the sale is actually held.) * 1965 Pun LR (Supp) 172 * ('56) 1956 Andh WR 544 (546) * AIR 1953 Mad 548 (548): ILR (1953) Mad 607 (DB) * AIR 1931 PC 5 (9): 10 Pat 284: 53 Ind App 17 * AIR 1928 All 721 (723): 50 All 394 (DB) * AIR 1935 Lah 753 (756) (DB).

(2) Whether a matter ought to have been made a ground of attack or defence in the previous suit depends on facts of each case. AIR 1963 Ker 313 (314, 315): ILR (1963) 1 Ker 240 * AIR 1960 J & K 123 (124, 125) * 1956 Andh WR 544 (546) * AIR 1939 Cal 692 (694): ILR (1939) 2 Cal 551 (DB) * ('93) 20 Cal 79 (85).

(3) One of the most important tests to determine whether a plea which might have been raised is also one which ought to have been raised, is to see whether the matters raised in the two suits are so dissimilar that their union might lead to confusion. (1966) 32 Cut LT 766 (773): ILR (1966) Cut 307 * AIR 1960 J & K 123 (124, 125) * AIR 1956 Trav-Co 266 (267) (DB) * ('93) 23 Cal 79 (8●): 19 Ind App 234 (PC) * AIR 1938 Lah 443 (444): ILR (1938) Lah 729 * AIR 1928 Rang 9 (10, 11): 5 Rang 565 (DB).

(4) The following pleas cannot be said to be such as ought to have been raised in the former suit:

(a) Pleas that will make the suit bad for multifariousness or will embarrass the trial thereof. AIR 1954 Mad 477 (479) (DB) * ('90) 14 Bom 31 (52) (DB) * AIR 1935 Lah 753 (756) (DB).

(b) Pleas irrelevant to the suit. AIR 1925 Mad 226 (226) * AIR 1932 Bom 222 (223): 56 Bom 292 (DB) * AIR 1920 Pat 291 (322): 5 Pat L Jour 164 (DB).

(c) Pleas, the evidence in support of which is such that it might be destructive of the other pleas. AIR 1963 Ker 313 (314, 315): ILR (1963) 1 Ker 240 * AIR 1956 Trav-Co 266 (267) (DB) * ('08) 31 Mad 385 (396) * AIR 1931 Bom 187 (189) (DB) * AIR 1935 Lah 753 (756) (DB).

(d) Pleas based on cause of action which cannot be united without inconsistency and confusion. AIR 1957 Andh Pra 76 (78) * AIR 1957 Mad 470 (471): ILR (1957) Mad 968 (DB) * ILR (1954) Mys 150 (153) (DB) * AIR 1940 Lah 27 (29, 30).

(5) Point which the Court, in its discretion, may or may not decide — It cannot be said that it ought to have been raised. AIR 1961 Bom 97 (103): 62 Bom LR 360 (DB) * AIR 1927 Mad 120 (121) (DB).

(6) A plaintiff who acquires a fresh claim during the pendency of his suit not bound to rely on that new right in the pending suit. 1958 Ker LT 808: 1958 Ker LJ 954 * AIR 1949 Mad 586 (590): ILR (1950) Mad 101 (FB).

(7) Point which the Court itself is bound to take whether raised by the parties or not is not one which ought to be taken by a party. AIR 1959 Punj 521 (522): 61 Pun LR 403 (DB) * AIR 1950 Cal 513 (515) (DB).

(8) Alternative cases the evidence to establish which is same ought to be taken in previous suit. ('56) AIR 1956 Trav-Co 266 (267) (DB).

(9) In a suit for pre-emption the challenge to the right of the vendor to sell the property is clearly outside the purview of the suit. Where, a suit for pre-emption is dismissed, a subsequent suit by the same plaintiff on the basis that vendor had no title to sell the property is not barred by constructive res judicata. AIR 1960 J & K 123 (124-125).

**31. Grounds of attack.** — (1) Grounds of attack contemplated are those in respect of the claim made and not other claims that

**Section 11 — Note 31 (contd.)**
were open to the plaintiff. AIR 1944 Mad 98 (101, 102) (DB).

(2) Plaintiff bound to set up all the grounds of his title in the alternative in respect of the claim made by which he became entitled to the relief. AIR 1931 Mad 268 (269) * ('76) 2 Cal 152 (172, 173, 177) (FB) * ('01) 25 Bom 189 (192, 197, 201) (DB) * AIR 1961 Punj 322 (325).

(3) If plaintiff sets up a title to certain properties and he has two or more alternative capacities on which to rest such title, he must disclose both or all those capacities. ('23) 71 Ind Cas 1009 (1011) (Pesh) * AIR 1958 Bom 152 (153, 154): ILR (1957) Bom 548 * AIR 1959 Raj 197 (199, 200): 1959 Raj LW 367.

(4) Where the capacity in which he sues in the subsequent suit is one in which he is a stranger to the capacity in which he sued in the former suit, he need not set up both the capacities in the former suit. ('10) 34 Bom 416 (419) (DB) * AIR 1938 Lah 139 (145) (DB).

(5) A's suit against B for money on basis of contract for supply of goods dismissed:— Second suit by A against B for same amount as compensation for services rendered in supplying goods is barred. ('12) 15 Ind Cas 374 (375) (DB) (Low Bur).

(6) Suit by minor to set aside compromise on ground of fraud dismissed — Second suit to set aside compromise on ground of want of sanction under O. 32, R. 7 is barred. ('98) 21 Mad 91 (99) (DB).

(7) A sues on basis of his claim on nearness of kin but does not mention the family custom but for which the nearness could not be proved. His suit is dismissed on the merits. Subsequently he files a suit for the same relief basing his claim on nearness of kin by family custom. His suit is barred. AIR 1925 PC 55 (57): 47 All 158: 52 Ind App 100.

(8) A sues to eject B from certain properties on the ground that he is the reversionary heir of one X deceased. Failing in this suit he brings a fresh suit for the same relief on the ground that he is the heir of Y (who had died even at the time of the former suit.). The suit is barred. AIR 1926 Mad 234 (234) * AIR 1920 Nag 37 (38) * ('31) AIR 1931 Bom 114 (116) * AIR 1923 Mad 257 (259): 46 Mad 135 (DB).

(9) An alternative claim need not be added if there would be a distinct incongruity between the two claims. AIR 1945 Lah 210 (211) (DB).

(10) Suit by assignee of a promissory note against promisor and assignor for relief against both jointly or severally — Ground that the assignment has failed for want of consideration must be taken to be one which might and ought to have been raised and impliedly decided. AIR 1929 Oudh 172 (174): 4 Luck 603 (FB).

**32. Grounds of defence.**— (1) A party having several grounds of defence to a suit is bound to set forth all such grounds and cannot reserve any one or more of them for a separate suit. AIR 1953 Nag 19 (20) * ('50) 1950 Trav-Co LR 425 (430) * AIR 1947 Cal 393 (397) (DB) * AIR 1942 All 267 (287): ILR (1942) All 518 (DB).

(2) When a plaintiff claims an estate and the defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge then, to bring forward. ('66) 11 Moo Ind App 50 (73) (PC).

(3) Grounds of defence must be such as, if raised, would defeat the plaintiff's claim. AIR 1949 Bom 274 (275): ILR (1949) Bom 256 * AIR 1942 Oudh 354 (356) (DB) * AIR 1924 Lah 83 (83) (DB).

(4) Party not bound to raise ground of defence if it is no answer to plaintiff's claim. AIR 1946 Nag 277 (295): ILR (1946) Nag 159 (DB) * ('35) 62 Cal L Jour 153 (168) (DB).

(5) An assertion may be a claim if the defendant treats it as such by denying it and inviting the Court's decision thereto. AIR 1941 Cal 574 (578).

(6) Suit for ejectment — Defendant not setting up his right of redemption — Suit by defendant for redemption not barred — Existence of such right not valid defence to suit for ejectment. AIR 1921 Nag 69 (70): 17 Nag LR 33.

[But see AIR 1953 Nag 19 (21).]

(7) Suit by purchaser of certain properties from certain members of a joint Hindu family, to recover those properties impleading alienees of other properties from same members as parties — The latter need not claim possession of their properties in that suit inasmuch as such a claim will not be an answer to plaintiff's claim. AIR 1927 Mad 61 (62) (DB).

(8) Suit for certain sum of money — Failure to claim set off under Order 8, Rule 6 not a bar to defendant claiming same in separate suit — But if former suit is on general balance of account defendant must plead it as a ground of defence. ('55) Madh BLJ 1955 HCR 743 (746) * AIR 1915 Mad 1213 (1213) (DB) * ('07) 1907 All WN 275 (275).

(9) In a suit for possession of land based on title, a claim for compensation for the improvements made by the defendant ought to be set up by him in defence. ('38) 42 Cal WN 110 (114) (DB).

(10) Failure of defendant to claim a set-off in respect of Government revenue paid by him, in defence to a suit for mesne profits against him, would not preclude him from claiming it in a separate suit. AIR 1941 Mad 847 (850) (DB).

(11) A plea of constructive res judicata must be determined only with reference to the suit as framed and not with reference

**Section 11 — Note 32 (contd.)**

to what under the law the suit must have been. AIR 1939 Mad 70 (75) (DB).

(12) Application for leave to appeal to Supreme Court — Valuation adopted in plaint and accepted for appeal by defendant — Party applying for certificate can show higher and real value of subject-matter — He is not precluded from doing so by provisions of Section 11. AIR 1961 Mad 511 (514, 515): (1962) 1 Mad LJ 65 (FB).

(13) Suit on mortgage — Preliminary decree for sale of the judgment-debtor's house passed — House subsequently exempted from sale under Section 60 (c) (U. P. Amendment) Act, 1948 — Judgment-debtor not pleading such exemption either at the time of the passing of final decree or at the time of first two applications for execution of decree for sale of house — Judgment-debtor is not barred by the principle of constructive res judicata from raising the objection at the time of the third application for execution — In view of U. P. Amendment it was the duty of the Court itself to refrain from passing an order directing the sale of the house, even though the judgment-debtor did not take any objection. AIR 1964 All 34 (36).

(14) Where in a previous suit the decision was that qua the property in dispute B the sister of the last male holder was not an heir in the presence of his collaterals, and the suit would have failed if she was the next heir.

Held, that the question whether B was the next heir in preference to the collaterals was directly and substantially in dispute. The decree in that suit meant that B's claim to succeed in preference to the collaterals of her brother was negatived and would operate as res judicata in a subsequent suit which was between her or persons claiming through her on one hand and those very collaterals on the other. (1960) 62 Pun LR 70 (72) (DB).

(15) Pre-emptor's suit for possession against tenant, vendee, decreed after coming into force of Section 17-A of Punjab Act 10 of 1953 — No plea by tenant under Section 17-A — Possession delivered — Application by tenant in executing Court after prescribed period for restoration of possession under Section 17-A held maintainable — Decree being contrary to law and inexecutable under Section 17-A of Punjab Act (10 of 1953), failure to raise objection under Section 17-A would not estop tenant by doing so by principles of constructive res judicata. (1964) 66 Pun LR 24.

**33. Mortgage suits — Several suits for redemption of same mortgage.** — (1) Where a decree for redemption merely directs that in case of default in payment of the decretal amount within the time prescribed the case shall stand dismissed and if no payment is made within the time prescribed a second suit for redemption of same mortgage is not barred. The reason is that by the Proviso to Section 60, T. P. Act, 1882 the right to redeem subsists unless it has been extinguished by order of the Court. ('34) AIR 1934 PC 205 (207, 208): 61 Ind App 362: 56 All 561 * ('57) AIR 1957 Raj 321 (325, 326): ILR (1957) 7 Raj 964 (DB) * ILR (1967) 2 Mad 124 * AIR 1965 Ker 153 (153, 154): (1964) 1 Ker LR 158.

(1-A) Suits for redemption under Section 60 Transfer of Property Act (1882) are not excluded from operation of principles of res judicata. AIR 1963 Mad 226 (230, 231) (DB).

(2) Where the prior decree for redemption does not provide that in default of payment within the time fixed, the right of redemption must be extinguished, a fresh suit for redemption is not barred. AIR 1950 FC 1 (6): 1949 FCR 484. (AIR 1945 Mad 225: ILR (1945) Mad 803, Reversed.) * ('55) ILR (1955) Punj 830 (836) * AIR 1953 Orissa 17 (19): ILR (1952) Cut 493 (DB) * ('50) ILR (1950) All 254 (259) (DB) * AIR 1945 Bom 307 (310) (DB) * AIR 1941 Mad 217 (221) (DB) * AIR 1936 Pat 420 (421): 15 Pat 607 (DB) * AIR 1959 Orissa 122 (125).

[See also ('53) AIR 1953 Trav-Co 265 (265).]

(3) Prior suit for redemption of usufructuary mortgage — Decree for redemption allowing mortgagor a right to set off arrears of purappad due to mortgagee at time of redemption — Decree becoming time barred — Second suit for redemption within limitation — Claim for set off of arrears of purappad against mortgage money held not barred by res judicata. ILR (1953) Trav-Co 196.

(4) All matters actually decided, such as the amount due, will be conclusive and cannot be raised in the fresh suit. ('40) AIR 1940 Oudh 273 (274): 15 Luck 545 (DB).

(5) In a suit for redemption brought by the plaintiff as successor of the mortgagor, the question of the plaintiff's right to sue is directly and substantially in issue and a finding on the question will operate as res judicata in a subsequent litigation. AIR 1960 All 85 (86, 87): 1959 All LJ 815.

(6) Suit for redemption — Party in possession impleaded as defendant — Defendant raising merely a plea of paramount title by adverse possession — Defendants, not raising the plea that they were tenants who could be ejected only in proceedings taken under Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947) — Statement in plaint also denying that defendant was tenant inducted by mortgagee — Court after considering the defence passing decree for redemption — Defendant is barred from raising the plea of his tenancy in execution proceedings. AIR 1964 Pat 482 (483): 1964 BLJR 507.

**Section 11 — Note 33 (contd.)**

**Suits for redemption and settlement of accounts.—** (7) Decree in suit for redemption — Separate suit for mesne profits between date of payment under preliminary decree and date when mortgagor is put in possession of mortgaged property is not barred. AIR 1918 Mad 284 (284) (DB).

[See also AIR 1957 Pat 446 (446, 447) (DB). (Suit for redemption — Subsequent suit for contribution in respect of rent paid is barred.)]

**Suits for redemption of several mortgages.—** (8) Several mortgages by mortgagor in favour of same mortgagee — Suit for redemption of one of such mortgages cannot bar a subsequent suit for redemption of other mortgages. ('06) 29 Mad 153 (154) (FB) * AIR 1930 Mad 264 (266) (DB).

**Suits for redemption for ejectment.—** (9) A suit for redemption of a mortgage does not bar a subsequent suit by the mortgagor as a proprietor for ejectment of the mortgagee and vice versa, the matters involved in the two suits being totally different and distinct. AIR 1940 Cal 550 (552): ILR (1940) 1 Cal 544 * AIR 1929 Lah 833 (833, 834) (DB).

(10) In a suit by a prior mortgagee against the puisne mortgagee for ejectment, the latter is not bound to set up his title to redeem as it is not a valid ground of defence to the suit in ejectment. AIR 1921 Nag 69 (70): 17 Nag LR 33.

[See also AIR 1939 Bom 303 (304, 305).]
[But see AIR 1953 Nag 19 (21).]

(11) Where mortgagor sues to eject the mortgagee, not entitled to possession under his mortgage, the latter need not set up his rights under his mortgage. ('04) 14 Mad L Jour 485 (487) (DB).

(12) Suit for possession by mortgagor on basis of absolute title treating mortgagee as trespasser dismissed — Subsequent suit for redemption not barred. AIR 1940 Cal 550 (552): ILR (1940) 1 Cal 544.

**Several suits for sale by mortgage.—** (13) Suit for sale by the mortgagee is not barred by reason merely of a decree for sale passed on same mortgage in prior suit so long as such a suit is not barred by Section 67, T. P. Act. AIR 1953 Mad 32 (38) (DB) * AIR 1966 Ker 273 (275, 276): 1966 Ker LT 376.

**Suit by puisne mortgagee against the mortgagor and the prior mortgagee.—** (14) In a suit by puisne mortgagee, a prior mortgagee impleaded as a party need not set up his prior mortgage as a ground of defence unless the prior mortgage is impugned or sought to be postponed in any way. AIR 1945 Mad 151 (153) (DB) * AIR 1920 PC 81 (83): 47 Cal 662: 47 Ind App 11 * AIR 1929 Oudh 463 (466): 4 Luck 256 (DB) * 1953 Ker L Tim 868 (870) * AIR 1923 Pat 290 (291): 2 Pat 435 (DB) * ('02) 24 All 429 (430): 29 Ind App 118 (PC).

[See also AIR 1964 Andh Pra 297 (298, 299): 1963-2 Andh LT 404.]

(15) Where a person having a prior mortgage is impleaded only as a subsequent mortgagee or as the owner of the equity of redemption, thus impliedly negativing the priority, he must, by way of defence, set up his priority or he will be barred from doing so later on. ('12) 39 Cal 527 (557, 558): 39 Ind App 68 (PC)* ('04) 8 Cal WN 385 (390) (DB).

[But see AIR 1919 Nag 57 (59, 60, 62): 15 Nag LR 114 (FB).]

**Suit by mortgagee against mortgagor and puisne mortgagee.—** (16) Suit by prior mortgagee impleading puisne mortgagee as party — Prior mortgage satisfied before sale under decree in favour of prior mortgagee — Suit for sale by puisne mortgagee not barred. AIR 1919 Mad 63 (66) (DB).

(17) Suit by prior mortgagee for sale impleading puisne mortgagee — Decree therein not providing for payment of balance of sale amount to puisne mortgagee — Second suit by puisne mortgagee held not barred by res judicata. AIR 1968 Andh Pra 336 (340, 343, 344): (1969) 1 Andh LT 9 (DB).

(18) Suit by a usufructuary mortgagee for possession against mortgagor — Subsequent suit by the latter for redemption is not barred. ('13) 35 All 227 (233, 234): 40 Ind App 74 (PC).

(19) In a mortgage suit mortgagor is bound to put forward a counter-claim for any sum that may be due to him by the mortgagee arising out of the mortgage transaction. AIR 1920 Mad 531 (532) (DB).

(20) In a suit to enforce a mortgage against the heirs of a mortgagor, an heir who has an independent title in the mortgaged properties is not bound to set up his title. AIR 1932 Cal 12 (13): 58 Cal 1222 (DB).

(21) Where after final decree in his mortgage suit mortgagee makes payments to avert sale of mortgaged property for arrears of revenue to Government, he can file a separate suit for recovery of such amount from mortgagor. AIR 1955 Andhra 274 (277).

**Suit by sub-mortgagee.—** (1) If in a suit by mortgagee the sub-mortgagee impleaded at the instance of the defendant does not prove his sub-mortgage he is not precluded from bringing a suit on his sub-mortgage although by reason of the decree in favour of the mortgagee in the previous suit he cannot ask for sale of the original mortgagor's interest. AIR 1944 Mad 137 (138).

**Suit by mrotgagee without impleading puisne mortgagee.—** (23) A mortgagee who omits to implead a subsequent mortgagee in his suit for sale is not debarred from afterwards bringing a second suit on the same mortgage against the subsequent mortgagee. AIR 1938 All 115 (115) (DB).

**Plea of paramount title in mortgage suits.—** (24) A defendant claiming paramount

**Section 11 — Note 33 (contd.)**
title is an unnecessary party in a mortgage suit and he need not raise such plea in the suit. AIR 1950 All 314 (315, 316) (DB) * AIR 1942 Pat 226 (229, 230): 20 Pat 841 (DB) * AIR 1929 Cai 672 (675) (DB) * 1937 Mad WN 60 (62) * AIR 1927 Mad 301 (304) * AIR 1929 Pat 678 (682): 9 Pat 539 (DB) * AIR 1967 Mad 453 (455, 456): (1967) 1 Mad LJ 399.

[See also AIR 1954 Cal 367 (369): 1954 Cri L Jour 132.]

(25) Lease of property to A — Then mortgage of same property to B — Then purchase of equity of redemption by A — Suit on mortgage by B — A impleaded as party — But no allegations derogatory to his right as prior lessee —He need not plead his right as lessee. AIR 1939 Cal 692 (694, 695): ILR (1939) 2 Cal 551 (DB).

(26) If the party claiming paramount title invites the Court to decide the question of his title and the Court goes into it and decides the question against him he will of course be bound by it. AIR 1942 Pat 226 (229, 230): 20 Pat 841 (DB) * ('06) 33 Cal 425 (439) (DB).

(27) Party claiming paramount title in mortgage suit and causing himself to be dismissed from suit cannot sue subsequently to redeem the mortgage. AIR 1954 Cal 367 (369): 1954 Cri L Jour 132 * ('86) 12 Cal 414 (421, 422): 12 Ind App 171 (PC).

(28) Mortgage suit — Question of paramount title of defendant decided at instance of mortgagee — Decision operates as res judicata. AIR 1951 All 794 (800, 801): ILR (1953) 1 All 697 (FB).

**Suit for redemption by mortgagor — Pleas which mortgagee might and ought to raise.**— (29) In a suit for redemption of usufructuary mortgage the mortgagee need not set up his rights under simple mortgage executed by the same mortgagor as it is not a ground of defence to the suit. AIR 1925 Lah 516 (516).

(30) Decree for redemption — Mortgagor failing to deposit amount within time — Mortgagee must obtain order for sale — His failure would debar him from suing for mortgage debt. ('89) 13 Bom 567 (570, 571) (DB).

(31) Where a mortgagor sues to cancel a mortgage given in renewal of an earlier mortgage and for possession, the defendant mortgagee is bound to set up his rights under the earlier mortgage; otherwise he will be barred from subsequently suing to enforce his rights thereon. ('11) 14 Oudh Cas 117(123).

[But see AIR 1927 Nag 83 (84).]

(32) In a suit for redemption by a puisne mortgagee against prior mortgagee and his sub-mortgagee, it is not incumbent on latter to claim payment of amount due to him and the failure to do so will not preclude him from subsequently suing his mortgagor for recovery of such money. AIR 1929 Oudh 455 (455): 5 Luck 369.

(33) In redemption suit mortgagee need not set up in defence his right to specific performance of an agreement to sell. AIR 1930 Mad 539 (540) (DB).

(34) Failure on the part of the mortgagee in a redemption suit to raise the plea that he, as owner of a part of the equity of redemption, is also entitled to redeem does not operate as res judicata, debarring him from subsequently asserting his claim to the equity of redemption. AIR 1945 Bom 69 (71, 72).

**Claim for personal decree in mortgage suits.** — (35) If mortgagee's right to obtain a personal decree is adjudicated upon in a mortgage suit the same is res judicata in subsequent application under Order 34, Rule 6. AIR 1930 Oudh 378 (389): 6 Luck 132 (FB).

[See also AIR 1951 All 195 (196) (FB).]

(36) Where in a previous suit on mortgage the personal liability of the defendant is not adjudicated upon but only a charge decree is passed it would not operate as res judicata in subsequent money suit. AIR 1944 Pat 129 (134, 135) (DB).

**Suit on mortgage against Hindu father impleading the sons.**— (37) Suit to enforce mortgage against Hindu father — Sons impleaded as defendants but only personal decree claimed against them — Personal decree refused — Subsequent suit against sons in respect of their interest in joint family property is barred by constructive res judicata. AIR 1942 Oudh 9 (11): 17 Luck 319 (DB).

**34. Former suit must be between same parties.** — (1) A decision in a litigation will be binding on parties and their privies. AIR 1946 Mad 372 (374, 375) (DB) * AIR 1914 PC 31 (32): 41 Ind App 247 * AIR 1929 Oudh 172 (174): 4 Luck 603 (FB) * AIR 1968 Manipur 64 (65, 67) * AIR 1967 Madh Pra 152 (154, 155): 1966 Jab LJ 267 * AIR 1966 J and K 45 (58): 1966 Kash LJ 8 * AIR 1966 Madh Pra 318 (322): 1966 Jab LJ 1133 * AIR 1966 Pat 235 (240): 1966 BLJR 237 (DB) * ('64) 30 Cut LT 419 (421) * 1968 MPLJ 165: 1968 Jab LJ 97 (SC) * (1968) 2 Andh LT 204 (DB) * 1968 Pat LJR 554 (DB).

(2) It is essential for a previous adjudication of a point to bar its consideration a second time that it must have been between the same parties. 1962 All LJ 604: (1962) Supp 3 SCR 217.

(3) Persons not parties to decision of trial Court — Decision of trial Court not operating as res judicata — Fact that such persons had to be impleaded as parties in appeal against decision of trial Court would not make decision of trial Court as res judicata against such persons. ILR (1964) 2 All 191. (Reversed on another point in AIR 1969 SC 135.)

(4) A decision in litigation between A and B will not operate as res judicata (unless it were a judgment in rem) in a subsequent litigation between A and C. AIR

**Section 11 — Note 34 (contd.)**
1949 PC 54 (56) * AIR 1947 PC 1 (8): ILR (1947) Kar (PC) 38 * AIR 1927 PC 128 (131): 54 Cal 770: 54 Ind App 238 * AIR 1914 PC 67 (69): 41 Cal 972: 41 Ind App 110 * AIR 1958 Pat 80 (83): 36 Pat 1075 * AIR 1957 Ker 86 (89): ILR (1957) Ker 287 (DB) * AIR 1968 Andh Pra 306 (307): (1967) 2 Andh WR 15 * 1967 All WR (HC) 292. (Earlier suit against alienor of property instituted after alienation — Plaintiff in that suit claiming as adopted son of alienor — Alienee not party to suit — Finding that plaintiff was adopted son of alienor could not operate as res judicata against alienee in subsequent proceedings.) * AIR 1965 Cal 294 (298): 69 Cal WN 57 * AIR 1963 Cal 483 (499): 67 Cal WN 662 (SB) * 1963 All LJ 761. (7 All LJ 861 and 7 All LJ 995 held either overruled or explained in AIR 1923 All 490 and 18 All LJ 40, Disting. and held also no longer good law in view of AIR 1953 SC 419.) * AIR 1963 All 187 (190) * (1963) 76 Mad LW 757 * 1963 BLJR 921 (928) * 1963 BLJR 589. (Miscellaneous case arising out of execution proceedings — Decision in such case does not operate as res judicata against parties to execution proceedings but not in the miscellaneous case.)* AIR 1962 Cal 616 (619-620-621) * AIR 1959 Andh Pra 280 (283): (1959) 1 Andh WR 72 * 1959 Raj LW 585: ILR (1959) 9 Raj 692.

(5) A judgment not inter partes may be admissible in evidence to prove that a right or liability had, in a previous suit, been unsuccessfully set up by one of the parties in the subsequent suit. ('21) AIR 1921 Mad 248 (253, 254, 257): 44 Mad 778 (FB). (Overruling 12 Ind Cas 715 (Mad), 36 Mad 141 and 33 Mad 483.) * AIR 1932 Pat 105 (112): 11 Pat 50 (DB).

[See also AIR 1941 PC 128 (129): 21 Pat 243: ILR (1941) Kar (PC) 150.]

[But see AIR 1930 Mad 751 (754) (DB).]

(6) A party not bound by a previous proceeding between third parties cannot also take advantage of findings in his favour in those proceedings. AIR 1925 Mad 300 (301).

(7) A previous decision though not inter partes and so not res judicata may yet operate as a judicial precedent. AIR 1955 SC 481 (485): (1955) 2 SCR 22: ILR (1955) 2 All 177 * AIR 1960 Orissa 46 (53): ILR (1959) Cut 203. (Reversed on another point in AIR 1962 SC 945.) * (1963) ILR (1963) Andh Pra 517 * (1962) ILR (1962) Andh Pra 1084 (DB).

(8) Principles of res judicata must apply with equal vigour to all parties to earlier proceedings — It cannot be enforced so as to deprive only one of the two parties of an opportunity to reagitate an issue. AIR 1969 Bom 111 (116): 70 Bom LR 376.

(9) Previous decisions holding adoption not proved — In one such decision adoptee himself giving evidence — Adoptee however not a party to these decisions — Decisions cannot operate as res judicata in subsequent suit to which adoptee is party and where the question of the factum of his adoption is in issue but can be relied on under Section 13 of Evidence Act. AIR 1964 Orissa 174 (175).

**35. "Same parties".**— (1) To maintain a plea of res judicata it must appear from an inspection of the records that the person whose interest it is sought to bind was in some way a party to the suit. AIR 1955 Pat 451 (453) (DB) * AIR 1944 Sind 165 (167):ILR (1944) Kar 62 (DB) * ('06) 28 All 1 (17): 32 Ind App 229 (PC) * 1968 MPLJ 165: 1968 Jab LJ 97 (SC).

(2) A 'party' is a person whose name appears on the record at the time of the decision. ('82) 6 Bom 703 (710, 711, 712) * AIR 1969 Andh Pra 76 (78): (1968) 1 Andh LT 72 (DB).

(3) Omission of party's name in the formal order by oversight will not deprive him of his character of a party. AIR 1930 PC 22 (23): 57 Ind App 24.

(4) A party whose name is struck off or who is discharged from the suit is not a party. AIR 1952 Tripura 30 (31). (Trespasser in possession struck off from list of defendants in mortgage suit.) * AIR 1926 Lah 202 (202, 203). (Discharge.) * ('05) 27 All 59 (61) (DB) * AIR 1969 Andh Pra 76 (78): (1968) 1 Andh LT 72 (DB).

(5) Person wrongly made parties in execution proceedings are not parties. ('10) 8 Ind Cas 161 (161) (DB) (Mad).

(6) A person whose application to be made party was refused is not a party. AIR 1927 PC 108 (110): 54 Ind App 190: 54 Cal 595.

(7) Persons whose names are introduced on record by fraud and without their knowledge are not parties. ('82) 6 Bom 703 (710, 711, 712) * AIR 1969 Andh Pra 76 (78): (1968) 1 Andh LT 72 (DB).

(8) Minor not represented in the suit by any guardian is not a party. AIR 1942 Pat 279 (281) (DB).

(9) A person merely interested in litigation is not a party. AIR 1920 Nag 184 (186) * AIR 1969 Andh Pra 76 (78): (1968) 1 Andh LT 72 (DB).

(10) Previous suit by A as trustee of a certain shrine. Second suit by the same shrine through A as trustee. Two suits are by the same party. AIR 1938 Mad 257 (258).

[See also AIR 1957 Him Pra 16 (21).]

(11) A party who pleads insanity but who is not adjudged as an insane person continues to be a "party" though not represented by a guardian. AIR 1915 All 265 (267) (DB).

(12) Order removing guardian ad litem on his application on ground that minor has attained majority and without notice to the minor. Latter cannot be deemed to be a party to that order. AIR 1927 Pat 271 (275): 6 Pat 388 (DB).

**Section 11 — Note 35 (contd.)**

(13) The word "same parties" do not necessarily mean parties ranged on opposite sides . ('04) 31 Cal 95 (100).

[But see ('82) 1882 All WN 168 (168) (DB) * ('10) 1910 Pun WR No. 42, p. 109.]

(14) A decision may be res judicata between the parties on the same side if the matter in issue has been actively in issue between them and the decision thereon is necessary to grant relief to the plaintiff or against the defendant. AIR 1948 Lah 195 (197) (DB).

(15) Former suit by A against B is not between the same parties as a subsequent suit by A against B and C. ('99) 26 Cal 428 (431) (FB).

(16) Matter directly and substantially in issue between common parties in two suits would be res judicata but not against the parties not common. AIR 1940 Mad 201 (203) * AIR 1929 All 500 (501) (DB) * AIR 1928 Pat 436 (437): 7 Pat 840 (DB) * ('99) 26 Cal 428 (432) (FB).

(17) Suit under Order 21, Rule 63 — Judgment-debtor are not necessary parties but made parties and suit disposed of in their presence — Decision operates as res judicata. AIR 1969 Orissa 16 (19): 34 Cut LT 1246.

(18) The mere fact that a person is a party in one suit will not prevent him from filing another suit in his own right unless it can be shown that he, or if he be a privy, his predecessor-in-interest, had the opportunity of fighting out the same cause of action in the previous litigation. 1960 All WR (HC) 475: 1960 All LJ 620.

(19) Person not party to original proceeding made party at appellate stage — Appellate decision is binding on him. 1967 MPLJ 165: 1967 Jab LJ 110 (DB).

**36. Jus tertii.**— (1) Suit by A against B on his title — B setting up title in C — Decision on such a plea of jus tertii will not operate as res judicata in a suit by C or his privies on their title against A. AIR 1927 Mad 844 (845): 50 Mad 877 (DB).

(2) Decision in a previous suit between A and C that A and not C had the title does not operate as res judicata in a suit by A against B in which B sets up title in C. AIR 1921 Mad 248 (253): 44 Mad 778 (FB). (Overruling AIR 1916 Mad 465 and 33 Mad 483) * AIR 1932 Oudh 342 (343): 6 Luck 710.

[See also AIR 1925 Cal 1218 (1219, 1220) (DB).]

[But see AIR 1922 Cal 198 (200): 50 Cal 23 (DB).]

**37. Intervenors.**— (1) An intervenor is a party no matter at what stage of suit he so intervenes, and the decision in that suit will bar a subsequent suit by or against him on the points already so decided. ('86) 12 Cal 563 (565) (DB) * ('75) 1 Cal 144 (147): 2 Ind App 283 (PC).

(2) Where in a rent suit a question of title was raised as between an intervenor and the plaintiff, he will be bound by the decision of that question. ('78) 2 Cal L Rep 33 (39) * ('78) 3 Cal 145 (147, 148) (FB).

**38. Co-defendants.**— (1) An adjudication between co-defendants may be res judicata in certain circumstances. AIR 1943 Cal 76 (83): ILR (1942) 2 Cal 299 (DB) * AIR 1926 Cal 568 (571) (DB) * 1965 BLJR 575.

(2) In order that an adjudication may be res judicata between co-defendants, there must be a conflict of interest between them, it must be necessary to decide the conflict in order to give the relief which the plaintiff claims, the question between the defendants must have been finally decided, and the co-defendants were necessary or proper parties in the former suit. AIR 1950 PC 17 (18): ILR (1951) 1 Cal 193: 77 Ind App 27 * AIR 1958 Ker 399 (400): ILR (1958) Ker 1034 (DB) * AIR 1955 Hyd 232 (233): ILR (1955) Hyd 599 (DB) * AIR 1953 Punj 120 (123, 124): ILR (1953) Punj 521 (DB) * AIR 1943 PC 115 (119): ILR (1943) Kar (PC) 123 * AIR 1943 Cal 76 (83): ILR (1942) 2 Cal 299 (DB) * AIR 1943 Mad 276 (277): ILR (1943) Mad 477 (DB) * AIR 1942 Cal 1 (16, 17): ILR (1941) 2 Cal 434 (DB) * AIR 1942 Cal 92 (95): ILR (1942) 1 Cal 169 (DB) * AIR 1931 PC 114 (117): 53 All 103: 58 Ind App 158 * AIR 1931 PC 231 (234) * AIR 1935 PC 139 (142): 14 Pat 611: 62 Ind App 224 * AIR 1932 PC 161 (164, 165): 59 Ind App 247: 10 Rang 322 * (1966) 2 Andh WR 46 (49, 50): ILR (1967) Andh Pra 968 * 1966 Ker LT 683 (684) 1966 Ker LJ 647 (DB) * AIR 1963 Guj 183 (185) * 1962 Raj LW 624: ILR (1962) 12 Raj 868 * AIR 1959 Raj 127 (129, 130, 131): 1959 Raj LW 454.

(3) No conflict between co-defendants — No res judicata. AIR 1945 Mad 375 (376) * AIR 1958 Madh Pra 261 (268) (DB) * ('53) 1953 BLJR 711 (714, 715) * ('39) 43 Cal WN 1214 (1217) (DB) * AIR 1921 Cal 632 (633) (DB) * AIR 1963 Bom 244 (246): 65 Bom LR 408 * 1962 Raj LW 624: ILR (1962) 12 Raj 868 * AIR 1961 Bom 97 (100, 101, 102): 62 Bom LR 360 (DB).

(4) Conflict of interest not necessary to decide for giving relief to plaintiff — No res judicata. AIR 1943 Mad 276 (277): ILR (1943) Mad 477 (DB) * AIR 1923 Bom 203 (205): 47 Bom 534 (DB) * AIR 1965 Pat 345 (350) * 1961 Jab LJ 238: 1961 MPLJ 253 * AIR 1960 All 367 (368, 369): 1959 All LJ 841.

(5) Conflict of interest between co-defendants not decided in previous suit — No res judicata. AIR 1941 Pat 211 (212) * AIR 1923 Oudh 101 (102) * ('16) AIR 1916 Pat 126 (129) (DB) * AIR 1960 All 367 (368, 369): 1959 All LJ 841.

(6) To operate as res judicata it is not necessary that issue between co-defendants should have been the only ground on

**Section 11 — Note 38 (contd.)**
which the Court could have decided the suit. AIR 1925 All 546 (546, 547): 47 All 778 (DB).

(7) It is not necessary that there should have been an active contest between the co-defendants. It is only necessary that there must have been a conflict of interest. AIR 1943 Cal 76 (85): ILR (1942) 2 Cal 299 (DB).

[See also AIR 1935 Mad 81 (83).]

(8) The question of res judicata will not be affected by the circumstance that the co-defendant remains ex parte. AIR 1950 PC 17 (18): 77 Ind App 27: ILR (1951) 1 Cal 193 * AIR 1955 Hyd 179 (182): ILR (1955) Hyd 440 (DB) * AIR 1948 Mad 336 (337) (DB) * ILR (1967) Andh Pra 968. * (1966) 2 Andh WR 46 (49, 50) * 1966 Ker LT 683 (684): 1966 Ker LJ 647 (DB).

[See however AIR 1955 Hyd 232 (233): ILR (1955) Hyd 599 (DB).]

(9) Where a defendant in a prior suit was ex parte and a co-defendant was added as a party later, it was held that as the former was not even aware of the claim of the other defendant, no question between the defendants could be said to have been heard and finally decided. AIR 1943 Cal 76 (84): ILR (1942) 2 Cal 299 (DB) * ('38) 1938 Mad WN 224 (226) (DB).

(9-A) If the co-defendant is to be bound by a previous judgment it must be proved that he had notice that the question was in issue and would be decided. 1966 Ker LJ 647: 1966 Ker LT 683 (684) (DB).

(10) In an inter-pleader suit one of the several defendants puts forward a right as against the others, the latter must contest it on all grounds which might and ought to have been raised by them, and if they do not do so, the point will be deemed to be constructively in issue between them and to be impliedly decided. AIR 1928 Oudh 155 (179, 181).

(11) Doctrine of res judicata must be applied to co-defendants with great caution. AIR 1943 Cal 76 (84): ILR (1942) 2 Cal 299 (DB).

(12) In a partition suit where there is a complete partition the rights of each party are determined, not only against the plaintiff but as against all the co-defendants and such determination will, therefore, bar a subsequent suit between the co-defendants on the points decided. AIR 1955 Andhra 81 (81, 82) * AIR 1926 Sind 282 (283, 285).

(13) Partition suit — Whether rights between co-defendants amongst themselves have, or have not, been determined in any particular case depends on nature of partition suit. AIR 1929 Oudh 275 (277, 278): 4 Luck 713 (DB) * AIR 1926 Sind 282 (285).

(14) Suit for partition of plaintiff's share only — No res judicata between co-defendants since there could be no conflict. AIR 1955 Andhra 81 (81, 82) * AIR 1923 Bom 203 (205): 47 Bom 534 (DB) * AIR 1932 All 666 (668): 54 All 742 (DB).

(15) In a partition suit, a matter may become res judicata as between co-defendants even though its decision may not have been necessary to give relief to the plaintiff. AIR 1947 Mad 170 (171, 172) * AIR 1941 Pat 83 (88, 89): 19 Pat 669 (DB).

(16) Where in a suit to challenge the validity of a will all the defendants who are beneficiaries under the will are interested in the question of the validity, the decision operates as res judicata among them. AIR 1946 All 399 (400): ILR (1946) All 325 (DB).

(17) In case of pro forma defendant there is really no conflict of interest between him and another defendant and so there can be no res judicata between them. AIR 1949 East Punj 213 (217) * ('36) 64 Cal L Jour 3 (5) * AIR 1914 Lah 161 (163) (DB) * AIR 1932 Mad 298 (301): 55 Mad 601 (DB) * AIR 1939 Pat 225 (228) (DB).

[See however AIR 1939 Mad 830 (833).]

[But see AIR 1956 Punj 129 (131): ILR (1956) Punj 1 (FB). (12 Cal 580 (FB); AIR 1928 Lah 493; AIR 1935 Lah 942 and AIR 1938 Lah 842, Dissented from. (Per Majority; Khosla J. contra.) ) * AIR 1958 Assam 179 (181): ILR (1956) 8 Assam 496 (DB). (Suit by decree-holder under Order 21, Rule 63 against claimant and judgment-debtor as pro forma defendant — Decision in, if operates as res judicata as between defendants.) * ILR (1955) 2 Cal 460 (465) (DB) * AIR 1963 Punj 401 (402): 1963 Cur LJ 58 * ILR (1960) 10 Raj 221 (224).]

(18) If the co-defendants were proper parties, though they may not be necessary parties, the judgment would operate as res judicata. (1966) 2 Andh WR 46 (49, 50): ILR (1967) Andh Pra 968.

(19) Dismissal of suit against both defendants — Dispute between defendants inter se also decided by decree — Defendant affected by decree can file appeal if decision would operate as res judicata in subsequent suit filed by him. 1967 Ker LJ 588: AIR 1968 Ker 154 (155).

**39. Co-plaintiffs.**— (1) Principles of res judicata applicable to co-defendants apply also to co-plaintiffs inter se. AIR 1951 Pat 537 (538): 24 Pat 814 (DB) * AIR 1961 Ker 224 (225, 226): 1961 Ker LT 48.

(2) No conflict of interest between co-plaintiffs — No res judicata. AIR 1951 Pat 537 (538): 28 Pat 814 (DB) * AIR 1948 Lah 195 (197, 199) (DB).

[But see AIR 1938 Lah 571 (574).]

(3) Conflict between co-plaintiffs not necessary to decide for granting relief against defendants — No res judicata. AIR 1951 Pat 537 (538): 28 Pat 814 (DB) * AIR 1948 Lah 195 (197) (DB).

**Section 11 — Note 39 (contd.)**

(4) Conflict between co-plaintiffs not decided actually or constructively — No res judicata. AIR 1951 Pat 537 (538): 28 Pat 814 (DB).

(5) Where the parties to the present suit invoked a will in support of their claim as plaintiffs in a previous suit for the allotment to them of the share that would have been allotted to the testator in case he had been alive and succeeded in their attempt neither of them will, in the present suit filed by one against the other, be allowed to deny the will and claim the spoils on the basis that it was not operative. AIR 1961 Ker 224 (225, 226): 1961 Ker LT 48.

**40. "Parties under whom they or any of them claim".—** (1) If the proceeding originally instituted is right and proper, any decision obtained therein is binding on all persons on whom the right or interest may devolve. AIR 1928 Mad 246 (248) * AIR 1969 Andh Pra 76 (78): (1968) 1 Andh LT 72 (DB) * AIR 1967 Guj 16 (19): (1966) 17 STC 581 (DB). (Party not litigating under the same title and further not as a person claiming through party in the previous suit — No res judicata.) * 1967 Raj LW 135.

(2) A previous decision, is binding on all persons who claim under the parties to the decision, whether they have notice of it or not. AIR 1946 Mad 519 (524): ILR (1946) Mad 429 (DB) * ('69) 13 Moo Ind App 270 (275) (PC) * AIR 1958 Cal 453 (455) (DB) * AIR 1919 Cal 169 (170).

(3) The expression should be restricted so as to bind a person only in respect of the interest represented by the party in the former suit at the time of the suit, the ground of privity for purposes of res judicata being property and not personal relationship. AIR 1952 All 272 (272, 273) * ('11) 33 Mad 459 (464) * AIR 1931 Nag 183 (183): 27 Nag LR 127.

[See also AIR 1931 All 635 (642): 54 All 299 (FB).]

(4) It is necessary that the parties to the former suit under whom the parties in the subsequent suit claim should have been ranged on opposite sides or, at least, have had conflicting interests. ('87) 1887 All WN 246 (247).

(5) Where plaintiff and defendant in subsequent suit claim through same person who was a party in the former suit, they cannot be said to claim under the parties to the previous litigation and the decision in that suit is, therefore, not res judicata. AIR 1925 Oudh 164 (166) * ('03) 30 Cal 556 (564): 30 Ind App 71 (PC).

(6) Though defendant in subsequent suit was a party to prior suit, decision in prior suit will not be res judicata between parties to the subsequent suit, when both of them claim through the other party to the former suit. AIR 1932 Mad 198 (203): 55 Mad 40.

**41. Parties claiming under parties in previous suit.—** (1) A person is said to claim under another when he derives his title through the other by assignment or otherwise subsequent to the commencement of the first suit. AIR 1934 Mad 292 (292) (DB) * AIR 1947 Cal 200 (208, 209): ILR (1944) 2 Cal 542 (DB) * AIR 1969 Andh Pra 76 (78): (1968) 1 Andh LT 72 (DB).

(2) A predecessor-in-interest of a party to the former suit is not contemplated by Section 11. Consequently such a predecessor-in-interest of a party to the former suit will not be bound by any decision in the former suit against the party. AIR 1969 Andh Pra 76 (78): (1968) 1 Andh LT 72 (DB).

(3) Where a person is adjudged an insolvent, any decision obtained against him subsequently thereto will not bind the Official Receiver as his title arose previous to the decision. AIR 1924 Mad 689 (691): 47 Mad 633.

(4) A purchaser or lessee is not bound by a decree obtained in a suit against the vendor, or lessor commenced after the date of the purchase or lease. AIR 1948 Bom 193 (195): ILR (1947) Bom 770 (DB) * AIR 1945 Cal 283 (291, 292): ILR (1947) 1 Cal 270 (DB).

(5) When the predecessor in the previous suit did not fill the same character as that in which the successor claims in the subsequent suit, it cannot be said that the latter is claiming under the predecessor. AIR 1953 Assam 57 (58) (DB)*AIR 1953 Nag 221 (221) * AIR 1932 Mad 198 (203, 204): 55 Mad 40.

**42. Hindu son.** — (1) A Hindu son does not claim through his father in respect of ancestral property. AIR 1944 Lah 220 (230): ILR (1945) Lah 67 (FB).

(2) Suit against Hindu father as representing sons' interest also — Decision operates as res judicata against son. AIR 1948 Mad 136 (136) * AIR 1929 All 726 (730): 51 All 932 * AIR 1929 Bom 213 (214): 53 Bom 444 * AIR 1959 Mad 524 (525, 526): (1959) 2 Mad LJ 218.

(3) Suit against father and sons — Withdrawal of suit against sons — Decree against father alone — Doctrine of res judicata not applicable — Decree can be executed against sons' shares because of 'pious obligation' of son to pay father's debts. AIR 1967 Raj 184: 1967 Raj LW 290.

(4) Where it is clearly proved that there was no representation of the plaintiff's interests by his father in the previous suit, he will not be bound by the decision. ('53) AIR 1953 Nag 167 (169): ILR (1952) Nag 644 (DB) * AIR 1963 Bom 100 (106): 64 Bom LR 322 (DB).

(5) Father while defending a suit filed against him by a creditor for recovery of a debt not incurred by him for benefit of family does not represent his sons and the

**Section 11 — Note 42 (contd.)**
sons are not bound by the decree in respect of this plea under the principles embodied in explanation VI to Section 11. AIR 1960 Punj 261 (271): 61 Pun LR 813 (DB).

**43. Co-heirs.** — (1) One heir does not claim under another and cannot be barred by res judicata by a decision against the former. ('82) 1882 Pun Re No. 2, p. 3 (12) (SB).

**44. Co-owners.** — (1) One co-owner does not claim under another co-owner. A judgment rendered against one co-owner does not bar a suit against another co-owner. ('86) 13 Cal 352 (356) (FB).

(2) Possession of suit property obtained by D in execution of decree of suit filed by him found to be in possession as co-owner along with heirs of B — In subsequent suit by heirs of B for partition, pleas of res judicata and limitation raised by D — Plea held not to be in favour of D — Suit not barred by limitation. 1967 Ker LJ 729: 1967 Ker LT 1113.

**45. Co-tenants.** — (1) Decision against one tenant cannot operate as res judicata against co-tenants, who were not parties thereto. ('12) 16 Ind Cas 698 (701) (DB) (Mad) * ('09) 1 Ind Cas 184 (185) (DB) (Cal).

(2) A decree for rent passed against one tenant will not bind shares of other co-tenants unless it was passed in representative capacity. AIR 1921 Cal 584 (590) (DB).

**46. Transferor and transferee.** — (1) A transferee will be a person claiming under the transferor if his transfer is subsequent to the institution of the suit by or against the transferor but not otherwise. AIR 1946 Lah 330 (334): ILR (1947) Lah 235 (FB). (Transferee pendente lite.) * AIR 1944 Pat 163 (173) * ('87) 15 Ind App 97 (99): 15 Cal 756 (PC) * AIR 1925 Nag 132 (134): 22 Nag LR 110 * AIR 1948 PC 168 (171): Pak LR (1949) Lah 1 * ('54) ILR (1954) 4 Raj 417 (421, 422) (DB) * AIR 1925 Mad 358 (358).

**47. Mortgagor and mortgagee.** — (1) The mortgagee will be bound by a decision against his mortgagor in respect of the mortgaged property, if the decision was in a suit which was instituted prior to the mortgage but not otherwise. AIR 1914 All 386 (388) * AIR 1953 Mys 111 (112): ILR (1953) Mys 98 * AIR 1953 Trav-Co 529 (531) (DB) * AIR 1949 Cal 666 (669, 670) (DB).

(2) Decision against mortgagee in respect of proprietary title to mortgaged property is not res judicata against the mortgagor. AIR 1918 Oudh 176 (180).

(3) Mortgagee's suit for possession against stranger on basis of title of mortgagor — Decision operates as res judicata in subsequent suit for redemption by mortgagor. AIR 1924 Bom 299 (299, 300) (DB).

(4) A mortgagor cannot be said to be claiming under his co-mortgagor. ('04) 28 All 1 (16): 32 Ind App 229 (241, 242): 9 Oudh Cas 7 (PC).

(5) Suit for redemption by a co-mortgagor must be deemed to be one brought in a representative capacity on behalf of all the mortgagors and the decision will bind them all. AIR 1925 Oudh 696 (697): 28 Oudh Cas 212 (DB).

**48. Auction-purchaser.** — (1) An auction-purchaser in execution of a money decree claims under the judgment-debtor and will be bound by a previous decision against him in respect of such property. AIR 1922 Pat 63 (64, 67, 68): 1 Pat 174 (DB) * ('97) 24 Cal 62 (74) (FB) * ('04) 26 All 447 (460, 464) (FB) * ('95) 22 Cal 909 (919): 22 Ind App 129 (PC).

[See however AIR 1953 Trav-Co 529 (531) (DB). (Pending application to set aside sale, auction-purchaser is not person claiming through the judgment-debtor within Section 11.)]

(2) An auction-purchaser in execution of a mortgage decree represents both the mortgagor and the mortgagee in respect of their respective interest. AIR 1929 Rang 183 (183).

(3) The auction-purchaser in execution of a decree on a mortgage will not be affected by a decision in a suit subsequent to the mortgage, though the auction-purchase itself may be subsequent to the suit. AIR 1922 Mad 390 (390) (DB).

(4) A purchaser in execution of a puisne mortgagee's decree against the mortgagor and his sons who has purchased subject to a first mortgage is not debarred in a suit by the first mortgagee on his mortgage from challenging the validity of the first mortgage as the sons themselves could have done, if the validity of that mortgage was not in question in the former suit. AIR 1928 Mad 557 (558).

(5) In a revenue sale the auction-purchaser, claims paramount title and not through the defaulting proprietor and is therefore, not barred by res judicata by a previous decision against the defaulting proprietor. AIR 1920 Cal 420 (421) (DB) * ('07) 34 Cal 868 (871) (DB).

(6) An attaching creditor of A is a person claiming under him, in regard to whom a decision passed in favour of or against A would operate as res judicata. AIR 1939 All 202 (203) * AIR 1957 Andh Pra 61 (65, 66) (FB) * AIR 1942 Cal 92 (95): ILR (1942) 1 Cal 169 (DB). (Authority of AIR 1928 Cal 130: 55 Cal 448, Held, to be shaken by AIR 1931 PC 114: 53 All 103: 58 Ind App 158.)

(7) A creditor asserting the title of his debtor claims under him and is bound by a decision against the debtor. AIR 1942 Oudh 327 (330): 18 Luck 92 (DB).

[But see AIR 1945 Mad 118 (118, 119) * ('42) AIR 1942 Mad 128 (129).]

**Section 11 — Note 48 (contd.)**

(8) The judgment-debtor does not claim under the decree-holder and is not bound by a decision given against the decree-holder. AIR 1928 Cal 130 (134): 55 Cal 448 (DB) * AIR 1933 Pat 210 (217).

**49. Lessor and lessee.** — (1) The lessor cannot be said to claim from the lessee and is not bound by the litigation against the lessee. AIR 1924 Mad 576 (576, 577) * AIR 1927 Bom 270 (272) (DB) * AIR 1959 Orissa 87 (88): (1959) 1 Orissa JD 28.

(2) A lessee cannot be said to claim under the lessor for the purposes of Section 11, unless his title as lessee arises subsequent to the previous litigation which is alleged to operate as bar. AIR 1924 Mad 576 (577) * AIR 1919 Cal 782 (785) (SB) * AIR 1959 Cal 195 (198): 61 Cal WN 970 (DB).

[But see AIR 1937 Mad 544 (546).]

(3) A transferee from a licenser who is not bound by the license under Section 59 of the Easements Act is also not bound by a previous decision in a suit by the licensor against the licensee. AIR 1930 Oudh 203 (204) (DB).

(4) An order of the Rent Controller fixing fair rent of certain premises does not preclude an application for fixation of fair rent in respect of the same premises by a succeeding tenant. AIR 1952 Nag 129 (130): ILR (1952) Nag 112 (DB).

**50. Miscellaneous.** — (1) Where an inam was granted to A and his male descendants in perpetuity, the successors to the inam are representatives of the prior holders for the purposes of Section 11. AIR 1925 PC 184 (187): 52 Ind App 294.

(2) An Official Assignee acting on behalf of creditors cannot be said to be representing the insolvent where the Official Assignee is not litigating under the same title as the insolvent debtor. A decision against the insolvent in a previous proceeding is not binding on the Official Assignee acting on behalf of the creditors in the subsequent proceeding. AIR 1925 Mad 688 (688).

[See however AIR 1942 Oudh 327 (330): 18 Luck 92 (DB).]

(3) Official Assignee does not represent the creditors for all purposes and decision of the Insolvency Court holding that a certain person is not a partner of the insolvent firm, though binding on the Official Assignee, would not operate as res judicata against a creditor of the firm AIR 1940 Cal 225 (226).

(4) A pre-emptor stands in the shoes of the vendee, and so a decision in a suit between the original vendor and the vendee relating to the pre-empted properties cannot be challenged in a subsequent suit between the original vendor and the pre-emptor. AIR 1933 Lah 529 (530).

(5) A decree for foreclosure obtained against a life estate holder without impleading the remainder-man is not binding on the remainder-man. AIR 1931 Oudh 358 (362): 6 Luck 715 (DB).

(6) Earlier suit by authors of trust — Subsequent suit on behalf of creditors — Plaintiffs in later suit cannot be said to claim through plaintiffs in earlier suit ('54) ILR (1954) Mad 537 (586, 587) (DB).

**51. Explanation VI.** — (1) The principle involved in the Explanation is that the persons represented by the party are not parties to the suit but that they shall be deemed to claim under him. AIR 1955 Mad 281 (283): ILR (1955) Mad 339 (FB) * ('44) AIR 1944 Mad 381 (383): ILR (1945) Mad 138 (DB).

(2) Explanation VI is not confined to cases covered by Order 1, Rule 8, but extends to include any litigation in which apart from that rule altogether, parties are entitled to represent interested persons other than themselves. AIR 1933 PC 183 (189): 56 Mad 657: 60 Ind App 278. (AIR 1928 Mad 77: 51 Mad 128 (FB), Overruled.) * AIR 1957 All 270 (272).

[See also AIR 1957 All 287 (291).]

(3) Essential conditions for applicability of explanation are that the party litigating must do so in respect of a public right or of a private right claimed in common for himself and others, and the litigation must be conducted bona fide in respect of such right. AIR 1956 Trav-Co 266 (267) (DB) * AIR 1955 Hyd 172 (174): ILR (1954) Hyd 745 (DB) * AIR 1933 PC 183 (190): 56 Mad 657: 60 Ind App 278.

(4) A decision in litigation satisfying conditions of explanation VI will bind all persons interested in the right litigated. AIR 1956 Punj 241 (242) * ('56) 1956 All L Jour 225 (226) * AIR 1949 Mad 379 (381) (DB) * AIR 1942 Cal 1 (18, 19): ILR (1941) 2 Cal 434 (DB) * AIR 1969 Ker 26 (28) (DB) * AIR 1964 Punj 227 (229, 230): 1963 Cur LJ 392. (Fact that names of some persons interested are omitted from the list of parties would not make decision in the suit not binding on such persons.) * AIR 1959 SC 31 (38, 45, 48): 1958 Ker LT 721. (Representative suit for declaration of title and possession of trust properties of Malankara Syrian Christian Church.)

(5) Onus of proving want of bona fides in respect of previous litigation is on party seeking to avoid the prior decisions. AIR 1956 Trav-Co 266 (267) (DB) * AIR 1937 PC 1 (4): ILR (1937) Mad 263: 64 Ind App 17 * AIR 1969 Ker 26 (28) (DB).

(6) If the parties were not, in truth, represented in the former suit and that suit was what is generally called a representative suit only because of the fiction in Explanation VI, then on the wording of the explanation, they would not be required to show that the former decision was obtained by fraud or collusion. AIR 1969 Ker 26 (28) (DB).

(7) Proof of negligence is not sufficient to establish such want of bona fides. AIR

**Section 11 — Note 51 (contd.)**

1937 PC 1 (4): ILR (1937) Mad 263: 64 Ind App 17.

(8) The words "public right" have been added in explanation VI in view of the new Section 91 and to prevent multiplicity of litigation in respect of public rights. AIR 1933 PC 183 (189): 56 Mad 657: 60 Ind App 278.

(9) Explanation 6 to Section 11 refers to a private right which is indivisible and not such a private right as the right of ownership in property which is capable of separate enjoyment by its various owners. ('51) ILR (1951) 2 All 328 (361) (DB).

(10) Where it does not appear that all the persons intended to be represented are necessarily interested in obtaining the relief sought, a suit is not a representative one. ('05) 28 Mad 457 (463) (FB).

(11) The Explanation will not apply where the plaintiff claims a right for himself, though the right may be common to others also. AIR 1949 All 761 (762) (DB) * AIR 1942 Oudh 199 (200) (DB) * ('07) 30 Mad 185 (190): 34 Ind App 93 (PC) * AIR 1927 Mad 645 (647) * AIR 1959 Andh Pra 280 (285): (1959) 1 Andh WR 72.

(12) Where A sues B, a decree-holder, that his property is not liable to attachment in execution of B's decree, B cannot be deemed to represent other persons holding other decrees against A and seeking to sell the property. AIR 1942 Mad 128 (129).

(13) Whether a plaintiff, in a particular case, sues in a representative character or a defendant is sued or defends in a representative character, depends upon the facts of that case. It also depends upon the substance and not the form of pleadings. AIR 1956 Pepsu 69 (71) * AIR 1949 All 761 (763) (DB) * AIR 1959 Andh Pra 280 (283, 284): (1959) 1 Andh WR 72.

(14) It is not necessary that the cause title of the suit or pleading should make it plain that the suit is one in a representative capacity. AIR 1928 Mad 445 (446) (DB).

(15) A suit for partition by a member of a joint Hindu family wherein all matters in dispute between the members of the family are decided is a suit in a representative capacity. AIR 1925 Oudh 566 (566, 567).

(16) The Explanation is not confined in its applicability to the right of a joint Hindu family or of a Malabar tarwad or of joint trusteeship. AIR 1917 Mad 457 (459) (DB).

(17) A decision against a community is not res judicata against some members who stand in the second suit in a special capacity other than the capacity of a communal member, inasmuch as the latter claim is not under the same common title ('10) 6 Ind Cas 229 (230): 33 Mad 483 (DB).

(18) Rejection of an objection by certain persons in their individual capacity that a certain temple was a public temple will not bar a similar objection by the trustees of the property in a subsequent suit. AIR 1949 All 761 (762) (DB).

(19) For applicability of the Explanation the claim actually made in the previous suit and not the result of that suit has to be considered. AIR 1957 All 270 (272) (DB) * (1967) All WR (HC) 290 (291).

(20) A predecessor-in-interest cannot be deemed to be a person interested within the meaning of Explanation VI. AIR 1969 Andh Pra 76 (78): (1968) 1 Andh LT 72 (DB).

(21) Suit for declaration of title in respect of land recorded in name of deity with A as Marfatdar — Defendants impleaded in their individual capacity — Marfatdar being untraceable deity remaining ex parte — Other defendants compromising with plaintiff — Court passing decree in terms of compromise — In subsequent suit against defendants of previous suit and others in representative capacity, defendants challenging decree as fraudulent and not binding either on deity or villagers — Held, deity remained unrepresented in previous suit — Hence compromise and ex parte decree could not bind interests of deity. ILR (1965) Cut 115: 32 Cut LT 133.

(22) Suit by one of the legatees under a will for declaration of shikami right in respect of an item of property bequeathed to him — Due execution and genuineness of will contested by defendant — Both points decided against him. Later suit by a different legatee for declaration of patta in respect of another item of property bequeathed to him under the same will — Sons claiming through defendant in previous suit, the contesting defendants in the later suit — Held, Explanation VI applied to their case and that they were barred by res judicata from contesting the factum of the due execution of the will. 1962 Mys LJ (Sup) 474.

**52. Suits under Order 1, Rule 8 and Section 91.** — (1) Where a suit under Order 1, Rule 8 is conducted without complying with any of the conditions imposed by that Rule, the benefit of Explanation VI cannot ordinarily be extended to a decree in such a suit even though the litigation might have been bona fide. AIR 1933 PC 183 (190): 56 Mad 657: 60 Ind App 278 * ('54) ILR (1954) Mad 537 (586, 587) (DB) * AIR 1953 All 547 (548): ILR (1954) 2 All 148 (DB).

(2) Suit under Order 1, Rule 8 not complying with that rule — Test in such cases is whether previous litigation was bona fide and whether any injury had resulted to plaintiffs in second suit on account of omission (in the former suit) to comply with the requirements of O. 1, Rule 8. AIR 1938 Lah 369 (390) (FB).

(3) Where a suit is brought by any member of the public, without the sanction

**Section 11 — Note 52 (contd.)**

of the Advocate-General, in respect of a public nuisance in a case in which no special damage has been caused, the decree in that suit will not bind the other members of the public. AIR 1933 PC 183 (190): 56 Mad 657: 60 Ind App 278 * AIR 1937 Lah 425 (427): ILR (1937) Lah 629 (DB) (On appeal from AIR 1937 Lah 70.)

(4) In case of a suit filed under Section 53, Transfer of Property Act, by one of the creditors of the insolvent on behalf of the body of creditors, unless the Official Receiver has either been impleaded as a party or has been given a notice of the suit the decision in the suit will not be binding on the Official Receiver and he would not be precluded by Explanation VI of Section 11, Civil P. C., from filing an application under Section 54 of the Provincial Insolvency Act to set aside the transfer which was the subject-matter of the suit. (1949) 2 Mad LJ 559: AIR 1950 Mad 184, Dist. AIR 1962 Mad 189 (191): 1961 Mad WN 676.

(5) Though the plaintiffs eo nomine are different persons in two suits under O. 1 Rule 8, in both cases they being representatives of the same public are in substance the same. AIR 1961 All 266 (275).

(6) Plaintiffs in two suits being same but defendants different — Subject matter of previous suit, auction-sale in execution of mortgage decree — Subject-matter of subsequent suit being private sale to pay off mortgage decree — Vendees under the private sale cannot be held to be representatives of the interest of the auction purchaser — Decree in previous suit cannot operate as res judicata. AIR 1961 All 266 (276).

**53. Shebaits and trustees.** — (1) Decision in suit by or against a trustee as such binds the whole body of persons interested in the subject-matter of the trust. AIR 1949 East Punj 141 (147): ILR (1948) East Punj 113 (DB) * AIR 1924 All 504 (506): 46 All 651 (DB) * AIR 1938 Lah 369 (388) (FB).

(2) Where a person sues as a trustee of a certain institution, the decision in such a suit will operate as res judicata in any subsequent suit on behalf of the institution, notwithstanding that the person suing as trustee in the former suit occupied a representative position in regard to another institution also. AIR 1938 Mad 257 (258) (DB).

(3) Suit by or against shebait as representing idol — Decision is binding on succeeding shebaits. AIR 1950 Assam 92 (94, 96) (DB) * ('74) 2 Ind App 145 (152) (PC) * ('07) 6 Cal L Jour 621 (633) (DB)

(4) Decision in a suit by mahant of a mutt concerning property of mutt will be res judicata in a subsequent suit by a succeeding mahant. AIR 1935 All 255 (256).

(5) A decree against a shebait who, to the knowledge of the plaintiff, has been dismissed from the temple or who has been guilty of gross negligence in the conduct of the case, cannot be said to be a decree against the shebait as representing the idol and, therefore, cannot bind succeeding shebaits. ('11) 11 Ind Cas 280 (283, 284) (DB) (Cal).

(6) Suit under Section 92, C. P. C., being a representative suit a decision therein will operate as res judicata on all persons interested in the subject-matter of the suit. AIR 1925 Mad 1070 (1071, 1072) (SB) * ('37) AIR 1937 PC 1 (3): ILR (1937) Mad 263: 64 Ind App 17 * AIR 1959 Bom 396 (400, 401): 60 Bom LR 1273. (Consent decree in representative suits under Section 92.)

(7) Where a representative suit is brought under Section 92 and a decree is passed in such a suit, law assumes that all persons who have the same interest as the plaintiffs in the representative suit were represented by the said plaintiffs and, therefore, are constructively barred by res judicata from reagitating the matters directly and substantially in issue in the said suit. A similar result follows if a suit is either brought or defended under Order 1, Rule 8. AIR 1964 SC 107 (114, 115): (1964) 2 SCR 647.

(8) Where an earlier suit against a trustee is dismissed on the ground that it was not brought under Section 92 after obtaining necessary sanction, a subsequent suit under Sec. 92 after obtaining necessary sanction is not barred. AIR 1953 Mys 25 (25): ILR (1953) Mys 107 (DB).

(9) Suit under Section 92 — Decision in is not a judgment in rem — Judgment binds only those who are represented. ('59) 37 Mys LJ 234 (DB).

(10) Suit under Section 92 by Cutchi Memons of Sunni community — Suit proceedings on basis that mosque belonged to Cutchi Memons — No issue and no finding on the question — Decision is not binding on non-Cutchi Memon Sunnis. ('59) 37 Mys LJ 234 (DB).

(11) Scheme suit — Scheme framed — Appointment of trustees from worshippers — Suit and scheme on basis that institution belonged to one sect of community — Application by persons of another sect applying to be associated with management dismissed and applicants directed to file suit — Second suit by such persons for framing scheme held not barred. ('59) 37 Mys LJ 234 (DB).

(12) If in a suit under Section 92 any issue as to whether the property in suit was not a public trust property was necessary and was required to be decided by the Court and if it came to be decided, that decision obviously stands and binds the parties to the subsequent proceeding provided the other conditions contemplated under Section 11 are fulfilled. AIR 1968 Guj 257 (260): 9 Guj LR 1002.

**Section 11 — Note 53 (contd.)**

(13) In a suit by the Hindu Religious Endowment Board to recover contribution under Madras Religious Endowments Act by attaching the temple properties in possession of the Archakas, when the deity was not before the Court, the Board, far from representing the deity must be said to have acted against it and the suit could not be said to be in representative capacity. Consequently, the temple or the institution was not a party to that suit and the judgment in it could not fall within the scope of Section 11, for the purpose of a subsequent suit for possession brought by the managing trustees of the temple against those Archakas. AIR 1959 Andh Pra 180 (181): ILR (1958) Andh Pra 665 (DB).

**54. Manager of a Hindu family.** — (1) A suit by or against the manager of a Hindu family where the latter has been bona fide acting on behalf of the other members interested must be taken to be one litigated in a representative capacity and a decree in such a suit will bind the other members so interested as res judicata. AIR 1956 Hyd 146 (149): ILR (1956) Hyd 535 (DB) * AIR 1957 Andh Pra 688 (690) (DB) * AIR 1953 Mys 152 (152): ILR (1953) Mys 295 * AIR 1950 Trav-Co 73 (77): 1950 Trav-Co LR 532 (DB) * AIR 1948 Pat 388 (389, 390) (DB) * AIR 1947 All 168 (169): ILR (1947) All 218 (DB) * AIR 1927 PC 56 (57): 51 Bom 450: 54 Ind App 122 * AIR 1914 PC 136 (137): 36 All 383: 41 Ind App 216. (Affirming 33 All 71.) * ('78) 6 Ind App 233 (236, 237) (PC) * ('72) 14 Moo Ind App 367 (376) (PC) * (1965) 78 Mad LW 463 * AIR 1969 Ker 26 (28) (DB).

(2) Whether a Hindu father, in a particular suit, in which he alone of the family is a party, represents his coparceners is a question to be decided with reference to the circumstances of each case. ('07) 17 Mad L Jour 197 (198, 199) (DB) * AIR 1914 Bom 113 (114): 39 Bom 29 (33, 34) (DB).

(3) Mere fact that sons are not added as party defendants to a suit against father as representing the family would not affect the applicability of res judicata. AIR 1956 Hyd 146 (149): ILR (1956) Hyd 535 (DB) * AIR 1948 Pat 388 (389, 390) (DB) * AIR 1939 All 399 (400): ILR (1939) All 602 (FB).

(4) Suit against father in representative capacity -- Express description as manager of family not necessary. AIR 1947 Nag 129 (137): ILR (1946) Nag 844 (DB).

(5) In the case of a joint Hindu family governed by the Mitakshara School of Hindu law the family should be represented either by the Karta or by all co-parceners of the family. AIR 1966 Pat 268 (269).

(6) Manager's representation can be only in respect of joint family property and not other property. AIR 1925 Oudh 75 (75, 76).

(7) Question whether a debt contracted by father is tainted by illegality, or immorality — Father cannot represent sons in regard to such question and a decree against father will not bar a suit by sons attacking the debt as immoral or illegal. AIR 1947 Nag 129 (138): ILR (1946) Nag 844 (DB) * AIR 1939 All 6 (7). (13 Cal 21 (PC), Followed.)

[See also AIR 1950 East Punjab 282 (287) (DB).]

(8) Prior decision against father on basis of his alienation of joint family property will not bar a suit by the sons questioning the validity of the alienation. But sons would be barred by res judicata with regard to a plea which was open to the father equally with the sons, whether expressly or constructively decided. AIR 1947 Nag 129 (138): ILR (1946) Nag 844 (DB).

(9) Plaintiff in previous suit not joined as representing family — Decision is not binding on other members of family not made parties. AIR 1954 Pat 12 (13, 14)

(10) Mortgage executed by father not found to be for legal necessity — Simple money decree passed against estate of deceased in hands of sons — Suits against grandsons dismissed — Subsequent born grandsons cannot contend on strength of Section 11, Ex. VI that the decree of dismissal operates as res judicata. AIR 1944 Oudh 131 (134): 19 Luck 481 (DB).

(11) Dismissal of suit by a member of a joint family to reclaim property from a trespasser — Decision would be binding on any other member who would have taken benefit of the decision had the suit succeeded. AIR 1956 Nag 241 (243): ILR (1956) Nag 256 (DB).

**55. Karnavan of Malabar Tarwad.** — (1) Suit by or against karnavan of Malabar Tarwad — Decree is binding on other members in respect of their interest even though they are not parties provided suit is honestly conducted. AIR 1950 Mad 546 (548): ILR (1950) Mad 326 (DB) * ('27) AIR 1927 Mad 1043 (1050): 51 Mad 46 (FB). (Overruling 30 mad 215 and 24 Mad 658.) * ('96) 20 Mad 129 (133) (FB). (Overruling 5 Mad 201, 6 Mad 121 and referring to 7 Mad 413, 8 Mad 484 (FB), 15 Mad 6 and 10 Mad 79.)

(2) Karnavan in previous suit raising contentions opposed to interests of other members — Decision against him will not operate as res judicata as against other members in a subsequent suit. ('10) 8 Ind Cas 129 (130) (DB) (Mad).

(3) Where the karnavan is acting in excess of his powers or is submitting to a decree in respect of a debt borrowed in excess of his powers, he cannot be said to represent the tarwad. ('37) 1937 Mad WN 435 (438).

(4) A decree in order to be binding on the tarwad should be obtained against the tarwad and there should be a proper

**Section 11 — Note 55 (contd.)**

person representing that tarwad. ('54) 1954 Ker LT 755 (757, 758).

(5) Suit against Karnavathi of sub-tarwad in Maldar — Minor male member, who was not a party, attaining majority before decree — Decree does not operate as res judicata against sub-tarwad. 1954 Ker LT 755.

(6) Karnavan continuing in possession of tarwad properties pending suit for partition represents entire tarwad — Execution against tarwad with notice to karnavan — Proceedings binding on all members of tarwad. 1959 Ker LT 998 (1000) (DB).

(7) If the decision in the previous suit is binding on all the members of the tarwad who were in existence at the time of the earlier suit and who were parties to it, the subsequently born members in the different thavazhies of the tarwad cannot claim any independent right as members of an undivided tarwad. AIR 1959 Ker 169 (170): 1958 Ker LT 1028.

**56. Hindu widow.** — (1) A Hindu widow represents the entire inheritance in respect of her husband's estate and a decree against her, fairly and properly obtained, is binding on the succeeding heirs. AIR 1953 Mad 676 (681) (DB) * AIR 1946 Oudh 163 (178): 21 Luck 1 (DB) * (1863) 9 Moo Ind App 539 (604) (PC) * AIR 1922 Cal 321 (324, 336): 49 Cal 45 (DB) * AIR 1931 PC 114 (117, 118): 53 All 103: 58 Ind App 158 * ('84) 11 Cal 186 (195, 196, 197): 11 Ind App 197 (207) (PC) * AIR 1967 All 370 (373): 1966 All LJ 1010 (DB). (Held, on facts that widow represented her estate in the earlier proceeding and that the decree against her would bind the reversioner.)

(2) Decision against widow is binding on succeeding heirs not by virtue of Section 11 but on general principles of res judicata. AIR 1918 PC 87 (91): 40 All 593: 45 Ind App 168 * ('57) AIR 1957 Orissa 201 (202) * AIR 1964 Orissa 156 (158): 32 Cut LT 76. (Suit for declaration of title by Hindu reversioner — Earlier suit by adoptive mother ending in compromise decree — Therein mother making admission of adoption in favour of adopted son — Suit barred by res judicata.)

(3) Even a decree based on a bona fide compromise by widow would be binding on succeeding heirs. AIR 1922 PC 356 (357, 358): 40 Ind App 342 * ('11) 33 All 356 (367): 38 Ind App 87 (PC).

(4) Where a decree is passed against the widow on a ground personal to herself or the litigation is not conducted by her bona fide for the benefit of the estate, it binds only her widow's estate and is not binding on the reversioner. AIR 1955 All 543 (545) * AIR 1947 Bom 140 (144) (DB) * AIR 1938 PC 254 (256, 258): ILR (1938) 2 Cal 653: 65 Ind App 365: 32 Sind LR 918 * AIR 1923 Cal 204 (206) (DB) * ('31) AIR 1931 All 407 (411) (DB).

(5) Whether the widow represents the estate in a litigation may be gathered from the nature of the allegations put forward and the issues raised, tried and decided in the former suit. AIR 1954 Pepsu 85 (87, 88): ILR (1954) Patiala 44 (DB) * AIR 1946 Oudh 163 (178): 21 Luck 1 (DB) * ('24) AIR 1924 Mad 301 (307) (DB).

(6) Suit by Hindu widow challenging an adoption, or for recovery of the inheritance, or for protecting or preserving the inheritance as against strangers, will be one brought by her as representing the estate. AIR 1925 All 79 (83): 46 All 637 (DB). (Challenging adoption.) * AIR 1934 Pat 696 (698) (DB). (Do) * ('13) 37 Bom 172 (177, 178) (DB). (Recovery of inheritance.) * ('19) AIR 1919 Oudh 258 (259): 22 Oudh Cas 260. (Preserving inheritance.)

(7) A decree obtained by a mortgagee on basis of a mortgage executed by the widow cannot bind the reversioners unless the mortgage was for legal necessity or for the benefit of the estate. AIR 1940 All 433 (436) (DB) * AIR 1925 Pat 625 (673, 674): 4 Pat 510 (DB) * ('09) 4 Ind Cas 483 (485) (DB) (Cal).

(8) As to the binding nature of compromises made by the widow out of Court on the reversioners. AIR 1918 PC 70 (74): 40 All 487 ((496): 45 Ind App 118 * AIR 1924 PC 56 (58, 59): 47 Mad 181: 51 Ind App 145 * ('17) AIR 1917 PC 95 (98): 45 Cal 590: 45 Ind App 35 * AIR 1914 PC 44 (45).

(9) Lease by Hindu widow challenged by B as next reversioner — Decision that B was not the next presumptive reversioner as there was a nearer reversioner J and so B had no locus standi — The decision that J was the next presumptive reversioner would be res judicata in a subsequent suit by another reversioner challenging a gift by the widow in favour of J. AIR 1956 Pepsu 69 (70, 71).

**57. Hindu reversioners.** — (1) A suit by the nearest reversioner in the lifetime of the widow that an adoption made by her is not valid or an alienation by her is not binding on the inheritance, being a suit in a representative capacity and on behalf of all the reversioners, the decision in such a suit affects reversioners as body and under Explanation VI to Section 11 bars a fresh suit by another reversioner on the same cause of action. AIR 1956 Nag 231 (235): ILR (1956) Nag 451 (DB) * ('57) AIR 1957 All 270 (271, 272) (DB) * AIR 1955 Madh B 99 (101) (DB) * AIR 1952 All 335 (337) (DB) * ('25) AIR 1925 PC 272 (276, 277): 52 Ind App 398: 47 All 883 * AIR 1915 PC 124 (126): 38 Mad 406: 42 Ind App 125 * AIR 1922 All 301 (308, 309): 44 All 19 (FB) * AIR 1938 Lah 571 (573) (DB).

(2) A compromise made bona fide for benefit of estate and not for personal benefit of Hindu widow will bind the

**Section 11 — Note 57 (contd.)**
reversioners quite as much as a decree on contest. AIR 1922 PC 356 (358): 1 Pat 741: 49 Ind App 342 * AIR 1957 Punj 69 (72): ILR (1957) Punj 337.

(3) Where in the previous suit the plaintiff who sued as a reversioner was held not to be a reversioner, he cannot be said to have represented the reversionary body and, therefore, the decision would not operate as res judicata against other reversioners. AIR 1926 All 573 (573) (DB).

(4) Where a reversioner sues not in a representative capacity but in a personal one, it will not operate as res judicata in a suit by actual reversioner after widow's death. AIR 1930 All 9 (11) (DB).

(5) Decision in a suit by reversioners against widow for declaring a gift by her as invalid does not operate as res judicata in a subsequent suit by adopted son. AIR 1944 Mad 326 (327): ILR (1944) Mad 775 (DB).

(6) A decision in a suit against the nearest reversioner is binding on the succeeding heirs to the estate. AIR 1947 Oudh 45 (64): 21 Luck 463 (DB).

(7) Suit by reversioner against widow for declaration that alienation by her is not binding upon estate — Reversioner sues in representative capacity — Female reversioner intervening between him and estate — Decision cannot operate as res judicata in subsequent suit on question whether plaintiff or female reversioner was immediate reversioner. AIR 1967 Pat 157: 1966 BLJR 386.

**58. Legal representatives.**— (1) Decree passed in a suit against one of several legal representatives is, in the absence of fraud or collusion, binding on the estate and on all the other representatives. AIR 1942 Oudh 216 (217): 17 Luck 720 * ('02) 26 Mad 230 (234, 235) (DB).

(2) Where a person is substituted as legal representative of a deceased party without deciding whether he was such representative, the decision in suit would not bar as res judicata a subsequent suit by such representative for a declaration that the decree is not binding on him. ('81) 6 Cal 777 (781) (DB).

(3) A suit against a wrong person as the legal representative of a deceased person is not res judicata in a subsequent suit against the real heir. AIR 1928 Pat 362 (363).

**59. Administrators.** — (1) Decision in suit against executor or administrator is binding on all persons who subsequently succeed to the estate. ('09) 4 Ind Cas 483 (485) (DB) (Cal). (Executrix.) * ('05) 29 Bom 96 (100) (DB). (Administrator.)

(2) A declaratory decree obtained against the representatives of a deceased debtor to the effect that a certain property does not form part of the assets of deceased is binding as res judicata in a suit for administration of the estate. AIR 1942 Oudh 327 (330): 18 Luck 92 (DB).

**60. Benamidar or agent.** — (1) Decision in a litigation by or against benamidar will bind beneficial owner as res judicata. AIR 1956 Cal 613 (614) (DB) * ('57) AIR 1957 Andh Pra 557 (559) (DB) * AIR 1918 PC 140 (143): 46 Cal 566: 46 Ind App 1 * AIR 1959 Pat 89 (92): ILR 36 Pat 1027.

(2) A benamidar is only another name for real owner and as such the real owner himself must be deemed to be a party for purposes of Section 11. ('84) 10 Cal 697 (705, 706) * AIR 1924 Lah 702 (705) (DB).

(3) Decree passed against benamidar under protest and without impleading real owner would not bind real owner as res judicata. AIR 1914 All 173 (175): 36 All 446 (450, 451) (DB) * AIR 1960 Andh Pra 592 (598 to 600) (DB).

(4) Decree passed only against agent is binding on the principal inasmuch as he must be deemed to be a party to the suit. ('13) 18 Ind Cas 278 (279) (Lah) * ('88) 11 Mad 309 (316) (FB) * AIR 1968 Pat 77 (DB).

(5) A benamidar's son also represents true owner and a decree obtained against benamidar's son is binding on true owner as res judicata. AIR 1947 Cal 320 (324) (DB).

(6) Benamidar can represent real owner — Proceedings between benamidar and third party — Death of benamidar — His heirs brought on record — Application by real owner for being brought on record dismissed — Decree against heirs of benamidar — Held, on facts that benamidar and his heirs represented real owner and decree was binding on the real owner. AIR 1969 SC 316 (318, 319): (1969) 1 SCJ 373.

(7) If a transaction is not intended to be given effect to, or if a document of title is executed only as a sham deed, there is no benami purchaser. The principles of benamidar representing the real owner, are not applicable to such a case. AIR 1962 Pat 204 (207, 208): ILR 41 Pat 941.

**61. Miscellaneous.** — (1) A creditor of a party is not its representative, for purposes of Section 11. ('92) 15 Mad 477 (479) (DB).

(2) Dispute about public well — Decision against municipal board is res judicata against other persons. AIR 1924 All 178 (180): 46 All 110 (DB).

(3) Judgment against municipal council will operate as res judicata against chairman. AIR 1933 Mad 59 (61).

(4) The Official Liquidator, represents the debenture-holders and creditors as well as the company, and if an order is made against him in respect of the company's property, the order is conclusive, in the winding up, against all parties so represented. ('20) AIR 1920 PC 56 (58): 43 Mad 550: 47 Ind App 33.

**Section 11 — Note 61 (contd.)**

(5) Suit by creditor to establish that transaction was benami for his debtor — Pending suit creditor declared insolvent and Official Receiver brought on record — Dismissal of suit — Appeal by Official Receiver — Held, Official Receiver represented not only insolvent but also entire body of creditors including plaintiff and dismissal of suit was not only against plaintiff but also against entire body of creditors represented by Official Receiver — A dismissal of suit would operate as res judicata in subsequent suit by Official Receiver. AIR 1968 Ker 154 (155): 1967 Ker LT 1156.

(6) A decree against a vatan holder as representing the estate is binding on his successor. ('85) 9 Bom 198 (221) (FB).

(7) Decree passed against a jahgirdar as representing estate is binding on his successors. AIR 1931 Nag 183 (184): 27 Nag LR 127.

(8) Suit by lambardar of a mahal under Section 245 of the U. P. Tenancy Act, 1939 — Subsequent suit by some of the co-shares on the same cause of action was barred. AIR 1947 All 88 (88) (DB).

(9) In a suit which may be brought by or against the State in which the status of a person claiming to be a State subject and an agriculturist is in issue the State represents the entire community and a decree passed against the State in the absence of fraud or collusion is binding on all those persons who had an interest in the determination of the question and will operate as res judicata by reason of Section 11, Expl. VI. ('49) 8 J and KLR 47 (51, 52).

(10) Prior application for scaling down decree by one of judgment-debtors — Application not made in representative capacity — Rights of other judgment-debtors not adjudicated — Subsequent application for scaling down decree made by another judgment-debtor held was not barred by res judicata. AIR 1958 Andh Pra 231 (233).

**62. Judgments in rem.**— (1) Judgments in rem are conclusive proof of the matters specified in Section 41, Evidence Act, and, by Section 4 of the Evidence Act, evidence cannot be allowed to disprove the facts established by such judgments. AIR 1956 Nag 209 (211): ILR (1956) Nag 549 (DB) * AIR 1921 Mad 248 (253, 255): 44 Mad 778 (FB) * AIR 1916 PC 78 (80): 43 Cal 694: 43 Ind App 91.

(2) A judgment by a Subordinate Judge or a District Judge in exercise of the jurisdiction conferred upon him by the Hindu Marriage Act (1955) would fall within the purview of Section 41, Evidence Act. AIR 1963 Andh Pra 158 (159): (1962) 2 Andh WR 259.

(3) Judgments which do not fall within Section 41 of the Evidence Act can only be evidence if they come under Section 42 or any other relevant section of the Evidence Act but cannot be used for the purpose of preventing the other side from proving facts which he sets up. ('95) 22 Cal 533 (542): 22 Ind App 60 (PC) * AIR 1958 Pat 477 (484) * (1900) 24 Bom 591 (598, 599) (DB) * AIR 1921 Mad 248 (253, 256): 44 Mad 778 (FB) * ('07) 31 Bom 143 (158) (DB) * 1959 Raj LW 535; ILR (1959) 9 Raj 692.

[See also AIR 1957 SC 286 (297): 1956 SCR 889: ILR (1957) Punj 819.]

(3-A) A judgment is not a judgment in rem because in a suit by A for the recovery of an estate from B, it has determined an issue raised concerning the status of a particular person or family. ('66) 9 Moo Ind App 539 (601) (PC).

(4) A judgment in rem must have been given by the Court in the exercise of its Probate, Matrimonial, Admiralty or Insolvency Jurisdiction. AIR 1928 All 395 (396) (DB).

(5) Judgment of an Insolvency Court declaring a person to be a creditor of the insolvent does not operate as a judgment in rem. AIR 1931 Mad 441 (445, 448, 451): 54 Mad 601 (SB).

(6) Finding of Insolvency Court that a certain person is not a partner in the insolvent firm is not a decision as to his status or legal character and is not a judgment in rem. AIR 1940 Cal 225 (226).

(7) There is a broad distinction between the effect of a judgment in rem and a judgment in personam. The point adjudicated upon in the former is always as to the status of a person and is conclusive against the world as to that status, whereas in a judgment in personam the point whatever it may be, which is adjudicated upon is conclusive only between the parties or their privies. AIR 1940 Cal 225 (226) * AIR 1928 Sind 121 (124): 22 Sind LR 105 (DB) * 1967 Mah LJ 985 (988): 69 Bom LR 749.

(8) Principle of res judicata is modified by Section 44, Evidence Act, 1872 and principle will not apply if any of the three grounds mentioned in Section 44 exists. AIR 1967 Ker 97 (99): 1967 Ker LT 629 (DB).

**63. Decree against minor.**— (1) Decree against a minor not represented at all or, represented by a person incompetent to act as guardian, is without jurisdiction and not binding on him as res judicata as minor is no party to it. AIR 1956 Trav-Co 70 (73): ILR (1955) Trav-Co 341 (DB) * ('04) 28 All 1 (16): 32 Ind App 229 (241): 9 Oudh Cas 7 (PC) * AIR 1927 Pat 271 (275): 6 Pat 388 (DB).

(2) Decree against minor not properly represented owing to gross negligence or fraud or collusion of the guardian would not operate as res judicata. AIR 1950 Pat 97 (108, 115): 27 Pat 441 (FB). (Per Narayan J. contra.) * AIR 1958 Mad 148 (150) (DB) * AIR 1946 Lah 233 (243): ILR

**Section 11 — Note 63 (contd.)**
(1946) Lah 515 (FB) * AIR 1932 All 293 (300): 54 All 646 (FB) * AIR 1960 Ker 367 (371): 1960 Ker LT 546.

(3) In the absence of gross negligence or fraud or collusion of the guardian, a decree obtained against a minor properly represented is res judicata, even in respect of pleas which might and ought to have been raised but which were not raised by the guardian. AIR 1927 Oudh 354 (354, 355) (DB) * AIR 1957 Him Pra 14 (15) * AIR 1930 Lah 654 (655) (DB) * AIR 1924 Mad 608 (609): 47 Mad 476 (DB) * (1965) 78 Mad LW 463.

[But see AIR 1925 Oudh 633 (640) (DB).]

(4) Decree against minor on compromise without the Court's sanction under O. 32, Rule 7 is without jurisdiction and cannot operate as res judicata. AIR 1917 PC 146 (151): 45 Cal 17: 44 Ind App 229 * ('11) 36 Bom 53 (57) (DB).

(5) Where there are several defendants besides the minor defendants, having identical interests, a decision therein is binding on the minors, as the other defendants must be deemed to have litigated on behalf of themselves and of the minors under Explanation VI to Section 11. AIR 1929 All 346 (346).

(6) Suit for partition between brothers — Minor sons presumed to be represented by fathers — Decree binding on minors — Explanation VI to Section 11 C. P. C. applies — Minors challenging decree — Burden is on minors to prove fraud, collusion etc. 1961 Jab LJ 381.

**64. Litigation under same title.**— (1) Expression "title" in Section 11 refers to the capacity or interest of a party; it has nothing to do with the particular cause of action on which he sues or is sued. AIR 1946 Nag 277 (294): ILR (1946) Nag 159 (DB) * AIR 1941 Cal 574 (579) * AIR 1929 All 400 (402).

[See however AIR 1947 Nag 39 (42): ILR (1946) Nag 630 (DB).]

(2) Where the capacities in which the two suits are brought are altogether different the bar of res judicata cannot come into operation. AIR 1959 Andh Pra 448 (457): (1959) 1 Andh WR 239.

(3) According to the rule of res judicata a verdict against a man impleaded in one capacity will not affect his rights when proceeded against in another distinct capacity. AIR 1961 Punj 229 (231): ILR (1960) 1 Punj 731.

(4) A suit against a person in his individual capacity does not cease to be so merely because he pleads that he is a trustee or shebait and is in possession as such. AIR 1941 Cal 574 (579).

(5) Where a person is made a defendant as a member of the family owning the property in a suit and entitled to claim a share in the partition thereof, that capacity of his cannot be altered by his claiming to hold the property on behalf of a Dargah and not in his own rights. AIR 1960 Madh Pra 250 (251): 1960 Jab LJ 683.

(6) First suit for possession as reversioner of A, second suit for the same relief as reversioner of B. Litigation is under the same title. AIR 1926 Mad 234 (234).

(7) First suit as trustee, second suit also as trustee. Litigation is under same title. ('10) 7 Ind Cas 184 (185) (DB) (Mad) * AIR 1930 Cal 47 (49): 57 Cal 258 (DB).

(8) First suit against a firm. Second suit against a partner thereof. Litigation is under same title. ('09) 34 Bom 244 (249) (DB).

[But see AIR 1925 Cal 1195 (1198) (DB).]

(9) First suit litigated as heir of husband. Second suit on the basis of a claim for dower. Litigation is under same title. AIR 1920 All 70 (72): 42 All 290 (294) (DB).

(10) First suit based on right by purchase. Second suit based on the right as heir. Litigation is under same title. AIR 1923 Mad 257 (259): 46 Mad 135 (DB).

(11) First suit as heir at law. Second suit as sole legatee under the will of deceased. Litigation is under same title. AIR 1947 All 147 (148): ILR (1947) All 186 (DB).

(12) First suit by widow based on adoption of a son to her deceased husband. Second suit by the same adopted son based on a later adoption by the widow to her deceased husband. Litigation is under same title. AIR 1954 SC 82 (84).

(13) Plaintiff in both suits suing as reversionary heir in respect of a Hindu widow's estate. Mere fact that in one of suits plaintiff professes also to sue in another capacity does not make the second suit one not litigated under the same title. AIR 1938 Nag 401 (405): ILR (1938) Nag 496 (DB).

(14) Hindu father sued his son claiming certain property as his self-acquired property. Subsequent suit by father against a creditor of the son for declaration that the property was not liable to attachment in execution of a decree held by the creditor against the son. It was held that creditor claimed under the son litigating under the same title and the bar of res judicata arose so far as the question whether the property was the self-acquired property of father was concerned. AIR 1937 Mad 651 (652).

(15) Previous suit by Hindu widow against reversioner H — H not contesting suit as manager of joint family consisting of himself and his brother J but defending suit by alleging that property in suit was joint family property — Subsequent suit by J for possession of property for benefit of himself and H — Decision

**Section 11 — Note 64 (contd.)**
in previous suit operates as res judicata. AIR 1953 All 78 (81).

(16) Suits for possession first as owner and next as mortgagee — Both suits in individual capacity — Litigation is under same title. AIR 1948 Pat 302 (307, 308): 26 Pat 24 (DB).

(17) First suit in a personal or individual capacity. Second suit in a representative capacity. Litigation is under different title. AIR 1951 Mad 285 (286) (DB) * AIR 1924 Lah 275 (276) (DB) * AIR 1927 PC 128 (130, 131): 54 Ind App 238: 54 Cal 770 * AIR 1939 Cal 148 (151) (DB).

(18) First suit as heir of K. Second suit as manager of Mutt. Litigation is under different title. ('04) 28 Bom 215 (226) (FB).

(19) Previous suit by Municipality against B as trespasser, for his eviction — B contending that suit property being held in public trust for Sadhus etc., he as a Sadhu was entitled to reside therein — B not sued in a representative capacity on behalf of beneficiaries — Suit decreed — Subsequent application under Section 19 Bombay Public Trusts Act (29 of 1950), for determining whether property was held under a public trust of a religious or charitable character — Not barred by rule of res judicata. AIR 1968 SC 418 (420): (1968) 2 SCR 652.

(20) First suit in which A is impleaded as legal representative of a party who died pending suit. Second suit by A in his personal capacity and vice versa. Litigation is under different title. AIR 1925 Mad 59 (59) (DB) * AIR 1929 All 252 (253) (DB).

(21) In prior suit plaintiff claiming as nearest presumptive reversioner — In subsequent suit after death of widow, he claiming as nearest reversioner entitled to succeed. AIR 1955 Mad 533 (533, 534): ILR (1956) Mad 222 (DB).

(22) Plaintiff in subsequent suit, also plaintiff in previous suit under Section 92, but in different capacity — Finding in previous suit as to legality of alienations held not res judicata in the subsequent suit. AIR 1954 Pat 586 (595) (DB).

(23) Decision against mortgagor after execution of mortgage-deed — Held mortgagee could not be considered as litigating under same title. AIR 1953 Mys 111 (112): ILR (1953) Mys 98 (DB).

(24) The words "between parties under whom they or any of them claim litigating under the same title" cover a case where the litigants in the later suit occupy by succession the same position as the litigants in the former suit. AIR 1916 Bom 273 (275): 40 Bom 606 (613, 614) (DB).

(25) Objection under Section 11, U. P. Encumbered Estates Act dismissed — Subsequent suit under Section 92 Civil P. C. Held parties did not litigate under the same title. AIR 1963 All 187 (190).

(26) Suit for partition—Petition made for being impleaded as a party to suit — Person from whom claim was made was described as the wife of a particular individual — Petition dismissed — Another petition for same relief in which petitioner was described as step-mother of another individual.

Held, it could not be said that the capacity in which the second petition was filed was different from that on the basis of which previous petition was filed. (1959) 2 Andh WR 487.

**65. Identity of subject-matter and cause of action.**— (1) The words "any matter" in Section 11 does not mean "matter arising out of the same cause of action". AIR 1952 Pat 472 (474) * ILR (1957) Andh Pra 700 (705) (DB) * ('04) 6 Bom LR 594 (597, 598) (DB) * AIR 1924 Pat 265 (266): 2 Pat 771 (DB) * AIR 1929 Oudh 172 (174): 4 Luck 603 (FB) * AIR 1959 Bom 396 (399): 60 Bom LR 1273.

(2) It is the matter in issue directly and substantially, either actually or constructively, and not the subject-matter of the suit that forms the test of res judicata. AIR 1953 SC 33 (39): 1953 SCR 154 * AIR 1954 Pat 443 (445) (DB) * AIR 1950 Hyd 15 (17): ILR (1951) Hyd 84 (DB) * AIR 1946 Lah 387 (390, 391) (DB) * 1967 Ker LJ 237 * AIR 1959 Pat 36 (40): 1959 BLJR 594.

[See however AIR 1950 FC 142 (179): 1949 FCR 715.]

(3) Where the matter in issue decided covers a subject-matter besides that involved in the first suit, it will be res judicata. AIR 1953 Nag 19 (21) * AIR 1942 All 267 (287): ILR (1942) All 518 (DB) * ('85) 8 Mad 219 (225): 12 Ind App 16 (PC).

(4) Decrees already obtained would bind as res judicata regarding title to those properties concerned in the respective decrees though they do not operate as res judicata regarding relief prayed for in the subsequent suit so far as properties not covered by these decrees are concerned. (1968) 2 Andh WR 522.

(5) The test of res judicata is the identity of title in the two litigations and not the identity of the actual property involved in the two cases. AIR 1953 SC 33 (39): 1953 SCR 154 * AIR 1950 Hyd 15 (17): ILR (1951) Hyd 84 (DB) * AIR 1967 J and K 85 (86): 1967 Kash LJ 44 * ILR (1966) Cut 307: (1966) 32 Cut LT 766 (773) * AIR 1963 Ker 313 (314, 315): ILR (1963) 1 Ker 240 * (1963) 65 Pun LR 188 * ILR (1960) 10 Raj 221 (224).

(6) Where the right claimed in both suits is the same, the subsequent suit would be barred as res judicata though the right in the subsequent suit is sought to be established on a ground different from that in the former suit. It would be only in those cases where the rights claim-

**Section 11 — Note 65 (contd.)**

ed in the two suits were different that the subsequent suit would not be barred as res judicata even though the property was identical. AIR 1954 SC 82 (84) * AIR 1944 Lah 282 (284): ILR (1944) Lah 568 (FB) * AIR 1957 Pat 365 (370) (DB) * AIR 1952 Punj 252 (254) * AIR 1963 Ker 313 (314, 315): ILR (1963) 1 Ker 240 * AIR 1961 Punj 563 (564).

[See also 1961 Jab LJ 1207: ('58) 1958-1 Mad L Jour 286 (288).]

[See however AIR 1958 Mys 113 (115). (Landlord's previous application on ground of bona fide requirement of house for relations — Subsequent application on ground that he needed it for his own use is not barred.)]

(7) Where the causes of action in the two suits are different there is no res judicata. ('84) 8 Bom 174 (181) (FB)*AIR 1932 All 553 (554) (DB) * ('03) 26 Mad 760 (769, 770) (DB) * AIR 1946 PC 165 (168): ILR (1946) Lah 569: ILR (1946) Kar (PC) 138 * AIR 1950 All 131 (132) (DB) * AIR 1952 Trav-Co 359 (361): ILR (1951) Trav-Co 522 (DB) * 1968 Raj LW 412 * 1967 Ker LJ 237 * AIR 1965 Cal 204 (298): 69 Cal WN 57 * 1961 Jab LJ 563: ILR (1961) Madh Pra 1025 * AIR 1960 Cal 440 (442) * AIR 1960 Mad 194 (195): (1961) 1 Mad LJ 322 * AIR 1959 Andh Pra 448 (457): (1959) 1 Andh WR 239. (Cause of action arising subsequent to former suit or proceeding.) * ILR (1959) Cut 448 * AIR 1955 Andhra 282 (285, 286): 1955 Andh WR 411.

[See also (1965) 1 Andh LT 352. (Application under Section 98, A. P. (Telangna Area) Tenancy and Agricultural Lands Act, 1950 — Applications under — Causes of action entirely different — No question of res judicata arises.) * AIR 1958 Madh Pra 5 (6).]

(8) There is no res judicata where the subject-matter of the later suit is different from that in the former suit. AIR 1954 All 215 (217) * AIR 1954 Mys 45 (46) * AIR 1953 Pat 383 (384) * AIR 1945 Mad 396 (400): ILR (1945) Mad 420 (DB) * ('90) 14 Bom 206 (212, 213) (DB) * AIR 1969 Bom 111 (114, 115): 70 Bom LR 376 * AIR 1968 Guj 257 (262 to 264): 9 Guj LR 1002. (If there is any change in the effect of law governing the matter, the effect of any such bar of res judicata has to be broadly considered before it can be allowed to stand for all time to come.) * AIR 1963 Orissa 130 (132)*AIR 1968 Pat 476. (Petition under Bihar Public Land Encroachment Act, 1956 for eviction — Revenue Courts only deciding that it was not a fit case for taking action for eviction under the Act — Held, decision would operate as res judicata only to the extent that fresh petition for eviction under the same Act could not be filed.) * AIR 1968 Pat 238*AIR 1963 Punj 225 (DB). (Principle of res judicata cannot be invoked when there is a change in the law.) * 1967 All LJ 1054 (1057) * 1967 All WR (HC) 766 (767) * AIR 1967 All 423 * (1967) 8 Guj LR 620 (627) * AIR 1967 J and K 85 (86): 1967 Kash LJ 44*(1967) 69 Pun LR (D) 260. (Previous application of landlord for eviction of tenant under Delhi and Ajmer Rent Control Act (1952) on ground of bona fide requirement dismissed — Second application on same ground under Delhi Rent Control Act, 1958 — After disposal of previous application circumstances of landlord changing due to increase in family members — No question of res judicata arises to bar second application for eviction.) * 1966 Ker LJ 204: 1966 Ker LT 167 (171) * 1966 Jab LJ 232 (237) * AIR 1966 Madh Pra 207 (209): 1965 Jab LJ 905. (Former suit filed by original landlord on ground of genuine need — At appellate stage, subsequent landlord impleaded as a transferee pendente lite — No retrial on question of his genuine need — Suit by subsequent landlord for eviction and arrears of rent on ground of genuine need — Not barred by res judicata.) * 79 Mad LW 403: (1966) 2 Mad LJ 389 (392). (Change in law resulting in alteration of identity of question of decision — Section does not apply.) * ILR (1966) 2 Mad 402 * 1966 BLJR 1016: ILR 46 Pat 660 (DB). (Agreement between workman and employer as to compensation for permanent partial disablement registered under Sec. 28, Workmen's Compensation Act — Workman later declared unfit for service — Workman not disentitled from claiming compensation on basis of permanent total disablement.) * (1966) 68 Pun LR 69 (71) (DB). (Decision in prior suit regarding the private properties of the Trustee does not operate as res judicata in a subsequent proceeding under Sec. 48 of Bihar Hindu Religious Trust Act involving the Trust property.) * AIR 1965 Mad 355 (357): 77 Mad LW 651 (DB) * AIR 1965 Mad 185: (1966) 1 Mad LJ 30 (DB). (Present suit by villagers to evict artisans — Previous suit by artisans against villagers dismissed as not having been pressed — Relief in previous suit related only to single crop standing on land and no question of title involved therein — Artisans would not be precluded in present suit from agitating their title.) * AIR 1965 Pat 238: ILR 44 Pat 735 (DB). (Proceedings under S. 69-A of T. P. Act do not operate as res judicata in subsequent suit in respect of title to property.) * AIR 1964 Cal 452 (454, 459): 68 Cal WN 586 * AIR 1964 Him Pra 18 (19). (Application under Section 34 for stay of suit is not barred by sub-section (3) of Section 69 of Partnership Act.) * AIR 1964 Pat 484 (485, 486). (Previous suit for possession of land on allegation of tenancy — Subsequent suit for ejectment as trespasser — Decision in previous suit that it is cognizable by Revenue Courts does not operate as res judi-

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cata.) * 1964 BLJR 234. (Previous execution case for attachment of compensation money payable under Bihar Land Reforms Act dismissed — Subsequent execution case for attachment of ad interim payment payable under Section 33, Bihar Land Reforms Act not barred by res judicata.) * AIR 1963 Andh Pra 158 (159): (1962) 2 Andh WR 259. (Previous decision in maintenance suit by wife — Does not operate as res judicata in subsequent petition by husband under Section 10 Hindu Marriage Act (1955.) * (1963) 4 Guj LR 90: ILR (1963) Guj 1. (Suit under Section 28, Bombay Rents, Hotel and Lodging House Rates Control Act — First suit an ordinary regular suit — Res judicata inapplicable.) * AIR 1963 Ker 313 (314, 315): ILR (1963) 1 Ker 240 * AIR 1963 Pat 16 (23, 24): 1963 BLJR 73 * AIR 1963 Raj 119 (126): 1963 Raj LW 167: ILR (1963) 13 Raj 171 (DB)* 1962 All LJ 604: (1962) Supp 3 SCR 217 * AIR 1962 Andh Pra 160 (162): (1962) 2 Lab LJ 207 (DB). (Question whether person is workman raised under Industrial Disputes Act — Finding by Industrial Tribunal will not operate as res judicata in subsequent proceeding under Payment of Wages Act.) * 1960 Andh LT 118: (1959) 2 Andh WR 7 * AIR 1960 Pat 36 (40): 1959 BLJR 594 * AIR 1959 Andh Pra 448 (457): (1959 1 Andh WR 239 * ILR (1958) Bom 239 (240). (Dismissal of petition under Section 71, Bombay Tenancy and Agricultural Lands Act on the sole ground that a notice terminating tenancy had not been given — Second application on same ground after notice not barred.) * ILR (1954) Cut 204. (New rights and liabilities created by new legislation since decree.)

**66. Competency of Court trying former suit.**— (1) Under Section 11 it is necessary that the Court trying the former suit should have been competent to try the subsequent suit itself. AIR 1956 Trav-Co 161 (163): ILR (1956) Trav-Co 87 (FB) * AIR 1958 Andh Pra 363 (365): ILR (1958) Andh Pra 281 (FB) * AIR 1955 Pat 393 (395): 34 Pat 324 (DB) * AIR 1954 All 801 (812) (DB) * AIR 1954 Raj 4 (6, 8): ILR (1954) 3 Raj 505 (DB) * AIR 1952 Cal 201 (203) * AIR 1952 Mad 384 (386) * AIR 1952 Nag 271 (274): ILR (1952) Nag 318 (DB) * AIR 1928 Mad 840 (844) (DB) * AIR 1937 All 20 (21) * AIR 1967 Andh Pra 143: (1966) 1 Andh WR 241 * 1960 MPLJ 962: 1960 Jab LJ 910 * 1959 Andh LT 156 (DB).

(2) Such subsequent suit — It denotes whole of suit and not part of it. AIR 1962 SC 214 (217, 218): (1962) 3 SCR 483.

(3) It is the Court which decides the former suit whose jurisdiction to try the subsequent suit has to be considered and not the Court in which the former suit may have been filed. AIR 1966 SC 1332 (1335): (1966) 3 SCR 300.

(4) Where the Court which tried the former suit is incompetent to try the later suit, Section 11 will not apply. AIR 1956 Bhopal 25 (25) * AIR 1952 All 546 (547) * AIR 1952 Raj 115 (120): ILR (1952) 2 Raj 58 (DB) * AIR 1950 All 402 (402): ILR (1953) 2 All 1 (DB) * 55 Mys HCR 201 (206, 207) (DB) * AIR 1939 Pat 375 (377): 18 Pat 342 (DB) * AIR 1939 Sind 329 (330): ILR (1940) Kar 15 (DB) * AIR 1925 Bom 241 (242, 243): 49 Bom 442 (FB) * AIR 1932 Pat 105 (110): 11 Pat 50 (DB). (Fact that prior decree was based on award cannot render it res judicata.) * AIR 1962 SC 287 (293, 294): (1962) 3 SCR 440 * AIR 1962 Orissa 224 (224): 28 Cut LT 521 (DB) * ILR (1960) Mys 120.

(5) Section 11 being explicit general principles of res judicata cannot be invoked in this respect. AIR 1955 Pat 393 (395): 34 Pat 324 (DB) * 1964 Kash LJ 207.

(6) When plea of res judicata is founded on general principles of law, it is not necessary that the Court deciding the former case should have jurisdiction to hear later suit. AIR 1953 SC 33 (40): 1953 SCR 154 * AIR 1968 Guj 257 (259): 9 Guj LR 1002 * AIR 1967 All 125 (127): 1966 All WR (HC) 782 * 1966 Ker LJ 624: 1966 Ker LT 711 * 1959 Andh LT 156 (DB).

(7) Court trying the first suit should have been competent to try that suit. AIR 1953 Cal 669 (670) * AIR 1950 All 402 (403): ILR (1953) 2 All 1 (DB) * AIR 1918 Mad 988 (989) (DB) * AIR 1926 Bom 481 (484) * 1959 Andh LT 156 (DB).

(8) If a Court has no jurisdiction to try a suit, its judgment and orders are mere nullities and have no effect either as estoppel or otherwise and, therefore, cannot operate as res judicata in subsequent proceedings. AIR 1956 Pat 57 (60) (DB) * AIR 1958 Andh Pra 1 (3): ILR (1957) Andh Pra 326 (FB) * AIR 1958 Bom 30 (31): ILR (1957) Bom 786 * AIR 1958 Madh Pra 100 (102, 103) (DB) * AIR 1954 Trav-Co 43 (45) * AIR 1951 Mad 491 (493) * AIR 1951 Pat 361 (363) (DB) * AIR 1949 Pat 466 (469): 28 Pat 336 (DB) * AIR 1940 PC 222 (225): ILR (1940) Kar (PC) 460 * AIR 1968 Goa 36 (39, 40). (Civil Court's decree in tenancy matter contrary to Section 58 (2) of Goa Act VII of 1964 is without jurisdiction — Cannot operate as res judicata.) * (1967) 1 Com LJ 172 (180, 181): 38 Com Cas 82 (Cal) * ILR (1967) Guj 982 (999): 9 Guj LR 1018 * 8 Guj LR 986: ILR (1967) Guj 795 (818) * (1964) 1 Mys LJ 292 * AIR 1964 Pat 247 (249): 1962 BLJR 960 * (1961) 63 Punj LR 71 (75) * AIR 1963 Punj 9 (14): 64 Punj LR 782 (FB) * AIR 1962 Cal 635 (637): 66 Cal WN 970 (SB) * AIR 1962 Cal 616 (619, 620, 621,) * (1960) 1 An WR 286 (292) (DB). (Matter within competence of revenue Courts — Civil Court cannot give decision thereon.) * (1960) 64 Cal WN 324 (330) * AIR 1960 Manipur 49 (50). (Decree passed by Village Authority in Manipur after it ceas-

**Section 11 — Note 66 (contd.)**
ed to have jurisdiction — Second suit on same cause of action is not barred by res judicata.) * (1959) 61 Bom LR 1607: ILR (1960) Bom 154 * 1959 Jab LJ 764: 1960 MPLJ 293 * ILR (1958) Mys 432.

(9) A Court has always jurisdiction to decide for itself whether it has jurisdiction to try the suit before it and its decision thereon will be as much res judicata in a subsequent suit as a decision on any other point. AIR 1956 Pat 57 (60) (DB) * AIR 1943 Cal 460 (463) (DB) * AIR 1941 Cal 156 (159): ILR (1940) 2 Cal 277 * AIR 1940 PC 222 (225): ILR (1940) Kar PC 460 * AIR 1937 Lah 649 (652) * AIR 1935 Mad 835 (838): 59 Mad 62 (DB) * 1968 All WR (HC) 305: 1968 All LJ 77 . (AIR 1962 SC 287 held impliedly overruled by AIR 1965 SC 1153, in AIR 1967 All 442.)

[See however AIR 1956 Bom 268 (270).]

[But see AIR 1941 Cal 493 (494, 495).]

(10) Where existence or otherwise of jurisdiction depends upon facts proved or upon facts in the knowledge of the party which he had an opportunity of bringing forward in the Court but which he did not, and the Court expressly or impliedly decides that it has jurisdiction and proceeds with the suit the decision cannot be challenged on the ground of want of jurisdiction in subsequent proceedings. AIR 1953 SC 65 (71): 1953 SCR 377 * AIR 1955 Bom 239 (239): ILR (1955) Bom 546 * AIR 1953 Hyd 237 (237): ILR (1952) Hyd 57 * ('45) 49 Cal WN 354 (356) * AIR 1922 Pat 322 (333, 334) (DB) * AIR 1926 Bom 481 (485, 487) * AIR 1961 Cal 422 (429, 430) * AIR 1961 Cal 92 (92, 93) (FB) * AIR 1960 Cal 331.

(11) Where the jurisdiction of a Court or Tribunal depends upon the existence of a collateral fact, a decision on such collateral fact would not operate as res judicata so as to oust the jurisdiction of the Civil Court to re-examine the question to see whether the Tribunal or Court acted within its jurisdiction. AIR 1958 Orissa 197 (199, 200): ILR (1958) Cut 417.

(12) U. P. Agricultural Tenants (Acquisition of Privileges) Act (10 of 1949), Section 12 (1) (c) — Occupancy tenant having property situate in A and D — Suit challenging gift deed involving property situate in both places and for possession decreed by Court in D — Application in Revenue Court in A for cancellation of Praman Patras under Section 12 as ordered in decree — Decree passed by Court in D held to be res judicata between parties — Court in D had jurisdiction to entertain suit — Revenue Court must cancel Praman Patras under Section 12 (1) (c). AIR 1967 All 375 (377): 1967 All WR (HC) 52.

(13) Suit for recovery of arrears of rent — Decrees in previous Small Cause Suits determining payment of rent — Decrees do not operate as res judicata in original suit for recovery of arrears. AIR 1967 Mys 65 (66): (1965) 2 Mys LJ 93.

(14) In order to determine whether a Court which decided the former suit had jurisdiction to try the subsequent suit regard must be had to the jurisdiction of the Court at the date of the former suit and not to its jurisdiction at the date of the subsequent suit. AIR 1966 Pat 235 (241) (DB).

**67. "Court", meaning of.—** (1) Administrative Officers are not 'Courts' within the meaning of Section 11. AIR 1952 All 48 (49). (Rent Controller.) * AIR 1957 All 719(725) (DB). (Assistant Collector acting under U. P. Act 10 of 1949.) * AIR 1949 Cal 609 (610). (Settlement officer.) * ('07) 29 All 519 (533): 34 Ind App 125 (PC). (Committee of Oudh Talukdars.) * ('06) 30 Bom 220 (224) (DB). (Talukdari settlement officer in Bombay.) * AIR 1938 PC 210 (216): 13 Luck 508: 32 Sind LR 845: 65 Ind App 314. (Collector in partition proceedings under U. P. Land Revenue Act.) * AIR 1929 Cal 130 (132) (DB). (Certificate officer under the Bengal Public Demand and Cess Recovery Act.) * ('81) 7 Cal 736 (738) (DB). (Registrar acting under the Indian Registration Act.) * AIR 1938 Mad 148 (151): ILR (1938) Mad 151 (SB). (Income Tax Officer.) * AIR 1930 Mad 209 (213): 53 Mad 420 (FB). (Do.) * AIR 1969 Raj 95. (Decision of Government under Section 12 (2) of Industrial Disputes Act is an administrative act.)

(2) Under the Rules for the conduct of settlement proceedings, framed by the Governor-in-Council on the 5th December, 1925, Assistant Settlement Officers and Settlement Officers were vested with all the powers of a Santal Parganas Civil Court. (1957) ILR 36 Pat 439: 1957 BLJR 461.

**68. Court of exclusive jurisdiction.—** (1) On general principles of res judicata, decision of former Court of exclusive jurisdiction will be conclusive on the matter decided irrespective of the limitation that the former Court must be competent to decide the subsequent suit. AIR 1953 SC 33 (40): 1953 SCR 154 * AIR 1955 Pat 393 (395, 396): 34 Pat 324 (DB) * AIR 1954 All 801 (806) (DB) * AIR 1954 Cal 506 (511) (DB) * AIR 1953 Bilaspur 23 (24). (Revenue Court.) * AIR 1951 Punj 32 (33) * ('50) 55 Mys HCR 201 (215, 216) (DB) * AIR 1949 Nag 304 (305) * ILR (1949) Nag 220. (Debt Relief Court.) * AIR 1932 Oudh 199 (203, 204): 7 Luck 716 (FB) * AIR 1926 Sind 236 (237): 21 Sind LR 23 (DB). (Small Cause Court.) * AIR 1964 SC 993 (999 to 1003): (1964) 5 SCR 946 * AIR 1967 Andh Pra 143: (1966) 1 Andh WR 241 * AIR 1961 Mad 423 (425): 1961-1 Mad LJ 188 (DB) * 1959 Andh LT 156 (DB) * (1955) 2 Mad LJ 178: 1955 Mad WN 447. (Exclusive jurisdiction of Settlement Officer — Jurisdiction of Civil Court barred.) * (1969) 1 Andh WR 228: (1968) 2 Andh LT 386.

**Section 11 — Note 68 (contd.)**

(2) Small Cause Courts and Revenue Courts have been empowered by the Legislature to try particular classes of suits to the exclusion of ordinary Civil Courts and any decision arrived at by such Courts in the exercise of such exclusive power is conclusive and cannot be questioned by the ordinary Civil Courts. AIR 1954 Mad 788 (792): ILR (1954) Mad 715 (FB) * AIR 1938 Lah 811 (813): ILR (1939) Lah 185. (Small Cause Court.) * AIR 1937 Lah 346 (347). (Do.) * AIR 1929 Lah 586 (587). (Revenue Court.) * ('88) 9 Mad 39 (41, 42) (DB). (Do.) * AIR 1929 Oudh 362 (363): 4 Luck 220. (Do.) * AIR 1967 All 125 (127): 1966 All WR (HC) 782.

[But see AIR 1924 Cal 487 (489) (DB) * AIR 1939 Nag 130 (131) * AIR 1934 Nag 178 (179) * AIR 1959 Punj 420 (422, 423, 424): 61 Pun LR 875.]

(3) The judgment of a Court of exclusive jurisdiction can operate as res judicata only on a matter which that Court could exclusively decide. AIR 1954 Mad 788 (792): ILR (1954) Mad 715 (FB) * ('57) 1957 MPLJ 424 (429) (Nag). (Debt Relief Court.) * AIR 1962 SC 287 (294): (1962) 3 SCR 440. (AIR 1954 Mad 788 (FB), Approved.) * AIR 1967 Andh Pra 143 (144, 145): (1966) 1 Andh WR 241 * (1966) 79 Mad LW 200 (202): (1967) 2 Mad LJ 237. (There is no finality to the decision of the Revenue Divisional Officer under Madras Cultivating Tenants Protection Act on matters not in his exclusive jurisdiction.) * AIR 1964 Mad 513 (513, 514): (1964) 2 Mad LJ 93 * AIR 1960 Mys 209 (211): 38 Mys LJ 165. (Decision by revenue Court on incidental question of rate of rent (not within its competence) not res judicata — 1958 Mad WN 603, Dissented from.) * AIR 1960 Pat 484 (485). (Small Cause Court — Decision in suit for rent — Subsequent suit for declaration as to rate of rent — No res judicata.) * AIR 1961 Mad 423 (426, 427, 428): (1961) 1 Mad LJ 188 (188) (DB). (Jurisdiction of Civil Court to try suit for rent not excluded by Sections 3 (4) and 6 of Madras Cultivating Tenants Protection Act (25 of 1955) —(1958) 2 Mad LJ 216, Overruled.)

(3-A) Matter incidentally decided by Court of exclusive jurisdiction would not operate as res judicata. (1967) 1 Andh WR 393: (1967) 1 Andh LT 170.

(4) Decision of Small Cause Court on a question of title to immovable property cannot operate as res judicata in a suit in the ordinary Civil Court. AIR 1954 Trav-Co 470 (471): ILR (1954) Trav-Co 846 (FB) * AIR 1950 Cal 351 (352) * AIR 1948 All 296 (297): ILR (1948) All 283 * AIR 1967 J and K 117 (118): 1965 Kash LJ 331.

(5) The decision of Revenue Court on a question of title will not bar a fresh litigation in respect thereof in a Civil Court, even if it was absolutely necessary for the Revenue Court to have decided it for the purpose of disposing of the case before it. AIR 1950 Mad 95 (97) * AIR 1945 All 76 (78, 79): ILR (1944) All 601 * AIR 1942 Oudh 258 (259): 17 Luck 558 (DB) * AIR 1916 PC 150 (151): 20 Oudh Cas 8 * AIR 1930 All 611 (614): 52 All 823 (DB) * AIR 1935 Lah 739 (740): 17 Lah 38 (DB) * AIR 1934 Mad 551 (552) (DB) * AIR 1931 Oudh 21 (22): 6 Luck 419 (DB) * AIR 1921 Pat 218 (225) (DB) * AIR 1962 SC 287 (294): (1962) 3 SCR 440 * (1969) 1 Andh WR 228: (1968) 2 Andh LT 386.

(6) Where, as between the parties to a revenue suit, a Civil Court of competent jurisdiction has decided a question of title the decision will operate as res judicata in the revenue suit. ('09) 31 All 253 (256) (FB) * ('09) 31 All 257 (261, 262) (FB) * ILR (1963) Madh Pra 347.

(7) Where the Revenue Court has no jurisdiction at all to decide the subsequent suit or in issue in such suit its decision on such matter is not conclusive in the subsequent suit in the Civil Courts. AIR 1951 Cal 45 (46): ILR (1952) 1 Cal 364 (FB) * AIR 1951 Pat 361 (363) (DB) * ('30) AIR 1930 Cal 238 (239) (DB) * AIR 1921 Mad 473 (473) (DB).

(8) Where a Revenue or Settlement Court is invested with the power of deciding the question of title it becomes in such cases pro tanto a Civil Court of concurrent and competent jurisdiction and when such Court decides a question of title against a party, he is barred by the rule of res judicata from reopening the question of title in a Civil Court. AIR 1948 Oudh 9 (16): 22 Luck 308 (DB) * AIR 1937 All 481 (493): ILR (1937) All 628 (DB) * AIR 1921 All 348 (349): 43 All 55 (FB) * ('96) 18 All 270 (283) (FB) * ('90) 17 Cal 721 (725, 726) (DB) * AIR 1931 Pat 215 (216): 10 Pat 337 (DB).

(9) A decision by a Revenue Court in a matter within its competence will be res judicata in a subsequent suit in another Revenue Court, where the other conditions of res judicata are satisfied. ('90) 13 Mad 287 (291) (DB) * AIR 1931 All 462 (466): 59 All 568 (DB).

(10) A decision in summary proceedings which is not of a Court of exclusive jurisdiction and which is not made final under the law in summary proceedings cannot operate as res judicata in a subsequent regular suit. AIR 1957 Raj 281 (282): ILR (1957) 7 Raj 1 (DB). (AIR 1940 PC 7, Foll.)

(11) Revenue Courts' Jurisdiction to entertain a suit under Section 59, U. P. Tenancy Act is not barred by any provision of the Administration of Evacuee Property Act — Where a suit has been decided under Section 59 even after the passing of the Administration of Evacuee Property Act the decision given by the Revenue

**Section 11 — Note 68 (Contd.)**
Court in the suit is binding between the parties and would operate as res judicata between them. 1965 All WR (HC) 385: 1965 All LJ 563.

(12) As the decision of the Court under Section 33 of the U. P. Agriculturists Relief Act is a decision of a Court of exclusive and competent jurisdiction a readjudication of the matters which were decided by that Court is barred by the principle of res judicata. AIR 1959 All 764 (766)

(13) Orissa Tenants Relief Act — Question as to relationship of landlord and tenant — Revenue authority can decide — Decision can however be challenged in the Civil Court by the aggrieved party — Decision not conclusive or final — No bar of res judicata. ('62) 28 Cut LT 311 (315).

(14) Civil Court has no jurisdiction to entertain any suit regarding any matter decided by any Settlement Court in Santal Parganas — Transfer of land by Hindu widow — Question of legal necessity or benefit not raised before Settlement Court — Question raised in subsequent suit not barred by res judicata. AIR 1964 Pat 254 (258).

**69. Court deciding former suit must be a Court of concurrent jurisdiction.** — (1) Court deciding former suit must be a Court of concurrent jurisdiction both as regards pecuniary limit as well as subject-matter. AIR 1938 All 82 (85): ILR (1938) All 184 (DB) * ('83) 9 Cal 439 (444): 9 Ind App 197 (PC) * ('85) 11 Cal 301 (309): 12 Ind App 23 (PC) * 1968 All LJ 207.

(2) 'Competency' in Section 11 has no reference to territorial jurisdiction so far as Courts in India are concerned. AIR 1914 All 514 (514, 515): 37 All 1 (DB). (Confirmed on appeal in AIR 1916 PC 136.) * AIR 1925 Mad 1167 (1167) (DB) * AIR 1939 All 202 (202).

(3) Judgment of a foreign Court can never operate as res judicata. But on matters directly adjudicated upon by such Court, and within its jurisdiction, the judgment will be conclusive in proceedings taken on such judgment in India under Section 13 of the Code. AIR 1916 PC 136 (138). (Affirming on appeal AIR 1914 All 514: 37 All 1.) * AIR 1938 Bom 173 (177): ILR (1938) Bom 16 (DB).

(4) Where the question whether some of the several contracts had an arbitration clause or not was put in issue before the foreign Court, and that Court was satisfied that all contracts did contain the arbitration clause and on that basis it proceeded to appoint the Umpire, the parties cannot, later on, in the proceedings under Arbitration (Protocol and Convention) Act before the Indian Court, reagitate the issue on principles of res judicata. AIR 1960 Cal 146 (148): ILR (1960) 2 Cal 427.

(5) Section 8 of Ordinance 2 of 1125 and Section 8 of the Travancore-Cochin High Courts Act had no application to proceedings closed before the date of the Ordinance — Decree of former High Court of Cochin did not become decree of High Court of the United State of Travancore and Cochin — Being foreign judgment was not conclusive on issue as to title to property situate beyond its territorial jurisdiction. AIR 1964 Ker 4 (5, 6, 7): 1963 Ker LT 730 (FB).

(6) The Civil Courts have concurrent jurisdiction with the Insolvency Courts in the matters coming under Sections 55 and 56 of the Presidency-Towns Insolvency Act. ('48) 52 Cal WN 343 (353) (DB).

(7) When, over the same matter both the appellate Court and the trial Court had concurrent jurisdiction to extend time, and an adverse order was passed by the appellate Court, the same matter cannot be reagitated before the trial Court. As between the parties, appellate Court's order constituted res judicata. AIR 1969 Orissa 7 (10): 34 Cut LT 930.

**70. Pecuniary jurisdiction.** — (1) In order to make the decision of one Court final and conclusive in another Court, it must be the decision of a Court which would have had pecuniary jurisdiction over the matter in the subsequent suit, in which the first decision is given in evidence as conclusive. AIR 1952 Mad 384 (386) * AIR 1958 Madh Pra 100 (103) (DB) * AIR 1957 Andh Pra 992 (993) * AIR 1943 Oudh 58 (60): 18 Luck 220 (DB) * ('83) 9 Cal 439 (443, 444, 445): 9 Ind App 197 (PC) * (1900) 24 Bom 456 (458) (DB) * AIR 1927 All 297 (298): 49 All 543 (DB) * AIR 1964 Pat 452 (454): 1963 BLJR 589 * AIR 1960 Raj 304 (308): 1960 Raj LW 116 (DB).

(2) The rule as to pecuniary jurisdiction applies to a case where the plea is founded on general principles of res judicata apart from the terms of the section. AIR 1925 Mad 1270 (1273, 1274) (DB).

[But see AIR 1936 Mad 951 (953) (DB) * AIR 1941 Nag 346 (349, 350) (DB) * AIR 1962 Jab LJ 447.]

(3) A plaintiff cannot get rid of the bar of res judicata by including in a subsequent suit a clearly unsustainable and therefore, not a bona fide claim and bringing it in a Court of higher jurisdiction AIR 1954 All 801 (812) (DB) * AIR 1952 Trav-Co 383 (385): ILR (1952) Trav-Co 175 (DB) * AIR 1926 Mad 829 (830). (Addition of an untenable claim.)

(4) Plaintiff cannot evade the bar of res judicata by deliberately or arbitrarily overvaluing the same claim in the subsequent suit. AIR 1952 Trav-Co 383 (385): ILR (1952) Trav-Co 175 (DB) * AIR 1957 Him Pra 16 (21) * AIR 1928 All 127 (128) (DB).

(5) Where A institutes a suit in Court X for possession of properties valued at

**Section 11 — Note 70 (contd.)**

Rs. 1,000 (the jurisdiction of Court X extending only up to Rs. 1,000), the decision therein will operate as res judicata in a subsequent suit by A in Court Y (a Court of a higher grade) for possession of the same properties valued at Rs. 1000 and Rs. 42 mesne profits. AIR 1923 All 176 (177): 45 All 59 (DB) * AIR 1919 Nag 25 (26): 16 Nag LR 91 * AIR 1943 Oudh 338 (346): 18 Luck 683 (FB).

(6) Where the first suit is for rent valued at a certain amount and the second suit is for a declaration of title for possession and for mesne profits valued bona fide at a figure beyond the pecuniary limits of the jurisdiction of the first Court, the second suit is not barred. AIR 1922 Cal 138 (139, 140) (DB).

(7) Where by reason of the additional relief which cannot be said to be unnecessary, jurisdiction is given to a superior Court, the earlier decision will not bar the subsequent suit. AIR 1954 All 801 (812) (DB) * ('29) AIR 1929 Mad 529 (539) (DB).

(8) A defeated party cannot by merely adding another claim re-agitate the same question in a fresh suit instituted in a higher Court. AIR 1947 Oudh 122 (126, 127): 22 Luck 37 * AIR 1945 Bom 45 (49) (DB) * AIR 1928 All 62 (63, 64) (DB) * AIR 1935 Cal 792 (797) (DB).

(9) For the purpose of deciding a question of res judicata, each cause of action in the subsequent suit should be treated as a separate suit and if it be found that one of these causes of action was relied upon in the earlier suit, then, although taking all the causes of action together the second suit may be said to be outside the jurisdiction of the former Court, the former decision will operate as res judicata in the subsequent suit. AIR 1948 Oudh 147 (151): 23 Luck 13 (DB). (AIR 1943 Oudh 338: 18 Luck 683 (FB), Followed.) * AIR 1945 Bom 45 (49) (DB) * AIR 1932 Cal 162 (162, 163) (DB) * AIR 1928 All 714 (716): 50 All 306 (DB) * AIR 1927 Mad 273 (275) * (1959) 1 Mad LJ 346 (347).

[But See ('08) 35 Cal 353 (360) (DB).]

(10) The rule of res judicata cannot be avoided because in the former suit only a part of the cause of action was sued on in an inferior Court while the later suit embraced the whole cause of action and was therefore, instituted in a superior Court. ('51) AIR 1951 Pat 595 (598): 30 Pat 377 (DB) * ('45) AIR 1945 Bom 67 (68): ILR (1945) Bom 38 (DB).

(11) If as a result of any rise in the value of the property the suit is subsequently instituted in a higher Court that by itself cannot save the operation of the rule of res judicata. AIR 1966 Pat 268 (269).

(12) The decision on an issue by a Court of inferior jurisdiction would not operate as a bar to the trial of that issue by a Court of superior jurisdiction in a subsequent suit, if the latter suit was beyond the jurisdiction of the Court of inferior jurisdiction. AIR 1945 Nag 171 (173): ILR (1945) Nag 134 (DB) * ('53) 1953 BLJR 711 (713, 714) (DB) * ('85) 11 Cal 301 (308, 309): 12 Ind App 23 (PC).

**71. Jurisdiction as regards subject-matter.**— (1) A revenue Court cannot be said to have concurrent jurisdiction over questions of title, with Civil Courts dealing with questions of title. A decision of such Court therefore, upon an issue incidentally arising as to the title to immovable property cannot operate as res judicata in any subsequent suit for the determination of enforcement of any right or interest in immovable property. AIR 1924 Bom 454 (454): 48 Bom 541 (DB) * AIR 1927 Mad 96 (96) * ('81) 3 Mad 192 (196, 199) (FB).

(2) Where a suit of a small cause nature is decided by a Judge on the regular side for want of small cause powers, then a finding as to title will be res judicata in a subsequent suit between the parties. AIR 1918 All 52 (53): 41 All 54 (59) (DB).

**72. Competency must be of trial Court in former suit.**— (1) The words "in a Court competent to try such subsequent suit . . . . ." refer to the competency of the original Court and not Appellate Court in the previous litigation. AIR 1954 Trav-Co 169 (172): ILR (1953) Trav-Co 943 (DB) * ('80) 5 Cal 832 (838) (DB) * AIR 1922 All 445 (446): 44 All 712 (DB) * AIR 1925 Bom 241 (242, 243): 49 Bom 442 (FB).

[See also AIR 1957 Mad 60 (62). (Writ petition to High Court — Decision of Industrial Appellate Tribunal held to be correct — Plea of res judicata must be rested on decision of Appellate Tribunal and not High Court.)]

(2) The competency of the former Court refers to the competency to try the later suit and not the appeal in such suit. AIR 1939 Sind 329 (330): ILR (1940) Kar 15 (DB).

**73. Competency if affected by existence of another Court with preferential jurisdiction.**— (1) Where a former judgment, between the parties, of a Court acting on the regular side is relied upon in a small cause suit, the circumstance that the small cause suit could not have been tried by the former Court will not make it a Court incompetent to try the subsequent suit. ('02) 27 Mad 63 (64) (DB) * AIR 1917 All 263 (264): 39 All 717 (719) * ('04) 28 Bom 338 (340) (DB) * AIR 1918 Nag 163 (164): 14 Nag LR 115 (116).

(2) Suit for redemption of a mortgage filed in Munsif's Court — Decision in, will operate as res judicata in a subsequent proceeding before a Collector by an application under Section 12, U. P. Agriculturists Relief Act (27 of 1934) — Fact that Collector had been constituted a Court of

**Section 11 — Note 73 (contd.)**
preferential jurisdiction under that Act to try such application cannot affect the competency of the Munsif's Court. AIR 1952 All 628 (629): ILR (1951) 1 All 620 (DB).

**74. Explanation II.** — (1) Under Explanation it is the competency of the original Court that determines res judicata, irrespective of any provision as to right of appeal from the decision of such Court and the fact that appeals do not lie or lie to different Courts is immaterial. AIR 1939 Sind 329 (330): ILR (1940) Kar 15 (DB) * AIR 1918 All 52 (53, 54): 41 All 54 (59) (DB) * AIR 1928 Cal 758 (758) (DB).

(2) Explanation II is not retrospective in operation. AIR 1916 Mad 1035 (1036) (DB) * ('10) 8 Ind Cas 999 (1040): 1910 Pun Re No. 97.

**75. Competency must have existed at date of former suit.** — (1) Words "in a Court competent to try such subsequent suit" must be construed to refer to the jurisdiction of the Court at the time when the first suit was brought. AIR 1954 SC 9 (10): ILR (1953) Hyd 400 * AIR 1954 Pat 443 (446) (DB) * ('52) AIR 1952 All 628 (629): ILR (1951) 1 All 620 (DB) * AIR 1952 Cal 673 (674): ILR (1952) 1 Cal 373 (DB) * ('84) 10 Cal 697 (706, 707) (DB).

(2) Court which tried first suit competent to try subsequent suit if then brought — Decision of such Court would be conclusive, although on a subsequent date by a rise in the value of the property which was the subject-matter of the suit or from any other cause the said Court ceases to be the proper Court to take cognizance of the suit relating to that matter. AIR 1954 SC 9 (10): ILR (1953) Hyd 400 * AIR 1952 Cal 673 (674): ILR (1952) 1 Cal 373 (DB) * AIR 1951 Pat 595 (598): 30 Pat 377 (DB) * ('85) 11 Cal 153 (157) (DB). (Incompetency on account of legislative enactment.) * ('19) AIR 1919 Mad 236 (237): 42 Mad 702 (DB). (Do.) * 1963 BLJR 589.

(3) The augmentation of a claim by accrual of interest is not similar to a rise in the value of one and the same property and, therefore, if a subsequent suit on a pecuniary claim has to be filed in a Court of superior jurisdiction on account of the accumulation of interest, the former decision would not conclude the matter. AIR 1952 Mad 384 (386, 387) * ('06) 29 Mad 65 (67, 68) (DB).

(4) Question of competency of former Court to try subsequent suit may necessitate consideration of some extraneous evidence. AIR 1954 Pat 443 (446) (DB).

**76. Fraud if affects competency.** — (1) A decree obtained by fraud or collusion is a nullity and cannot operate as a bar to a fresh suit between the parties with respect to the same subject-matter. AIR 1948 PC 168 (171, 172): Pak LR (1949) Lah 1 * AIR 1958 Andh Pra 1 (3): ILR (1957) Andh Pra 326 (FB) * ('55) ILR (1955) 7 Assam 460 (463) * AIR 1947 All 168 (169): ILR (1947) All 218 (DB) * AIR 1947 Lah 117 (144): ILR (1946) Lah 300 (DB) * AIR 1917 Oudh 197 (198) * AIR 1967 Andh Pra 51 (55): 1966-1 An WR 11 (DB).

(2) Where a party seeks to set aside a decree on ground of fraud or collusion, no question of res judicata can arise and the suit is maintainable. AIR 1955 Him Pra 63 (63) * ('50) 28 Mys LJ 151 (158) (DB) * AIR 1941 Cal 401 (404): ILR (1941) 1 Cal 477 * AIR 1936 All 422 (429) (DB) * AIR 1919 Pat 232 (232): 4 Pat L Jour 205 (206) (DB) * AIR 1918 PC 184 (188) * ('82) 6 Bom 703 (711) * AIR 1959 Andh Pra 212 (214): ILR (1958) Andh Pra 129 (DB).

[But see AIR 1942 All 302 (305) (DB). (Dissenting from AIR 1921 Cal 298: 48 Cal 298.)]

(3) Setting aside of decree on ground of fraud — Fraud must be external and collateral to adjudication and must be of person who secured judgment. AIR 1963 Ker 26 (27, 29): 1962 Ker LJ 307.

(4) Although a decree can be set aside on the ground of fraud, if the question has already been agitated between the parties and decided by a Court of competent jurisdiction, the matter is res judicata. AIR 1942 Pat 357 (359) (DB) * ('07) 29 All 608 (611, 612) (DB) * AIR 1924 Pat 238 (239): 2 Pat 833 (DB).

(5) Where the allegations of fraud in the subsequent suit are plainly an attack not on the regularity or sufficiency of the service of summons of the proceedings, but on the whole suit as a fraud from beginning to end, the question of fraud in the service of summons may be re-opened. ('02) 29 Cal 395 (399, 400): 29 Ind App 99 (PC).

(6) When the parties have had the opportunity of putting their respective cases before the Court and the Court has come to a conclusion on the evidence, the rule of res judicata comes into operation and it is not open to the defeated party to re-open the matter by merely alleging that the evidence and the averments which the Court believed were untrue. AIR 1916 Mad 364 (365): 38 Mad 203 (DB) * AIR 1922 All 166 (168) (DB) * AIR 1924 Bom 100 (101) * AIR 1915 Lah 153 (154): 1915 Pun Re No. 98 (DB) * AIR 1919 Oudh 272 (275): 22 Oudh Cas 60 * AIR 1920 Pat 831 (832) (DB).

(7) A collusive decree is binding on the parties thereto and their representatives. AIR 1955 Nag 221 (221, 222): ILR (1956) Nag 5 (DB).

**77. Criminal and Civil Courts.** — (1) A finding of a Criminal Court is not conclusive in a Civil Court when the same matter is in issue in the Civil Court and the latter is bound to decide the question for itself. ('69) 12 Suth WR 477 (478) (DB) * ('70) 14 Suth WR 339 (339) (DB).

[See also AIR 1958 Andh Pra 371 (374, 375): ILR (1958) Andh Pra 421 (DB).

**Section 11 — Note 77 (contd.)**
(Prosecution for failure to furnish returns of turnover — Judgment of acquittal — Subsequent assessment based on same questions — Judgment of criminal Court held did not bar assessment.)]

(1-A) The principle of res judicata as enunciated in AIR 1956 SC 415, in relating to criminal proceedings requires that the previous judgment must be inter partes. AIR 1964 All 139 (145): 1964 (1) Cri LJ 378 (DB).

(2) Judgment of Criminal Court is a valuable piece of evidence. AIR 1933 Lah 461 (461): 15 Lah 262 * AIR 1933 Mad 429 (430): 56 Mad 641 (DB).

(3) A judgment in a civil action cannot be used as conclusive in a criminal case. AIR 1932 Mad 254 (255, 256): 55 Mad 346 (DB).

(4) Decision of Civil Court is admissible in Criminal Court as evidence if the parties are substantially the same and the issues in the two cases are identical. ('96) 23 Cal 610 (618, 619) (DB) * AIR 1916 Bom 163 (163): 41 Bom 1 (3, 4, 5) (DB).

(5) The decision of a Magistrate in a proceeding under Section 488, Criminal Procedure Code, is binding on succeeding Magistrate on general principles of res judicata. ('83) 5 All 224 (226) * AIR 1957 All 658 (661): ILR (1958) 1 All 72: 1957 Cri L Jour 1052 * AIR 1957 Cal 115 (116): 1957 Cri L Jour. 177 * AIR 1965 Manipur 49 (50): 1965 (2) Cri LJ 785. (Prior application is no bar to a subsequent application if that application was dismissed for default and there was no adjudication on the merits.)

(6) If a criminal Court of competent jurisdiction has recorded a finding then that finding operates as res judicata in a criminal Court in any subsequent proceedings about same matter. ('55) Madh BLJ 1955 HCR 341 (343).

(7) Two prosecutions by State — Accused not parties to previous prosecution — Held, decision in former case could not operate as an issue estoppel against the accused in second case. AIR 1968 SC 1281 (1285): (1968) 3 SCR 525.

(8) Accused acquitted on minor offence by Magistrate — Order of acquittal set aside by Sessions Judge in revision — Order confirmed by High Court in revision — Contention that facts proved in trial of minor offence could not be proved against accused in subsequent proceedings on major offence — Held principle of res judicata did not apply since order of acquittal must be deemed to have been validly set aside by High Court in its revisional jurisdiction. AIR 1967 SC 1156 (1160, 1161): 1967 Cri LJ 1076: (1967) 2 SCR 368.

(9) Any decision rendered during the pendency of an appeal against acquittal cannot operate as res judicata and bar the consideration of the appeal on merits. AIR 1962 Mys 124 (128): 1962 (1) Cri LJ 733: 39 Mys LJ 993.

**78. Heard and finally decided.**— (1) In order to support a plea of res judicata it is not enough that the parties are the same and that the same matter is in issue; it must also be shown that the matter was heard and finally decided. AIR 1954 All 115 (116) * AIR 1958 All 207 (209) (DB) * 1958-1 Andh WR 524 (527) * AIR 1952 Hyd 51 (52): ILR (1951) Hyd 792 (DB) * AIR 1942 Pat 279 (281) (DB) * AIR 1940 Mad 544 (545): ILR (1940) Mad 815 * ('97) 24 Cal 616 (626, 627): 24 Ind App 50 (PC) * ('99) 21 All 505 (514): 26 Ind App 175 (PC) * ('89) 16 Cal 173 (182): 15 Ind App 186 (PC) * AIR 1968 Mad 362 (365): (1968) 1 Mad LJ 1. (Sale by A and B of certain property to C — Creditor of B attaching the property in execution of his decree — Claim by C allowed — Suit by creditor against B and C under O. 21, Rule 63 — Sale deed in favour of C held to be nominal and to defraud creditors — Settlement by A of his share in favour of D, wife of B — Suit by C against A, B and D for declaration of his title to property — Finding in previous suit held operated as res judicata against C.) * 1967 Ker LR 141: 1967 Ker LT 188 * AIR 1969 Orissa 21 (23): 34 Cut LT 1175. (Question of want of inherent jurisdiction — Question decided in suit or execution — Court holding that it had jurisdiction — Identical question cannot be raised inter partes.) * AIR 1968 Mys 323 (325, 326): (1967) 2 Mys LJ 85. (Provision under which certain octroi duty was payable decided in earlier litigation — Provisions in the Act and the goods remaining the same, decision bars fresh adjudication on the same contention.) * AIR 1965 All 527 (532): 1965 All LJ 432. (Suit by Municipal Board for restraining enforcement of restitution order against it on ground that ownership in property vested in it — Question of ownership not decided in previous suit against Board — Held Board was neither estopped from maintaining regular suit nor was suit barred under Sec. 11.) * AIR 1965 Guj 131 (134): (1965) 6 Guj LR 99 (DB). (Proceedings under Bombay Tenancy and Agricultural Lands Act (67 of 1948) — High Court ordering that question of title to property should be referred to Civil Court. Civil Court's jurisdiction to decide question neither raised nor decided by High Court — No bar of res judicata to raising the question.) * 1964-2 Andh WR 75 * 1964 All WR (HC) 589 * (1964) 2 Andh LT 124: (1964) 1 Andh WR 60. (Suit by Mohammedan for restitution of conjugal rights — Suit dismissed on ground that marriage stood dissolved by apostasy of wife — Subsequent suit by wife for recovery of deferred dower — Husband's plea in defence that wife's apostasy did not result in dissolution of marriage is barred by res judicata.) * (1964) 5 Guj LR 786: ILR (1964) Guj 775 * 1962 Ker LT 715 * AIR

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1960 Pat 418 (419). (Matters finally decided by order of remand.) * ILR (1960) 10 Raj 510 (516) * AIR 1959 Andh Pra 601 (603, 604): (1959) 2 Andh WR 371. (Suit on bonds — Plaintiff paying stamp duty and penalty during trial — Amount of penalty not included in costs of suit — Suit to recover such amount is barred.) * AIR 1959 Andh Pra 64 (71) (DB) * (1959) 2 Andh WR 133. (Suit in forma pauperis — Defendant contesting claim to sue as pauper — Defendant's petition rejected — Subsequent application for dispaupering plaintiff on same grounds — Res judicata.) * AIR 1951 Hyd 44 (44) (DB).

[See also AIR 1968 Guj 124 (136, 137) (DB). (Decision reversed by appellate Court — Part of judgment expressly kept open by Appellate Court while reversing other part — Unreversed part remains binding.)]

(2) A decree in a suit expressed to be 'subject to the final decision of the Privy Council' in another case is not a final decree within the meaning of this section. AIR 1942 PC 8 (10): ILR (1942) 2 Cal 1: ILR (1942) Kar (PC) 23: 69 Ind App 51 * AIR 1956 Raj 166 (168): ILR (1956) 6 Raj 127 (DB) * 1968 All LJ 1047: 1968 All WR (HC) 704 (FB). (7 ALJR 861 (FB); 7 ALJR 995 and AIR 1941 All 277, Overruled.)

[See AIR 1956 Cal 525 (528) (DB).]

(3) Principle of res judicata — Not affected by subsequent overruling by Full Bench of the principle laid down in former litigation. AIR 1964 Orissa 121 (122): ILR (1963) Cut 651 (DB).

(4) Appeal to High Court challenging vires of Rule 17 of Employees' Insurance Court Rules — Reference to Division Bench — Division Bench holding Rule 17 to be intra vires powers of State Government vide ILR (1963) 2 Punj 11 and remandng case — On remand, Single Judge refusing to extend time — Letters Patent Appeal — During its pendency, 1966 PLR 566 (FB), overuling: IL R(1963) 2 Punj 11 and holding that Rule 17 was ultra vires — Held, entire appeal had been referred to Division Bench, and though certain points were left open for decision by Single Judge, that could not detract from conclusiveness of decision in ILR (1963) 2 Punj 11 given at previous stage of proceedings on vires of Rule 17, even after decision in 1966 PLR 566 and order of Division Bench was not open to challenge in Letters Patent. (1967) 69 Pun LR 433: 1967 Cur LJ 329.

(5) Though an obiter dictum cannot operate as res judicata the mere fact that the judgment contains observations made obiter will not prevent the point, which arises in the case and is decided by the Court, from operating as res judicata. AIR 1946 Mad 141 (143).

(6) Decision in explicit terms in the former suit is not necessary in order to constitute it res judicata; it is enough if an adjudication on the matter is necessarily involved in the decision in the prior suit. AIR 1951 All 794 (813): ILR (1950) 1 All 697 (FB) * AIR 1956 Cal 613 (614) (DB) * ('55) ILR (1955) Madh-B 165 (168, 169) * AIR 1954 Pepsu 55 (57): ILR (1953) Patiala 140 (DB) * AIR 1952 Mys 94 (96): ILR (1952) Mys 234 (DB) * AIR 1933 Lah 594 (595, 596): 14 Lah 409 * AIR 1936 Bom 402 (404): 60 Bom 1008 (DB) * 1960 Ker LJ 866: 1960 Ker LT 658.

(7) To constitute it as res judicata it is not necessary that the decision should have been appealable. AIR 1946 Mad 509 (515): ILR (1946) Mad 566 (DB) * AIR 1939 Cal 169 (174): ILR (1938) 2 Cal 418 (DB) * AIR 1964 SC 993 (999 to 1003): (1964) 5 SCR 946.

(8) When there is an appeal, it is the appellate decision that will be the final decision and operate as res judicata. AIR 1953 SC 33 (40): 1953 SCR 154 * ('63) 67 Cal WN 350.

(9) Where on a reference a Division Bench of the High Court expresses its opinion on an abstract question of law detached from the facts of the case and leaves that opinion to be applied by the trial Court, the opinion of the Division Bench will not operate as res judicata so as to debar a subsequent Division Bench from considering its correctness on appeal from the decision of the trial Court inasmuch as it was not its final decision on the facts of the case. AIR 1946 Lah 419 (422, 423) (DB).

(10) (Per majority, P. C. Pandit J. contra.) — Division Bench on reference by Single Judge deciding only question of law and remitting case to Single Judge for deciding other points arising in the case — L. P. appeal against decision of Single Judge — Letters Patent Bench cannot examine correctness of view taken by earlier Division Bench on question of law. AIR 1968 Punj 529 (FB). (AIR 1946 Lah 419, Dissent. from.)

(11) A matter could not be said to have been heard and decided either actually or constructively, if it was decided behind the back of a party without notice to him. AIR 1930 All 699 (700): 52 All 1024.

(12) Mere fact that procedure in prior suit was summary does not affect finality of decision. AIR 1938 Lah 369 (388) (FB) * 1966-2 Mys LJ 365: (1966) 7 Law Rep 13.

(13) In case of two or more conflicting decisions last of such decisions in order of date will be the one which will operate as res judicata. AIR 1955 Andhra 194 (195) * AIR 1957 Ker 31 (32) * AIR 1954 All 770 (771) (DB) * AIR 1954 Cal 443 (444): ILR (1955) 2 Cal 236 * AIR 1952 Trav-Co 294 (295): ILR (1952) Trav-Co 252 (DB) * AIR 1951 Mys 36 (37): ILR (1951)

**Section 11 — Note 78 (contd.)**
Mys 396 (DB) * AIR 1932 All 520 (521) (DB) * AIR 1965 Mys 290 (292): (1965) 1 Mys LJ 351 * 1965 Cur LJ 701 (Punj) * AIR 1963 Ker 217 (218).

[See however AIR 1943 Mad 36 (38): ILR (1943) Mad 40 (DB). (Rule is subject to statutory provision to the contrary).]

(14) An application for a rule and its rejection does not prevent a Court, on a subsequent occasion, if the occasion arises, from granting a rule in the interest of justice. AIR 1936 Pat 119 (120).

(15) Suit by A and B against C for arrears of rent dismissed and C held to be occupancy tenant — Second suit by C against A only for declaration of occupancy right — Plea of res judicata not raised and previous decision not brought to notice of Court — Suit dismissed — Third suit by C against A and B for same relief — Decision in second suit operates as res judicata. 1965 All WR (HC) 518: 1965 All LJ 1095.

(16) Court granting reliefs not asked for — Parties availing of such reliefs — They cannot later retrace their steps and seek the reliefs prayed for originally by them. AIR 1968 Mad 374 (377): 81 Mad LW 160.

**79. Matter, left undecided.**— (1) Matter not in issue at all, cannot be said to have been heard and finally decided. AIR 1955 Ajmer 12 (13) * AIR 1955 Mad 560 (560) * ('56) 1956 All WR (HC) 234 (235) * AIR 1925 PC 184 (187): 21 Nag LR 117: 52 Cal 971: 52 Ind App 294 * AIR 1932 Bom 3 (7) (DB). * AIR 1965 All 44 (45) * AIR 1965 Andh Pra 339 (341) (DB).

(2) Matter, though directly raised in issue, expressly left open and undecided. It cannot operate as res judicata. AIR 1953 Punj 103 (104): ILR (1954) Punj 26 (DB) * AIR 1958 Madh Pra 326 (328) * AIR 1958 Orissa 139 (140, 141) * AIR 1957 Cal 128 (132) (DB) * AIR 1952 Pat 475 (476): 31 Pat 731 (DB) * AIR 1951 Mad 630 (632) * ('99) 21 All 505 (514): 26 Ind App 175 (PC) * AIR 1931 Pat 1 (10, 12) * AIR 1937 Rang 421 (424): 1937 Rang LR 136 * AIR 1967 Madh Pra 34 (44): 1967 Jab LJ 680. (Appeal to Supreme Court from judgment pronounced by High Court in reference under Section 66 (1) of Income-tax Act (1922) — Supreme Court holding that objection as regards vires of any taxing provision could not be entertained in proceedings before them and deciding against assessee — Assessee subsequently challenging validity of taxing provision in writ petition under Article 226 — Held, the previous decision of Supreme Court did not operate as res judicata.) * 1967 Raj LW 48 (51) * (1962) 66 Cal WN 692.

(3) Suit allowed to be withdrawn with liberty to bring a fresh suit in respect of the same matter — No res judicata. ('42) 197 Ind Cas 27 (29) (PC) * AIR 1918 Mad 1287 (1292): 40 Mad 259 (FB) * ILR (1967) 2 Punj 6.

[See however AIR 1958 Pat 270 (271, 272): 37 Pat 201. (Defence raised in previous suit — Court erronoeusly directing second suit — Second suit barred).]

(4) Withdrawal or abandonment of claim without leave of Court under O. 23, R. 1—Fresh suit is barred. AIR 1939 Lah 414 (415) * (1962) 4 Orissa JD 27.

[See also AIR 1959 All 530 (532): 1959 All LJ 142. (Suit against Hindu father and sons — Suit withdrawn against sons before adjudication on merits — No res judicata on question of liability of son's shares in joint family property in execution of decree against father — Principle of res judicata would apply if suit were withdrawn after adjudication on merits.)]

(5) Court having no power to leave matter open — Matter left open can still be res judicata. AIR 1931 Mad 268 (270) * ('89) 11 All 187 (190) (FB).

(6) Where the order granting permission is in contravention of Order 23, Rule 1 and consequently without jurisdiction, such reservation will not prevent the application of the rule of res judicata. AIR 1925 PC 55 (58, 59): 52 Ind App 100*AIR 1920 Pat 63 (64) (DB) * AIR 1925 Mad 1162 (1165).

(7) A files a suit against B. The suit is dismissed on the ground that the plaintiff has failed to produce evidence in support of his case, but his right to bring another suit in respect of the same matter is reserved. A suit subsequently brought by A against B in respect of the same matter, will nevertheless, be barred inasmuch as the reservation of liberty in a decree dismissing a suit for failure of proof, is without jurisdiction. ('69) 13 Moo Ind App 160 (171, 172) (PC).

(8) Where the suit is dismissed on a preliminary or technical point, but the plaintiff's right to file a fresh suit is reserved the fresh suit is not barred. AIR 1930 Lah 634 (635). (Formal defect in plaint.) * ('12) 15 Ind Cas 930 (932): 1912 Pun Re No. 56 (DB). (Dismissal on ground of no cause of action.) * AIR 1915 Lah 303 (304). (Relief refused on ground of want of jurisdiction.) * ('08) 18 Mad L Jour 198 (199) (DB). (Suit for possession dismissed on failure to produce sale certificate.)

(9) The mere fact that an order granting leave to withdraw under Order 23, Rule 1, is erroneous or is made on unjustifiable grounds does not make it an order without jurisdiction and a subsequent suit in accordance with the liberty given is not barred. AIR 1921 Cal 34 (38): 48 Cal 138 (FB). (Overruling AIR 1916 Cal 255.) * AIR 1918 Mad 1093 (1095) (DB).

(10) Where a matter is decided by the first Court but the appellate Court without deciding that issue, disposes of the case on other grounds, the judgment of the first Court upon that issue is no more a bar to a future suit than it would be if that

**Section 11 — Note 79 (contd.)**
judgment had been reversed by the Court of appeal. ('49) 8 J and K LR 203 (209) (DB) * ('97) 24 Cal 616 (627): 24 Ind App 50 (PC) * ('81) 6 Bom 110 (112) (DB) * AIR 1917 PC 201 (203): 44 Ind App 213: 45 Cal 442 * AIR 1921 Mad 21 (22, 24) (FB).

(11) When a suit comprises several distinct matters a separate judgment and decree in regard to each would be legal under the Code and these may be passed at different stages as each matter is disposed of. Each such decree would operate as res judicata in so far as the matters covered by it are concerned. AIR 1940 Lah 1 (3): ILR (1940) Lah 171 (DB).

**80. Issues omitted or refused to be decided.**— (1) Issue not only not decided in previous suit but expressly refused to be decided, or excluded from decision in the suit, cannot be treated as res judicata. AIR 1948 Mad 152 (153): ILR (1947) Mad 828 (DB) * AIR 1947 Oudh 77 (79): 21 Luck 577 (DB) * AIR 1918 Pat 618 (619, 620) (DB).

(2) Issue raised but expressly excluded from decision — Principle of constructive res judicata does not apply. AIR 1921 Mad 21 (24) (FB) * ('08) 32 Bom 315 (320) (DB).

**81. Decision must have been on merits.**— (1) Unless the former decision is on merits it cannot operate as res judicata. AIR 1955 All 543 (545) * AIR 1955 Andhra 215 (218) * AIR 1955 Pepsu 28 (29): ILR (1955) Patiala 9 (DB) * 1956 Madh BLR (Civ) 568 (568, 569) * AIR 1952 Hyd 33 (33): ILR (1952) Hyd 169 (DB) * (1966) 67 Bom LR 911: ILR (1966) Bom 648 (DB) * AIR 1969 Andh Pra 192 (193, 194) * AIR 1968 Andh Pra 378 (381) * AIR 1968 Punj 63 * 1967 All LJ 767: (1968) 2 Lab LJ 1 * AIR 1967 All 423 * AIR 1967 All 362 (367): (1966) 2 ITJ 126 (DB) * AIR 1964 All 64 (65) * ILR (1964) 2 Mad 101: 78 Mad LW 44 * AIR 1961 Mad 220 (222): (1960) 2 Mad LJ 479 (DB). (Final order on merits of attachment before judgment — Application under Section 95 is not maintainable.) * AIR 1960 Mys 178 (181): 37 Mys LJ 889 * AIR 1956 Bom 332 (334): 58 Bom LR 404 (FB). (When a decision has been given without the pros and cons of the question being considered, such a decision does not acquire finality.) * ILR (1964) 2 All 191. (Appeal dismissed without issue of notice to respondents and without expressing any opinion on merits of any question — Order of dismissal does not operate as res judicata.) * AIR 1966 SC 1332 (1337): (1966) 3 SCR 300. (Suit decided by trial Court on merits — Appeal dismissed on ground of limitation or default in printing — Such dismissal when it confirms decision of trial Court itself amounts to the appeal being heard and finally decided on merits — Decision of appeal Court will be res judicata.) * AIR 1959 Punj 37 (39): ILR (1957) Punj 1833.

(2) Suit by unregistered firm dismissed under Section 69, Clause (2) Partnership Act (1932) — Second suit instituted on same cause of action after registration of firm, not barred by res judicata. AIR 1937 Nag 146 (147): ILR (1937) Nag 430.

(3) Where the only defendant to the suit is found not a necessary party to the suit, the suit ought to be dismissed without going into the merits. The decision on merits, in such a case, would not operate as res judicata. AIR 1945 Mad 11 (12) (DB).

(4) Where the suit is dismissed for non-compliance of the condition imposed under Order 23, Rule 1 (2) (b), a second suit is not barred by res judicata . AIR 1958 Punj 469 (471) (DB) * AIR 1959 Cal 715 (723): 30 Com Cas 582.

(5) Case dismissed on ground that Court had no jurisdiction — Decision not appealed against — Subsequent suit on same facts and for same relief is barred by res judicata even though the dismissal of prior suit was wrong. 1962 Mys LJ (Supp) 310.

(6) Withdrawal of suit under Order 28, Rule 1 is analogous to dismissal for default — There being no decision on merits, there can be no res judicata. (1964) 66 Punj LR 884: 1964 Cur LJ 315.

**82. Decision on preliminary or technical points.**— (1) When the prior suit has been dismissed on some technical ground without going into the merits of the questions raised, there can be no decision on such questions and therefore no res judicata. AIR 1956 Raj 166 (168): ILR (1956) 6 Raj 127 (DB) * AIR 1954 Mad 1024 (1026). (Limitation.) * AIR 1954 Pat 41 (42). (Suit dismissed as premature.) * 1954 All WR (HC) 411 (415) (DB). (Delay.) * AIR 1952 All 279 (284): ILR (1953) 1 All 170 (DB). (Dismissal on preliminary ground.) * AIR 1917 PC 201 (203): 45 Cal 442: 44 Ind App 213. (Defect in the frame of suit.) * AIR 1935 Bom 131 (133) (DB). (Multifariousness.) * 1968 Lab IC 302: ILR (1967) 1 All 239. (Some of the issues in earlier suit between the same parties as later suit decided as preliminary ones — Other issues agreed by counsel of parties to be assumed to be in favour of defendant — Plaintiff succeeding on such preliminary issues — Plaintiff can agitate such other issues in later suit.) * 1966 All LJ 987 (990): 1966 All WR (HC) 740. ( Dismissal on technical grounds.) * AIR 1963 Pat 60 (62): 1963 BLJR 20. (Limitation.) * AIR 1960 Madh Pra 138 (139): 1960 Jab LJ 90 * AIR 1959 Bom 125 (126, 129): 60 Bom LR 382. (Dismissal on ground that suit was premature.)

(2) Suit for cancellation of bond on ground of fraud — Suit dismissed as not properly framed — Subsequent suit by defendant on bond — Plea of fraud not

**Section 11 — Note 82 (contd.)**
barred. AIR 1917 PC 201 (203): 45 Cal 442: 44 Ind App 213.

(3) Suit for mere declaration dismissed under Section 42, Specific Relief Act — Subsequent suit for possession which could have been claimed in previous suit not barred. AIR 1929 Lah 596 (597).

(4) A finding given for the purpose of deciding a preliminary issue is final and conclusive during all subsequent stages of the litigation. ('57) 99 Cal L Jour 72 (75).

[See also 1963 Ker LT 1105. (An issue such as whether a suit or an issue will lie or can be tried in view of the provisions of like Sections 11, 80, or 86 of the Code or Section 5 of the Kerala Tenants and Kudikidappukar Protection Act is properly settled and tried as a preliminary issue.)]

(5) Failure of party to amend plaint — Dismissal for — Does not amount to final decision in suit. AIR 1964 Tripura 19 (21).

**83. Dismissal for non-prosecution or default.**— (1) The dismissal of a suit or other proceeding for default under the provisions of Order 9 cannot operate as res judicata. AIR 1956 Pat 143 (145) * AIR 1957 Andh Pra 537 (538) * AIR 1954 Nag 234 (235): ILR (1954) Nag 447 (DB) * AIR 1953 Orissa 285 (287): ILR (1954) Cut 380 * AIR 1952 Punj 123 (124) * AIR 1951 Hyd 55 (56): ILR (1951) Hyd 429 (DB) * AIR 1951 Mys 48 (50): ILR (1951) Mys 377 * ('88) 16 Cal 98 (101, 102): 15 Ind App 156: 1888 Pun Re No. 177 (PC) * ('90) 13 All 53 (60): 17 Ind App 150 (155) (PC) * 1968 MPLJ 183: 1968 Jab LJ 361: 1968 MPWR 459 * 1964-2 Andh WR 75 * 1965 All WR (HC) 806 * 1966 All WR (HC) 733 (734). (Order under O. 9, Rule 3. C. P. C.) * AIR 1966 Cal 60 (61 to 63). (Suit dismissed under Order 9, R. 5 against one of several defendants for non-service of summons on him.) * AIR 1959 Punj 252 (254): 61 Pun LR 264.

(2) Order 9, Rule 8 when read along with Order 9, Rule 9 imposes a certain disability upon the plaintiff whose suit has been dismissed, namely that he is thereby precluded from bringing a fresh suit in respect of the same cause of action. AIR 1956 Pat 143 (145) * AIR 1920 All 340 (341): 42 All 193 (195).

(3) A decision or direction in an interlocutory proceeding of the type provided for by Order 9, Rule 7 is not of the kind which can operate as res judicata so as to bar the hearing on the merits of an application under Order 9, Rule 13. AIR 1964 SC 993 (999, 1000, 1001, 1002, 1003): (1964) 5 SCR 946.

(4) The dismissal of a claim under Order 17, Rule 3 on account of plaintiff's default in producing evidence to substantiate his case has the same effect as a dismissal founded upon evidence and the subject-matter of such a claim will be res judicata. AIR 1928 Cal 271 (272) (DB) * ('05) 9 Cal WN 679 (689) * AIR 1929 Mad 404 (407) (DB).

(5) Dismissal of suit under Section 4 of Provincial Insolvency Act for default — Order of dismissal is under Order 17, R. 2 and not Rule 3 and not final and hence will not operate as res judicata. AIR 1967 Delhi 115 (116) (DB).

(6) Judgment pronounced against a party under Order 10, Rule 4 (2) will operate as res judicata. ('11) 13 Bom LR 658 (660) (DB).

(7) The dismissal of a suit on default of plaintiff to furnish security for costs or to pay commissioner's fees does not bar a second suit on same cause of action. ('02) 26 Bom 637 (640) * ('90) 13 Mad 510 (511) (DB).

(8) Dismissal of a suit on plaintiff's default to deposit adjournment costs does not bar a second suit on same cause of action. AIR 1950 Assam 169 (172) (DB).

(9) Abatement of a suit cannot operate as res judicata though a subsequent suit on same cause of action may be barred. ('10) 5 Ind Cas 325 (329) (All) * AIR 1958 Pat 95 (96) * ('04) 6 Bom LR 638 (639) (DB).

[See also AIR 1964 Orissa 136 (DB). (Order holding that suit abated held did not amount to decree and was not res judicata.)]

[See however (1969) 1 Mad LJ 440: 82 Mad LW 113. (AIR 1933 Lah 752, Foll.).]

(10) Where a suit for partition is dismissed for want of prosecution due to the demise of the plaintiff, a subsequent purchaser of the share from the legal representative of the deceased plaintiff can file a second suit for partition. AIR 1964 Mad 365 (366): 1964-1 Mad LJ 268.

(11) Where the plaintiff had applied under Order 28, Rule 3 for recording compromise and the plaintiff was absent on the date so fixed and the counsel reported no instructions, whereupon the application was dismissed and the appeal against the order and also the application under O. 9, Rule 9 for restoration were also dismissed, the, dismissal is conclusive, even though it was not on merits and the subsequent application under Order 23, Rule 3 on the same facts and cause of action is barred by principles of constructive res judicata. AIR 1959 Pat 319 (322, 323): 1959 BLJR 191 (DB).

.(12) Dismissal for non-payment of costs — Order for amendment of plaint — Payment of costs made condition precedent — Failure to pay costs — Dismissal of suit on ground that Court could not decide suit in absence of amendment of plaint — Dismissal is not on merits but one for want of prosecution — Further suit not barred. AIR 1964 Tripura 19 (21) * AIR 1966 Mad 321 (322): 79 Mad LW 180 * (1964) 5 Guj LR 786: ILR (1964) Guj 775 * AIR 1963 Punj 9 (14):64 Pun LR 782 (FB) * 1969 Jab LJ 764: 1960 MPLJ 293 *

**Section 11 — Note 83 (contd.)**
AIR 1959 Bom 125 (129): 60 Bom LR 382. (Issue numbered one and tried first not sufficient to infer that it was principal issue.)

(13) Non-joinder of necessary parties — Dismissal of suit — Further suit impleading proper and necessary parties not barred. AIR 1964 Tripura 19 (20).

**84. Plea of set-off.**— (1) A plea of set-off which had been adjudicated upon previously in a separate suit is unsustainable. ('71) 15 Suth WR 252 (252).

**85. Decision must have been necessary for determination of suit.**— (1) Finding on an unnecessary or irrelevant issue cannot operate as res judicata. AIR 1947 PC 1 (8): ILR (1947) Kar (PC) 38 * AIR 1957 All 48 (49) (DB) * AIR 1955 Cal 251 (254) (DB) * AIR 1955 Pat 393 (395): 34 Pat 324 (DB) * AIR 1951 Him Pra 54 (55) * AIR 1948 Mad 152 (153): ILR (1947) Mad 828 (DB) * AIR 1947 Bom 392 (393): ILR (1947) Bom 156 * AIR 1923 All 495 (497): 45 All 466 (DB) * 1966 All LJ 389 (393): 1966 All WR (HC) 266. (Order of remand — Views expressed held were mere passing observations.) * AIR 1966 Andh Pra 221 (222): (1965) 2 Andh WR 13. (Issue framed in former suit not necessary for its decision — Finding on that issue cannot operate as res judicata in second suit raising the point involved in that issue.)

[See also AIR 1969 SC 316 (318, 319): (1969) 1 SCJ 373. (Expression of opinion on question not in issue does not operate as res judicata.) * AIR 1956 Bom 493 (494): 55 Bom LR 717. (It is never desirable for any Judge to express an opinion which is not necessary for the decision of a case. Tribunal under the Income-tax Act should be very careful in giving findings and in expressing opinion.)]

[But see AIR 1945 Oudh 144 (146): 20 Luck 262.]

(2) A decision can operate as res judicata if it was necessary for the purpose of the case in which it was given. (1966) 2 SCJ 259 (263): (1966) 2 Andh WR (SC) 48.

(3) Where in the earlier suit, the question whether the defendants were licensees, was not in issue between the parties and was not necessary for the decision of the case, then the Court's observation that it was inclined to believe that the defendants were licensees, would not operate as res judicata on the question of their status as licensees in a subsequent suit. 1965 All WR (HC) 489.

(4) Court dismissing suit basing its decison expressly on a partcular point. Finding against plaintiff on another issue in order to prevent remand by Appellate Court cannot operate as res judicata. AIR 1924 Mad 893 (894) (DB).

(5) Suit dismissed as not maintainable — Finding given against plaintiff on another issue cannot operate as res judicata. AIR 1925 Cal 996 (1000) (DB) * (1966) 1 Mys LJ 539 (540): ILR (1966) Mys 458.

(6) Previous application dismissed as not maintainable — Observation made on merits of controversy cannot operate as res judicata. AIR 1965 All 253 (256): 1964 All LJ 273.

(7) Where a decree is one of dismissal in favour of the defendant but there is an adverse finding against him on one point, a plea of res judicata cannot be founded upon that decision. AIR 1956 Nag 273 (275): ILR (1956) Nag 539 * AIR 1957 Cal 128 (133) (DB) * AIR 1953 Mys 38 (39): ILR (1953) Mys 234 * AIR 1949 Pat 197 (206): 26 Pat 717 (DB) * AIR 1946 Lah 256 (258) * AIR 1946 Nag 401 (416): ILR (1946) Nag 518 (DB) * AIR 1922 PC 241 (243): 48 Cal 460: 48 Ind App 49 * AIR 1933 Oudh 439 (450): 8 Luck 602 (DB) * AIR 1936 All 21 (23): 58 All 313 (FB) * AIR 1967 J and K 85 (87): 1967 Kash LJ 44 * (1965) 6 Guj LR 194: ILR (1965) Guj 190 * ('63) 76 Mad LW 728 * AIR 1961 Bom 218 (219, 221): 63 Bom LR 152 * AIR 1960 Cal 440 (442) * AIR 1960 Raj 304 (309): 1960 Raj LW 116 * ILR (1957) 9 Assam 109 (116) (DB) * 1968 All LJ 321: 1968 All WR (HC) 141.
[See however ('55) ILR (1955) Madh B 165 (172).]

(8) Where the decree itself embodies the adverse finding against the defendant, it cannot be said to be not res judicata merely because the suit itself was dismissed on another point. AIR 1929 Cal 449 (450) (DB) * AIR 1924 Mad 626 (632, 633) (DB) * AIR 1916 Bom 277 (278): 40 Bom 662 (DB) * AIR 1967 J and K 85 (87): (1967) Kash LJ 44.

(9) Where a plaintiff's suit is entirely decreed in his favour with an adverse finding against him that finding cannot operate as res judicata. AIR 1952 Nag 238 (239): ILR (1949) Nag 313 (317) (DB) * ('99) 23 Bom 296 (302) (DB) * AIR 1929 All 910 (912) (DB) * AIR 1926 Cal 672 (676) (DB) * AIR 1930 Lah 149 (150) (DB) * AIR 1933 Mad 770 (771) * AIR 1968 All 282 (283) * AIR 1967 All 423 (425) * 1968 Lab IC 603: 1967 BLJR 457 (459) (DB) * AIR 1961 Bom 218 (219, 221): 63 Bom LR 152 * 1961 MPLJ 253 * AIR 1960 Andh Pra 168 (171).
[But see AIR 1927 Mad 643 (644).]

(10) In a suit for eviction the Court recognised the joint right of the plaintiff and the defendant but dismissed that suit on the ground that it was not one for partition as it should be, but gave only half the costs to the defendant as it found title to only half the property in his favour.

Held, that finding that the defendant was entitled to an equal right in the suit property was the basis for disallowing half the costs to the defendant. The defendant

**Section 11 — Note 85 (contd.)**
could have preferred an appeal against that part of the decree. The finding therefore, certainly operated as res judicata against him. AIR 1955 Andhra 282 (285-286): 1955 Andh WR 411.

**86. Appealable decisions.**— (1) Where an appeal is filed against a decree, the finality of the decisions of the lower Court is destroyed and the matter again becomes sub judice. ILR (1955) Hyd 786 (788) * AIR 1954 Mad 563 (568): ILR (1954) Mad 908 (DB) * AIR 1952 Cal 124 (126): ILR (1952) 1 Cal 305 (DB) * AIR 1952 Pat 458 (460): 31 Pat 746 (DB) * ('89) 11 All 148 (161) (FB) * AIR 1917 Mad 597 (598) (DB) * 1968 Raj LW 62: AIR 1968 Raj 81 * (1966) 70 Cal WN 670 (674, 675) (DB). (Suit for ejectment and arrears of rent — Suit dismissed on ground that plaintiff had no right to maintain suit and notice of ejectment was invalid — Appeal against part of decree relating to arrears — Principles of res judicata not attracted.) * AIR 1963 Guj 30 (32): (1963) 4 Guj LR 204.

(2) A decree appealed against is not final in the sense that it will form res judicata as between the same parties. AIR 1945 Mad 62 (64): ILR (1945) Mad 378 (DB) * AIR 1931 PC 263 (264).

[But see AIR 1938 All 635 (636) (DB).]

(3) The mere possibility of an appeal being filed does not affect the finality of the decree. AIR 1949 Oudh 1 (10): 23 Luck 231 (DB) * AIR 1926 Rang 122 (123): 4 Rang 8 (DB).

[See also ILR (1963) Cut 85. (Fact that party affected had no necessity to file an appeal against the order does not prevent the operation of res judicata.) * AIR 1949 Nag 385 (385, 386): ILR (1949) Nag 295.]

[But see ('89) 11 All 148 (161) (FB). (Obiter.) * AIR 1917 Mad 597 (598) (DB) (Do.) * AIR 1938 Lah 232 (234) (DB). (Following AIR 1916 Lah 177: 1916 Pun Re No. 48.)]

(4) If a decision is appealed against, it is the appellate judgment that must be looked into in order to decide a question of res judicata. ILR (1955) Hyd 786 (788) * AIR 1957 Andh Pra 557 (559) (DB) * ILR (1955) Mys 163 (169) * AIR 1951 Punj 363 (364) * AIR 1939 Bom 522 (524): ILR (1939) Bom 639 * AIR 1963 Mys 120 (121): 40 Mys LJ 1057.

[See also AIR 1960 All 85 (86, 87): 1959 All LJ 815. (Additional finding by appellate Court in support of trial Court's decree will be res judicata.)]

(5) An appellate judgment operates by way of res judicata as regards all the findings of the lower Court which though not expressly referred to in it, are necessary to sustain the appellate decree. ('05) 28 Mad 338 (341) (DB).

(6) Appeal dismissed on default or preliminary point — Decision of lower Court operates as res judicata. AIR 1947 Oudh 74 (77): 21 Luck 586 (DB) * AIR 1932 All 603 (605) * AIR 1960 Madh Pra 222 (223): 1960 Jab LJ 118.

(7) Case decided on preliminary points and not on merits in appeal — Findings of trial Court are not res judicata. AIR 1951 Punj 363 (364) * AIR 1932 Lah 452 (454): 13 Lah 375.

(8) Decision open to appeal but not appealed against cannot be attacked later in the course of the same proceeding or in a separate proceeding. AIR 1956 All 13 (14): ILR (1956) 1 All 395 * AIR 1953 Mys 153 (154): ILR (1953) Mys 267 (DB) * AIR 1952 Pat 4 (7): 30 Pat 1135 (DB) * AIR 1952 Punj 265 (265): ILR (1953) Punj 33 * AIR 1952 Trav-Co 316 (317): ILR (1951) Trav-Co 639 (DB) * AIR 1951 Pepsu 130 (132): 2 Pepsu LR 649 (DB) * ('09) 36 Cal 336 (344): 36 Ind App 27 (PC) * AIR 1967 SC 1182 (1186): (1967) 2 SCR 476 * 1966 Cal 580 (583 to 585) (DB) * AIR 1963 Guj 1 (2, 3, 5, 6): (1962) 3 Guj LR 1032 * 26 Cut LT 615: (1960) 2 Orissa JD 476. (Notwithstanding that there may have been any subsequent change in law.) * (1968) 9 Guj LR 340: ILR (1967) Guj 943 (DB).

[See also AIR 1962 All 124 (125). (Appeal against decree — Change in law in favour of appellant during pendency of appeal — Appeal not pressed and allowed to be dismissed — Execution — Change in law cannot be relied on by J. D. to defeat execution.)]

(9) Application for restitution of possession — Dismissal by Board of Revenue in revision — Writ petition challenging order of Board also dismissed — No appeal filed against decision of High Court — Subsequent appeal to Supreme Court by Special Leave against Board's decision — Appeal held barred by res judicata. AIR 1964 SC 782 (783): 1968 Supp (2) SCR 828. (AIR 1961 SC 1457 and AIR 1962 SC 1619, Rel. on. Observations of S. K. Das, J., in AIR 1961 SC 1708, held obiter.)

(10) Point decided by High Court in previous appeal — No appeal filed against it — Decision is final and conclusive in respect of subsequent stages of litigation between the same parties. AIR 1965 SC 1970 (1971): (1965) 3 SCR 122.

(11) Where on the dismissal of his suit the plaintiff appeals only in respect of a portion of the disputed property and the appellate Court restricts its decision to that portion, the decision of the lower Court regarding the remaining portion will operate as res judicata. ('41) 45 Cal WN 854 (858).

(12) Appellate Court deciding on certain questions but remanding suit for trial in respect of certain claim — Trial Court deciding that claim — Appeal against that decision — Decision on question in earlier appeal is binding on parties when they

**Section 11 — Note 86 (contd.)**
have not appealed against earlier decision AIR 1965 Ker 203 (205): 1964 Ker LJ 539.

(13) Where an appellate Court having jurisdiction to hear an appeal on a particular point decides other points as well on which no appeal lay the judgment of the trial Court merges in that of the appellate Court and therefore, the decision of the appellate Court operates as res judicata. AIR 1952 Pepsu 76 (78): ILR (1952) Patiala 423 (DB).

(14) Where in a suit for declaration of title and for possession the right to the reliefs depends on the same facts and the lower Court passes a decree in favour of the plaintiff granting both the reliefs the defendant would be precluded by the principle of res judicata from challenging in appeal only the portion of the decree for declaration of title. AIR 1946 Pat 408 (411, 412) (DB).

(15) Suit by A for a declaration that a sale-deed executed by B in favour of C and D in respect of joint family property was void. Suit dismissed holding sale to be valid. Appeal by A impleading only C and D. Finding that the sale was valid which had become final as between A and B, carried with it the finding that the sale was valid as between A and the purchasers C and D also and became res judicata even in their case. AIR 1952 Madh B 164 (164). (AIR 1927 PC 252: 55 Ind App 7: 6 Rang 29, Rel. on.)

(16) Where the issues raised in a suit concerning the jointness of the parties and the nature of the property in question in the suit are decided against a party, that decision unless varied in appeal, is final and binding on the parties concerned. This is so, even if the party prefers an appeal but allows it to be dismissed. AIR 1963 All 210 (212): 1962 All LJ 1153 (FB).

**86-A. Decisions open to revision.** — (1) Landlord and tenant — Suit for eviction — Defendant asking in the written statement for fixation of standard rent — Standard rent fixed but suit dismissed — Plaintiff filing appeal — Appellate Court enhancing standard rent but confirming dismissal of suit — Revision application by plaintiff against dismissal of suit only — No revision filed by defendant — Defendant cannot plead that appellate Court had no jurisdiction to enhance rent. (1963) 4 Guj LR 282. (Reversed in AIR 1964 SC 1341.)

(2) Order rejecting claim of privilege under Section 123, Evidence Act affirmed in revision by High Court also — Question cannot again be raised on the principle of res judicata. AIR 1964 Pat 444 (444): ILR 45 Pat 241.

**87. Provisional orders.** — (1) A provisional order, as in the case of orders under Order 21, Rule 63, which grows into a permanent one, when steps are not taken, or being taken fail to displace it within a certain time, becomes res judicata after the lapse of that time. AIR 1955 Mad 446 (447). (AIR 1942 Mad 41: ILR (1942) Mad 336 (FB) and AIR 1918 Mad 693 (1), Foll.; AIR 1935 Mad 328, Held, must be deemed to be overruled by AIR 1942 Mad 41: ILR (1942) Mad 336 (FB).) * AIR 1961 Mad 196 (196, 197): (1967) 1 Mad LJ 166 * AIR 1959 Andh Pra 280 (283): (1959) 1 Andh WR 72.

(2) Suit by defeated claimant under Order 21, Rule 63. He is not precluded by res judicata from raising points which were not raised by him in prior proceedings. AIR 1951 Nag 183 (184). (AIR 1931 PC 263, Foll.)

(3) Suit under Order 21, Rule 63 — Result of suit cannot operate as res judicata in respect of attachment, in other decrees even if other decree-holders were impleaded in suit. AIR 1965 Punj 206: ILR (1965) 1 Punj 160.

(4) An order under Order 21, Rule 63 is conclusive only as regards the particular property in dispute and not with reference to any of the grounds on which the order has been passed. AIR 1952 Orissa 182 (184): ILR (1951) Cut 335.

(5) Subject to the operation of the doctrine of res judicata in any particular case, an order passed in a claim under Order 21, Rule 58 and decree made in a suit consequent thereon have no effect beyond the proceedings in which the attachment is levied. AIR 1953 Trav-Co 539 (531) (DB) * AIR 1959 Andh Pra 180 (181): ILR (1958) Andh Pra 665 (DB) * AIR 1957 Andh Pra 61 (65) (FB).

(6) The judgment in claim proceedings cannot be invested with any finality, within the purview of Section 11, because an order passed under Order 21, Rule 58 or under Order 21, Rule 63, does not extend beyond the execution of the decree giving rise to those proceedings. AIR 1959 Andh Pra 180 (181): (1958) 2 Andh WR 531.

(7) Suit under Section 9, Specific Relief Act — Finding that plaintiffs were not in possession within six months of suit cannot operate as res judicata and the finding is of no evidentiary value in the determination of the question as to when dispossession took place. AIR 1955 Tripura 13 (14) * AIR 1925 Cal 1046 (1048).

(8) Finding as to dispossession in suit under Section 9, Specific Relief Act operates as res judicata. ('59) 25 Cut LT 147.

(9) Order under Order 41, Rule 5, Civil P. C., staying execution of decree is not a final one, but a tentative one and can be barred by High Court under Section 151. AIR 1954 Andhra 40 (43).

(10) Proceeding under Section 78, Madras Hindu Religious Endowments Act (2 of 1927) is of a summary character and an adverse order passed on a petition under Section 78 does not bar a suit by res judicata in view of proviso to Section 78. AIR 1957 Andh Pra 643 (647, 648) (DB).

**Section 11 — Note 87 (contd.)**

(11) Application under Order 21, R. 100, Civil P. C. to Insolvency Court for redelivery dismissed — Subsequent proceedings under O. 21, R. 103 to set aside summary order and in alternative for partition — Held, suit was maintainable and summary order did not operate as res judicata. AIR 1965 Mad 331 (333, 334): (1965) 1 Mad LJ 242 (DB).

(12) A summary order passed on application under Sections 109 and 110 dismissing the said application as withdrawn and without notice to the opposite party — Does not operate as bar to subsequent suit. ILR (1964) 2 All 191. (Reversed on another point in AIR 1969 SC 135.)

**88. Conditional decrees.** — (1) Where the suit has been dismissed for failure to perform the condition imposed by a conditional decree a subsequent suit for the same relief after the performance of the condition will not be barred. AIR 1925 PC 63 (70): 47 All 250: 52 Ind App 145. (Affirming AIR 1919 All 128: 41 All 538.)

**89. Consent decrees.** — (1) Section 11 is not strictly applicable to compromise decrees. ('54) AIR 1954 SC 82 (84) * ('57) AIR 1957 Cal 59 (64) (DB) * (1966) ILR 45 Pat 533 (DB).

(2) A judgment by consent raises an estoppel between the parties as much as a judgment whereby the Court exercises its mind on a contested case. AIR 1958 SC 346 (351): 1956 SCR 72 * AIR 1954 SC 352 (355): 1955 SCR 99 * AIR 1954 SC 82 (84) * AIR 1958 Madh Pra 333 (337) (DB) * 61 Cal WN 67 (71) * AIR 1957 Cal 59 (64) (DB) * AIR 1957 Pat 365 (368, (369) (DB) * AIR 1929 PC 289 (294) * ('99) 22 Mad 508 (514): 26 Ind App 101 (PC) * AIR 1969 Mys 73 (76): (1968) 2 Mys LJ 111 * (1966) ILR 45 Pat 533 (DB) * AIR 1966 Punj 509 (512) * ILR (1963) 2 All 976: 1963 All LJ 832 * 1960 Ker LJ 866: 1960 Ker LT 658 * (1960) 1 Ker LR 123: 1960 Ker LT 579 * AIR 1959 Bom 396 (400, 401): 60 Bom LR 1273 * AIR 1958 Pat 31 (33): 1958 BLJR 733 (DB) * 1959 Raj LW 695: ILR (1959) 9 Raj 1264.

(3) Decree passed on compromise — Not a decision by Court — Does not operate as res judicata — Such decree might create an estoppel by conduct. AIR 1967 SC 591 (595): (1964) 2 SCR 310.

(4) An estoppel by a consent decree can arise only when the question raised in the subsequent suit was present to the minds of the parties and was actually dealt with by the consent decree. ('50) 28 Mys L Jour 33 (35) (DB) * AIR 1947 Oudh 98 (100): 22 Luck 270 * AIR 1945 Nag 288 (289): ILR (1945) Nag 1005 * AIR 1941 Pat 536 (539) * AIR 1916 Mad 411 (411) (DB) * 1964 Raj LW 93: ILR (1964) 14 Raj 386 * ILR (1959) Punj 2273 * 1959 Raj LW 695: ILR (1959) 9 Raj 1264.

[But see AIR 1944 Oudh 94 (98): 19 Luck 428 (DB).]

(5) Compromise decree in ejectment suit without any admission by tenant about landlord's bona fide requirement for his own use — Held, that in view of Section 11 (d), Marwar House Rent Control Act, which empowered the Court to treat the consent of the tenant to ejectment as any other reason sufficient for purposes of eviction, there was no necessary implication by the mere passing of the compromise decree that the tenant admitted that the landlord needed the house for his own use and, therefore, this was not a case where the executing Court could accept the decision of the trial Court on the principle of res judicata. AIR 1954 Raj 43 (44, 45): ILR (1952) 2 Raj 290.

(6) In order to affect an estoppel by consent decree it is necessary that it should appear on record that the question had been put in issue. AIR 1947 Oudh 98 (100): 22 Luck 270.

(7) Where in a suit for a certain sum of money on account of cesses, defendants appeared in person, filed no written statement and simply confessed judgment whereupon a decree was passed against them, it was held that the prior decision did not preclude the defendants from disputing in a subsequent suit the right of the plaintiff to levy the cess. AIR 1929 Mad 694 (696).

(8) A compromise decree passed in a representative suit brought in accordance with Order 1, Rule 8 will be binding on the persons represented by the parties to the suit provided the settlement is bona fide and will operate as res judicata. AIR 1951 Cal 456 (457, 458) * AIR 1961 All 266 (275).

[See also ('59) 37 Mys LJ 234. (Consent decree in suit under Section 92 is binding on persons not parties.)]

(9) A compromise decree cannot create an estoppel between the parties to it, where the parties have subsequently entered into another compromise which has been embodied in a decree. AIR 1933 Cal 69 (71): 59 Cal 513.

(10) Where a compromise falls through by reason of the default of one of the parties in not carrying out its terms, no question of estoppel by consent decree arises. AIR 1955 All 665 (666): ILR (1956) 2 All 652 (DB).

(11) A party to a suit who is not a party to the compromise is not bound by the compromise or the decree based on it and such decree cannot operate as an estoppel against him. AIR 1955 Cal 624 (624) (DB) * AIR 1939 Pat 225 (228) (DB).

(12) A decree based on a compromise entered into by shebait on behalf of the idol which is wholly prejudicial to the interest of the idol is illegal and void and cannot operate as res judicata in a subse-

**Section 11 — Note 89 (contd.)**
quent suit on behalf of the idol. AIR 1952 Pat 438 (441): 31 Pat 417 (DB).

(13) Section 6 of the Hyderabad Land Alienation Restraint Act (1349-F) overrides Section 11, Civil P. C., and the fact that the agriculturist agreed to a decree being passed on admission cannot deprive him of a right which has been conferred on him by the statute. AIR 1956 Hyd 178 (180): ILR (1956) Hyd 29 (DB).

(14) A consent decree cannot preclude a party from asserting the invalidity of the decree made in contravention of East Punjab Urban Rent Restriction Act. AIR 1956 Punj 95 (96): ILR (1956) Punj 211.

(15) Application for fixation of fair rent under Section 4, East Punjab Urban Rent Restriction Act, decided on agreement between parties without holding any enquiry — Decision does not operate as res judicata in a subsequent application under Section 4. ('55) 57 Pun LR 188 (191).

[See however AIR 1958 Bom 1 (4): ILR (1957) Bom 688. (In proceeding under the Bombay Rent Control Legislation, 1947, arising out of a dispute as to standard rent, a consent decree by which the standard rent of certain premises is fixed would operate as res judicata in a subsequent application by the same tenant for fixing the standard rent for the same premises.)]

(16) A party who has successfully pleaded a certain agreement as a bar to execution of a decree against him cannot in a subsequent suit against him be allowed to say that the agreement not being registered is inadmissible in evidence. The question of registration not having been raised in the previous proceeding would operate as res judicata. ('55) ILR (1955) Punj 891 (895). (AIR 1937 Nag 132: ILR (1937) Nag 6, Rel. on.)

(17) Compromise decree — Judgment debtor objecting to attachment and sale — Objection allowed — Appeal filed by decree-holder decided on basis of compromise between parties — Held, compromise decree was binding on judgment debtor. ILR (1963) 2 All 976: 1963 All LJ 832.

(18) Promotion in services — Rules not followed — Writ petitions by aggrieved civil servants — Compromise between Government and petitioners — Compromise based on mutual mistake of facts — Agreement held vitiated — Consent order based upon compromise held only bound parties to agreement and not others. AIR 1965 Mys 244 (248): (1964) 2 Mys LJ 451.

(19) Consent decree containing term opposed to law or public policy — Unless set aside in proper proceedings decree will operate as res judicata and estoppel. AIR 1968 Mys 184 (188): (1967) 2 Mys LJ 509.

(20) Where the Court, on the previous occasion when the plaintiff had filed his suit, had only dismissed the suit on a compromise which had stated that the plaintiff's suit should be dismissed, the compromise and the final orders passed in that case would be taken, by implication as a decision against the plaintiff. But when both the compromise and the final orders by the Court expressly stated that the dismissal was without adjudication of any of the issues or matters involved in the suit, the position is entirely different and keeps out the ban of res judicata. AIR 1967 Pat 101.

(21) A compromise decree in a previous suit agreeing to divide the amount of pension in certain proportion between the parties will not operate as res judicata between the same parties in subsequent suit to recover the plaintiff's share wrongfully withdrawn by the defendant. Such decree can be ignored as being void ab initio in view of Section 12, Pensions Act read with Section 23, Contract Act. AIR 1959 Pat 17 (21): 1958 Pat LR 343.

(22) A and B holding two separate money decrees against C judgment-debtor — A in execution of his decree purchasing certain land from C — Compromise between A and B along with C regarding land purchased by A — Application by B for execution of his decree and attachment of land purchased by A — Held, question as to A had any interest in attached property and as such was competent to file objections had become res judicata after compromise. (1968) 70 Pun LR 419: 1968 Cur LJ 228.

(23) Agreement arrived at in compromise — No decree in its terms however passed — Agreement does not operate as res judicata. 1961 Jab LJ 395: ILR (1961) Madh Pra 867.

**90. Declaratory decrees.** — (1) A mere declaratory decree without giving any consequential relief does not bar a subsequent suit for working out the rights so declared. 52 Mys HCR 447 (449) (DB) * AIR 1921 Low Bur 22 (24): 11 Low Bur Rul 60 * ('89) 12 Mad 183 (186) (DB) * AIR 1927 Oudh 457 (460) (DB).

(2) A declaratory decree is conclusive as to the rights which were declared. ('98) 21 Mad 344 (351): 25 Ind App 102 (PC).

(3) Apart from Section 11 a declaratory decree is conclusive between the parties to it under Section 43 of the Specific Relief Act and hence, though in a particular case such a decree may not operate as res judicata the re-trial of the questions decided by the decree will be barred under the provisions of Section 43 of the Specific Relief Act. AIR 1946 Nag 277 (293): ILR (1946) Nag 159 (DB) * AIR 1936 Mad 951 (953) (DB).

[See however AIR 1952 Mad 384 (388). (AIR 1936 Mad 951 and AIR 1946 Nag 277: ILR (1946) Nag 159, Dissented from.)]

(4) The rule laid down in Section 43, Specific Relief Act, is not exactly a rule of res judicata — It is narrower in one

**Section 11 — Note 90 (contd.)**
sense and wider in another. AIR 1958 SC 886 (895).

(5) Section 43, Specific Relief Act, must be read subject to Section 11, Civil P. C. AIR 1958 Andh Pra 363 (366): ILR (1958) Andh Pra 281 (FB). (AIR 1936 Mad 951, Dissented from.)

**91. Decision need not be express but may be implied.** — (1) Where a question was necessarily decided in effect, though not in express terms, the decision cannot be reagitated as between the parties to the suit in any other form in any other suit. AIR 1956 Cal 613 (614) (DB) * AIR 1952 Mys 94 (96): ILR (1952) Mys 234 (DB) * AIR 1946 Nag 277 (293): ILR (1946) Nag 159 (DB) * AIR 1914 Mad 399 (413, 414): 37 Mad 70 (FB). (Overruling 35 Mad 216.)

(2) The decision in former suit, to operate as res judicata must necessarily involve an adjudication in a particular way on the issue raised in the later suit and such adjudication must be inconsistent with the claim made in the later suit. AIR 1914 Mad 399 (406): 37 Mad 70 (FB).

(3) If the matter was not raised at all in the previous suit, there can be no question of implied decision in the prior suit. AIR 1925 PC 184 (187): 52 Cal 971: 52 Ind App 294.

(4) An order of transfer under Cl. 13 of the Letters Patent of the Calcutta High Court does not involve any adjudication as to the jurisdiction of the Court in which the suit was filed so as to operate as res judicata. AIR 1955 Cal 331 (336).

**92. How to determine what issues were decided.** — (1) Question whether a matter was raised and then heard and finally decided is one of fact to be decided upon the circumstances of each particular case. AIR 1954 Bom 1 (26, 27): ILR (1953) Bom 1081 (FB) * AIR 1968 Raj 94.

(2) Burden of establishing plea of res judicata lies upon party setting it up. AIR 1945 Nag 288 (289): ILR (1945) Nag 1005 * ('07) 1907 Pun WR No. 66, p. 383 (FB) * 1967 All WR (HC) 827 (828).

(3) Plea of res judicata cannot be maintained where the decree or order upon which it rested has not been produced. ('91) 18 Cal 216 (224): 17 Ind App 181 (PC) * AIR 1950 Assam 162 (163) (DB) * ('35) AIR 1935 Cal 792 (796) (DB).

(4) Even if the judgment in the prior suit shows clearly enough what the Judge understood to be the questions for decision, Court cannot give effect to the plea unless it can say for itself that the matters now in issue were in the former proceedings; whether any issues were settled in those proceedings or the points in dispute were otherwise formulated must appear from the record. ('06) 33 Cal 116 (127): 32 Ind App 244 (PC) * ('97) 24 Cal 504 (519, 520): 24 Ind App 33 (PC).

(5) The bare wording of the decree is not the sole test of what the Court decided in the prior suit; so that if it is not clear from the decree, the Court may and should look into the judgment and the pleadings in the case. AIR 1931 Cal 511 (513) (DB) * ('05) 1 Cal L Jour 337 (349) (DB) * AIR 1930 Pat 71 (74) (DB).

(6) The rule of res judicata ousts the jurisdiction of the Court and has therefore, to be construed carefully with reference to the parties, competency of the Court and the issues, on which the parties joined in the pervious litigation. AIR 1963 Pat 390 (392): ILR 44 Pat 491 (DB).

(7) It cannot be laid down as an inexorable rule that a party shall be debarred from raising the bar of res judicata if it does not produce a copy of the written statement, even though it files a copy of the plaint, the issues and the judgment for the consideration of the Court which tries the subsequent suit. AIR 1968 Raj 94 * 1967 Raj LW 532.

(8) Plea of res judicata should be given effect to only on a strict construction of the pleadings and of the decisions in the previous suits. ('55) AIR 1955 Orissa 28 (29): ILR (1954) Cut 706 (DB) * AIR 1967 Raj 272.

(9) An order to operate as res judicata record of previous suit must show that the matter was necessarily determined. ('48) 52 Cal WN 343 (348) (DB) * AIR 1931 Mad 381 (396) (DB).

(10) In order to see what was in issue in a suit or what has been heard and decided, the judgment and not the decree must be looked at. AIR 1939 Pat 19 (20) (DB) * 1967 All WR (HC) 827 (828). (It is not sufficient to produce a certified copy of the decree (without the judgment). The party should file the judgment, the plaint and the written statement in the earlier suit to enable the Court to ascertain what was in issue and what was decided and whether the Court was competent.)

[See also ('89) 16 Cal 173 (183): 15 Ind App 186 (PC) * ('98) 21 Mad 344 (350): 25 Ind App 102 (PC).]

(11) If a decree is specific and is at variance with a statement in the judgment, regard must be had to the decree and not to the statement in the judgment. ('93) 15 All 3 (5) (DB).

[See also AIR 1957 Andh Pra 981 (984) (DB). (In applying explanation V reference to decree and not to judgment should be made. AIR 1955 Andhra 215, Reversed.)]

(12) Parties cannot adduce extrinsic evidence to show that a particular matter was decided where there is ambiguity in previous record. ('97) 24 Cal 504 (519, 520): 24 Ind App 33 (PC).

[See AIR 1923 Mad 514 (515) (DB). (In such cases former decision does not operate as res judicata.)]

(13) Meaning of certain indefinite terms used in prior decree uncertain. Acts of

**Section 11 — Note 92 (contd.)**
parties can be taken into consideration in fixing meaning of such terms. ('92) 19 Cal 312 (321, 323): 19 Ind App 69 (PC).

**93. Explanation V.**— (1) Legal effect of Explanation V is to treat the omission to grant a relief asked for as equivalent to an express refusal to grant it. AIR 1953 Mys 139 (141, 142): ILR (1953) Mys 244 (DB) * AIR 1957 Cal 727 (730) (DB) * ('91) 14 Mad 328 (331) (DB) * ('89) 11 All 187 (190) (FB) * AIR 1938 Pesh 68 (69) (DB).

(2) Suit withdrawn without liberty to bring fresh suit — Explanation V does not apply. ('94) 21 Cal 265 (267, 268) (DB) * ('05) 15 Mad L Jour 462 (464) (FB).

(3) Where no relief is asked for in the plaint, or the Court refuses to grant a relief on the ground that no such relief is claimed in the plaint, the explanation does not apply. AIR 1951 Nag 355 (356): ILR (1952) Nag 65 * AIR 1925 Pat 145 (147) (DB).

(4) Where a personal remedy is asked for in plaint in a mortgage suit, which could not be granted at the time of passing the decree for sale, the explanation does not apply. AIR 1927 Mad 779 (780, 781) (DB) * AIR 1935 All 411 (414): 57 All 797 (DB).

(5) Explanation V does not apply to consent decrees. AIR 1930 All 619 (619) (DB).

(6) Particular relief asked for in a prior suit was not objected to, but somehow or other decree omitted to grant the relief. Subsequent suit for same relief is not barred by explanation. AIR 1929 Bom 323 (325).

[See also AIR 1945 Oudh 70 (74) (DB).]

(7) Where in a partition suit Court holds that plaintiff is entitled to a certain share in plaint schedule properties but the preliminary decree, by mistake, does not provide for partition and separate possession of one of the items, separate suit for partition of such item is barred by reason of Explanation V. AIR 1957 Andh-Pra 981 (987). (AIR 1955 Andhra 215 (218), Reversed.)

(8) Explanation V only applies to a relief claimed in the plaint. AIR 1940 Rang 136 (138).

(9) Where in disposing of an application for a personal decree against the mortgagor under Order 34, Rule 6 the Court does not expressly grant the prayer for a personal decree, a second application for a personal decree is not barred by res judicata. AIR 1937 Lah 204 (206) (DB). (Reversing on appeal AIR 1936 Lah 388).

(10) Where an objection petition under Section 47, Civil P. C., of the judgment-debtor is dismissed for the default in the presence of the decree-holder, a subsequent petition on same ground is barred. AIR 1955 Orissa 81 (83): ILR (1955) Cal 31 (DB).

(11) If a relief is not claimed specifically but simply as the ground for the real and substantial relief or merely as an argumentative step towards the decree sought, the absence of any mention in the decree will not bar a subsequent suit for that relief. ('89) 13 Bom 242 (249). (Affirming 12 Bom 454 on this point.) * AIR 1931 All 657 (658) (DB) * AIR 1925 Cal 1195 (1197, 1198) (DB) * AIR 1921 Mad 21 (22, 24) (FB).

(12) The words 'relief claimed' only apply to something which forms part of the claim strictly so called, i.e., something which the plaintiff may claim as of right, something included in his cause of action and which, if he establishes his cause of action, the Court has no discretion to refuse. They do not apply to reliefs which the Court may, in the exercise of its discretion, grant or refuse. ('05) 15 Mad L Jour 462 (465) (FB) * AIR 1954 Orissa 202 (204): ILR (1954) Cut 232 * AIR 1961 Mad 413 (414): 73 Mad LW 666.

(13) Where in a suit for possession and mesne profits the decree omits to grant past mesne profits it will be deemed to have been refused under this explanation. ('94) 21 Cal 252 (254, 255) (DB).

(14) Relief of mesne profits expressly claimed in suit not granted by decree either expressly or by implication — Must be deemed to have been disallowed. AIR 1960 Pat 260 (262): 1959 BLJR 731.

(15) The omission to grant future mesne profits in a suit for possession and mesne profits is not a bar to a subsequent suit for such profits, as granting of such relief is in the discretion of the Court. AIR 1954 Orissa 202 (204): ILR (1954) Cut 232 * AIR 1952 Pat 475 (476): 31 Pat 731 (DB) * AIR 1918 Mad 484 (486): 41 Mad 188 (FB). ( Overruling AIR 1915 Mad 1132.) * ('99) 21 All 425 (438) (FB) * AIR 1938 Bom 231 (233): ILR (1938) Bom 655 (FB). (Overruling AIR 1920 Bom 39: 44 Bom 954.) * ('90) 17 Cal 968 (971) (DB) * AIR 1963 Mad 402 (402, 403): (1963) 1 Mad LJ 148. (AIR 1961 Orissa 111, Diss. from.)'

[But see AIR 1961 Orissa 111 (112, 113): 27 Cut LT 43.]

(16) Suit for ejectment, arrears of rent and mesne profits — Claim for mesne profits dismissed as not pressed — Subsequent suit for mesne profits held not barred by Explanation 5 to Section 11, as Court in prior suit was not bound under Order 20, Rule 12 to pass a decree for mesne profits. AIR 1962 Cal 111 (112): 65 Cal WN 1067 (1067).

(17) Bihar Shops and Establishments Act (8 of 1954), Sections 26 and 28 — Application under Section 26 by dismissed employee for reinstatement, arrears of wage and compensation for harassment

**12. Bar to further suit.**—Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies.

[See O. 21, R. 2.]

**13. When foreign judgment not conclusive.**—A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—

(a) where it has not been pronounced by a Court of competent jurisdiction;

(b) where it has not been given on the merits of the case;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of [a][India] in cases in which such law is applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud;

(f) where it sustains a claim founded on a breach of any law in force in [a][India].

[1882, 1877, S. 14; See S. 2, Cls. 5, 6; Expln. to S. 10; S. 29; Ss. 43-45]

[a] Substituted for 'the States' by the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), S. 3 [1-4-1951].

**14. Presumption as to foreign judgments.**—The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

[1882, 1877, S. 13, Expln. VI.]

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**Section 11 — Note 93 (contd.)**

and humiliation — Labour Court ordering reinstatement and granting only compensation in its discretion but not choosing to deal with question of arrears of wages — Subsequent application to Labour Commissioner under Section 28 for arrears of wages not barred by principle of res judicata — Principle of Explanation 5 to Section 11 does not apply to such a case. AIR 1968 Pat 117 (122) * AIR 1967 Pat 381 (385) (DB).

(18) Explanation V to Section 11 is confined to question of res judicata covered by Section 11. It throws no light on the principle of construction of a decree. AIR 1966 Orissa 203 (205): 32 Cut LT 805.

(19) A mere mistake on the part of the Court, omitting to mention part of the relief claimed in the suit, would not be any ground for entertaining a fresh suit to obtain that relief. 1961 Jab LJ 1182.

**94. Supersession of decree.** — (1) Money recovered under a subsisting and valid decree or judgment cannot be recovered back in a fresh suit or action. ('98) 20 All 237 (241) (DB) * AIR 1921 Cal 761 (761) (DB).

(2) If a decree is reversed on an appeal therefrom, or in an appeal from another proceeding in the same suit, or otherwise superseded by a separate suit, then the prior decision will not operate as res judicata in a subsequent suit. AIR 1939 Lah 540 (540). (Decree reversed on appeal.) * ('77) 3 Cal 30 (35, 37) (FB). (Do.) * ('12) 17 Ind Cas 205 (206) (DB) (Bom). (Do.) * AIR 1923 All 456 (457) (DB) * AIR 1915 PC 111 (113): 1915 Pun Re No. 93 * AIR 1916 Lah 237 (237). (In another suit.)

**Section 12 — Note 1**

(1) For illustrations of rules barring fresh suits, see O. 2, R. 2, O. 9, R. 9, O. 22, R. 9, and O. 23, R. 1.

**SECTIONS 13 AND 14 — SYNOPSIS**

1. SCOPE.
2. "FOREIGN JUDGMENT".
3. "ANY MATTER THEREBY DIRECTLY ADJUDICATED UPON."
4. "SAME PARTIES OR BETWEEN PARTIES UNDER WHOM THEY OR ANY OF THEM CLAIM".
5. FOREIGN JUDGMENTS, WHEN NOT CONCLUSIVE.
6. Section 13, Cl. (a).
7. Foreign judgment against firm.
8. Presumption as to competency.

**Sections 13-14 — Synopsis (contd.)**

9. Submission to, and waiver of objection as to jurisdiction.
10. Section 13, Cl. (b).
11. Section 13, Cl. (c).
12. Section 13, Cl. (d).
13. Section 13, Cl. (e).
14. Section 13, Cl. (f).
15. EFFECT OF FOREIGN JUDGMENT.
16. ENFORCEMENT OF FOREIGN JUDGMENTS IN INDIA.
17. Foreign judgment on a decree of Indian Court — Effect of.
18. Suit on foreign judgments.

**TOPIC INDICATOR**

Carrying on business in a foreign country through agent — Effect of — See Note 9.
Defendants not served with notice — Effect — See Note 12.
Ex parte decree, when amounts to submission — See Note 9.
Irregularities in procedure do not affect jurisdiction — See Note 6.
"Litigating under the same title" — See Notes under S. 11.
Onus to prove want of jurisdiction — See Note 8.
Operation of S. 13 — See Notes 1 and 5.
Possession of immovable property in a foreign country does not give jurisdiction in personam — See Note 6.
Recognition of foreign judgments as a basis of suit — See Notes 15 and 16.

**1. Scope.** — (1) Section 13 is based on the principle prevailing under English system of jurisprudence that where a Court of competent jurisdiction has adjudicated that a certain sum is due from one person to another, a legal obligation arises to pay that sum on which an action of debt to enforce the judgment can be maintained. ('97) 20 Mad 112 (114) (DB).

(2) Owing to the principle of territorial sovereignty a judgment delivered in one country, in the absence of international agreement cannot have a direct operation of its own in another. AIR 1966 Goa 38 (43) (FB).

(3) Under Section 13 a foreign judgment is conclusive as to any matter directly adjudicated upon except in the six cases specified. AIR 1956 Bom 49 (52): ILR (1955) Bom 1021 (DB) * AIR 1942 Mad 478 (480) (DB) * AIR 1941 Pat 109 (114) : 20 Pat 444 (DB) * AIR 1915 Mad 486 (487): 39 Mad 24 (FB).

(4) The word 'directly' does not mean expressly. AIR 1947 PC 192 (195): 74 Ind App 203: ILR (1947) Bom 563.

(5) Where a claim made is abandoned but the decree implies that the claim has not been accepted by the Court, the Court must be deemed to have directly adjudicated upon it. AIR 1944 Mad 427 (427, 428) (DB).

(6) Every step in the reasoning which led the Court to its conclusion need not have been directly adjudicated upon. AIR 1947 PC 192 (195): 74 Ind App 203: ILR (1947) Bom 563.

(7) Ordinarily it is not open to Indian Courts to sit in appeal over a foreign judgment unless it offends against rules under Section 13. AIR 1938 Bom 173 (177): ILR (1938) Bom 16 (DB).

(8) Indian Courts can refer to the pleadings of the parties and the reasons of the Judge to decide whether any of the exceptions in Section 13 applies AIR 1943 Bom 201 (204): ILR (1943) Bom 366 (DB).

(9) Section 13 applies to cases in which the plaintiff seeks to obtain a decree in an Indian Court on a foreign judgment. AIR 1928 Mad 327 (336): 51 Mad 720 (DB).

(10) Rules laid down in Section 13 are rules of substantive law and not merely of procedure. AIR 1962 SC 1737 (1741): (1963) 2 SCR 577.

(11) Conclusiveness of foreign judgment — Judgment need not have been delivered before institution of subsequent suit. AIR 1963 SC 1 (19): (1963) 3 SCR 22.

(12) The principles laid down in Section 13 do not apply to a foreign award. AIR 1959 Bom 414 (421): 61 Bom LR 333 (DB).

[Reversed on another point in AIR 1964 SC 538.]

(13) The provisions of Section 13 are as applicable to suits as to execution proceedings. AIR 1959 Punj 265 (268): 61 Punj LR 418 (FB).

[See also AIR 1962 Cal 622 (622, 623) (DB). (Execution proceedings relating to notary mortgage bond executed under French Law.)]

**2. "Foreign judgment."** — (1) "Foreign judgment" means the judgment of a foreign Court. The following were held all foreign Courts.

(a) Courts in England. ('01) 28 Cal 641 (645) (DB).

(b) Supreme Court of Mauritius. ('02) 29 Cal 509 (516) (SB).

(c) French Courts in India. (1865) 4 Suth WR 107 (109) (DB) * ('81) 6 Bom 292 (295) (DB) * ('80) 2 Mad 400 (405) (DB).

(d) Courts in Ceylon. ('09) 32 Mad 469 (474) (DB).

(2) Where a decree was passed by the Court of Munsif, Jamalpur in Mymensingh District before 15th August 1947, it was held that after that date the judgment on the basis of which the decree was passed was a foreign judgment. AIR 1950 Cal 12 (14) (DB).

[See also AIR 1951 Simla 255 (256): ILR (1951) Punj 111.]

**Sections 13-14 — Note 2 (contd.)**

(3) The Indian States have ceased to be foreign States with the coming into force of the Constitution. AIR 1954 Mad 1051 (1053): ILR (1955) Mad 80 (DB) * AIR 1952 Hyd 80 (84): ILR (1952) Hyd 196 (FB) * AIR 1956 Bom 49 (52): ILR (1955) Bom 1021 (DB) * AIR 1955 Hyd 184 (185): ILR (1955) Hyd 464 (DB).

[See AIR 1958 All 775 (782) (DB). (Until then Gwalior State must be held to have been foreign State.)]

(4) Personal decree passed prior to the Constitution by a Court in a Native State against a resident of British India, who had not submitted to the jurisdiction of that Court would be a nullity according to Private International Law. ('95) 22 Cal 222 (237, 238): 21 Ind App 171 (PC).

(5) After the advent of the Constitution the decree passed prior to the Constitution by a Court in a Native State against resident in British India who has not submitted to the jurisdiction of that court cases to be that of a "foreign Court" and hence notwithstanding the non-residence of the defendant and his non-submission to the jurisdiction of the Court, the decree is valid and can be executed in India under Article 261 (3) of the Constitution provided that otherwise the Court which passed it had jurisdiction to do so. AIR 1955 Madh B 1 (12): ILR (1955) Madh B 31 (FB) * AIR 1953 Raj 204 (208): ILR (1953) 3 Raj 449 (FB) * AIR 1953 Sau 16 (19) (FB) * AIR 1951 Bom 125 (126): ILR (1952) Bom 65 (FB) * AIR 1955 Hyd 184 (185): ILR (1955) Hyd 464 (DB).

[See also AIR 1956 Bom 49 (52): ILR (1955) Bom 1021 (DB).]

(6) Pre-Constitution personal ex parte judgment by British Indian Court against subject of Hyderabad State — Decree is nullity and not executable after advent of Constitution. AIR 1962 Andh Pra 400 (404, 405, 406) : (1962) 1 Andh WR 272 (FB).

(7) Judgments of former Court of Dhami State are not "Foreign judgments" after its integration into Himachal Pradesh. AIR 1957 Him Pra 16 (21).

(8) The crucial date of testing the validity of a decree is the date when the decree is passed and what was a void decree under Private International Law cannot become valid merely because the Ccurt which passed it ceases to be a foreign Court. AIR 1956 Punj 193 (197) : ILR (1956) Punj 434 (FB) * AIR 1956 Raj 81 (83) : ILR (1956) 6 Raj 236 (FB) * AIR 1956 Nag 273 (276) : ILR (1956) Nag 539* AIR 1958 Andh Pra 407 (417) (DB) * AIR 1956 Orissa 136 (140) : ILR (1956) Cut 174 (DB) * AIR 1955 All 490 (493, 494) * AIR 1955 Nag 103 (103) : ILR (1955) Nag 194 (DB) * AIR 1954 Cal 67 (69) * AIR 1954 Trav-Co 358 (359) : ILR (1954) Trav-Co 694 (FB) * AIR 1952 Mys 69 (74) : ILR (1952) Mys 201 (DB) * AIR 1962 Madh Pra 276 * AIR 1969 Guj 23 (26, 27, 28) : 10 Guj LR 93. (If a decree is unenforceable in a particular Court the time when it is passed, it would not become enforceable and valid simply because of the political changes that take place unless there is a specific provision to the contrary.) * AIR 1964 Madh Pra 78 (81) : 1964 MPLJ 11 (DB). (View taken in AIR 1955 Madh B 1 (FB), held not correct in view of AIR 1962 SC 1737) * AIR 1962 Raj 231 (237) : ILR (1961) 11 Raj 103 (DB). (Decree passed by Delhi Court in 1943, against subjects of the former princely State of Kotah is a decree of a foreign court notwithstanding the advent of the Constitution.) * AIR 1960 Mys 1 (5 to 8) : 37 Mys LJ 645 * AIR 1959 Punj 265 (267, 268, 269, 270): 61 Pun LR 418 (FB). (Per majority Gosain J. Contra — Decrees passed by Courts in Part A or Part C State in January 1951 were foreign decrees vis-a-vis the Pepsu Courts and could be executed in Pepsu subject to provisions of S. 13). * AIR 1958 All 775 (787, 788) (DB) * AIR 1958 Andh Pra 407 (409, 412) : (1958) 2 Andh WR 35 (DB).

[See also AIR 1954 Sau 123 (127) (FB).]

(9) A instituted a suit against B, who was resident of Uttar Pradesh, in Gwalior Court on 15-5-1947. The writ of summons was served on B on 12-9-1947 but he did not appear in the Gwalior Court and on 18-11-1948 an ex parte decree was passed by the Court against B. On 14-9-1951 an order was passed by the Gwalior Court for transfer of the decree for execution to the Court at Allahabad in U. P. Held Court could not do so. Court at Allahabad could not execute decree. The Court of Gwalior fell within the definition of "Foreign Court" and its judgment had to be enforced in the manner that foreign judgments were enforceable. AIR 1962 SC 1737 (1741) : (1963) 2 SCR 577.

(10) The term "foreign judgment" means the decree or order of a foreign Court. AIR 1933 Mad 511 (515): 56 Mad 951 (DB) * (1967) 2 Andh WR 335 (DB) * 1965 Cur LJ 485 (Punj).

[See AIR 1952 Hyd 49 (50) : ILR (1952) Hyd 322 (DB).]

(11) Judge's reasons for his decision cannot be included in "foreign judgment." AIR 1947 PC 192 (192) : 74 Ind App 203: ILR (1947) Bom 563. (AIR 1943 Bom 201: ILR (1943) Bom 366, Affirmed.)* AIR 1963 SC 1 (21, 22, 23) : (1963) 3 SCR 22. (View of Srinivasa Aiyangar, J., in AIR 1928 Mad 327, Disapproved.) * 1965 Cur LJ 485 (Punj) * AIR 1964 Ker 244 (248) : 1964 Ker LJ 205.

(12) An order which is not a "judgment" cannot be a foreign judgment. ('77) 1877 Pun Re No. 36, p. 75 (77) (FB).

(13) An Act of State passed by a State in its sovereign capacity is not a foreign judgment. ('93) 17 Bom 620 (624).

(14) So far as those Courts are concerned which are now situate within the

**Sections 13-14 — Note 2 (contd.)**
boundaries, of the State of Rajasthan, it can be held that decrees of these Courts even if they were foreign Courts at the time when the decrees were passed and even if the defendants were non-resident foreigners who had not submitted to their jurisdiction, become the decrees of the present Courts of Rajasthan and are therefore executable in the present State of Rajasthan without the judgment-debtors having the right to raise an objection under S. 13, Civil P. C. AIR 1956 Raj 81 (86): ILR (1956) 6 Raj 236 (FB) * AIR 1962 Raj 41 (42): 1962 Raj LW 145 (FB). (ILR (1958) 8 Raj 591: 1959 Raj LW 291, Overruled.)

(15) Baroda State has merged with the Indian Union. But the merger of the State does not authorise the Courts in Indian Union to reopen orders competently passed by Courts in the Baroda State and which have become final, before that State was merged. AIR 1955 Bom 170 (175): 56 Bom LR 1028.

(16) Partition suit instituted in Court at Dinajpur — Dinajpur included in dominion of Pakistan — Compromise decree passed in suit — Present suit for declaration and injunction in respect of said compromise decree brought in Court at West Dinajpur in India — Compromise decree passed by Dinajpur Court in Pakistan held was not decree of foreign Court. AIR 1959 Cal 663 (666): 63 Cal WN 442 (DB).

(17) Foreign judgment — Subsequent political changes cannot change nature of judgment. AIR 1965 Mys 97 (100): (1964) 1 Mys LJ 342.

**3. "Any matter thereby directly adjudicated upon."** — (1) Clause "the matter directly adjudicated upon" in Section 13 is narrower than the clause "the matter directly and substantially in issue" in Section 11. AIR 1953 Mad 261 (266) (DB) * AIR 1963 SC 1 (21, 22, 23): (1963) 3 SCR 22.

[See AIR 1956 Bom 49 (52): ILR (1955) Bom 1021 (DB).]

**4. "Same parties or between parties under whom they or any of them claim."** — (1) In a suit for the administration in a foreign Court of a deceased testator's estate, the title of the executors as such was challenged. It was held that under such circumstances, the legatee was not bound by a foreign judgment against the executors. AIR 1938 Bom 394 (397): ILR (1938) Bom 529 (DB).

(2) Application under Section 491, Criminal P. C. — Fact in issue whether detenus were foreigners within meaning of Foreigners Act — Judgments of Baroda State Courts passed on application for habeas corpus deciding that they were not Baroda State subjects held not binding under Section 13, Civil P. C. as they were not inter partes. AIR 1950 Bom 101 (111): 51 Cri LJ 558: 51 Bom LR 852 (DB).

**5. Foreign judgments, when not conclusive.** — (1) Before a foreign judgment can be a valid cause of action for a suit upon it in India, it must be shown that, in the Court by which it was pronounced, it conclusively, finally and for ever, established the existence of the right of which it is sought to be made conclusive evidence in this country. AIR 1935 Rang 284 (289) (DB).

(2) A foreign judgment will not operate as res judicata on any matter not directly adjudicated upon by that judgment and also in the six cases specified in Clauses (a) to (f). AIR 1921 Lah 20 (23, 24): 2 Lah 207 (DB) * AIR 1938 Bom 173 (175): ILR (1938) Bom 16 (DB).

(3) It is only in proceedings on a foreign judgment that the question of the effect of the foreign judgment can properly arise. AIR 1916 PC 136 (138).

(4) In considering whether a judgment of a foreign Court is conclusive, the Courts in India will not inquire whether conclusions recorded thereby are supported by the evidence, or are otherwise correct. AIR 1963 SC 1 (13, 14): (1963) 3 SCR 22.

**6. Clause (a).** — (1) Whether a foreign Court is of competent jurisdiction within the meaning of Section 13 (a), has to be determined according to international law. (1899) 1 Ch 781 (791) * AIR 1942 Mad 614 (616): ILR (1942) Mad 376 * AIR 1956 Nag 273 (274): ILR (1956) Nag 539 * AIR 1951 Bom 190 (193): ILR (1950) Bom 640 (DB) * AIR 1938 Cal 511 (515): 63 Cal 1033 * AIR 1963 SC 1 (14, 15, 16, 17, 18, 60, 61, 62, 63, 64): (1963) 3 SCR 22.

[See AIR 1952 Cal 508 (523) * AIR 1967 Cal 24 (25): ILR (1960) 2 Cal 85. (Proper test is whether dispute is one which properly relates to foreign Court.)]

(2) The decision of foreign Court as to whether a particular Court is a proper Court to deal with a particular matter according to the law of the foreign country is conclusive for purposes of Section 13 (a). AIR 1947 PC 192 (194): 74 Ind App 203: ILR (1947) Bom 563.

(3) It is a rule of private international law that a Court has no jurisdiction to entertain an action for the determination of the title to or the right to the possession of any immovable property situated outside its jurisdiction. AIR 1953 Mad 261 (263) (DB) * AIR 1963 SC 1 (21, 22, 23): (1963) 3 SCR 22 * AIR 1964 Ker 4 (5, 6, 7): 1963 Ker LJ 697 (FB).

(4) As a general rule the plaintiff must sue in the Court to which the defendant is subject at the time of the suit. ('95) 22 Cal 222 (237): 21 Ind App 171: 1894 Pun Re No. 112 (PC).

(5) Fact that the defendant possesses property within jurisdiction will not confer jurisdiction in action of a personal nature against him. AIR 1942 Bom 199

**Sections 13-14 — Note 6 (contd.)**

(201): ILR (1942) Bom 688 * AIR 1927 Lah 200 (212): 8 Lah 54 (DB).

(6) For the cases in which foreign Courts are, in England, recognised to be internationally of competent jurisdiction in regard to suits of a personal nature, see (1880) 14 Ch D 351 (371).

[See also AIR 1954 Trav-Co 358 (359): ILR (1954) Trav-Co 694 (FB) * AIR 1956 Nag 273 (274) * AIR 1954 Raj 4 (8): ILR (1953) 3 Raj 505 (DB) * (1908) 1908-1 KB 302 (306, 307): 77 LJKB 180 * AIR 1942 Bom 199 (201): ILR (1942) Bom 688.]

(7) The Legislature of a country cannot by its legislation confer jurisdiction over a non-resident foreigner in cases not recognised by international law. ('95) 22 Cal 222 (238): 21 Ind App 171: 1894 Pun Re No. 112 (PC).

(8) A decree passed by a foreign Court under legislation conferring jurisdiction over non-resident foreigner on ground of cause of action could not be enforced in British India under Sec. 13. ('76) 1 Mad 196 (198) (DB) * ('09) 32 Mad 469 (474) (DB).

[See also AIR 1938 Cal 511 (513): 63 Cal 1033.]

(9) Cause of action is not a ground of jurisdiction recognised by international law. AIR 1952 Cal 508 (524).

(10) Whether the non-resident foreigner is a subject of the sovereign power, legislation conferring jurisdiction over the foreigner on ground of cause of action is not against international law. AIR 1938 Cal 511 (516): 63 Cal 1033.

[See however ('52) AIR 1952 Cal 508 (524).]

(11) Judgment pronounced by the Court at Kandy in Ceylon against a person residing in British India who had not submitted himself to the jurisdiction of that Court, could not be enforced in British India notwithstanding the fact that both Ceylon and British India owed allegiance to the British Sovereign. ('09) 32 Mad 469 (473) (DB).

(12) A decree in a personal action pronounced by a Court of the Native State of Faridkot in absentem against a resident of Jhind who owed no allegiance to the State of Faridkot was, by international law, a nullity. ('95) 22 Cal 222 (238): 21 Ind App 171: 1894 Pun Re No. 112 (PC).

(13) Foreign judgment may be impeached on the ground that the Court was without jurisdiction because the property in respect of which the suit is brought is situate outside its jurisdiction. AIR 1929 Lah 627 (629) * AIR 1957 Mad 214 (216) * AIR 1914 All 514 (515): 37 All 1 (DB) * ('96) 19 Mad 257 (262) (DB) * AIR 1965 Mys 97 (99, 100) * (1964) 1 Mys LJ 342.

(14) Foreign judgment may be impeached because the defendant was not a resident within jurisdiction and did not submit himself to the jurisdiction of that Court. AIR 1956 Nag 273 (274): ILR (1956) Nag 539 * AIR 1958 Raj 189 (190): ILR (1958) 8 Raj 374 (DB) * AIR 1955 All 490 (492) * AIR 1951 Bom 190 (193): ILR (1950) Bom 640 (DB) * AIR 1951 Mad 289 (290) * AIR 1941 Pat 109 (113): 20 Pat 144 (DB) * ('95) 22 Cal 222 (238): 21 Ind App 171: 1894 Pun Re No. 112 (PC) * AIR 1962 SC 1737 (1741, 1742): (1963) 2 SCR 577 * 61 BLJR 109 * AIR 1960 Mys 1 (5 to 8): 37 Mys LJ 645 (DB).

(15) A resident of Khyrim State borrowed money from another resident of that State and agreed to give up his orchard in favour of the latter upon failure to repay the money within certain period. It was held that the Khyrim Darbar was competent to give effect to the agreement. ('45) 49 Cal WN 754 (756) (DB).

(16) A casual passage through, or a momentary presence in, a State, is not a sufficient residence for creating jurisdiction. ('90) 13 Mad 496 (498) (DB).

(17) In an action in personam the fact that the defendant was carrying on business in a foreign country through a manager or agent at the time when the obligation (in respect of which the action is brought) was incurred, will not confer jurisdiction on the foreign Court. AIR 1942 Bom 199 (201): ILR (1942) Bom 688.

(18) The fact that the contract was made in a foreign country is not sufficient to clothe a Court of that country with jurisdiction in an action in personam if the defendant was not a resident of that country. AIR 1955 Nag 103 (104): ILR (1955) Nag 194 (DB).

(19) Foreign Court can pass judgment against a subject of the foreign State though resident abroad. AIR 1941 Mad 688 (689, 690): ILR (1941) Mad 891 (DB).

(20) The declaration by a French Indian Court that A is the validly adopted son of B (parties being Hindus and A being domiciled within the jurisdiction of the French Court) will be valid not only with regard to succession to the property situated in French India but also regarding succession to the property, movable and immovable, situated in British India. AIR 1939 Mad 693 (697): ILR (1939) Mad 507 (DB).

[See also AIR 1966 SC 1436 (1437). (Residence alone is insufficient evidence to establish acquisition of new domicile.)]

(21) Where the foreign Court is competent in the international sense to pass a judgment, it will be conclusive even though there were irregularities in that Court, not affecting the jurisdiction of that Court, which under the law governing the foreign Court would render the judgment a nullity. ('07) 30 Mad 292

**Sections 13-14 — Note 6 (contd.)**
(294) (DB) * (1899) 1899-1 Ch 781 (793, 795, 796) * AIR 1918 Mad 274 (275, 276): 41 Mad 205.

(22) The words 'Court of competent jurisdiction" should, for purposes of actions relating to the office of trusteeship, be held to refer to Courts of the country where most of the trust properties are situate and almost the whole of the trust is to be performed. AIR 1928 Mad 327 (337): 51 Mad 720 (DB).

(23) The judgment of an Indian Court against a non-resident foreigner will not be nullity in India if the cause of action has arisen wholly or partly within the jurisdiction of the Court. But in the foreign country of which the defendant is a resident, the decree would not be of a Court of competent jurisdiction. AIR 1951 Bom 125 (126): ILR (1952) Bom 65 (FB).

[But see AIR 1958 All 775 (784) (DB). (AIR 1951 Bom 125 (FB) and AIR 1951 Bom 190, Dissented from.)]

(24) Personal action against defendant residing within jurisdiction — Subsequent death of the defendant does not oust jurisdiction of court to proceed against non-resident legal representatives of the deceased defendant. AIR 1962 SC 232 (234, 238): (1962) 3 SCR 391.

(25) Suit for possession of movables outside jurisdiction of Court — Suit for retransfer of shares of company registered outside jurisdiction in the name of plaintiffs — Share certificates must be deemed to be with defendants within jurisdiction — By personal compliance with order for retransfer judgment in favour of plaintiffs can be rendered effective. AIR 1963 SC 1 (14, 15, 16, 17, 18, 60 to 64): (1963) 3 SCR 22.

(26) Practice in Mysore High Court to refer cases under Section 15 (3) of Mysore High Court Act after delivering differing opinions including final orders to be passed on such opinions — Practice not strictly warranted by Section 15 (3) — Held decision of Full Bench on such reference could not be attacked as wanting in competence. AIR 1963 SC 1 (19, 20, 49): (1963) 3 SCR 22.

(27) Suit as to succession to estate — Suit raising question about title to property which plaintiffs' father could devise by will — Suit held was not regarding succession and personal status of father and plaintiffs. AIR 1963 SC 1 (23): (1963) 3 SCR 22.

(28) Suit on overdraft account in Bank of Calcutta — Defendant carrying on business in West Bengal and having assets in East Pakistan — Suit held maintainable by Calcutta High Court — Decree can be executed in East Pakistan by employing machinery of S. 13. AIR 1960 Cal 779 (783, 784): 64 Cal WN 161.

**7. Foreign judgment against firm.** — (1) Mere fact that a person residing in one State is a partner of a firm carrying on business in another State will not enable the Court of the latter State to pass a personal decree in absentem against the former. ('11) 36 Mad 414 (417) (DB) * (1900) 24 Bom 77 (85) (DB).

(2) In the case of a incorporated company judgment against officer or agent or member of the firm residing within the jurisdiction is binding on all. ('78) 2 Mad 400 (403) (DB) * (1889) 23 QBD 519 (524, 525).

**8. Presumption as to competency.** — (1) Production of the copy of foreign judgment duly authenticated is presumptive evidence that the Court which pronounced it had jurisdiction. ('55) 1955 All L Jour 539 (540) * AIR 1942 Bom 199 (200): ILR (1942) Bom 688.

(2) The Court should not disallow the production of the copies of judicial record relating to a foreign Court in evidence without first giving the party a sufficient opportunity either to have them certified by the representative of the Central Government or to have them proved by any other mode of proof. AIR 1951 Ajmer 54 (2) (54).

(3) Compromise decree passed by Calcutta High Court in 1942 in suit for dissolution of partnership — Parties and firm resident within jurisdiction — Assuming that decree was of a foreign Court when it was passed it must be presumed to be by a Court of competent jurisdiction under S. 14. ILR (1960) 10 Raj 94.

(4) An ex parte decree passed by a foreign Court would be inexecutable only if an objection is raised by the judgment-debtor under Section 13 and that objection is sustained after due enquiry.

The burden would always be upon the judgment-debtor to prove that the ex parte decree sought to be executed against him was pronounced by a foreign Court which was not competent to pass the decree in the international sense. AIR 1959 Raj 47 (48): 1959 Raj LW 682.

**9. Submission to, and waiver of objection as to jurisdiction.** — (1) Foreign Courts are recognised to be internationally of competent jurisdiction where the party voluntarily submits to jurisdiction of the Court. AIR 1952 Cal 508 (523) * AIR 1937 Mad 97 (98) * ('07) 30 Mad 292 (294) (DB) * (1871) 6 QB 155 (160) * AIR 1962 Raj 231 (237): ILR (1961) 11 Raj 103.

(2) Mere intention on the part of the defendant to submit to the jurisdiction of the foreign Court is not tantamount to submission to that jurisdiction. AIR 1955 Nag 103 (105): ILR (1955) Nag 194 (DB).

[See however AIR 1931 All 689 (694): 53 All 747 (DB).]

(3) The mere fact that the defendant allowed the suit in the foreign Court to be heard ex parte will not amount to his

**Sections 13-14 — Note 9 (contd.)**

submitting to the jurisdiction of that Court. AIR 1931 All 689 (692): 53 All 747 (DB) * ('50) 1950 Ker L Tim 54 (58, 60) (DB).

(4) The mere fact of entering into a contract in a foreign country does not involve an agreement that all matters and disputes arising thereunder shall be submitted to the jurisdiction of the Courts of that country. AIR 1955 Nag 103 (105): ILR (1955) Nag 194 (DB) * ('50) 1950 Ker L Tim 54 (58, 60) (DB). (Execution of promissory note.) * (1908) 1908-1 KB 302 (308) * AIR 1933 Mad 112 (113) (DB).

(5) Mere fact that the parties have agreed that the law of a particular country should apply to a transaction or stipulation to pay money, under a contract in a foreign country does not amount to submission to the jurisdiction of the Court of that country. AIR 1952 Cal 508 (524).

(6) Where the defendant voluntarily appears in the cause without any protest as to jurisdiction or without any such protest until a late stage of the case, his conduct will clearly amount to a submission to the jurisdiction of the Court. (1871) 6 QB 155 (161) * AIR 1929 Mad 469 (469, 470): 52 Mad 503 (DB) * AIR 1948 Mad 203 (204) * AIR 1917 Mad 780 (787): 39 Mad 733 (FB) * AIR 1915 Mad 486 (487): 39 Mad 24 (FB) * (1890) 6 TLR 85. (Cited in AIR 1915 Mad 486.)

[But see ('49) 53 Cal WN 368 (386) (DB).]

(7) The mere fact that the defendant employs a pleader in a suit in a foreign Court will not amount to a submission to its jurisdiction if at the hearing the pleader reports that he has no instructions from his client. ('95) 18 Mad 327 (330) (DB).

[See also AIR 1955 Nag 103 (105): ILR (1955) Nag 194 (DB).]

(8) Merely because a counsel at Rangoon on his own initiative and without any instructions from the defendants to contest the suit, undertook to file power and written statement and asked for time but later withdrew for want of instruction is not sufficient to infer that the defendants ever submitted to the jurisdiction of the Burma Court, even assuming that the summons was served on the defendants. 1960 Pat LR 221: 1961 BLJR 109.

(9) Where a foreign Court passes a judgment in absentem against a defendant not resident within its jurisdiction and subsequent thereto the defendant applies to that Court to set aside the ex parte decree this does not amount to a submission to jurisdiction so as to make the decree originally passed against him a valid one. ('95) 18 Mad 327 (330) (DB) * AIR 1934 Mad 434 (434): 57 Mad 824 (DB) * AIR 1956 Nag 273 (274): ILR (1956) Nag 539 * AIR 1955 Nag 103 (105): ILR (1955) Nag 194 (DB). (Overruling AIR 1926 Nag 77: 22 Nag LR 82.)

[See AIR 1924 Bom 351 (352) (DB).]

[But see AIR 1927 Lah 200 (213): 8 Lah 54 (DB).]

(10) Where a business is carried on within the jurisdiction of a foreign Court by means of an agent resident there and a decree is passed on summons to him or on a pleader authorized to receive summons, the decree is prima facie binding on the principal who will be deemed to have submitted to the jurisdiction of the foreign Court. AIR 1925 Mad 155 (156): 47 Mad 877 (DB) * AIR 1930 Bom 511 (515) * AIR 1926 Mad 259 (259) (DB).

(11) Where the power of attorney under which the agent is authorised to defend suits has come to an end and the agent ceases to live within the jurisdiction of the foreign Court at the time when the suit is brought, it cannot be said that the defendant has submitted to the jurisdiction of the foreign Court. AIR 1942 Bom 199 (202): ILR (1942) Bom 688.

(12) A submission is not voluntary if the appearance is made to obtain release of property seized by a foreign tribunal in attachment or other proceedings. AIR 1915 Mad 486 (487): 39 Mad 24 (FB).

[See also AIR 1954 Trav-Co 141 (142).]

(13) Where in a suit against minor the Court appoints its own officer as the guardian ad litem in spite of the existence of a de facto and de jure guardian it cannot be said that the defendant has voluntarily submitted to the jurisdiction of the foreign Court. AIR 1939 Bom 374 (377).

(14) Where in a suit in a foreign Court against a defendant residing in British India, the plaintiff effected an attachment before judgment of moneys belonging to the defendant in the hands of a third person, and the defendant wrote a letter to the plaintiff praying that he might be allowed to collect a portion of the money and stating that the plaintiff might collect the rest of it and the defendant therefore allowed the suit to proceed ex parte, there was a submission to the jurisdiction of the foreign Court. AIR 1936 Mad 552 (555): 59 Mad 918 (DB).

(15) No submission to jurisdiction of the Courts of a foreign country can be implied from occasional visits to that country or short stays there or even the acceptance of a directorship of a company of that country. ('50) 1950 Ker L Tim 54 (58, 68) (DB).

(16) The mere fact that a party has once appeared before a foreign Court in the character of a plaintiff, cannot be taken to be a submission to the jurisdiction of that Court in regard to all subsequent actions against him in that Court. AIR 1937 Mad 97 (99) * AIR 1936 Mad 552 (554): 59 Mad 918 (DB).

**Sections 13-14 — Note 9 (contd.)**

(17) Submission to jurisdiction may be by intervention by means of an application to be examined pro interesse suo, to protect one's own interest, in a suit instituted between other parties. See AIR 1955 Cal 491 (493).

(18) Application for leave to defend summary suit — Amounts to voluntary submission to jurisdiction of foreign Court. AIR 1967 SC 739 (740): (1963) 2 SCR 574.

(19) Suit for recovery of money filed in Sialkot in Pakistan in 1949 — Ex parte decree passed — Decree containing an observation that summons was duly served on defendant — Defendant resident of Sialkot till September 1947 — Afterwards, defendant becoming permanently domiciled in India and never going to Pakistan again — Evidence clearly showing that defendant was not served while he was in Pakistan — Since he did not submit to the jurisdiction of the Sialkot court in a personal action against him, a decree pronounced in absentem will be an absolute nullity and is unenforceable in India under Section 13. AIR 1967 Delhi 22 (24): 69 Pun LR (D) 88 (DB).

**10. Clause (b).** — (1) Foreign judgment must, in order to operate as res judicata, have been on the merits of the case. AIR 1956 Orissa 136 (142): ILR (1956) Cut 174 (DB) * AIR 1951 Sau 37 (39) (DB) * (1900) 24 Bom 86 (87, 88) (DB).

(2) Courts in India have the power to examine the judgment to see whether it has been given on the merits. AIR 1938 Bom 173 (177): ILR (1938) Bom 16 (DB).

(3) Judgment given to the plaintiff when the defendant commits default in appearance without any further hearing is not a decision on merits. AIR 1922 PC 120 (122): 45 Mad 496: 49 Ind App 174 * AIR 1927 Mad 265 (270): 50 Mad 261 (FB). (Overruling AIR 1925 Mad 155: 47 Mad 877; AIR 1926 Mad 259.) * AIR 1958 All 775 (783) (DB) * AIR 1958 Ker 203 (206): ILR (1958) Ker 80 (DB).

(4) True test for deciding whether a judgment has been given on the merits is to see whether it has been given as penalty for any conduct of the defendant or whether it is based on a consideration of the truth or otherwise of the plaintiff's case. AIR 1952 Cal 508 (524) * AIR 1941 Pat 109 (112): 20 Pat 144 (DB) * AIR 1939 Bom 374 (376).

(5) Where, in an action for recovery of money in the Kings Bench Division of the High Court in England, the defendant having failed to comply with an order to answer interrogatories, his defence was struck off and judgment was entered for the plaintiff, the judgment was not one given on merits and no action could be maintained on it in Indian Courts. AIR 1916 PC 121 (123): 40 Mad 112: 44 Ind App 6.

(6) Section 13 (b) refers to cases where the controversy raised in the action has not been in fact, the subject of direct adjudication by the Court. AIR 1946 Mad 448 (449) * AIR 1916 PC 121 (123): 40 Mad 112: 44 Ind App 6 * ('35) 62 Cal 682 (684).

(7) Where the controversy raised in the action is the subject of direct adjudication by the Court, the mere fact that the defendant was not present at the hearing will not make the judgment one not on merits unless the defendant proves that evidence was not taken. AIR 1943 Cal 42 (43, 44, 45) (DB).

(8) Where, notwithstanding the non-appearance of the defendant, evidence is taken on behalf of the plaintiff and judgment is given on such evidence, it will be one on the merits. AIR 1942 Bom 199 (202): ILR (1942) Bom 688 * AIR 1958 Ker 203 (206): ILR (1958) Ker 80 (DB) * AIR 1958 Mad 203 (204) (DB) * AIR 1941 Mad 387 (389) * AIR 1932 Lah 649 (650): 14 Lah 58 * AIR 1919 All 228 (229): 41 All 521 (DB) * AIR 1930 Bom 511 (515) * AIR 1920 Mad 587 (588) (DB) * AIR 1959 Bom 414 (421): 61 Bom LR 333 (DB). (Reversed on another point in AIR 1964 SC 538.) * AIR 1961 Mad 385 (388): (1961) 2 Mad LJ 1 * AIR 1961 Orissa 158 (160): ILR (1961) Cut 150 (DB).

[See however AIR 1956 Orissa 136 (142): ILR (1956) Cut 174 (DB).]

(9) Suit under Order 37 — Application for leave to defend dismissed as defendant did not appear — Decree passed without entering into merits — Decision is not on merits. AIR 1962 Raj 231 (240, 241): ILR (1961) 11 Raj 103 (DB).

(10) Where a suit is adjourned for settlement and the parties agree that if the suit is not settled by the adjourned date, a judgment should be passed in favour of the plaintiff and a judgment is so passed on the adjourned date, there having been no settlement it has been held that the judgment will be one on the merits of the case. AIR 1929 Mad 469 (471): 52 Mad 503 (DB).

(11) Where both the parties go to the Court with a drafted compromise and the Court passes a decree on the strength of a compromise, it has been held that there is no decision on the merits. AIR 1950 Kutch 78 (79) * AIR 1946 Mad 296 (297).

[But see AIR 1955 Raj 59 (61): ILR (1954) 4 Raj 905 (DB).]

(12) Ex parte decree obtained under the summary procedure of the Court of Ceylon is not one on the merits, is not even a judgment and therefore does not satisfy the requirements of this clause. AIR 1933 Mad 544 (547).

(13) Judgment of a French Court in an ex parte case may be, prima facie, presumed to be based upon a consideration of the truth of the claim in accord-

**Sections 13-14 — Note 10 (contd.)**
ance with the French Civil Procedure Code. AIR 1941 Pat 109 (112): 20 Pat 144 (DB).

(14) A wrong view of the legal liability of a party or of the onus of proof will not show that the judgment is not one on the merits. AIR 1918 Mad 274 (275): 41 Mad 205 (DB).

(15) Dismissal of a suit as being barred by limitation will not be deemed to be on the merits except where that law not only bars the remedy but extinguishes the right itself. ('09) 32 Mad 469 (477).

(16) The fact that a foreign judgment may fail to show that every separate issue was separately framed and decided is irrelevant unless it can be shown that that failure brings the case within one of the exceptions. AIR 1941 Pat 109 (114): 20 Pat 144 (DB).

(17) Where an appeal is filed against a foreign judgment (which is on merits) and the appeal is held to be not competent, the judgment appealed from will be the judgment in the case and so there will be a judgment on the merits in such a case. AIR 1947 PC 192 (194): 74 Ind App 203: ILR (1947) Bom 563. (AIR 1943 Bom 201: ILR (1943) Bom 366 (DB). Affirmed — 24 Cal 616: 22 Ind App 50 (PC). Distinguished.)

(18) Foreign judgment cannot claim conclusiveness unless adjudication is shown to be a judicial consideration of tenability or justness of claim in relation to material on which it is based. ILR (1966) 1 Mad 18.

(19) Foreign judgment given without any trial and without any evidence but only stating that defendant who had been served with summons did not appear — Held, judgment was not one on merits. ILR (1966) 1 Mad 18.

(20) Foreign judgment dismissing suit at preliminary stage for non-production of a document, and even before defendant has filed written statement and without framing issues — Judgment is not one dismissing suit on merits. AIR 1959 Punj 306 (307): 61 Pun LR 260 (DB).

(21) For purpose of Article 117, Limitation Act (1908) foreign judgment need not be one on merits of case if it satisfies definition of term in Section 2 (6). ILR (1966) 1 Mad 18 (25) (DB).

**11. Clause (c).** — (1) Judgment based upon an incorrect view of international law or a refusal to recognize the law of India where such law is applicable is not conclusive. AIR 1934 Mad 145 (147) * AIR 1938 Bom 173 (179): ILR (1938) Bom 16 (DB) * ('99) 26 Cal 931 (935) (DB).

(2) Where in a suit instituted in England on the basis of a contract made in India, the English Court erroneously proceeds on the view that the case is governed by English and not Indian law, its judgment must be held to be based on an incorrect view of International Law. AIR 1952 Cal 508 (525).

**12. Clause (d).** — (1) Present language of the clause refers to the procedure taken by the foreign Court for arriving at a judgment rather than to the merits of the case. AIR 1943 Bom 201 (206): ILR (1943) Bom 366 (DB) * AIR 1918 Mad 274 (276): 41 Mad 205 (DB).

(2) Judgment obtained without notice of the suit to the defendant or without giving him a reasonable opportunity of presenting his case is contrary to natural justice. AIR 1953 Mad 261 (266) (DB) * AIR 1952 Cal 508 (525) * ('02) 29 Cal 509 (516) (SB) * ('95) 22 Cal 222 (238): 21 Ind App 171: 1894 Pun Re No. 112 (PC).

(3) Judgment against a party not properly represented in the proceedings is contrary to natural justice. AIR 1927 Lah 200 (214): 8 Lah 54 (DB). (No guardian ad litem appointed for minor defendant or legal representative of deceased party brought on record.) * AIR 1934 Bom 390 (397). (Interest of guardian ad litem appointed in conflict with that of minor.)

(4) Where the Court appoints its own officer as the guardian ad litem of a minor defendant although there is in existence a de facto and de jure guardian, the Court acts against the interest of the minor and against natural justice. AIR 1939 Bom 374 (377).

(5) Errors in procedure, interest of slight nature (like using the cars of party, eating marriage dinners, etc.), mere suspected bias, pungent observations of Judges at hearing, a non-liberal attitude towards requests for constituting another Bench and not hearing the case themselves, and not granting adjournments for engaging eminent counsel will all be inadequate for vitiating a foreign judgment of a competent Court. AIR 1953 Mad 261 (267) (DB).

[See also AIR 1957 Madh B 74 (75) (DB).]

(6) Previous acquaintance of the Judges of foreign Court with the matters in dispute and forming opinions regarding them does not come within any of the exceptions to Section 13. AIR 1953 Mad 261 (268) (DB).

(7) Courts in India will insist on a strict proof of the service of process alleged to have emanated from a foreign Court, before giving effect to a foreign judgment. ('87) 11 Bom 241 (245) (DB).

(8) Where the foreign Court has held a particular notice to be sufficient, it must, in the absence of any evidence to the contrary, be presumed to be correct. AIR 1925 Mad 155 (157): 47 Mad 877 (DB).

(9) A foreign judgment based on a second or a third review is opposed to natural justice. AIR 1927 Lah 200 (211): 8 Lah 54 (DB).

**Sections 13-14 — Note 12 (contd.)**

(10) An incorrect view of the law by the foreign Court will not render the judgment one opposed to natural justice. AIR 1918 Mad 274 (275, 276): 41 Mad 205 * AIR 1963 SC 1 (24, 25): (1963) 3 SCR 22. (A foreign judgment of a Competent Court is conclusive even if it proceeds on an erroneous view of evidence on the law.)

(11) Natural justice does not mean Indian justice as opposed to the justice of any particular foreign country. AIR 1953 Hyd 29 (31): ILR (1952) Hyd 233 * AIR 1953 Mad 261 (267) (DB) * AIR 1941 Pat 109 (114): 20 Pat 144 (DB).

(12) Proceedings opposed to natural justice — Plea not restricted to want of due service or want of opportunity of hearing only — Judgment not impartial — Is nullity. AIR 1963 SC 1 (24, 25): (1963) 3 SCR 22.

(13) Judge trying probate proceedings and dismissing caveat filed by certain persons — Subsequent suit by latter claiming title to properties disposed of by the will of the testator — Same judge being member of the bench deciding appeal against the suit — Inference of bais not possible. AIR 1963 SC 1 (27, 28, 51): (1963) 3 SCR 22.

(14) Bias on part of judge cannot be inferred merely from the fact that he suggested that possibility of compromise of the dispute between the parties to the suit be explored. AIR 1963 SC 1 (28): (1963) 3 SCR 22.

(15) Judge delivering final opinion in appeal — Sitting in Full Bench constituted in such appeal even after objection by party — The circumstance cannot be discarded from consideration in deciding whether the plaintiff had a fair trial. AIR 1963 SC 1 (29): (1963) 3 SCR 22. (ILR 6 All 468 and AIR 1924 Cal 257 (FB) and AIR 1917 Cal 123 (FB) and ILR 1 All 60 (FB) and ILR 1 All 117 (FB) and ILR 1 All 508 and ILR 2 All 181 (FB) and ILR 3 All 206 (FB) and ILR 3 All 554, Disapproved.)

(16) Judges of High Court not willing to consider request of party for formation of another bench on ground of bias and not considering his application for adjournment with sympathy — Held, though the attitude might appear to be somewhat rigid that attitude by itself might not justify inference of bias. AIR 1963 SC 1 (31, 32, 48): (1963) 3 SCR 22.

(17) Burden is on party setting up case of bias to prove same by cogent evidence. AIR 1963 SC 1 (32): (1963) 3 SCR 22.

(18) Foreign judgment opposed to natural justice — Failure to appoint natural guardian as guardian ad litem of minor defendants — It is not mere irregularity of procedure — Judgment cannot be acted upon. AIR 1964 Ker 244 (248): 1964 Ker LJ 205 (DB).

(19) Dissenting judgment by judges of Division Bench — Full Bench deciding case without being referred to it — Decision is Coram non judicium — Judges dissuading particular counsel to appear for one of parties — This is infirmative circumstance under Section 13 (a) and (b) — Full Bench hearing appeal almost ex parte inasmuch as no adjournment was granted to enable senior counsel to appear — This is denial of justice. (1954) 67 Mad LW 147.

**13. Clause (e).** — (1) Party to an action can impeach the judgment in it for fraud, for it vitiates the most solemn transactions. AIR 1934 Bom 390 (393) * ('89) 1889 Pun Re No. 2, p. 2 (3) * ('84) 7 Mad 164 (166) (DB) * (1883) 10 QBD 295 (303) * ('90) 17 Cal 769 (784) (FB).

(2) Mere concealment of facts is not sufficient to avoid a foreign judgment. (1861) 30 LJQB 163 (168) * (1880) 5 App Cas 685 (697).

[See AIR 1941 Pat 109 (111): 20 Pat 144 (DB).]

(3) Fraud to attract Clause (e) should be one connected with the procedure in the suit. AIR 1941 Mad 387 (389) * AIR 1942 Bom 199 (202): ILR (1942) Bom 688.

(4) Fraud invalidating a foreign judgment may be either fraud on the part of the party in whose favour the judgment is given or fraud on the part of the Court pronouncing the judgment. AIR 1953 Mad 261 (266) (DB).

(5) Fraud in Cl. (e) means that the Court was imposed upon or tricked, as a result of which its order came to be passed. AIR 1964 Ker 244 (248): 1964 Ker LJ 205 (DB).

(6) Foreign judgment obtained by fraud — Setting aside of such judgment is not necessary. AIR 1964 Ker 244 (248): 1964 Ker LJ 205 (DB).

**14. Clause (f).** — (1) Where foreign judgment is founded on breach of Indian law it will not be enforced even though defect is not apparent on face of proceedings. ('09) 33 Bom 479 (482): 2 Ind Cas 530 (531) (DB).

(2) Foreign judgment on a claim which is barred according to Indian law cannot be said to be based upon a breach of Indian law. AIR 1952 Cal 508 (525, 526) * AIR 1924 All 161 (162): 46 All 119 (DB).

(3) Where foreign decree sustains a claim founded on two grounds one of which involves a breach of Indian law and the other does not and the latter is sufficient in itself to support the claim, the decree is not open to attack under Clause (f). AIR 1941 Mad 387 (389).

(4) A foreign judgment granting a claim for simple interest at 18 per cent. based on a contract under a promissory note does not contravene any statutory provision in any all-India statute. AIR 1958 Ker 126 (128): ILR (1958) Ker 100 (DB).

(5) Where a husband secures a divorce decree from a foreign Court in respect

**Sections 13-14 — Note 14 (contd.)**
of his Roman Catholic marriage solemnized in Goa, such a decree cannot be confirmed. since such a marriage is indissoluble in view of Section 4 of Decree No. 35461 dated 22nd January, 1946. AIR 1967 Goa 113 (115, 116) (DB).

**15. Effect of foreign judgment.** — (1) On obtaining a foreign judgment the creditor has two remedies open to him, namely (1) of bringing an action in a domestic tribunal on the foreign judgment, or (2) of bringing in a domestic tribunal a suit upon the original cause of action. AIR 1952 Cal 116 (117, 118) * ('54) 7 Sau LR 108 (111) (DB) * ILR (1966) 1 Mad 18.

[See also AIR 1958 Ker 126 (127): ILR (1958) Ker 100 (DB).]

(2) Plaintiff, who has obtained a judgment in a foreign Court against some of the joint promisors on a promissory note, can successfully maintain a suit in an Indian Court against the rest of the joit promisors on the same cause of action. AIR 1941 Cal 64 (67, 68): ILR (1941) 1 Cal 171 (DB).

(3) A foreign judgment which has been satisfied prevents a suit on the original cause of action being brought in the domestic tribunal. AIR 1952 Cal 116 (118).

(4) Pendency of appeal from foreign judgment in foreign Court is no bar to an action on foreign judgment. AIR 1927 Lah 200 (207): 8 Lah 54 (DB).

(5) Where the foreign Court did not decide the issue raised, the Indian Court is not barred from deciding that issue. AIR 1921 Lah 20 (23, 24): 2 Lah 207 (DB).

(6) Every issue decided by the foreign Court is not binding though the relief granted or refused is binding. AIR 1928 Mad 327 (336): 51 Mad 720 (DB).

(7) Where defendant relies on a foreign judgment as a bar to suit presumption is that defendant submitted to the jurisdiction of foreign Court. ('99) 26 Cal 931 (935).

(8) In a suit upon a foreign judgment plaintiff cannot recover anything more than what appears on the face of the judgment. AIR 1941 Pat 109 (115): 20 Pat 144 (DB) * ('01) 28 Cal 641 (648) (DB) * AIR 1962 Raj 231 (244): ILR (1961) 11 Raj 103 (DB).

(9) An obligation created by a foreign judgment to pay interest will not control the discretion of the Court. in which the suit has been filed, under Section 34 to allow or not to allow interest pendente lite. AIR 1953 Hyd 29 (32): ILR (1952) Hyd 233.

(10) Even where there is no question of the binding character of a foreign judgment, when the issue is as to what is the customary law in a foreign State, a judgment pronounced by the highest tribunal of that State would be valuable evidence of such law. AIR 1942 Bom 185 (189): ILR (1942) Bom 467 (DB).

**16. Enforcement of foreign judgments in India.** — (1) A person who desires to enforce the judgment of a foreign Court must satisfy that the requirements of this section have been fulfilled. AIR 1951 Bom 190 (192): ILR (1950) Bom 640 (DB) * AIR 1951 Punj (Simla) 255 (256): ILR (1951) Punj 111 * AIR 1950 Cal 12 (14) (DB).

(2) A foreign judgment is not enforceable in India unless it is embodied in a decree of the Indian Court. AIR 1957 Cal 103 (104) (DB).

(3) In a suit on foreign judgment Court cannot go into the merits of original claim or question the correctness or propriety of the foreign judgment. AIR 1951 Mad 742 (744) * AIR 1924 All 161 (162): 46 All 119 (DB) * (1865) 4 Suth WR 107 (108) (DB)*('81) 6 Bom 292 (296) (DB) * AIR 1923 Mad 72 (73, 74): 45 Mad 1014 (DB).

[See also AIR 1957 Madh B 74 (75) (DB).]

[Section 44-A now provides for execution in India of foreign decrees passed in a "reciprocating territory."]

(4) Arbitration agreement entered into Bombay — Award made in New York and confirmed by New York Supreme Court — Suit to enforce award or judgment in Bombay High Court — Held not maintainable. AIR 1964 SC 538 (552 to 557): (1964) 4 SCR 19. (AIR 1959 Bom 414, Reversed.)

**17. Foreign judgment on a decree of Indian Court — Effect of.** — (1) Existence of foreign judgment on a decree of Indian Court is no bar to execution of the Indian decree in the Indian Court. ('81) 7 Cal 82 (83, 84) (DB).

(2) A judgment of an Indian Court does not entitle the decree-holder to restrain the judgment-debtor from proceeding in a foreign Court. See AIR 1916 SC 136 (138).

**18. Suit on foreign judgments.** — (1) A suit upon a foreign judgment cannot be brought against persons other than those against whom foreign judgment was passed. ('83) 6 Mad 273 (276) (DB).

(2) No suit can be brought on a foreign judgment unless it is for an ascertained sum of money. AIR 1953 Hyd 29 (31): ILR (1952) Hyd 233 * ('95) 22 Mad 382 (383) (DB).

(3) Suit on a foreign judgment is not small cause suit. ('88) 1888 Pun Re No. 97, p. 261 (262) * ('83) 6 Mad 191 (192) (DB).

(4) When a decree is obtained in an Indian Court on a foreign judgment, the judgment and the decree of the foreign Court are not merged in Indian decree and can still be executed in foreign country. AIR 1944 Lah 302 (313): ILR (1944) Lah 79 (DB).

(5) Where a suit on the basis of foreign decree (of Bombay State in this

## PLACE OF SUING

**15. Court in which suits to be instituted.**—Every suit shall be instituted in the Court of the lowest grade competent to try it.

[1882, S. 15; 1877, Ss. 15 and 25; 1859, S. 6, Para. 1.]

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**Sections 13-14 — Note 18 (contd.)**
case) was dismissed in Rajasthan, the foreign decree cannot subsequently be executed in Rajasthan. AIR 1958 Raj 189 (191): ILR (1958) 8 Raj 374 (DB).

### SECTION 15 — SYNOPSIS


1. Scope and object.
2. "Shall be instituted".
3. "Court of the lowest grade."
4. "Competent to try it".
5. Satisfactory valuation not possible.
6. Improper valuation — Effect.
7. Valuation for jurisdiction and for court-fees.
8. Mode of valuation.
9. Suit for dissolution of Muhammadan marriage.
10. Mode of valuation for appellate jurisdiction. See Notes on S. 96.
11. Suits embracing two or more subjects.
12. Objection to jurisdiction. See S. 21.


### TOPIC INDICATOR


Court's power to pass decree for amount exceeding its pecuniary limits — See S. 6.
Effect of wrongly instituting suit in Court of lower or higher grade — See Note 2.
Inferior Court's power to declare decree of superior Court, a nullity — See Note 4.
Place of suing — See Note 1.
Proof of valuation does not affect jurisdiction — See S. 6.


**1. Scope and object.** — (1) Sections 15 to 20 regulate the forum for the institution of suits in India. AIR 1928 Lah 297 (299) : 9 Lah 455 (DB).

(2) District Judge and Subordinate Judge have jurisdiction over all original suits cognisable by the Civil Court but the suits must be instituted in the Court of the lowest grade competent to try them. ('85) 7 All 230 (234, 235) (FB) * ('03) 30 Cal 453 (457) (FB).

(3) The object is that Court of higher grade shall not be overcrowded with suits. AIR 1954 Pat 34 (35) (DB) * AIR 1944 All 1 (4) : ILR (1944) All 20 (DB).

(4) Section 15 does not apply to High Court exercising original civil jurisdiction. AIR 1951 Mad 93 (97) (FB).

(5) Section 15 read with S. 141 not applicable to execution proceedings. AIR 1963 Manipur 45 (46).

[See also AIR 1963 Andh Pra 452 (455) (DB). (Application for execution to appellate Court will not save limitation for execution.)]

(6) The rule in S. 15 is merely intended for the protection of the Courts of higher grade; but it does not otherwise affect the jurisdiction of Courts. AIR 1963 Punj 208 (211) : ILR (1962) 2 Punj 915 (DB).

(7) As subordinate Court has also had concurrent jurisdiction with District Munsif and that Court also having inherent jurisdiction under S. 10 of Act III of 1873 to try suit below Rs. 5,000 in value bar under S. 15 of the Code will not apply in terms to proceedings (involving property below Rs. 5,000) forwarded to that Court. AIR 1967 Mad 91 (94) : 1967 Cri LJ 213 : (1967) 2 Mad LJ 70.

**2. "Shall be instituted."**—(1) Section 15 does not deprive any Court of the jurisdiction possessed by it under the Acts constituting them. AIR 1953 All 158 (160) * AIR 1957 Trav-Co. 69 (71) : ILR (1956) Trav-Co. 1314 (FB). (Establishment of new Subordinate Judge's Court in particular area over which District Court was exercising jurisdiction — Original jurisdiction of District Court is not taken away.) * AIR 1944 Bom 300 (302) * AIR 1943 Cal 450 (451) (DB) * AIR 1962 Mad 450 (456) : (1962) 2 Mad LJ 318 (FB) * AIR 1953 All 158 (160) : 1952 All LJ 697. (S. 15 contains merely a procedural provision and its object is not to oust the jurisdiction of a Court of higher grade.) * AIR 1950 Madh Bha 14 (14). (Madhya Bharat Notification No. 1567 (3rd March 1948) does not bar jurisdiction of Court of Small Causes in cases within its pecuniary jurisdiction.)

[See also ILR (1960) 10 Raj 189. (Case under S. 6 of Raj Act 17 of 1950).]

(2) Institution of a suit in Court of higher grade is merely an irregularity not affecting jurisdiction. AIR 1927 Mad 568 (569) * AIR 1958 Andh Pra 218 (220): ILR (1958) Andh Pra 54 (DB). (13 Mad 25 and 13 Mad 273 held impliedly overruled by AIR 1951 Mad 93 (FB) and AIR 1957 Andh Pra 49 (FB).) * ('85) 7 All 230 (242) (FB).

(3) The Court of higher grade should return the plaint for presentation to the proper Court. The date of the institution of the suit in such case is the date of original presentation and not the date on which it was represented. AIR 1941 Mad 711 (712) (DB) * AIR 1964 Ker 314 (315, 316) : 1964 Ker LJ 712 * AIR 1963 Punj 208 (211): ILR (1962) 2 Punj 915 (DB). (AIR 1956 Punj 30, Overruled.)

(4) Suit instituted in a Court of a lower grade is without jurisdiction, and if plaint is returned for presentation to proper Court the suit must be deemed to be filed on the date of representation. AIR 1941 Mad 711 (712) (DB) * AIR 1957 Andh Pra 654 (657, 658) : ILR (1956) Andhra

**Section 15 — Note 2 (contd.)**
162 * ('11) 38 Cal 639 (668) (DB) * AIR 1933 Lah 8 (9) * AIR 1950 Pat 473 (475): 29 Pat 699 (DB).

(5) Suit pending in Civil Court wrongly transferred to Small Cause Court — Decree passed by Small Cause Court is nullity — Executing Court can declare it nullity — Objection as to inherent want of jurisdiction can be taken at any stage. AIR 1957 Madh Pra 71 (72) (FB).

(6) Suit properly pending in Civil Court wrongly transferred to Small Cause Court — Decree passed by Small Cause Court is nullity — Civil Court has no inherent power to recall the case. AIR 1957 Madh Pra 70 (71) (FB).

(7) A, as a sole plaintiff entitled to sue in Court of Subordinate Judge — B, his co-plaintiff, by virtue of Act XX of 1863 entitled to sue only in District Court — A and B can institute the suit as co-plaintiff in District Court. ('99) 23 Mad 537 (540) (DB).

(8) Suit should not be transferred if it is subsequently found that plaintiff is entitled only to a part of the claim cognisable by a lower Court. AIR 1920 Nag 47 (48).

(9) Suit for partition — Value of property exceeding Court's jurisdiction — Jurisdiction raised during pendency of suit — Decree for property valued beyond Court's original jurisdiction is valid. ('57) 1957 Ker LT 1211 (1212).

**3. "Court of the lowest grade".**—(1) The words 'Court of the lowest grade' refer only to Courts to which the Civil P. C. applies. ('90) 13 Mad 145 (146) (DB * ('69) 5 Mad HCR 45 (47) (FB).

(2) Suit triable both by village Court and District Munsif — Section 15 does not apply. AIR 1940 Mad 495 (496) : ILR (1940) Mad 684.

(3) Suit on negotiable instruments — Institution of suit in Court of higher grade — Court may entertain and try it or return the plaint. AIR 1965 Mys 248 (250): (1964) 2 Mys LJ 348.

**4. "Competent to try it."** — (1) Where the Court has jurisdiction to try a suit, it has jurisdiction to decide every question arising in the suit. ('04) 26 All 522 (525) * (1900) 22 All 270 (280) (FB) * ('01) 25 Bom 337 (347, 348) : 27 Ind App 216 (PC).

(2) Where any law sets out the jurisdiction of the Court in general terms without particularising the remedies or processes for its exercise the jurisdiction includes the authority to issue necessary writ or process. AIR 1940 Rang 84 (89): 1940 Rang LR 325 (SB).

(3) Suit instituted in a Court having no jurisdiction — Defect is fatal — Not cured by its subsequent transfer to proper Court. AIR 1935 Pesh 174 (175) * ('87) 9 All 191 (202) : 13 Ind App 134 (PC) * AIR 1952 Madh Pra 196 (199): Madh BLJ 1955 HCR 1315. (Proper remedy is to return plaint for presentation to proper Court.)

(4) Decree of superior Court obtained by fraud — Inferior Court competent to try suit can set it aside. AIR 1919 Sind 53 (54) : 13 Sind LR 144 * AIR 1918 Mad 711 (712) : 41 Mad 213 (DB) * ('07) 11 Cal WN 579 (581) (DB).

(5) No matter is beyond the jurisdiction of a superior Court of Record (like a Chartered High Court) unless it is expressly shown to be so. AIR 1940 Rang 84 (89): 1940 Rang LR 325 (SB).

(6) The question of pecuniary jurisdiction of a Court cannot be raised collaterally by a subsequent suit challenging the previous decision. AIR 1950 Pat 473 (477) : 29 Pat 699 (DB).

(7) Jurisdiction of civil Courts fixed under Rajasthan Ordinance 7 of 1950 can only be changed by notification under ordinance — Notification under Rajasthan Territorial Divisions Ordinance cannot change it. AIR 1957 Raj 241 (243) : ILR (1957) 7 Raj 702.

(8) United States of Rajasthan Civil Courts Ordinance (31 of 1948) — District Judge had unlimited jurisdiction to hear all suits for the time being cognizable by Civil Courts — Hence such suit should be filed in Court of District Judge and not in High Court. 1952 Raj LW 37 : ILR (1951) 1 Raj 741 (DB).

**5. Satisfactory valuation not possible.**— (1) In suits which are not capable of satisfactory valuation for purposes of jurisdiction, such as suits for the restitution of conjugal rights and suits for the removal of a trustee, plaintiff's valuation should be accepted as determining jurisdiction. ('06) 28 All 545 (551) (FB). (Restitution of conjugal rights.) * ('11) 35 Bom 264 (265) (DB). (Adoption.) * ('10) 37 Cal 860 (862) (DB). (To set aside adoption.) * ('07) 34 Cal 352 (356) (DB). (Restitution of conjugal rights.)

[But see ('91) 18 Cal 378 (381). (Appeal to Privy Council.) * AIR 1927 Mad 563 (565): 50 Mad 646 (DB) * AIR 1935 Mad 874 (875).]

(2) A sues for a declaration of the validity of an adoption or to set aside an adoption. The relief claimed affects properties which the person adopted will be entitled to and, therefore, the market value of the properties will determine jurisdiction. AIR 1927 Mad 563 (565): 50 Mad 646 (DB).

[See also AIR 1924 Mad 84 (85).]

(3) Suit to set aside a document or to compel the registration of a document — Value of interest affected by the document is value for purposes of jurisdiction. ('08) 31 Mad 89 (93) (FB). (Suit to enforce registration.) * AIR 1924 Mad 84 (84, 85). (Suit to set aside award.)

**6. Imporper valuation. — Effect.** — (1) Plaintiff is not at liberty to place an arbitrary value on his suit or to misrepresent

**16. Suits to be instituted where subject-matter situate.**—Subject to the pecuniary or other limitations prescribed by any law, suits—

(a) for the recovery of immoveable property with or without rent or profits,

(b) for the partition of immoveable property,

(c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immoveable property,

(d) for the determination of any other right to or interest in immoveable property,

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**Section 15 — Note 6 (contd.)**

its real value so as to have it tried by a Court different from that intended by Legislature. AIR 1932 All 413 (414) (DB) * ('84) 8 Bom 31 (33, 34) (DB) * ('13) 21 Ind Cas 771 (772) (DB) (Cal) * ('12) 40 Cal 245 (249) (DB) * AIR 1914 Lah 214 (216): 1913 Pun Re No. 111 (FB) * AIR 1925 Rang 278 (278).

[See AIR 1959 Punj 646 (648).]

[But See ('13) 18 Ind Cas 363 (363) (FB) (Mad).]

(2) In case of false allegations in plaint the Court may require the plaintiff to prove that the valuation is proper. ('01) 24 Mad 158 (159) * AIR 1924 All 652 (656):46 All 553 * AIR 1915 Mad 444 (445).

(3) The mere change in the forum consequent on the overvaluation or undervaluation of a suit will not be considered as affecting the disposal of the suit on the merits. AIR 1918 Mad 590 (591) (DB)* ('97) 24 Cal 661 (664) (DB).

(4) Where, owing to the undervaluation of a suit, the appeal from the decree is heard and decided by a District Court instead of by the High Court, the decree passed by the District Court is a nullity. ('11) 38 Cal 639 (668) (DB).

**7. Valuation for jurisdiction and for court-fees.**—(1) Valuation for court-fees does not necessarily determine the value of the subject-matter of a suit for purposes of jurisdiction. AIR 1940 Cal 375 (375) (DB) * ('87) 11 Bom 591 (595) (DB). (Per Birdwood J.) * ('80) 4 Bom 515 (527) (FB).

(2) Suit for bare declaration of title to property — Court-fee payable is fixed amount under Sch. II, Art. 17 of Court-fees Act — Valuation for jurisdiction is real value of property. AIR 1918 PC 188 (191): 43 Bom 507: 46 Ind App 24.

(3) The Suits Valuation Act and the Court-fees Act have no bearing on the question as to which is the proper Court for the institution of the suit, having regard to the property involved in the suit. AIR 1932 All 413 (414) (DB).

(4) Where the suit for a declaration that the election of the defendant as Mayor to the City Corporation of Trivandrum is invalid is valued for purposes of jurisdiction at Rs. 100, Section 62 of Trivandrum City Municipal Act has no application and the suit has to be instituted in the Court of the District Munsiff and not the District Court. AIR 1959 Ker 160 (161):1958 Ker LT 1111 (DB).

(5) Partition suit plaintiff seeking partition after adjudication of his title to property — Value of plaintiff's share determines jurisdiction of Court. (1962) 28 Cut LT 433 (435) * 1953 Pat 342:1953 BLJR 359 (DB).

(6) Suit for declaration of title and injunction — Restraining execution of decree by sale of suit property — Property of greater value than decretal amount — Valuation cannot be made on basis of decretal amount but should be on market value involved. AIR 1954 All 782 (783): 1954 All LJ 541 (DB).

**8. Mode of valuation.**—(1) Generally the amount of the claim or the actual value of the property claimed determines jurisdiction. See ('66) 3 Mad HCR 170 (172) * AIR 1967 Bom 389 (391): 69 Bom LR 172. (Valuation of subject-matter is a consideration in determining jurisdiction.)

(2) In suits referred to in S. 8 of the Suits Valuation Act, the value for purposes of jurisdiction as well as for court-fees is the same. AIR 1921 Cal 84 (85).

(3) Jurisdiction of a Court to entertain a suit is determined by the allegations made in plaint and not by result of the suit. AIR 1954 All 749 (750) * (1951) 3 Pepsu LR 458. (Competency of Court to try suit — To be determined by jurisdictional value in plaint as framed and not by amount ultimately decreed.)

**9. Suit for dissolution of Muhammadan marriage.**—(1) Suit for dissolution of a Muhammadan marriage — S. 15 applies — Value of suit less than Rs. 1000 — Suit can be instituted in Munsif's Court. AIR 1937 Cal 189 (190, 191):ILR (1937) 2 Cal 79 (SB).

**10. Mode of valuation for appellate jurisdiction.**— See Notes on Section 96.

**11. Suits embracing two or more subjects.**—(1) The aggregate value of the different subjects included in suit constitutes the value of the suit. ('93) 16 Mad 328 (329) (DB) * ('12) 36 Bom 628 (637) (DB) * ('81) 6 Cal 6 (8) (DB).

**12. Objection to jurisdiction.**—See Section 21.

## SECTION 16 — SYNOPSIS

1. Scope and object.
2. Pecuniary and other limitations.
3. Immovable property.
4. Clause (a).
5. Clause (b).
6. Clause (c).

(e) for compensation for wrong to immoveable property,

(f) for the recovery of moveable property actually under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate :

Provided that a suit to obtain relief respecting, or compensation for wrong to, immoveable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

Explanation — In this section "property" means property situate in [a][India]. [1882, 1877, S. 16; 1859, S. 5.]

[a] Substituted for 'the States' by the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), S. 3 [1-4-1951].

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**Section 16 — Synopsis (contd.)**

**7. Clause (d).**
**8. Clause (e).**
**9. Clause (f).**
**10. Proviso.**
**11. "Held by or on behalf of the defendant".**
**12. Specific performance.**
**13. "Actually and voluntarily resides".** See Section 20.
**14. "Carries on business".** See Section 20.
**15. "Personally works for gain".** See Section 20.
**16. Chartered High Courts.**
**17. Explanation.** See Notes 1, 5, 9, 10.

**TOPIC INDICATOR**

Immovable property.
—Charge upon. See Note 6.
—Compensation for wrong to. See Note 8.
—Mortgage of. See Note 6.
—Partition of. See Note 5.
—Recovery of. See Note 4.
—Right or interest in. See Note 7.
Moveable property under distraint or attachment. See Note 9.

**1. Scope and object.**—(1) Suits for the recovery of immovable property, or for the determination of any other right or interest in immovable property or for the recovery of movable property actually under distraint or attachment must be instituted in the Court within the local limits of whose jurisdiction the property is situate. ('90) 17 Cal 699 (703) (FB) * AIR 1928 Mad 1272 (1277).

[See ('85) 12 Cal 225 (237, 238):12 Ind App 215 (PC).]

(2) The object of the section is to limit the territorial jurisdiction of Courts in regard to the property. ('90) 17 Cal 699 (703) (FB) * ('99) 23 Bom 22 (31) (DB).

[See also AIR 1950 FC 83 (105):1949 FCR 849.]

(3) Courts have no power to decide on rights and interests in property lying outside their local jurisdiction. ('99) 23 Bom 22 (31) (DB) * AIR 1931 Sind 47 (48): 25 Sind LR 204 (DB) * ('90) 17 Cal 699 (703) (FB).

(4) The general rule that the Court within the limits of whose jurisdiction a part of the cause of action arises can entertain the suit is not applicable to the suits governed by this Section, unless the case is covered by the proviso. AIR 1952 Assam 95 (96) (DB).

(5) The explanation makes it clear that Courts have no power to entertain suits in respect of property situate outside India. AIR 1955 Cal 159 (161) (DB) * AIR 1958 Cal 700 (701) : ILR (1956) 1 Cal 503 (504) (DB) * AIR 1953 Mad 492 (496) (DB) * AIR 1941 Mad 129 (137) (DB) * AIR 1941 Nag 36 (38, 49): ILR (1941) Nag 1 (FB) * ('81) 3 All 568 (572) (DB) * AIR 1918 Nag 151 (152) * AIR 1935 Nag 250 (255) : 31 Nag LR (Sup) 43 (FB) * AIR 1935 Nag 192 (193): 31 Nag LR 357 (DB).

(6) Courts are not precluded from trying any question in respect of property lying outside their territorial jurisdiction where such question arises incidentally. ('80) 5 Cal 923 (931) (DB) * ('99) 23 Bom 22 (30) (DB) * ('67) 4 Bom HCR 173 (175) * ('11) 10 Ind Cas 267 (267) (DB) (Mad).

[See also ('97) 19 All 450 (451).]

(7) The section applies to suits for the recovery of immovable property as well as moveable property provided the immovable property is situate, wholly or in part within the Court's local jurisdiction. AIR 1926 Lah 503 (504) (DB) * AIR 1931 Sind 50 (52): 25 Sind LR 275 * (1963) 2 Andh WR 474: (1964) 1 Andh LT 168 (171) (DB). (But if immovable property is situate outside Court's jurisdiction suit is not maintainable merely because movable property is situated within its jurisdiction.)

(8) An officer having territorial jurisdiction over the entire district and presiding from time to time over both the Courts at places X and Y in the District is competent, while sitting at X, to entertain a plaint in a mortgage suit in respect of properties situate in area Y. AIR 1955

**Section 16 — Note 1 (contd.)**
Assam 217 (217): ILR (1955) 7 Assam 275 (DB).

(9) Trust created by foreign sovereign in Bombay City and registered under Bombay Public Trusts Act — Trustees, beneficiaries and assets within jurisdiction of Bombay City — Suit for removal of trustees and appointment of new trustees — Bombay City Civil Court has jurisdiction to entertain, and appoint receiver. AIR 1959 Bom 275 (279, 280): 60 Bom LR 660.

(10) Suit by lessee for refund of premium amount on basis of frustration of contract of lease is governed by S. 20 and not by S. 16. AIR 1961 Punj 143 (145) : ILR (1960) 1 Punj 384 (DB) (Overruled on another point in AIR 1963 Punj 49 (FB).)

**2. Pecuniary and other limitations.** — (1) A suit under Section 92 must be instituted in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by State Government. Jurisdiction to entertain a suit under Section 92 depends only upon the existence within jurisdiction of property which is the subject-matter of the trust. Sections 16, 17 and 20 are not applicable to such suits. AIR 1955 Bom 55 (57, 58).

(2) By reason of the express provision in Section 120, Sections 16, 17, 20 do not apply to the High Court in exercise of its ordinary original civil jurisdiction. AIR 1955 Bom 55 (58).

(3) Suit for possession of land and for mesne profits — Various notifications limiting jurisdiction of Khetri Courts to suits in which both parties are residents of Thikana Khetri — Plaintiff not resident of Thikana Khetri — Situation of property in Khetri did not give jurisdiction to Khetri Court. ('48) 1948 Jaipur LR 89 (92) (DB).

(4) For instances of pecuniary limitations, see Section 15.

**3. Immovable property.** — (1) Under Section 3 (26) of the General Clauses Act 'immovable property' includes—

(a) land.
(b) benefits to arise out of land, and
(c) things attached to the earth, or permanently fastened to anything attached to the earth.

**(a) Land.** — (2) The word 'land' includes water covering the land and includes a jalkar or a right of fishery. ('78) 3 Cal 276 (279) (DB) * ('93) 20 Cal 446 (448) (DB) * ('97) 24 Cal 449 (454) (DB) * ('92) 19 Cal 544 (547, 554, 570, 571) (FB) * ('97) 1897 Pun Re No. 48 p. 215 (217).

[See ('91) 18 Cal 80 (82, 83).]

(3) Jalkar includes the right to drift stranded timber as well. ('97) 24 Cal 504 (517): 24 Ind App 33 (PC).

(4) Right to fish in territorial sea waters is common to all and is not property of any kind. ('77) 2 Bom 19 (48, 53) (DB).

**(b) Benefits to arise out of land.** — (5) Benefits arising out of land include such incorporeal hereditaments as issue out of, or are connected with immovable property so called and savouring of realty. ('81) 5 Bom 322 (335) (DB).

(6) Rights of common rights of way and profits in alieno solo such as rents, pensions and annuities secured upon land are benefits arising out of land. ('81) 5 Bom 322 (336) (DB).

The following are within the definition of immovable property:

(7) A right of ferry. (('13) 35 All 156 (157) * ('90) 13 Mad 54 (55) (DB).

(8) A hat. ('09) 36 Cal 665 (669) (DB) * ('95) 22 Cal 752 (755) (DB).

[See ('02) 29 Cal 614 (617, 618) (DB).]

(9) An easement. AIR 1941 Mad 91 (95): ILR (1941) Mad 157 * ('09) 4 Ind Cas 116 (117) (Cal) * ('75) 24 Suth WR 300 (300) (DB).

(10) The interest of a Hindu widow in the rents of her husband's lands. ('99) 23 Bom 1 (11).

(11) A malikana right. ('87) 9 All 591 (601).

(12) A haq-i-chaharam or liability to pay customary dues attached to land. ('73) 1 Ind App 34 (50) (PC).

The following are not immovable properties:

(13) A sayer compensation, i.e., duty which an owner of a bazaar levies on commodities sold there is not immovable property. ('92) 19 Cal 8 (10, 12) (DB).

(14) A chance of acquiring a right to light and air is not immovable property inasmuch as it is incapable of any valuation at all. ('96) 20 Bom 704 (715) (DB).

(15) It is the nature of the thing that has ordinarily to be looked to for determining whether it is immovable property. ('81) 5 Bom 322 (335) (DB).

(16) In certain cases a right is in law, deemed to be immovable property, independent of the nature of the right. ('81) 5 Bom 322 (335) (DB) * ('74) 1 Ind App 34 (50) (PC).

(17) Hereditary offices are by Hindu law regarded as immovable property. ('73) 1 Ind App 34 (50) (PC) * ('81) 5 Bom 322 (335) (DB) * ('84) 10 Cal 73 (73, 74) (DB) * AIR 1918 Nag 151 (151).

(18) A right to levy a cess or rate granted by the Peshwa is immovable property. ('09) 33 Bom 373 (375) (DB) * ('84) 6 Bom 546 (560) (FB).

**Mortgage:** — (19) A mortgage is an interest in immovable property and is therefore, itself immovable property. AIR 1927 Lah 373 (375) (DB) * AIR 1929 All 161 (164): 51 All 494 (DB) * ('93) 17 Bom 570 (572) (DB) * AIR 1916 Bom 272 (273): 40 Bom 337 (DB) * AIR 1926 Lah 660 (661).

(20) Where the mortgage includes a covenant to pay there is also a "debt" and for purposes of execution by attach-

**Section 16 — Note 3 (contd.)**

ment and sale, such "debt" is moveable property. AIR 1924 All 796 (798): 46 All 917 (DB) * ('02) 26 Bom 305 (309, 310) (DB) * ('93) 15 All 134 (135) (DB) * ('95) 19 Bom 121 (123) (DB) * ('93) 20 Cal 805 (809) (DB) * ('86) 12 Cal 546 (550) (DB) * ('09) 1 Ind Cas 450 (451) (Lah) * AIR 1915 Mad 209 (210): 37 Mad 51 (DB) * AIR 1919 Oudh 132 (133): 21 Oudh Cas 400 (DB).

(21) The definition of 'immovable property' as well as other definitions given in Section 3 of the General Clauses Act apply only where there is no repugnancy thereto in the subject or context. Order 21, Rule 46 relating to the attachment of debts constitutes such a repugnancy in respect of execution by attachment and sale of mortgage debts. Therefore the 'debt' in the covenant to pay, included in a mortgage, is moveable property for the purposes of execution by attachment and sale. ('02) 26 Bom 305 (305, 311) (DB).

(22) Where a decree is passed on a mortgage and the right to or interest in, immovable property has thus been determined, the mortgage decree is not immovable property. ('01) 26 All 603 (605) (DB) * ('91) 13 All 89 (91) (DB) * ('02) 6 Cal WN 5 (6) (DB) * AIR 1919 Nag 19 (20): 16 Nag LR 72.

[But see ('77) 1 Bom 267 (268) (DB) * ('72) 9 Bom HCR (AC) 64 (64) (DB).]

(23) A right to mesne profits under a decree on a mortgage does not constitute immovable property. ('99) 22 Mad 356 (357) (DB).

(24) An equity of redemption is immovable property. ('94) 18 Bom 739 (745) (DB) * ('97) 21 Bom 226 (228) (DB) * ('95) 22 Cal 33 (41) (DB).

**(c) Things attached to the earth.** — (25) Trees standing on land are immovable property, ('67) 2 Agra 300 (301) (DB) * ('83) 5 All 564 (566) (FB) * (1900) 24 Bom 31 (33) (DB) * ('98) 22 Bom 610 (611) (DB) * ('08) 7 Cal LJ 152 (157, 166) (DB) * ('97) 20 Mad 58 (63, 66) (FB) * ('89) 12 Mad 203 (209) (FB).

(26) By virtue of Section 2 (13) growing crops are movable property for the purposes of the Code. See Section 2, Clause (13).

(27) Tiled huts are immovable property. ('68) 10 Suth WR 416 (417) (DB) * ('72) 17 Suth WR 309 (311) (FB) * ('04) 31 Cal 340 (342).

(28) Doors and windows which are fixed to and are part of, a building are immovable property. ('85) 11 Cal 164 (166) (DB) * ('90) 13 Mad 518 (520) (DB).

(29) For other illustrations, see the following cases. ('79) 4 Cal 948 (948). (Flour and oil mill, steam engine and boilers are fixtures when attached to the earth.) * ('31) AIR 1931 Rang 109 (111): 9 Rang 13. (Suit for damages for preventing plaintiff from removing buildings and materials.) * ('72) 4 NWPHCR 15 (16). (Stone sugar mill is only movable.) * ('35) 39 Cal WN 1018 (1023, 1024). (Machinery and plant permanently installed must be looked upon as land itself.) * ('71) 15 Suth WR 499 (499). (Thatch when severed is moveable.) * AIR 1959 Cal 461 (462) (DB). (A machinery should ordinarily be regarded as movable property. In the absence of any averment as to the nature of machinery installed the machinery cannot be said to be permanently fixed or fastened to the earth.)

**4. Clause (a).** — (1) This clause refers to suits to recover possession of immovable property where the title to that property is in dispute. AIR 1941 Bom 247 (249, 250): ILR (1941) Bom 361 (DB) * AIR 1919 All 350 (350): 41 All 513 (DB).

(2) Where the properties are within India, but within the jurisdiction of different Courts, a suit for the recovery thereof may, under Section 17, be instituted in any Court within the local limits of whose jurisdiction any portion of such properties is situate. See AIR 1954 Madh B 156 (158, 160).

(3) A suit for the recovery of property after setting aside a decree must be brought in the Court within the local limits of whose jurisdiction the property is situate though the decree may be that of another Court. ('01) 5 Cal WN 559 (561) (DB) * ('06) 8 Bom LR 516 (516).

(4) If the suit is merely to set aside the decree without anything more, it may be instituted in the Court which passed the decree though the properties affected by the decree are situated elsewhere. AIR 1924 Pat 831 (831) (DB) * ('01) 5 Cal WN 559 (561) (DB).

(5) Mere presence of immovable property belonging to the defendant within the jurisdiction of the Court, does not give jurisdiction to it to entertain a suit for recovery of money due under a foreign judgment from the defendant. AIR 1958 Mad 203 (204) (DB).

(6) Where the suit is properly instituted in Court at X in the Punjab State, appeal from that Court would lie to the District Judge at X in the Punjab and not to the District Judge at Y in Pepsu merely because at the time of the institution of appeal the property lies in the jurisdiction of the Court at Y in Pepsu owing to the subsequent transfer of territories. Section 16 has no application in these circumstances. ('55) ILR (1955) Patiala 69 (72).

**5. Clause (b).** — (1) A suit for the partition of immovable property must be brought in the Court within whose jurisdiction the property is situate. AIR 1952 Bom 365 (370) (DB).

(2) Where the property is situate outside India the Court cannot grant any

**Section 16 — Note 5 (contd.)**

relief in respect of such property. AIR 1955 Cal 159 (161) (DB) * AIR 1957 Punj 214 (216. 218): ILR (1957) Punj 1032 (DB) * ('53) AIR 1953 Mad 492 (496) (DB) * AIR 1951 Mad 742 (744) * AIR 1946 Mad 398 (402 to 405): ILR (1946) Mad 858 (DB) * AIR 1928 Nag 295 (295, 296): 24 Nag LR 95.

[See also AIR 1943 Mad 721 (723, 724): ILR (1944) Mad 202.]

[See however AIR 1942 Mad 614 (621): ILR (1942) Mad 376 (DB).]

[But see AIR 1923 Lah 551 (553) (DB).]

(3) In a suit for partition of property situate in foreign country, even if the defendant submits to the jurisdiction of the Court in India, where the suit is instituted, such submission is taken to be only to the extent of the jurisdiction possessed by such Court and no further. No amount of consent, waiver or acquiescence can confer such jurisdiction which such Court has not. AIR 1957 Punj 214 (218): ILR (1957) Punj 1032 (DB).

(4) In the case of movables a suit for partition will lie in the Court within whose jurisdiction the property lies. AIR 1952 Bom 365 (370) (DB).

(5) Suit for partition covering both immovable and movable property — Suit not maintainable if only movable property is situated within Court's jurisdiction. (1963) 2 Andh WR 474: (1964) 1 Andh LT 168.

(6) Suit for maintenance with alternative relief of partition of immovable property outside jurisdiction of Court — Not maintainable in regard to later relief. (1967) 33 Cut LT 1056: ILR (1966) Cut 926.

**6. Clause (c).** — (1) Suit on mortgage, being a suit for reliefs respecting immovable property, must be brought in the Court within the local limits of whose jurisdicion the property is situate. ('83) 9 Cal 733 (735) * AIR 1954 MB 156 (158) * ('93) 17 Bom 570 (572) (DB) * ('76) 1 Cal 163 (167): 3 Ind App 1 (PC) * ('68) 9 Suth WR 170 (173) (FB) * ('66) 1 Ind Jur (NS) 319.

(2) If the land is beyond the Court's local jurisdiction, the suit is incompetent. AIR 1953 Bom 75 (76) * AIR 1952 Bom 75 (75) (DB) * AIR 1935 Nag 192 (193): 31 Nag LR 357 (DB).

[See AIR 1938 Lah 226 (227).]

(3) Court is not precluded in a suit for redemption from incidentally deciding questions relating to the mortgaged property held by the defendants outside the jurisdiction for the purpose of deciding plaintiff's right to recover the mortgaged property within the jurisdiction. AIR 1951 All 462 (467): ILR (1951) 2 All 703 (DB) * ('77) 1 All 431 (433) (DB).

[See also ('80) 5 Cal 928 (930).]

(4) A suit by a purchaser for contribution in respect of payment made on account of an arrear of revenue against a person on whose part there is no personal obligation to pay but whose estate alone is liable, must be brought within the local limits of the jurisdiction of the Court where the property is situate. AIR 1916 Mad 980 (981): 39 Mad 795 (DB).

(5) A decree in a suit on hypothecation bond filed in Court which has no jurisdiction over hypothecated property, can be looked upon only as money decree. ('86) 8 All 117 (119) (DB).

[See also ('04) 27 Mad 118 (119, 120).]

(6) Where after the institution of a mortgage suit in a Court having jurisdiction but before the passing of a final decee, the area in which the property is situate is transferred to the jurisdiction of another Court, the final decree passed by the Court where the suit is instituted is not bad. AIR 1925 Mad 117 (118) (DB) * AIR 1932 Sind 67 (69).

[See also ('10) 7 Ind Cas 864 (1) (864) (Mad).]

**7. Clause (d).** — (1) A suit falling under Clause (d) must be instituted in the Court within the local limits of whose jurisdiction the property is situate. AIR 1948 Pat 384 (385): 26 Pat 523 (DB) * AIR 1955 Sau 55 (55) * AIR 1941 Cal 363 (364) * AIR 1941 Mad 91 (95): ILR (1941) Mad 157 * AIR 1919 All 350 (350): 41 All 513 (DB) * ('04) 6 Bom LR 301 (302) (DB) * (1966) 68 Bom LR 886 (890): 1967 Mah LJ 98. (Decree-holder's suit under Order 21, Rule 63 that property is liable to attachment and sale — Property situate in Poona — Suit in Bombay City Civil Court not maintainable.)

[See also ('69) 1 NWPHCR 288 (289).]

(2) If the property be situate within jurisdiction, the Court has power to try a suit in respect thereof even though the parties may happen to be residents in a foreign State. AIR 1915 Mad 116 (116) (DB).

[See also AIR 1941 Bom 247 (249, 250): ILR (1941) Bom 361 (DB) * AIR 1941 Mad 91 (95, 96): ILR (1941) Mad 157.]

(3) It is necessary that the suit itself is for the purpose of determining rights to or interest in immovable property; it is not enough, for the clause to apply, to say that the relief granted in the suit would indirectly affect rights in immovable property. AIR 1923 Mad 109 (110) (DB) * AIR 1931 Lah 673 (674).

(4) Following are not suits within Clause (d) notwithstanding the fact that the relief claimed may indirectly affect right to or interest in immovable property:

(a) A suit for a declaration that a will is a forgery. AIR 1923 Mad 109 (110) (DB).

(b) Suit for declaration that a certain adoption is invalid. ('29) 30 Mad LW 691 (695, 696) (DB).

(c) A suit for an administration of an estate which does not involve a

**Section 16 — Note 7 (contd.)**

direct dealing with property outside jurisdiction. AIR 1921 Low Bur 82 (86, 87): 11 Low Bur Rul 188 (DB).

[See AIR 1926 Lah 503 (504). (Reversing AIR 1926 Lah 456.)]

[See also ('03) 30 Cal 369 (383).]

[See however AIR 1960 Cal 691 (692. 693): 64 Cal WN 711 (DB). (Suit for administration of estate of deceased — One item of immovable property situate outside jurisdiction — Suit not one for determination of right to immovable property— It can be tried by Court if any part of cause of action arises within its jurisdiction. ILR 30 Cal 369; 32 Ind App 193, Rel. on; AIR 1926 Lah 503, Dissented from.)]

(d) A suit for dissolution of partnership. ('55) Madh BLJ 1955 HCR 1074 (1076) (DB) * ('19) AIR 1919 All 350 (350): 41 All 513 (DB).

(e) Suit to have certain lands registered as owner in the revenue records. ('95) 19 Bom 43 (45) (DB).

(f) A suit for money paid as compensation for land acquired under the Land Acquisition Act. ('83) 6 Mad 344 (347) (DB).

(g) A suit on an agreement to lease. ('74) 22 Suth WR 287 (287) (DB) * (1962) 40 Mys LJ 1053 (1054). (Suit for recovery of rent under agreement of lease.)

[But see ('06) 33 Cal 1065 (1075) (DB).]

(h) A suit under Section 36 of the Bengal Money Lenders Act (1940) to re-open a mortgage decree. AIR 1942 Cal 69 (71): ILR (1942) 1 Cal 235 (DB).

(i) A simple suit for recovery of money under a foreign judgment. AIR 1958 Mad 203 (205) (DB).

(5) The words "determination of any right" do not only mean determination of an existing right; these words also include the determination of a right claimed which may not be in existence at the time the suit is brought. AIR 1941 Bom 247 (249): ILR (1941) Bom 361 (DB). (Suit for specific performance and possession.) * AIR 1916 Bom 272 (273): 40 Bom 337 (DB). (Suit for maintenance praying for charge on land.)

(6) Suits in respect of the following rights fall under the clause :

(a) A right to a toda giras hak. ('73) 1 Ind App 34 (53) (PC).

(b) A right to the possession and management of a saranjam. ('91) 1 Bom 247 (255) (DB).

(c) A right to open a water course through land. (1865) 4 Suth WR 107 (107) (DB).

(d) A right to hold land free of Government assessment. ('74) 11 Bom HCR 1 (2) (DB). (A case under Limitation Act.)

[But see ('98) 20 All 35 (36, 37) (FB).]

(e) A mortgage right. ('74) 8 Mad HCR 100 (102) (DB). (Mortgage of a house standing on site exclusive of site — Limitation Act.)

(f) Varshasans (annual allowance) charged on immovable property. ('99) 23 Bom 22 (26) (DB).

(g) A right to levy toll on all imports and exports from a State into British territory. ('01) 33 Bom 373 (376).

(h) A right to emoluments of a hereditary office arising out of a grant by the sovereign power, but not if the emolument is due by custom. (1887) 2 Moo Ind App 23 (35, 36) (PC) * ('82) 6 Bom 512 (515) (FB). (3 Bom 28, Not followed.) * ('99) 22 Mad 351 (352) (DB).

(i) A right to eject a person from land coupled with a right to recover rent. AIR 1923 Cal 619 (621) (DB).

(j) A right to future rent where such right is denied, but not a right to arrears of rent accrued due. ('99) 23 Bom 22 (30) * ('95) 5 Mad L Jour 95 (99) * AIR 1955 All 416 (416) (DB) * ('69) 6 Bom HCR (AC) 29 (30) (DB) * ('99) 26 Cal 204 (218) * ('97) 19 All 450 (451) (DB) * AIR 1923 Cal 619 (621) (DB).

(k) A right to maintenance or other amount to be charged on immovable property. AIR 1953 Orissa 25 (29): ILR (1952) Cut 451 (DB) * AIR 1916 Bom 272 (273): 40 Bom 337 (DB) * ('71) 15 Suth WR 277 (278) (DB) * AIR 1926 Lah 660 (661) * AIR 1935 Mad 1043 (1043) * AIR 1968 Cal 305 (309).

[See howerer AIR 1961 Orissa 69 (70): 26 Cut LT 274. (Suit for reducing amount of maintenance charged on property — Section 20 (c) and not Section 16 (d) applies.)]

[But see ('83) 9 Cal 535 (555) (DB).]

(l) Suit for recovery of dower debt and declaring it a charge on the estate. AIR 1948 Pat 384 (385): 26 Pat 523 (DB).

(m) Suit under Para. 20 of Sch. II (now repealed) to file an award declaring the proprietary title to immovable property. AIR 1933 All 380 (382): 55 All 542 (DB).

(n) A suit under Order 21, Rule 63, C. P. C. for determination of right or interest of judgment debtor in the attached property. (1966) 68 Bom LR 886 (890): 1967 Mah LJ 98.

(7) Where a dispute referred to arbitration out of Court involves the determination of a right to or interest in immovable property, the Court will have no jurisdiction to file the award if the property is situate outside the jurisdiction. AIR 1938 Lah 226 (227) (DB) *

**Section 16 — Note 7 (contd.)**
AIR 1934 Lah 652 (653) (DB) * AIR 1934 Sind 183 (184).

(8) A suit for the recovery of commission on coal sold by the plaintiff during the term of the lease of coal mines in favour of the defendant does not fall under this clause. AIR 1948 Nag 286 (287): ILR (1948) Nag 200.

(9) A suit for damages for breach of an agreement to sell immovable property does not relate to any right or interest in immovable property. The mere fact that the plaintiff prays for a charge on the property does not bring it within Clause (d). ('55) 1955-2 Mad L Jour 228 (229).

**8. Clause (e).** — (1) This clause applies to all wrongs of a civil nature affecting immovable property such as trespass, nuisance, etc. Such suits must be instituted in the Court within the local limits of whose jurisdiction the property is situate. ('93) 20 Cal 689 (692) (DB) * AIR 1922 Bom 188 (188): 46 Bom 108 (DB) * ('54) Madh BLJ 1954 HCR 65 (68).

**9. Clause (f).** — (1) Where moveable property situated in a foreign State and belonging to a person within the jurisdiction of an Indian Court is under attachment of a Civil Cour of such foreign State, the Indian Court has no jurisdiction to deal with such moveable property. ('12) 14 Ind Cas 279 (282) (DB) (Mad).

(2) Where the property in question is claimed by the plaintiff under the sale and his case is that the property is not liable to attachment in execution of a decree against his vendor, the suit in effect is for the recovery of the property after the declaration of his title to him. AIR 1965 Assam 35 (36): ILR (1965) 17 Assam 17. (It is the substance of the plaint which has got to be looked into and not the language of the relief. Section 16 (f) applies.)

**10. Proviso.** — (1) This proviso is based on the well-known maxim, equity acts in personam, whereby the Court looks to the fulfilment of its decree to the person of the defendant. ('55) Madh BLJ 1955 HCR 1074 (1077) (DB).

[See also ('09) 36 Cal 233 (235): 1 Ind Cas 927 (928) * AIR 1965 All 72 (75, 76): 1963 All LJ 1089 (DB).]

(2) The jurisdiction of Courts in this country is governed and must be ascertained by the same principles except so far as they may be at variance with the legislative enactments. (1900) 24 Bom 407 (411) (DB) * AIR 1934 Sind 123 (127): 28 Sind LR 54 (DB).

(3) The proviso applies only where the relief is respecting immovable property situated within and not beyond India. ('09) 33 Bom 373 (375) (DB).

(4) If the relief sought is in respect of movable property situate in a foreign State and can be obtained entirely through the personal obedience of the defendant, within jurisdiction, a decree in personam can be passed. ('12) 14 Ind Cas 279 (282) (DB) (Mad).

(5) Even if the proviso might not be applicable to cases of land situate outside British India, the English law with regard to jurisdiction in personam would apply to Courts in India, if the relief can be obtained entirely through the personal obedience of the defendant. AIR 1922 Bom 188 (188): 46 Bom 108 (DB) * (1900) 24 Bom 407 (414) (DB) * ('09) 33 Bom 373 (375, 376) (DB) * AIR 1928 Nag 56 (58): 23 Nag LR 170.

(6) The members of a joint Hindu family who have severed their status of coparceners, by notice of demand for partition in a suit instituted in a Court in India, against the karta of the family in India, for partition of properties situated in India, though not entitled to ask for a partition in respect of properties situated in a foreign territory, can ask for a relief not for partition of the properties, but for an account of the income of those foreign properties and payment of their share in the income. AIR 1955 Mad 629 (635): ILR (1956) Mad 282 (DB).

[See also AIR 1951 All 462 (467): ILR (1951) 2 All 703 (DB).]

(7) For the applicability of the proviso the property must be held by or on behalf of the defendant. (1965) 1 Mad LJ 313: ILR (1965) 2 Mad 546.

(8) For the applicability of the proviso the relief must be one which can be obtained entirely through the personal obedience of defendant. ('12) 17 Ind Cas 758 (758) (DB) (Mad) * ('93) 20 Cal 689 (692) (DB) * ('96) 20 Bom 495 (500) (DB) * ('99) 26 Cal 891 (921, 922).

[See also AIR 1961 Cal 422 (426 to 429). (Consent decree creating charge on property situate outside territorial jurisdiction of Court is not unlawful. In execution, Court has jurisdiction to appoint receiver for that property.)]

(9) The proviso cannot be used to enlarge the scope of the principal section. It applies only to those categories of cases provided in Clauses (a) to (f), which are limited to instances where the relief asked for can entirely be obtained by compelling the personal obedience of the defendant. ('55) 1955-2 Mad L Jour 228 (230).

(10) The expression 'personal obedience' must be interpreted with special reference to the fact that the defendants reside or work within the jurisdiction of the Court whose order is to be obeyed; the obedience must be such as the defendants could render without going beyond jurisdiction. ('05) 1 Nag

**Section 16 — Note 10 (contd.)**
LR 121 (124) * ('99) 23 Bom 756 (759) (DB).

(11) In the case of more than one defendant, the proviso will not apply unless all the defendants reside or work within the jurisdiction. ('99) 23 Bom 756 (759) (DB) * AIR 1924 Cal 443 (444) (DB) * ('05) 1 Nag LR 121 (124).

(12) The onus is on the plaintiff to show that the defendant is personally subject to the Court's jurisdiction. ('80) 6 Cal L Rep 417 (420) (DB).

(13) A suit for rent is not a "suit to obtain relief respecting immovable property" within the meaning of the proviso and is not governed by this section but by Section 20. AIR 1955 All 416 (416) (DB) * AIR 1935 Mad 545 (545).

(14) When relief is claimed on basis of a contract, the action is a personal action. A suit for recovery of arrears of rent is one on contract and can be filed in Court in India, within whose jurisdiction defendant is, even though premises are outside India. AIR 1958 Cal 700 (701): ILR (1951) 1 Cal 503 (505) (DB).

(15) A suit for dissolution of partnership is not a suit to obtain a relief respecting, or compensation for, wrong to immovable property. ('55) Madh BLJ 1955 IICR 1074 (1077) (DB).

(16) Mortgagee, giving up his security is entitled to seek personal relief against mortgagor in Court within whose jurisdiction mortgagor resides or carries on business. AIR 1964 Mad 527 (528): (1964) 2 Mad LJ 256 (DB).

**11. "Held by or on behalf of the defendant."** — (1) In a suit for damages for trespass on land where the plaint alleges that the land in dispute was in possession of the plaintiff, he is not entitled to the benefit of the proviso. ('93) 20 Cal 689 (692) (DB).

(2) The property must be held by or on behalf of the defendant at the time of the institution of the suit. ('91) 1891 Pun Re No. 39, p. 220 (221).

(3) It is permissible to ignore the criterion that the immovable property should be held by the defendant at the time of the institution of the suit if the relief claimed by way of damages is obtainable entirely through personal obedience of the defendants. The case, therefore, came within the ambit of proviso to Section 16. (1965) 1 Mad LJ 313 (317): ILR (1965) 2 Mad 546. (Suit for compensation for wrong done to immovable property.)

**12. Specific performance.** — (1) A suit by the vendor for specific performance of a contract to sell land is not a suit in respect of immovable property, but the case might be different if the suit is by the vendee. AIR 1916 Low Bur 44 (45) (DB) * AIR 1933 Mad 436 (437).

(2) Suit for specific performance of the contract to sell land is one for the determination of a right to immovable property and there is no difference between a suit by the vendor or a suit by the purchaser. ('09) 3 Ind Cas 576 (577) (Nag).

(3) A suit by the vendor to enforce specific performance of a contract to purchase land is a suit coming under Clause (d) and a suit by the vendee is covered by the proviso. AIR 1950 Mad 272 (272) * AIR 1933 Mad 436 (437) * AIR 1961 Cal 193 (194): 65 Cal WN 661. (Suit for specific performance of contract to sell land in India — Vendor in Pakistan — Indian Courts have jurisdiction to entertain. AIR 1950 Mad 272, Rel. on.)

[See also AIR 1935 Pat 220 (221).]

(4) A suit for specific performance and possession by the vendee falls, in respect of the former relief, under Cl. (d) of this section and in regard to the latter relief under Clause (a), and a Court within whose local jurisdiction the property is situated can entertain the suit. AIR 1941 Bom 247 (249, 250): ILR (1941) Bom 361 (DB).

(5) A suit to recover unpaid purchase money of land sold is not one coming under Section 16, Clause (d). ('11) 10 Ind Cas 267 (267) (DB) (Mad) * AIR 1920 Mad 578 (578). (Following 10 Ind Cas 267.)

[But see AIR 1933 Mad 436 (437) * ('08) 1908 Pun Re No. 122 p. 550 (551, 552).]

**13. "Actually and voluntarily resides."** — See Section 20.

**14. "Carries on business".** — See Section 20.

**15. "Personally works for gain."** — See Section 20.

**16. Chartered High Courts.** — (1) The section does not apply to Chartered High Courts in the exercise of their original civil jurisdiction. See Section 120.

(2) The High Courts of Calcutta, Madras and Bombay only have original civil jurisdiction. The exercise of their ordinary original civil jurisdiction is governed by Clause 12 of the Letters Patent. See Clause 12 Letters Patent (Calcutta, Madras and Bombay).

**17. Explanation.** — See Notes 1, 5, 9, 10.

**17. Suits for immoveable property situate within jurisdiction of different Courts.**—Where a suit is to obtain relief respecting, or compensation for wrong to, immoveable property situate within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate :

Provided that, in respect of the value of the subject matter of the suit, the entire claim is cognizable by such Court.

[1882, S. 19; 1877, Ss. 19, 22, 23, 24; 1859 Parts of Ss. 11 and 12.]

## SECTION 17 — SYNOPSIS

1. Applicability, scope and object.
2. "Courts."
3. Selection of forum.
4. Different causes of action.
5. Separate suits.
6. Withdrawal of part of claim.
7. Execution.
8. Chartered High Courts.

## TOPIC INDICATOR

Abandonment of claim. See Note 6.
Bar of second suit. See Note 5.
Compromise of claim. See Note 6.
Multifariousness. See Note 4.

**1. Applicability, scope and object.** — (1) Where a suit is to obtain a relief in respect of property situated in the jurisdiction of diffrent Courts, the suit can be brought in any one of the Courts and such Court can deal with the whole of the property, though some portion of it is situated outside its jurisdiction. AIR 1952 Nag 303 (304) : ILR (1952) Nag 182 (FB). (AIR 1942 All 387: ILR (1942) All 862, Doubted) * AIR 1954 Madh B 156 (158) (DB) * ('51) 87 Cal L Jour 375 (378) (DB) * AIR 1941 Lah 347 (351) (DB) * AIR 1941 Mad 129 (136) (DB) * ('87) 14 Cal 661 (667, 670) (DB) * AIR 1934 Pat 292 (296): 13 Pat 486 (DB) * AIR 1930 PC 188 (189): 54 Bom 495: 57 Ind App 194 * ('08) 30 All 560 (561, 562) (FB) * ('07) 5 Cal L Jour 580 (581, 582) (DB) * AIR 1926 Lah 503 (504) (DB) * ('10) 5 Ind Cas 853 (838) (DB) (Lah) * AIR 1929 Oudh 341 (347): 4 Luck 573 (DB) * AIR 1967 All 375 (377): 1967 All WR (HC) 52 * AIR 1968 Mys 82 (84): (1967) 1 Mys LJ 27 * AIR 1953 Orissa 25 (29, 30) : (1953) 19 Cut LT 1 (DB).

(2) Section applies whether several properties are situated in different districts or the same property extends over several districts. ('82) 8 Cal 703 (705) (DB).

(3) For the applicability of the section the property must, in the particular circumstances of the suit, be capable of being described as a single entity. AIR 1942 All 387 (389): ILR (1942) All 862 (DB).

(4) The section is intended for the benefit of suitors and to prevent multiplicity of suits. ('94) 16 All 359 (363) (DB).

(5) Section embraces evidently all the suits relating to immovable property to which S. 16 may apply. (1861) 1861 SDN WP 588.

(6) The section applies only where the properties are situated in India and in jurisdictions to which the Code applies. AIR 1942 Mad 614 (616): ILR (1942) Mad 376 (DB) * AIR 1941 Lah 347 (353) (DB) * AIR 1941 Nag 36 (50, 58, 59): ILR (1941) Nag 1 (FB) * AIR 1914 PC 140 (148): 42 Cal 116: 41 Ind App 197 * AIR 1930 PC 188 (189, 190): 54 Bom 495: 57 Ind App 194 * AIR 1938 Bom 121 (124). ILR (1937) Bom 895 (DB) * AIR 1935 Nag 192 (193): 31 Nag LR 357 (DB) * AIR 1919 PC 150 (152): 42 Mad 813: 46 Ind App 151 * ('95) 17 All 483 (485) (DB).

[See AIR 1941 Mad 129 (132) (DB).]

(7) Once the Court seized of jurisdiction in the case, such jurisdiction would continue till the disposal of the suit and would not be affected by a portion of the territory in which part of the property is situate, ceasing to be a part of British India, pending the decision of the suit. AIR 1943 FC 24 (28): ILR (1943) Kar (FC) 21: 1943 FCR 39. (AIR 1942 Mad 614: ILR (1942) Mad 376, Affirmed.)

(8) Under the Code of 1859, leave had to be obtained from a superior Court to institute a suit in one Court in respect of properties situated in several districts. No such sanction is now necessary. ('81) 3 All 568 (573) (DB) * ('78-80) 2 All 241 (247) (DB) * ('69) 12 Suth WR 328 (328) (DB) * ('91) 1891 Pun Re No. 10 p. 83 (85).

(9) There being no inconsistency in this section, its provisions applied to rent suits in Oudh filed under the Oudh Rent Act. AIR 1929 Oudh 341 (347): 4 Luck 573 (DB).

(10) The provisions of this section were applied to an application for filing an award under the now repealed Sch. II, para 20. AIR 1942 Sind 79 (80): ILR (1942) Kar 36 (DB) * AIR 1941 Mad 129 (134, 137) (DB).

(11) Section cannot apply to suits in respect of immovable property, which are not of any of the categories mentioned in S. 16. AIR 1942 Cal 69 (72): ILR (1942) 1 Cal 235 (DB).

(12) Where suit property situated in different places was alienated to different persons there being a single cause of action to recover property, suit is not bad for multifariousness and is covered by S. 17. AIR 1968 Mys 82 (84): (1967) 1 Mys LJ 27.

**2. "Courts."** — (1) The word "Courts" in this section must be held as meaning Courts to which the Code applies. AIR 1941 Mad 129 (137) (DB) * AIR 1930 PC 188 (190): 54 Bom 495: 57 Ind App 194 *

**Section 17 — Note 2 (contd.)**
('19) AIR 1919 PC 150 (152): 42 Mad 813: 46 Ind App 151 * AIR 1936 PC 189 (191): 15 Pat 567: 63 Ind App 311 * AIR 1914 PC 140 (148): 42 Cal 116: 41 Ind App 197 * ('95) 17 All 483 (484, 485) (DB) * AIR 1938 Bom 121 (124): ILR (1937) Bom 895 (DB) * AIR 1929 Lah 24 (26) (DB).

(2) Where some of the lands comprised in a mortgage are situated in the jurisdiction of Court A and some in a scheduled district to which the Code does not apply, the Court A cannot, in a suit for sale on the mortgage, order the sale of the property in the scheduled district. AIR 1919 PC 150 (152): 42 Mad 813: 46 Ind App 151 * AIR 1930 PC 188 (190): 54 Bom 495: 57 Ind App 194.

[But see AIR 1934 Pat 292 (296): 13 Pat 486 (DB).]

(3) The words "within the jurisdiction of different Courts" in S. 17 mean "within the jurisdiction of different Courts in India, except the areas as mentioned." AIR 1955 Cal 159 (161) (DB).

**3. Selection of forum.**— (1) A portion of the property must actually be existing in the jurisdiction of the Court in which the suit is brought. AIR 1938 Bom 121 (122): ILR (1937) Bom 895 (DB).

(2) Where a mortgage deed mentioned non-existent property within one local area and existing property in another, the Court having jurisdiction over the former area, is not competent to entertain a suit on the mortgage and grant a decree for sale. AIR 1914 PC 67 (71): 41 Cal 972 (988): 41 Ind App 110.

(3) Where the plaintiffs brought a suit in Cuttack Court for declaration of title and injunction against two sets of defendants resident within Cuttack and Kendrapara jurisdictions in respect of properties also situate within those two jurisdictions, the suit, as framed was not bad for multifariousness and was maintainable in Cuttack Court under S. 17 read with O. 1, R. 3, C. P. C. AIR 1960 Orissa 159 (160, 161). (AIR 1952 Nag 303 (FB), Foll.; AIR 1942 All 387, Diss. from.)

(4) Sections 16 to 18 deal with suits relating to immoveable property and suits relating to mixed actions. A reading of Ss. 15 to 20 lead to following legal consequences (1) that a Court has jurisdiction to entertain a suit if the cause of action arises within its jurisdiction though defendant does not reside therein and (2) that a Court has jurisdiction to entertain a suit if the defendant carries on business within its jurisdiction though cause of action arose outside it where therefore, cause of action arose in Pakistan, and the defendant was carrying on business at Delhi, Courts in Delhi can entertain a suit. (1955) 57 Pun LR 51: ILR (1955) Punj 633 (636, 637).

**4. Different causes of action.**—(1) Where a plaintiff has two or more causes of action in the suit, he can take advantage of the provisions of this section if the joinder of such causes of action is permitted by the provisions of O. 1, R. 3 and O. 2, R. 3. If the joinder of such causes of action is bad for multifariousness, then the suit cannot be tried in either of the Courts within whose jurisdiction the properties are situate. AIR 1940 All 205 (206) (DB) * AIR 1933 Mad 622 (624) (DB) * ('81) 7 Cal 739 (745) (DB) * ('01) 4 Oudh Cas 397 (403) * ('10) 5 Ind Cas 835 (838) (DB) (Lah) * ('13) 21 Ind Cas 438 (410) (DB) (Cal) * AIR 1968 Mys 82 (84): (1967) 1 Mys LJ 27.

(2) Where in a suit for partition, the properties are situated in two territorial jurisdictions and the causes of action in respect of two sets of properties are distinct such suit is not maintainable in one jurisdiction. AIR 1964 Pat 79 (80) (DB).

**5. Separate suits.**—(1) Where the plaintiff has a cause of action in respect of properties situated within the jurisdiction of different Courts, there are two courses open to him — (1) he may file a suit on the whole claim in any one of the Courts or (2) he may file separate suits on the same cause of action in respect of each of the properties situated within the jurisdiction of the said Courts and none of such suits will operate as a bar to the others. AIR 1917 Mad 350 (351) (DB). (Suit for partition.) * ('67) 3 Mad HCR 376 (377) * ('84) 1884 Pun Re No. 162 p. 408 (410).

[See also ('05) 28 Mad 216 (223, 224) (DB) * ('70) 5 Mad HCR 419 (421, 422) (DB).]

**6. Withdrawal of part of claim.**— (1) Where a suit is brought in B in respect of the properties situate, one in B District and the other in A district, and the claim in respect of the lands in B is withdrawn or compromised or abandoned by the plaintiff, the B Court does not thereby lose its jurisdiction to proceed to adjudicate on the claim respecting the property in A unless the withdrawal or compromise or abandonment is fraudulent or is a mere device to evade the provisions of the Code as to local jurisdiction. ('08) 30 All 560 (566, 567) (FB). (1885 All WN 125, Overruled.)

[See also ('94) 16 All 359 (363) (DB).]

(2) Where a suit in respect of a house and certain land was filed in a Court within whose jurisdiction the house alone was situate and an appeal from the decree in the suit was filed in the Court to which appeals lie from the decrees of that Court, it was held that the fact that the plaintiff abandoned his claim in respect of the house in appeal and that the appeal related only to the land which did not lie within the jurisdiction of the Appellate Court, would not affect the jurisdiction of that Court to hear the appeal. AIR 1938 Oudh 65 (69) (DB).

**18. Place of institution of suit where local limits of jurisdiction of Courts are uncertain.**—(1) Where it is alleged to be uncertain within the local limits of the jurisdiction of which of two or more Courts any immoveable property is situate, any one of those Courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any suit relating to that property, and its decree in the suit shall

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**Section 17 — Note 6 (contd.)**

(3) The fact that at the time of the decision the plaintiff is found not to have title to a portion of the property within jurisdiction, as alleged does not take away the jurisdiction unless the inclusion of such portion is not bona fide. AIR 1930 Nag 189 (191): 26 Nag LR 103.

**7. Execution.**—(1) No Court can execute a decree in which the subject matter of the suit or of the application for execution, is property situated entirely outside the local limits of its jurisdiction. ('11) 39 Cal 104 (108) (DB) * ('90) 17 Cal 699 (703) (FB).

Also see S. 38.

(2) Where a Court has acquired, under this section, jurisdiction over property situated partly within its limits and partly outside it, it will continue in execution proceedings also. ('92) 19 Cal 13 (15) (DB) * AIR 1933 Lah 687 (687): 14 Lah 457 * ('73) 11 Beng LR 56 (64, 66) (SB)* AIR 1925 Pat 139 (139. 140) (DB).

[See also ('75) 23 Suth WR 154 (155) (DB).]

(3) The reason is that the proceedings in execution of a decree are only a continuation of the proceedings in the suit in which the decree is passed. See ('02) 1902 Pun Re No. 8, p. 30 (33) (DB).

(4) If a Court has jurisdiction to try the suit and to pass a decree therein, it has jurisdiction to sell all the properties comprised in the decree though some of them may be beyond its jurisdiction. The Court may, however, in its discretion, under S. 39 of the Code, send the decree for execution to the other Court. ('92) 19 Cal 13 (16) (DB) * AIR 1925 Pat 139 (140) (DB).

**8. Chartered High Courts.**— (1) This section does not apply to Chartered High Courts in the exercise of their original civil jurisdiction. ('55) AIR 1955 Bom 55 (58).

(2) Under Cl. 12 of the Letters Patent, the High Court can entertain a suit for land suituate partly within and partly without the local limits of its ordinary original civil jurisdicion provided the leave of the Court is first obtained. ('77) 2 Cal 445 (463, 465) (DB) * AIR 1933 Cal 295 (300): 60 Cal 54 (DB) * ('98) 22 Bom 922 (926) * ('80) 4 Bom 482 (488).

[See also ('01) 24 Mad 293 (295) (DB).]

(3) For a suit under Cl. 12 of the Letters Patent for land situate partly within and partly outside local limits of original civil jurisdiction, it is not necessary that the cause of action should arise within such local limits or be one specifically with reference to the portion of the property within those limits. ('08) 36 Cal 28 (40, 41).

(4) Where the suit is for land situated outside the jurisdiction of the High Court and for moveables within the High Court has no jurisdiction to deal with lands and no leave to sue therein can be given. ('96) 19 Mad 448 (451) (DB) * ('80) 4 Bom 482 (488).

(5) The restrictions in Cl. 12 of the Letters Patent apply to the case of a plaintiff and not to that of a defendant. ('97) 24 Cal 190 (193) * ('10) 37 Cal 907 (911).

(6) A suit to determine title of land wholly within the original jurisdiction of Calcutta High Court could only be instituted in the High Court under Cl. 12 of Letters Patent. Jurisdiction of Mofussil Court as determined by Secs. 17 and 16. Provisions of O. 2, R. 3 Civil P. C. do not give a Court jurisdiction which is not given to it under Ss. 16 and 17. AIR 1962 Cal 616 (622).

## SECTION 18 — SYNOPISIS

**1. Scope.**
**2. Allegation of uncertainty.**
**3. Non-recording of statement as to uncertainty.**
**4. Objection to jurisdiction.**
**5. Immovable property.** See Section 16.

## TOPIC INDICATOR

Absence of Notification. See Note 2.
Adjudication of revenue authorities, if binding. See Note 2.
Execution proceedings. See Note 1.
Prior decision is to boundary. See Note 2.

**1. Scope.**— (1) The principle of this section applies also to execution proceedings though it does not, in terms, bind persons like execution creditors. AIR 1920 Mad 505 (508): 43 Mad 135 (DB).

**2. Allegation of uncertainty.**— (1) When an allegation as to the uncertainty of the property in dispute lying within the Court's jurisdiction is made, the Court must be satisfied that there is such uncertainty; and if so satisfied, it may record a statement and proceed with the case. It must try the question itself and cannot take the decision of a Revenue Court in respect of boundaries as settling the matter. ('01) 1901 Pun Re No. 1, p. 3 (p. 5) * (1864) 1864 Suth WR 191 (192) (DB) * ('69) 11 Suth WR 389 (391) (DB).

(2) A former decision of the Privy Council adjudging certain lands to be in particular jurisdiction is binding upon the Courts and removes the uncertainty in

have the same effect as if the property were situate within the local limits of its jurisdiction :

Provided that the suit is one with respect to which the Court is competent as regards the nature and value of the suit to exercise jurisdiction.

(2) Where a statement has not been recorded under sub-section (1), and an objection is taken before an appellate or revisional Court that a decree or order in a suit relating to such property was made by a Court not having jurisdiction where the property is situate, the appellate or revisional Court shall not allow the objection unless in its opinion there was, at the time of the institution of the suit, no reasonable ground for uncertainty as to the Court having jurisdiction with respect thereto and there has been a consequent failure of justice.

[1882, S. 16A.]

**19. Suits for compensation for wrongs to person or moveables.**—Where a suit is for compensation for wrong done to the person or to moveable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts.

**Illustrations**

(a) A, residing in Delhi, beats B in Calcutta. B may sue A either in Calcutta or in Delhi.

(b) A, residing in Delhi, publishes in Calcutta statements defamatory of B. B may sue A either in Calcutta or in Delhi.

[1877, S. 18.]

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**Section 18 — Note 2 (contd.)**

the matter. ('72) 18 Suth WR 182 (183) (PC)

(3) When there has been no notification fixing the boundaries of a particular district, that fact might create a reasonable uncertainty as to whether a certain property is within that district or not. ('97) 24 Cal 449 (454) (DB).

**3. Non-recording of statement as to uncertainty.** — (1) The non-recording of the statement as to uncertainty will not vitiate the decree where the Judge has, in fact, brought his mind to bear upon the question. ('01) 1901 Pun Re No. 1. p. 3 (5).

(2) It will not vitiate the decree unless it appears that no reasonable uncertainty existed at the time of the suit, and there has been a failure of justice in consequence thereof. AIR 1922 Cal 345 (346): 49 Cal 37 (DB).

**4. Objection to jurisdiction.**—(1) An objection to jurisdiction must be taken in the Court of first instance and unless so taken, the decree of the trial Court cannot be set aside on the ground of uncertainty of its territorial jurisdiction. ('08) 7 Cal L Jour 152 (167) (DB) * ('98) 1 Oudh Cas 51 (53) (DB) * AIR 1928 Pat 324 (325): 7 Pat 216 (DB).

**5. Immovable property.** — See Section 16.

**7. "Personally works for gain"** — See Section 20.

**8. Suits against Government** — See Note 5.

**1. Scope.** — (1) Suits for compensation for wrong done to the person or personal property may be brought either where the wrong is committed, or where the defendant resides or carries on business or personally works for gain. AIR 1915 Mad 1206 (1207, 1208): 39 Mad 433 (439) (DB) * AIR 1926 PC 88 (89) (PC) * AIR 1934 All 226 (230) (DB) * AIR 1952 Mad 481 (484): (1951) 21 Com Cas 138.

(2) Section 19 cannot be regarded as in the nature of an exception to S. 20. It is true that the provisions of S. 19, overlap, to some extent the provisions of S. 20 but is only an extension of S. 20. Section 19 appears to have been enacted only for the purpose of elucidating the position that the place, where the wrong is done to the person or movable property is the place where the cause of action arises within the meaning of S. 20 (c) of the Code. AIR 1961 Mys 188 (189, 190): 39 Mys LJ 270.

**2. Wrong to person or moveable property.** — (1) A wrong in this section, means the infringement of a legal right, and is consequently an actionable wrong. (1860) 8 Moo Ind App 103 (131) (PC) * ('01) 25 Bom 230 (236).

(2) The section applies only to actionable wrongs to the person or to moveable property. 'Wrong done to the person' connotes the same thing which is termed as trespass to the person. Wrongful attachment of one's immoveable property cannot amount to a trespass to the person or wrong done to

**SECTTON 19 — SYNOPSIS**

1. Scope.
2. Wrong to person or moveable property.
3. Suit must be for compensation.
4. Torts outside India.
5. "Resides."
6. "Carries on business" — See Sec. 20.

**20. Other suits to be instituted where defendants reside or cause of action arises.**—Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, or

**Section 19 — Note 2 (contd.)**

the person. ('54) Madh BLJ 1954 HCR 65 (67).

(3) Where wrongful criminal proceedings are instituted against a person and he is arrested thereunder, the arrest is a wrong done to his person and the Court of the place where he is arrested will have jurisdiction to try a suit in respect of such wrong. ('70) 6 Beng LR 141 (144).

(3a) A suit for damages for malicious prosecution can be entertained by the Court at the place where the plaintiff was served with the summons in the criminal case as the service of summons is part of the wrong done to the person. AIR 1965 Bom 109 (110, 111): 1965 (2) Cri LJ 75: 66 Bom LR 829.

[See also AIR 1961 Mys 188 (189): 39 Mys LJ 270. (Suit for compensation for malicious prosecution — Not necessarily governed by Section 19 in all cases.)]

(4) Where plaintiff's cargo boats are wrongfully seized by the defendant, the seizure is a wrong done to moveable property and a suit in respect thereof can be brought at the place where the seizure was made. (1865) 3 Low Bur Rul 164 (165).

(5) Where property is lost in one district and is found in another, a suit for its recovery may be instituted in the district in which it is found. ('68) 9 Suth WR 586 (586).

(6) In suits relating to moveable property the Court within whose jurisdiction the moveable property is kept has jurisdiction to try the case. AIR 1934 All 226 (230).

**3. Suit must be for compensation.** — (1) Suits for injunctions, e.g., against disturbances of rights of patent and trade mark, are excluded from the scope of the section. See ('95) 19 Bom 557 (564).

(2) Where the defendant has, by means of a tort, become possessed of a sum of money at the expense of the plaintiff the plaintiff may elect to sue either for damages, for tort or for the recovery of money obtained by the defendant. In the former case, the suit would be one falling within this section and in the latter, within Section 20. AIR 1936 Sind 229 (231): 30 Sind LR 182 (DB).

[See also ('53) AIR 1953 Madh B 38 (39).]

(3) A made over a stack of hay to B in payment of his debt but as B could not carry it away. A agreed to keep it in his possession and to see that it was safe. A also agreed to pay its price if there was any damage to it. On demand by B, A failed to hand back the stack or to pay its price as agreed. Thereupon B sued A claiming certain amount as damages on account of 'wrongful conversion of goods'. It was held that the suit was not one for damages for wrong done to moveable property to which Section 19 could apply, but was one for damages for breach of contract and the place of suit was to be determined with reference to provisions in Section 20. ('51) 1951 Raj LW 433 (434) (DB).

**4. Torts outside India.** — (1) Cases of wrongs committed outside India by defendants residing within the jurisdiction of the Court fall under Section 20 and not under this section. AIR 1915 Mad 1206 (1208): 39 Mad 433.

**5. "Resides."** — (1) The word "resides" does not apply to legal entities. Where a tort was committed for which the Secretary of State was liable, the suit could be brought only where the tort was committed and not elsewhere on the ground that he "resided" there. AIR 1927 Mad 689 (690): 50 Mad 449 (DB).

(2) Suit against Government for arrears of salary and travelling allowance — Plaintiff residing at A but throughout his service employed at place other than A — Notice under Section 80 given to Collector of A and suit filed in Court at A — Held, Court at A had not jurisdiction to try suit under either Section 19 or 20. AIR 1966 All 159 (161): (1966) 2 Lab LJ 365.

(3) For fuller notes. See Section 20.

**7. "Personally works for gain."** — See Section 20.

**8. Suits against Governmnet.** — See Note 5.

## SECTION 20 — SYNOPSIS


1. SCOPE AND PRINCIPLE.
2. "ACTUALLY AND VOLUNTARILY RESIDES".
   3. Temporary and occasional residence.
   4. Several places of residence.
   5. Non-existent or abandoned home.
   6. Compulsory residence.
7. "CARRIES ON BUSINESS".
   8. Business through agent.
   9. Suits against Government.
10. "PERSONALLY WORKS FOR GAIN".
11. LEAVE OF COURT.
12. ACQUIESCENCE IN INSTITUTION.
13. 'CAUSE OF ACTION'.
   14. "Wholly or in part arises".
   15. Notice under S. 80, Civil P. C.
   16. Suits on contracts.

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

Explanation I.—Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.

**Section 20 — Synopsis (contd.)**

17. Place of making of contract.
18. Place of breach or non-performance.
19. Place where money is payable.
20. Suits between principal and agent.
21. Suit for partnership accounts.
22. Suits between banker and customer.
23. Suits on negotiable instruments.
24. Suits on assigned debts or contracts.
25. Suits for contribution.
26. **Suits on torts.**
27. **Suits for custody of minor.**
28. **Suits for restitution of conjugal rights.**
29. **Suits for divorce.**
30. **Suits for maintenance.**
31. **Administration suits.**
32. **Suit to set aside decree.**
33. **Suit to set aside document.**
34. **Suit for infringement of copyright, trade-mark, etc.**
35. **Suits against corporations.**
36. **SUITS AGAINST FOREIGNERS.**
37. **REVISION.**
38. **CHARTERED HIGH COURTS.**

**1. Scope and principle.** — (1) Section 20 enacts the rule as to the forum in cases of personal actions, and has to be read subject to the provisions of Sections 15 to 19. (1896) 19 Mad 477 (478) (DB) * AIR 1953 Madh B 38 (39) * (1903) 30 Cal 453 (457) (DB) * AIR 1931 Mad 705 (707).

(2) The section is designed to secure that justice might be brought as near as possible to every man's hearth-stone and that the defendant should not be put to the trouble and expense of travelling long distances in order to defend himself. AIR 1956 Punj 188 (188): ILR (1956) Punj 1299 * AIR 1963 SC 1681 (1683): (1964) 3 SCR 164. (Principle behind the provisions of Cls. (a) and (b) of Section 20 is that the suit be instituted at a place where the defendant is able to defend the suit without undue trouble.)

[See also AIR 1967 Cal 24 (25): ILR (1960) 2 Cal 85. (Jurisdiction on basis of contractual clause — Court wherein evidence is readily available has to be preferred.)

(3) Section 20 does not relate to defect of jurisdiction arising out of nature of Court but about the place of trial of the suit. AIR 1950 Ajmer 49 (50).

(4) If several causes of action are joined against a defendant, it is necessary that the Court should have jurisdiction over all causes of action. See Note 13.

(5) The onus is upon the plaintiff to establish one or other of the facts mentioned in the section. AIR 1952 Raj 31 (32) (DB) * AIR 1930 Bom 150 (151): 54 Bom 192 (DB).

(6) After the question of local jurisdiction is decided, the question of pecuniary jurisdiction may arise before any plea affecting the suit is entertained. (1903) 30 Cal 453 (457) (DB) * 1910 Pun Re No. 83, p. 242 (242, 243): 7 Ind Cas 718 (718).

(7) The rules stated in the various portions of the section are alternative and give a choice of forum to the plaintiff. (1913) 21 Ind Cas 789 (801) (DB) (Mad) * (1949) 53 Cal WN 261 (265) * AIR 1936 All 514 (515) * AIR 1923 Mad 109 (111) * ('37) 20 Nag L Jour 238 (240).

(8) Very strong reasons must be shown for depriving a plaintiff of such right. AIR 1914 Low Bur 37 (39): 7 Low Bur Rul 129 (DB).

[See AIR 1956 Cal 33 (35).]

(9) A plaintiff cannot take advantage of his own default to choose his own forum. AIR 1921 Lah 213 (213, 214).

(10) Court does not get jurisdiction, where in order to bring a suit within the jurisdiction, the plaintiff makes a false avernment. AIR 1923 All 137 (138): 45 All 193 (DB) * 1955-2 Mad L Jour 228 (229).

(11) A Court is not deprived of its jurisdiction by the fact that the place where the cause of action arises ceases to be situate within its jurisdiction, or by the defendant changing his residence beyond its jurisdiction. AIR 1928 Mad 746 (747) (DB) * AIR 1933 Nag 318 (320): 29 Nag LR 342 * 1869 Pun Re No. 88.

Explanation II.—A corporation shall be deemed to carry on business at its sole or principal office in [a][India] or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

**Illustrations.**

(a) A is a tradesman in Calcutta. B carries on business in Delhi. B, by his agent in Calcutta, buys goods of A and requests A to deliver them to the East Indian Railway Company. A delivers the goods accordingly in Calcutta. A may sue B for the price of goods either in Calcutta, where the cause of action has arisen, or in Delhi, where B carries on business.

(b) A resides at Simla, B at Calcutta and C at Delhi. A, B and C being together at Benares, B and C make a joint promissory note payable on demand, and deliver it to A. A may sue B and C at Benares, where the cause of action arose. He may also sue them at Calcutta, where B resides, or at Delhi, where C resides; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without the leave of the Court.

[1882 and 1877, S. 17; Letters Patent: Bombay, Calcutta and Madras, Cl. 12.]

[a] Substituted for 'the States' by the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), S. 3 (1-4-1951).

## OBJECTS AND REASONS

Explanation III of Section 17 of the Code of 1882 related to the place where a suit arising out of a contract could be instituted. The committee have omitted this explanation, which has become unnecessary owing to the addition made to sub-clause (c) of this section of the words "wholly or in part" in reference to the cause of action — See S. O. R.

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**Section 20 — Note 1 (contd.)**

(12) A non-compliance with the provisions of this section is not fatal to the jurisdiction of the Court. AIR 1955 Cal 331 (334).

(13) Section 20 does not apply to suits under Section 92 of the Code. AIR 1955 Bom 55 (58).

(14) Section 4 of the Displaced Persons (Institution of Suits) Act 1948, gives special right of forum to a displaced person as a plaintiff, notwithstanding provision of this section. AIR 1959 Cal 281 (282) (DB).

(15) Cause of action arising outside jurisdiction of Nyaya Panchayat — Place of suing is not governed by Section 41 of Rajasthan Panchayat Act (1953) but by Section 20 of Civil P. C. 1962 Raj LW 412.

(16) Section 19, Civil P. C. cannot be regarded as in the nature of an exception to S. 20 Civil P. C. No doubt the provisions of the two sections overlap to some extent but Section 19 is only an extension of Section 20. AIR 1961 Mys 188 (189): 39 Mys LJ 270.

(17) Common Law rule that debtor to find creditor does not raise a fourth clause to Section 20. AIR 1968 Guj 276 (280): 9 Guj LR 932.

(18) Section 4 of Indian Independence Pakistan Courts (Pending Proceedings) Act (9 of 1952) creates an additional forum and does not bar jurisdiction of Courts otherwise competent to entertain suits by virtue of Section 20 Civil P. C. AIR 1961 Raj 162 (165): 1961 Raj LW 98.

**2. "Actually and voluntarily resides."**— (1) A Court can entertain a suit, if all the defendants reside within its jurisdiction even if the cause of action arises outside it. 1893 Pun Re No. 1, p. 1 (14) (FB) * AIR 1928 Nag 295 (296): 24 Nag LR 95 * AIR 1955 Mad 96 (98, 100): ILR (1955) Mad 116 (FB) * AIR 1919 All 350 (350): 41 All 513 (DB) * AIR 1921 Bom 460 (460, 461): 45 Bom 1228 (DB) * AIR 1923 Cal 619 (621) (DB) * AIR 1926 Mad 1207 (1207, 1208) * AIR 1969 SC 552 (554).

(2) The expression 'actually resides' means residence existing in reality and in fact and not merely in form, at the time of the commencement of the suit. AIR 1956 Punj 188 (189): ILR (1956) Punj 1299. (Distinction between actual and constructive residence explained.) * AIR 1958 Punj 361 (364): ILR (1958) Punj 682 * ILR (1954) Punj 670 (674, 675) * AIR 1952 Raj 31 (32) * AIR 1955 Kutch 18 (19). (Having lands and house in a place and making occasional visits to are not enough.) * AIR 1959 Raj 166 (167, 168): ILR (1959) 9 Raj 62 (DB). (Actually and voluntarily resides — It does not mean legal residence.)

(3) In every case residence is a question of fact and it must depend upon the particular circumstances. AIR 1954 Trav-Co 141 (142) * AIR 1924 All 669 (670) (DB) * (1936) 164 Ind Cas 907 (912) (DB) (Cal) * AIR 1962 Raj 88 (89, 90, 92): 1962 Raj LW 121 (DB).

(4) The word 'residence' has been held to denote the place where a person eats, drinks and sleeps, or where his family or servants eat, drink and sleep. AIR 1955 Kutch 18 (19). (Residence is not

**Section 20 — Note 2 (contd.)**
identical with ownership) * ILR (1954) Punj 670 (674). (Animus revertendi is not sufficient.) * AIR 1941 Cal 670 (671): ILR (1941) 1 Cal 490.

[See also (1867) 7 Suth WR 349 (350) (DB). (Temporary confinement in jail — Court at place where family resides has jurisdiction.)]

(5) The word 'dwell', and the word 'reside' are often treated as being synonymous and have been held to denote the fixed and permanent home of a man's wife and family, to which he has always an intention of returning. (1890) 14 Bom 541 (547) * (1875) 1 All 51 (52) (DB) * (1885) 8 Mad 205 (206).

(6) A Corporation is capable of having a residence or a dwelling. AIR 1958 Punj 57 (60): ILR (1957) Punj 1529 (DB).

(7) The adverb "actually" before the word 'resides' in the section has been used by the legislature so as to exclude any idea of domicile or constructive residence. AIR 1965 All 72 (75): 1963 All LJ 1089 (DB).

**3. Temporary and occasional residence.** — (1) An occasional residence is not sufficient to give jurisdiction. AIR 1952 Raj 31 (32) (DB).

(2) Where a person has a permanent residence at one place, he cannot be said to dwell also at a place where he casually or temporarily resides without the intention of remaining there. AIR 1953 Ajmer 8 (2) (9) * AIR 1952 Kutch 77 (79) * AIR 1952 Punj 113 (114).

[But see (1912) 14 Ind Cas 571 (573) (Mad).]

(3) Where a guru residing permanently at n came to b at the invitation of devotees and, while there, exchanged visits with his followers and stayed in a house which had been purchased by him for occasional residence, he was held not to dwell in b. (1890) 14 Bom 541 (552, 553) * (1894) 18 Bom 290 (293) (DB).

(4) Where an officer attached to a regiment at V went on medical leave to M where he resided in a rented house and finally returned to V, V was held to be the place where he dwelt. (1870) 5 Mad HCR 471 (472).

(5) Where a person permanently residing in A leaves his house in charge of a servant and goes with his wife and family to M with the intention of remaining there for several months he must be deemed to dwell at the latter place. (1911) 34 Mad 257 (268): 38 Ind App 129 (PC).

(6) In the case of persons in service, at any place, whether of the Government or of a private person, they are deemed to dwell at the place of service and not at the place where they have a family house. 1892 All WN 115 (116) (DB) * (1867) 7 Suth WR 417 (418) (DB).

(7) Under Explanation I to S. 20 a person is deemed to reside at the place of temporary stay also in respect of a cause of action arising at the place where he has such temporary residence. AIR 1949 Kutch 5 (6) * AIR 1933 Lah 120 (121) * AIR 1930 Cal 347 (347): 57 Cal 65.

**4. Several places of residence.** — (1) A man may have more than one place of residence at the same time. He may be living sometimes at one and sometimes at another, and during his temporary absence, each house though empty, is his residence if there is an animus revertendi. AIR 1949 Bom 304 (308) * AIR 1956 Punj 188 (189) * AIR 1941 Cal 670 (671): ILR (1941) 1 Cal 490 * (1936) 164 Ind Cas 907 (913) (DB) (Cal).

(2) Where the defendants had their permanent residence in Kutch Province but were residing in Bombay for business purposes, it was held that they could be sued in either of the places. AIR 1952 Kutch 58 (59) * AIR 1957 Assam 127 (130) (DB). (Party having permanent place of abode in Jodhpur — Residence in British India does not destroy its jurisdiction.) * AIR 1952 Kutch 27 (28) * AIR 1949 Kutch 5 (6).

**5. Non-existent or abandoned home.** — (1) A person who has no dwelling or place of residence will be deemed to dwell at the place at which he may be actually staying at the time. ('01) 25 Bom 176 (178) (DB).

(2) A, an officer attached to a regiment at S having availed himself of a furlough of two years and having retained no permanent place of residence at S or elsewhere, attended race meetings at Meerut with the intention of leaving after the races. It was held that during his stay at Meerut he must be deemed to have dwelt there. (1872) 4 NWPHCR 25 (28, 29) (DB).

(3) A, an officer proceeding from Burma to England and having no residence in Burma or elsewhere, stopped for a few days at Madras. It was held that such residence was sufficient to give the Court at Madras jurisdiction over him. (1885) 8 Mad 205 (207).

**6. Compulsory residence.** — (1) A person confined in jail cannot be said to reside there voluntarily though he may be residing there actually. AIR 1954 Trav. Co 141 (142) * 1909 Pun Re No. 77 p. 299 (300, 301) (DB).

**7. "Carries on business."** — (1) The word 'business,' is used in the section in a restricted sense and means commercial business alone. (1887) 14 Cal 256 (273) (DB) * AIR 1956 Assam 85 (93): ILR (1956) 8 Assam 51 (DB) * AIR 1927 Mad 689 (690): 50 Mad 449 (DB) * AIR 1930 Lah 818 (819) * AIR 1937 Mad 293 (294).

(2) The expression 'carries on business' is itself one of varying import and has to be interpreted in each case according to the context and the apparent purpose of the Legislature. (1880) 4 Bom

**Section 20 — Note 7 (contd.)**

416 (422) * (1894) 18 Bom 294 (298): 21 Ind App 13 (PC) * AIR 1952 Bom 365 (371) (DB).

(3) A person is said to 'carry on business' when he controls or directs it or has a voice in its control or a share in the gain or loss. AIR 1951 Punj 99 (101) * ('41) 1941 Nag L Jour 37 (41) * AIR 1922 All 367 (369) (DB).

(4) The test is not the continuity or the intermittency of the business, but the fact of owning interest in the business and receiving profits. AIR 1932 Nag 114 (115): 28 Nag LR 118 * (1887) 14 Cal 256 (273) (DB). (Clerk in Government office does not carry on business.)

(5) Where the owner of a ginning factory entered into a special contract of combination with other factory owners, under which his factory was to remain quiescent for sometime and he was to derive a profit on account of such contract it was held the factory owner was not carrying on the business. AIR 1932 Nag 114 (115): 28 Nag LR 118.

(6) Cause of action against defendant arising in Persia — Defendant carrying on business in Quetta — He can be sued in Court at Quetta. AIR 1926 PC 88 (89).

(7) A guru or high priest of a community who receives offerings and presents from his disciples and keeps account of them cannot be said to carry on business. (1894) 18 Bom 294 (298, 299) : 21 Ind App 13 (PC) (Coming decisions in 18 Bom 290 and 14 Bom 541.)

[cf. AIR 1959 SC 75 (77). (Case under Income-tax Act, 1922.)]

(8) Zamindar, business does not constitute a carrying on of business. (1887) 14 Cal 256 (273) (DB).

(9) It is doubtful whether mere letting of house property through agent can be said to be carrying on business. AIR 1922 Lah 164 (165).

(10) Whether a firm or a person carries on business at a particular place or not is a question of fact. AIR 1956 Trav-Co 200 (202): ILR (1956) Trav-Co 206 (DB) * AIR 1964 Punj 530 (531, 532). 66 Pun LR 923 (DB). (Case under Section 3, Punjab Professions, Trades Cailings and Employments Taxation Act (7 of 1956).)

(11) Where essential part of the business of a retail dealer in the mofussil consisted in selling European goods imported by him and making profits, and he had an agent in Bombay who simply purchased and forwarded the goods to him, it was held that the dealer does not carry on his business at Bombay. (1865) 1 Bom HCR 220 (223) (DB).

(12) Where the defendants had at Amritsar only a travelling agent who secured orders for them and forwarded them to the head-office at Calcutta, but had no power to enter into any contract or to receive any money on their behalf, it was held that the defendants did not carry on business at Amritsar. AIR 1923 Lah 427 (427) * AIR 1929 Mad 347 (348) * AIR 1936 Sind 121 (123) : 29 Sind LR 292.

(13) The sub-office conducted correspondence with its local customers, received orders, received and disbursed moneys and though the orders placed at the sub-office were not binding unless accepted by the head-office, it was held that the defendant firm was carrying on business at the place of sub-office. AIR 1933 Lah 11 (12): 14 Lah 42.

(14) The result of the second explanation is to restrict the meaning of the expression 'carries on business' in Cl. (a) in relation to corporations. Hence where the suit is instituted at a place where the corporation maintains a subordinate office, the Court cannot dispense with the requirement that the cause of action must arise at such place. AIR 1956 Nag 203 (204): ILR (1956) Nag 494 (DB). ('1941 Nag L Jour 37, Overruled.)

[See also AIR 1944 Cal 1 (3): ILR (1944) 1 Cal 101. (Insurance company — Held Office at Lahore — Branch office at Calcutta — Company held to carry on business in Calcutta — Suit held maintainable at Calcutta as part of cause of action arose there.)]

(15) The business need not be carried on personally but may be carried on through servants or agents. AIR 1952 Ajmer 48 (1) (48) * 99 Cal L Jour 95 (109) * AIR 1952 Bom 365 (371) * AIR 1951 Punj 99 (101) * AIR 1944 Cal 1 (3): ILR (1944) 1 Cal 101 * AIR 1922 All 367 (368, 369) (DB) * AIR 1918 Lah 320 (321): 1918 Pun Re No. 98 * (1882) 4 Mad 209 (212) (DB).

(16) Running of railways — It is business even in hands of Government — Principal place of railway administration is place of business. AIR 1963 SC 1681 (1683, 1685): (1964) 3 SCR 624.

(17) Loss of goods carried by Railway — Goods booked on Western Railway for destination on South Eastern Railway — Suit filed at Calcutta on Eastern Railway — Held, Court at Calcutta could not be said to have jurisdiction on the ground that Union of India carried on business of one of its Railways viz. Eastern Railway at Calcutta. AIR 1966 Cal 540 (544).

(18) Cause of action arising in Pakistan — Defendant carrying on business at Delhi — Court in Delhi held could entertain suit. AIR 1955 NUC (Punj) 1612: (1955) 57 Pun LR 51.

(19) Mortgagee giving up his security — Mortgagee is entitled to seek personal relief against mortgagor in Court within whose jurisdiction mortgagor resides or carries on business. AIR 1964 Mad 527: (1964) 2 Mad LJ 256 (DB).

**Section 20 — Note 8 (contd.)**

**8. Business through agent.** — (1) A business may be carried on through an agent. AIR 1952 Bom 365 (371) * AIR 1937 All 208 (217): ILR (1937) All 234 * (1903) 26 Mad 544 (553) : 30 Ind App 220 (PC).

(2) It is essential that the agent must be an agent in the strict sense of the term and must attend exclusively to the business of the principal. (1900) 23 Mad 458 (472) (DB) * AIR 1952 Bom 365 (371). (The agent must be a special agent.)

(3) A person conducting business at a place through commission agents or brokers or general agents cannot be held to carry on business there. AIR 1956 Trav-Co 200 (202): ILR (1956) Trav-Co 206 (DB) * AIR 1952 Bom 365 (371) * AIR 1937 Sind 17 (18) * AIR 1936 Sind 175 (178) : 29 Sind LR 410.

(4) A manager of a joint Hindu family is not an agent in the strict sense and the members of the family cannot be said to carry on business through him at any place. AIR 1952 Bom 365 (372, 373) * (1908) 26 Mad 544 (553) : 30 Ind App 220 (PC).

[But see (1922) 67 Ind Cas 69 (70) (DB) (Lah). (Where cases not referred to.)]

(5) Government of India cannot be sued in Indian Courts as agent of Pakistan Government for breach of a contract of carriage of goods entered into with the Pakistan Government as representing the Eastern Bengal Railway. AIR 1953 Cal 366 (367): ILR (1953) 2 Cal 168.

**9. Suits against Government.** — (1) The words "carry on business" are inapplicable in the case of the Union of India or a State Government. AIR 1955 Cal 626 (631) * 1958-1 Cal L Jour 67 (75) * AIR 1955 Mad 345 (349): ILR (1955) Mad 912 (DB) * Madh BLJ 1954 HCR 65 (67) * AIR 1951 Cal 37 (37) * (ILR (1941) 2 Cal 160, Dissented from.) * AIR 1927 Mad 689 (690, 692): 50 Mad 449 (DB). (Dissenting from 1 Mad HCR 286.) * (1887) 14 Cal 256 (272) (DB) * (1962) 66 Cal WN 29: 1961 Cal LJ 143 * AIR 1959 Cal 247 (252): 1958 Cal LJ 341 * AIR 1960 Cal 430 (433) : 64 Cal WN 765 (DB). (Held Impliedly overruled by AIR 1963 SC 1681 in AIR 1967 Cal 205.)

[But see AIR 1963 SC 1681 (1683, 1684, 1685): (1964) 3 SCR 624. (AIR 1956 Assam 85, Approved.) * AIR 1956 Assam 85 (93, 94): ILR (1956) 8 Assam 51 (DB). (The words 'carries on business' in Sec. 20 would lose their meaning if they are not applied merely because the defendant happens to be the Government.)]

(2) The words 'actually and voluntarily resides' refer only to natural persons and not to legal entities such as Union of India or to State Government. AIR 1956 Assam 85 (89): ILR (1956) 8 Assam 51 (DB) * AIR 1959 Cal 281 (283) (DB) * AIR 1955 Cal 626 (631) * AIR 1955 Mad 345 (346): ILR (1955) Mad 912 (DB) * (1962) 66 Cal WN 29: 1961 Cal LJ 143 * AIR 1959 Cal 281 (283): 62 Cal WN 900 (DB) * AIR 1962 Andh Pra 382 (383): (1962) 1 Andh WR 133.

(3) The Government has to be sued in the Court within whose jurisdiction either the whole or part of the cause of action has arisen. It cannot be sued on the basis that it carries on business in a particular place or dwells within such jurisdiction. AIR 1955 Cal 331 (336) * AIR 1959 Cal 281 (283, 284) (DB) * AIR 1950 Cal 207 208 (DB) * AIR 1964 Cal 196 (204 to 209) (DB) * AIR 1966 All 159 (161): (1966) 2 Lab LJ 365 * AIR 1966 All 159 (160) : (1966) 2 Lab LJ 365. (Suit against Government for refund of security money — Held, suit could be tried at place of plaintiff's residence.) * AIR 1962 Andh Pra 382 (383, 384, 385): (1962) 1 Andh WR 133 (DB).

[But see AIR 1956 Assam 85 (93, 94) : ILR (1956) 8 Assam 51 (DB). (The State is not excepted from the operation of any part of S. 20.)]

**10. "Personally works for gain."** — (1) To constitute work there must be some physical or mental effort. (1890) 14 Bom 541 (553, 554).

(2) A guru accepting presents and offerings from his chelas and invoking blessings upon them in return does not personally work for gain. (1894) 18 Bom 290 (294) (DB) * (1890) 14 Bom 541 (553, 554).

(3) An advocate though residing outside the station where the High Court is located, works for gain within local limits of jurisdiction of High Court. (1873) 6 NWPHCR 43 (45) (DB).

(4) A person residing at A and coming constantly to Calcutta for making contracts, works for gain within Calcutta. (1862) 2 Hyd 79 (83) (DB).

(5) A person carrying on business through an agent cannot be said to personally work for gain where the agent carries on the business. (1869) 11 Suth WR 530 (531) (DB).

(6) The expression "personally works for gain" in Cl. (a) of S. 20 refers to an individual person and not to a company or a corporation. AIR 1959 Cal 461 (462) (DB).

**11. Leave of Court.**—(1) Where no part of cause of action arises within the jurisdiction and some of the defendants reside outside it, leave to sue them should be obtained, unless they acquiesce in the institution of the suit. AIR 1948 Cal 268 (268) * 1955-2 Mad L Jour 228 (231) * AIR 1922 Bom 152 (153) : 46 Bom 229 (DB).

[See also AIR 1958 Madh Pra 425 (431) (DB). (Defendant joined with leave of Court.)]

**Section 20 — Note 11 (contd.)**

(2) A mere absence of territorial or pecuniary jurisdiction does not go to the root of the matter of jurisdiction but is capable of being cured. Even if territorial jurisdiction were altogether absent the defect can be cured under S. 20(b) by an order of special leave of Court or by acquiescence of the party concerned. AIR 1966 Mad 53 (55) : 1966 Cri LJ 146: 1965 Mad LJ (Cri) 696 (DB).

(3) No leave is necessary where the cause of action arises within the Court's jurisdiction though some of the defendants reside outside it. AIR 1929 Sind 170 (171, 172): 23 Sind LR 365 (DB).

[See AIR 1963 Cal 380 (382, 386, 389): 65 Cal WN 190 (SB). (Cause of action partly arising in Calcutta — S. 20(c), applies to City Civil Court and not Cl. 12, Letters Patent — Suit can be entertained by City Civil Court — Leave of Court to institute suit not necessary.) ]

(4) The clause is not limited to persons merely residing outside the limits of the territorial jurisdiction of the Court but within British India. AIR 1938 Mad 731 (733): ILR (1938) Mad 1080 (DB).

(5) Leave may be granted after the institution of the suit or even after the decision of the preliminary issue as to jurisdiction, but before the plaint is ordered to be returned for presentation to proper Court. 1953 Raj LW 282 (283) * (1906) 30 Bom 570 (574) (DB) * AIR 1933 Sind 179 (180) : 27 Sind LR 230 (DB) * AIR 1962 Raj 88 (91): 1962 Raj LW 121 (DB). (Section 20 (b) cannot be read in such a way so as to limit the power of the Court to grant leave only prior to the institution of the suit and not after it. The leave can be granted by the Court when the non-resident defendant objects to the jurisdiction of the Court.)

(6) Appellate Court can grant leave to sue even after plaint is ordered to be returned by trial Court. AIR 1961 Raj 187 (188): 1960 Raj LW 678.

(7) To an application under S. 10 Displaced Persons (Debts Adjustment) Act (1951) against several debtors some of whom reside outside territorial jurisdiction of Tribunal, resort to Section 20 Civil P. C. is not open. AIR 1959 Punj 367 (369): 61 Pun LR 280.

(8) Grant of leave should be distinctly sought and obtained and cannot be inferred from the plaintiff being allowed to continue the suit. (1891) 15 Bom 93 (98)* (1880) 4 Bom 482 (488).

(9) In exercising its power to grant or refuse leave to sue, the question of convenience of parties should be taken into consideration. (1907) 30 Mad 438 (440) (DB). (Application under Cl. 12, Letters Patent.)

(10) No notice is necessary to the defendants residing outside jurisdiction. (1904) 26 All 603 (605) (DB) * AIR 1921 Low Bur 19 (19, 20): 11 Low Bur Rul 26 (DB).

(11) Leave cannot be given arbitrarily, and when the defendants who reside, outside jurisdiction do not appear, the Court is bound to consider their position before granting leave. AIR 1938 Nag 262 (263): ILR (1940) Nag 502.

**12. Acquiescence in institution.** — (1) A defendant who objects to the jurisdiction will not be deemed to have acquiesced in the institution simply because he did not apply for transfer of the case. AIR 1915 Cal 62 (63) (DB).

(2) A defendant who appears and does not object to the jurisdiction, may be held to have acquiesced in the institution. 1953 Raj LW 282 (283).

(3) Suit against defendants some of whom reside within, and some without jurisdiction of the Court — Neither leave of Court obtained nor acquiescence shown on part of defendants not residing within jurisdiction — Suit cannot proceed against even residing defendants. AIR 1922 Bom 152 (153): 46 Bom 229 (DB).

(4) Territorial jurisdiction of Court — Objection as to place of suing — Defendant may waive such objection. AIR 1966 SC 634 (635, 636): (1966) 1 SCR 461. ( (1965) Ker LT 110, Reversed.)

(5) Territorial jurisdiction is not to proceed to the root of jurisdiction and the Civil P. C. recognises that a party can acquiesce in it. AIR 1966 Mad 437 (438): (1966) 1 Mad LJ 196 (DB).

**13. Cause of action.**—(1) Court will have jurisdiction over a matter if the cause of action arises within local limits of its jurisdiction. Such jurisdiction is not affected by the death of the person originally liable. AIR 1956 Ajmer 9 (10) * 1943 AMLJ 60 (61) * (1900) 24 Bom 407 (413) * (1890) 12 All 212 (216, 217) * (1862) 2 Hyd 18 (21) (DB) * AIR 1963 Bom 94 (97): 63 Bom LR 969 * ILR (1958) Cut 180. (Ornaments deposited by deceased at place P — Death of deceased at J — Suit by husband for value of ornaments at J — Court at J has jurisdiction.) * AIR 1965 Andh Pra 231 (233, 234) : (1965) 1 Andh WR 450 * AIR 1961 Ker 50 (51) : 1960 Ker LT 721 (DB).

(2) The words "cause of action" when used in a restricted sense mean the circumstances forming the infringement of the right or the immediate occasion for the action. In the wider sense they mean the necessary conditions for maintenance of the suit, including the infraction coupled with the right itself. (1895) 22 Cal 833 (840) (DB) * AIR 1950 Pepsu 21 (22) * AIR 1942 Cal 407 (409) * (1882) 9 Cal 105 (110) (DB) * AIR 1931 Pat 241 (243): 10 Pat 670 (FB) * AIR 1916 Mad 1119 (1120): 38 Mad 41 (DB) * (1868) 3 Mad HCR 384 (406) (DB) * (1883) 5 All 163 (173) (FB) * AIR 1966 All 522 (523): 1966 All LJ 64 (DB) * AIR 1959 Cal 273 (274): ILR (1960) 1 Cal 74.

**Section 20 — Note 13 (contd.)**

(3) "Cause of action" means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court but not every piece of evidence. AIR 1949 PC 78 (86): ILR (1948) All 571: 75 Ind App 121 * AIR 1958 Madh Pra 409 (410) * AIR 1957 Mad 201 (203). (Not related to defence or relief prayed.) * ILR (1957) Ker 932 (935) * AIR 1956 Punj 111 (111) * AIR 1956 Sau 75 (76) * AIR 1955 Punj 93 (95): ILR (1955) Punj 285 * AIR 1950 Pepsu 21 (22) * AIR 1949 Cal 495 (497): ILR (1945) 2 Cal 333 * AIR 1947 Bom 72 (73) * AIR 1947 Pat 134 (136): 25 Pat 292 (DB) * AIR 1937 All 208 (210): ILR (1937) All 234 * (1966) 2 Andh WR 253: (1966) 1 Andh LT 251 * AIR 1960 Cal 458 (460) : ILR (1960) 2 Cal 597. (Test in determining whether an allegation forms part of cause of action is whether the plaintiff has to prove the same in order to support his right to judgment of the Court.) * (1962) 66 Cal WN 29: 1961 Cal LJ 143 * AIR 1969 Cal 224 (227, 228, 229).

(4) Everything which if not proved would give the defendant's right to an immediate judgment is part of the cause of action. AIR 1956 Sau 75 (76, 77) * AIR 1958 Madh Pra 409 (410).

(5) It means the whole bundle of material facts which it is necessary for the plaintiff to prove in order to entitle him to succeed in the suit. AIR 1954 Mad 594 (602): ILR (1954) Mad 289 (FB) * AIR 1958 Andh Pra 451 (453): ILR (1958) Andh Pra 502 (DB). (Right to sue and cause of action are the same.) * AIR 1956 Sau 75 (77) * AIR 1955 All 387 (388) (DB) * AIR 1955 Raj 53 (55): ILR (1955) 5 Raj 269 (DB) * AIR 1954 Bom 491 (493): ILR (1954) Bom 1137 (DB) * AIR 1952 Pepsu 4 (4): 3 Pepsu LR 698 * AIR 1950 All 407 (409): ILR (1951) 2 All 568 (DB) * AIR 1949 Nag 195 (197): ILR (1948) Nag 853 (DB) * AIR 1949 Pat 270 (276): 27 Pat 723 (DB) * AIR 1942 Cal 99 (111): ILR (1941) 2 Cal 477 (DB). (Per Pal J.) * AIR 1937 Cal 643 (645) * AIR 1923 Mad 109 (110) * AIR 1924 Nag 308 (309) (DB) * 1958 All WR (HC) 806: 1957 All LJ 768 * AIR 1959 Pat 128 (131, 132): 1958 BLJR 766 (DB).

(6) In case of a life insurance policy, death of the assured is part of cause of action for suit claiming the insurance money. AIR 1943 Cal 199 (201) : ILR (1943) 1 Cal 564 (DB).

(7) A cause of action is something more than a ground or unity of title. It not only includes the facts necessary to support the plaintiff's title, but also the facts which entitle him to relief against a particular defendant. AIR 1954 Mad 594 (602, 604): ILR (1954) Mad 289 (FB).

(8) Whether any particular facts constitute a cause of action has to be determined with reference to the facts of each case and with reference to the substance rather than the form of the action. AIR 1956 Nag 204 (208) : ILR (1956) Nag 556* (1892) 19 Cal 372 (379) (FB) * ('73) Ind App Sup Vol 212 (218) (PC) * 1953 BLJR 707 (711) (DB) * AIR 1957 Mad 201 (205). (Revocation of contract is also part of cause of action in suit for breach of contract.) * (1962) 66 Cal WN 29: 1961 Cal LJ 143. (Communication of rejection does not form cause of action.) * (1954) 59 Cal WN 872. (Part of cause of action arises where notice of suit is served.) * AIR 1959 Bom 414 (417): 61 Bom LR 333 (DB). (Award in arbitration — Agreement to go to aribitration is a necessary part of cause of action — Court at place of agreement has jurisdiction.) (Reversed on another point in AIR 1964 SC 538). * AIR 1959 Bom 363 (367): 61 Bom LR 829 (DB) * AIR 1961 Andh Pra 282 (283).

(9) Where two or more causes of action against a defendant are sought to be joined in one suit, the Court to which the plaint is presented must have jurisdiction over all the causes of action. (1884) 7 Mad 171 (173) * AIR 1939 All 163 (164): ILR (1939) All 167 (DB).

(10) A Notification published after filing of suit cannot form part of cause of action of the suit. AIR 1950 Cal 207 (208) (DB) * AIR 1965 Punj 107 (109). (Cause of action must be antecedent to suit — Future expectation of performance of contract does not constitute part of cause of action.)

(11) Order under Cl. 6(1)(a) by Cane Commissioner, Bihar at Patna reducing area for sugar-cane purchase reserved for petitioner's sugar factory situate in U. P. — Another order allotting excluded area for respondent's Sugar Factory in Bihar — Allahabad High Court has no jurisdiction to entertain petition for quashing these orders as no part of cause of action arose within its territorial jurisdiction — Place of communication of order according to law or of consequence arising from order does not furnish cause of action. AIR 1969 All 105 (107, 108).

(12) Unless there is a completed cause of action, limitation cannot run and there cannot be completed cause of action unless there is a person who can sue and a person who can be sued. AIR 1968 Mad 161 (169): ILR (1966) 2 Mad 385 (DB).

(13) Suit for specific performance of contract — Suit premature — Cause of action arising during pendency of suit — Same can be taken into account for ends of justice. Per Shiv Dayal, J. AIR 1963 Madh Pra 51 (56): 1962 Jab LJ 764 (DB).

(14) The place of accrual of the cause of action does not confer jurisdiction on the High Court on its Original Side if the suit is a suit for land. In such a case the only criterion is the situs of the land that is its geographical location. AIR 1959 Ca' 767 (775): ILR (1960) 2 Cal 556 (SB).

**Section 20 — Note 13 (contd.)**

(15) When goods are booked from a forwarding station to the destination station, both places being outside the jurisdiction of the Court and the railway receipt is in the name of the consignee, there being no question of endorsement or assignment of the railway receipt the consignee's cause of action in case of loss or non-delivery would arise outside the jurisdiction of the Court and the delivery of the railway receipts by the consignor to the consignee within the jurisdiction of the Court would not be a part of the plaintiff's cause of action against the railways. AIR 1960 Cal 458 (460): ILR (1960) 2 Cal 597.

(16) Assessee in Calcutta paying sales tax to State of Bihar under Bihar Sales Tax Act, by cheque drawn on Calcutta Bank — Suit for refund — Principle that debtor must seek creditor applies and since money is payable by State at Calcutta where plaintiff stays, Calcutta Court has jurisdiction to try the suit for refund. AIR 1960 Cal 513 (515): 64 Cal WN 744.

(17) Payment of tax by cheque constitutes a cause of action for a suit for the refund of the same. The Court at the place where the payment by cheque was made has therefore jurisdiction to try the suit for refund, though under the statute, the payment to be valid payment has to be made elsewhere by some other mode. AIR 1960 Cal 513 (515): 64 Cal WN 744.

(18) Plaintiff entitled to sue in Court at T or Court at A — Plaintiff deciding to institute suit in Court at T—Not Court at A but Court at T closed on last day of limitation — Plaintiff can institute suit in Court at T, when Court reopens. ILR (1965) 1 Ker 143.

(19) Question whether any part of cause of action arose at a place to give Court therein jurisdiction — Question is a jurisdictional fact and finding on such a fact is amenable o scrutiny in revision. 1967 All LJ 343: 1967 All WR (HC) 380.

(20) Endorsement on railway receipt or payment to banker within jurisdiction of Court does not constitute cause of action. AIR 1966 Cal 540 (545).

(21) Service of notice under Section 80 C. P. C. is not part of cause of action. ILR (1968) Cut 424 (DB).

**14. "Wholly or in part arises."** — (1) Where freight was collected from the plaintiff at Calicut, but the goods were short delivered, the cause of action for refund of the freight and for price of goods short delivered arises in part at Calicut. AIR 1919 Mad 883 (884) (DB) * AIR 1915 All 53 (54) : 26 Ind Cas 620 (621). (Goods booked at Cawnpore — Suit for recovery of excess freight tenable in Cawnpore.)

(2) For a suit to recover the sum assured by a policy of life insurance cause of action arises partly at the place where the assured died. AIR 1943 Cal 199 (202): ILR (1943) 1 Cal 564 (DB).

(3) A suit for separate maintenance by a Hindu wife against her husband can be instituted at the place where the parties were married as the marriage forms part of the cause of action. AIR 1954 Mad 358 (360).

(4) In a suit for declaration that the order of plaintiff's dismissal from service was wrongful, the alleged failure of the Government to give him an opportunity under Art. 311 of the Constitution to show cause against the proposed punishment, being an essential fact to be proved, would constitute a part of the cause of action. AIR 1956 Sau 75 (77).

(5) Examination by Gauhati University held at Shillong — Suit by a student of College in Shillong in Court of Assistant to Deputy Commissioner K and J of Shillong Hills for declaration that he had passed the examination and for injunction to publish his name in list of successful candidates — Court held had jurisdiction. AIR 1955 Assam 9 (12) (DB).

(6) A part of cause of action for suit to enforce a new liability in the event of winding up of a company arises at the place where the winding up of the company and the appointment of the liquidator are decided upon. AIR 1956 Nag 204 (207): ILR (1956) Nag 556.

(7) Court would have jurisdiction to entertain a suit for partition of movables if they are situate within its jurisdiction. AIR 1952 Bom 365 (369, 371) (DB) * AIR 1959 Madh Pra 359 (361) : 1959 MPLJ 841 (DB) * (1964) 1 Andh LT 168. (Suit for partition of both immovable and movable properties — Movable property situated within local limits of jurisdiction of Court but not immovables — Court can entertain the suit.)

(8) In a claim under S. 70, Contract Act, the antecedent request pursuant to which the work was done does not form part of the cause of action. (1954) 93 Cal L Jour 373 (376).

(9) If the creation of the right and the infringement thereof both happens at a particular place, the whole cause of action will be said to arise there. But if they take place in different places parts of the cause of action arise in the different places. AIR 1918 Lah 52 (52): 1918 Pun Re No. 26 * (1878) 3 Cal 264 (269).

(10) Where the infringement itself is in respect of several items, parts of the cause of action arise in the several places of infringement in respect of those items. AIR 1923 Mad 109 (111) (DB).

(11) Where a cheque is received at G and cashed at B, the payment relates back to the date of delivery of cheque and thus part of cause of action having arisen at G, Court at G has jurisdiction to entertain the suit. AIR 1957 Madh B 90 (92, 93) (DB).

[See also AIR 1963 Pat 398 (400, 401). (Payment made by cheque in performance of contract — Cause of action arises partly in place where cheque is issued and

**Section 20 — Note 14 (contd.)**
partly in place where it is honoured or dishonoured.) ]

(12) Suit to recover arrears of rent — Tenure or holding situated partly in India and partly in Pakistan — Defendant residing in Pakistan — Court in India has jurisdiction to entertain suit. 1959 Cal LJ 9: ILR (1957) 2 Cal 6.

(13) Even fraction of cause of action is 'part' of it — Its percentage to whole cause of action is immaterial. AIR 1965 Mys 316 (316. 317): (1965) 1 Mys LJ 232.

(14) Where the letter terminating the appointment was posted at Calcutta where the principal was carrying on business and was received by the agent at Madras there can be no doubt that the termination of the agency was effected at Madras and at least a part of the cause of action arose within the jurisdiction of the Court in Madras. AIR 1963 Mad 30 (30) : (1962) 2 Mad LJ 270 (DB).

(15) Non-payment is part of cause of action only in suit for breach of contract. AIR 1965 All 590 (594): 1955 All LJ 221 (FB).

**15. Notice under S. 80, Civil P. C. —** (1) A statutory notice required by the provisions of S. 80 of the Code as well as the Railways Act, though an essential preliminary step for valid institution of suit, does not form part of the cause of action for the suit itself as the notice follows the cause of action. AIR 1954 Bom 129 (132): ILR (1953) Bom 1157 (DB) * AIR 1957 Punj 27 (31): ILR (1956) Punj 1129 (FB). (AIR 1949 Cal 622, Dissented from.) * AIR 1955 Mad 345 (350): ILR (1955) Mad 512 (DB) * (1950) 86 Cal L Jour 98 (104, 105) (DB). * AIR 1959 Cal 273 (276): ILR (1960) 1 Cal 74 * AIR 1960 Cal 391 (394): 64 Cal WN 502 (DB). (ILR (1950) 2 Cal 551, Overruled.) * AIR 1960 Cal 513: 64 Cal WN 744 * AIR 1960 Cal 458 (460): ILR (1960) 2 Cal 597.

[See also AIR 1960 Mad 58 (60 to 62): (1959) 2 Mad LJ 479 (DB). (In case of thorough traffic carried over more than one Zonal unit of Government railways, notice to any one such General Manager is sufficient under S. 77 Railways Act. (AIR 1949 Pat 329, Dissented from and AIR 1955 Mad 151, Overruled.) * ILR 1959-1 Cal 450.]

[But see AIR 1953 Cal 235 (236) * 59 Cal WN 405 (417) * (1954) 93 Cal L Jour 373 (379) * AIR 1956 Assam 85 (95): ILR (1956) 8 Assam 51 (DB).]

(2) No part of the cause of action would arise at the place from which the notice is issued and posted. AIR 1956 Cal 66 (70). (Obiter.) * AIR 1957 Punj 27 (31): ILR (1956) Punj 1129 (FB) * AIR 1955 Cal 626 (631) * (1954) 93 Cal L Jour 373 (379).

(3) Notice under S. 80 is valid when cause of action is sufficiently stated. AIR 1966 All 333 (336) : ILR (1965) 2 All 127.

**(4) Provision relating to cause of action must not be construed in narrow sense —** Cause of action as specified in notice if enables Government to know what plaintiff's claim is about and whether the claim should be conceded or resisted, S. 80 can be said to have been complied with. AIR 1967 Andh Pra 338 (349): (1967) 2 Andh LT 141 (DB).

**16. Suits on contracts. —** (1) In a suit based on a contract the cause of action will consist of the making of the contract and of its breach at the place where it is to be performed. AIR 1954 Hyd 39 (41): ILR (1953) Hyd 637 (DB) * AIR 1924 Rang 2 (7): 1 Rang 231 (DB) * AIR 1939 Pat 294 (294, 295) * 1958 Andh LT 930 * AIR 1967 All 9 (11) : 1967 All LJ 173 (DB) * 1957 Ker LJ 821: 1957 Ker LT 953 * AIR 1962 Andh Pra 338 (339, 340, 342): (1962) 1 Andh WR 314 (DB).

[But see (1882) 8 Cal 483 (490, 491, 495) (FB). (Letters Patent.) ]

(2) An action, therefore, for breach of a contract can, at the option of the plaintiff be brought either at the place where the contract was made or the place where the breach was committed. AIR 1954 Hyd 39 (41) : ILR (1953) Hyd 637 (DB) * AIR 1954 Pat 147 (148) * AIR 1954 Trav-Co 362 (363): ILR (1954) Trav-Co 298 (DB) * 1956 All WR (HC) 275 (276) * Madh BLR (1954) (Civ) 477 (478) * AIR 1953 Raj 134 (135).

(3) When a contract is both made and broken at a particular place, the whole cause of action will arise there. AIR 1954 Bom 491 (498, 504): ILR (1954) Bom 1137 (DB) * 1955-2 Mad L Jour 228 (229) * AIR 1942 Lah 252 (252) (DB) * (1867) 1 Beng LR (OC) 35 (37) * (1894) 18 Bom 43 (45) (DB) * ILR (1951) 1 Raj 662 (DB).

(4) The place where the cause of action arises in respect of any contract must be determined with reference to the terms of the original contract itself and not by subsequent negotiations. AIR 1922 Nag 127 (128) * 1967 All LJ 343: 1967 All WR (HC) 380. (Agreement specifying place where terms of contract were to be carried out i.e., where cause of action was to be deemed to arise is not illegal.) * 1960 MPLJ 1359 * AIR 1964 Mys 147 (151): (1963) 2 Mys LJ 513 (DB) * AIR 1968 Andh Pra 330 (332): (1967) 1 Andh WR 445 * AIR 1959 Mad 227 (228, 229): (1959) 1 Mad LJ 106 * AIR 1963 Guj 148 (150): (1963) 4 Guj LR 540 * (1964) 66 Pun LR 490: 1964 Cur LJ 176 * 1961-2 Mad LJ 337: 74 Mad LW 333. (Parties can agree to vest jurisdiction in one of two competent Courts.)

(5) Suit for recovery of arrears of rent is based on contract and is therefore triable in Calcutta if the parties are there, in spite of the fact that the premises are in Pakistan. AIR 1958 Cal 700 (701): ILR (1956) 1 Cal 503 (DB) * (1962) 40 Mys LJ 1053. (Suit for recovery of rent under agreement of lease — Can be brought in court within jurisdiction of which defen-

**Section 20 — Note 16 (contd.)**

dant resides.) * AIR 1962 Raj 106 (106): 1961 Raj LW 228. (House situated in Bombay — Suit for rent filed in Rajasthan Court within whose jurisdiction agreement was entered into and defendant resided — Court empowered to entertain suit under S. 20 — S. 28 of Bombay Act (57 of 1947) not bar to jurisdiction.) * AIR 1961 Punj 143 (145): ILR (1960) 1 Punj 384 (DB). (Suit by lessee for refund of premium amount on basis of frustration of contract of lease — Suit is governed by S. 20 and not by S. 16 Civil P. C. — Civil Court within whose jurisdiction defendant voluntarily resided has jurisdiction.) (Overruled on another point in AIR 1963 Punj 49). * 1961 BLJR 644 (DB). (Suit cognisable by Patna High Court when filed because rent payable at Patna though lands situate elsewhere.)

(6) Invalid contract cannot be relied upon as constituting part of cause of action. AIR 1965 Cal 191 (195).

(7) In a suit refund of deposit made as security for due performance of contract, the Court of the place where the plaintiff resides has jurisdiction to entertain the suit on the principle that debtor must seek the creditor and pay where he is. 1963 All LJ 251: 1963 All WR (HC) 206.

**17. Place of making contract.**—(1) Making of the contract itself is a part of the cause of action for a suit on the contract. AIR 1953 Raj 134 (135) * AIR 1957 Mad 201 (204) * AIR 1952 Punj 113 (113) * AIR 1947 Bom 72 (74) * AIR 1936 All 514 (516).

(2) A contract is made when an offer of one party is accepted by the other party. AIR 1954 Bom 491 (494): ILR (1954) Bom 1137 (DB) * (1905) 32 Cal 884 (889, 890) (DB) * AIR 1959 Madh Pra 234 (236) : 1959 Jab LJ 281. (Making of offer is a part of the cause of action.)

(3) An invitation to offer is not an offer. AIR 1953 Madh B 38 (39) * ILR (1954) 4 Raj 252 (256) * AIR 1947 All 337 (338, 339): ILR (1947) All 44 (DB) * AIR 1938 Nag 186 (188): ILR (1939) Nag 648.

(4) Where a catalogue is sent by a firm to any person, and he orders for an article mentioned therein, it is he who is really making the offer, the catalogue being merely an invitation to offer. (1909) 1 Ind Cas 325 (327) (Oudh) * AIR 1922 Lah 100 (101).

(5) An offer is made at the place where it is received and if it is made by post or telegram the place of dispatch is not a material factor. AIR 1954 Bom 491 (494): ILR (1954) Bom 1137 (DB) * ILR (1954) 4 Raj 252 (257) * AIR 1953 Madh B 38 (39) * AIR 1949 Pat 270 (276): 27 Pat 723 * AIR 1947 All 337 (338, 339): ILR (1947) All 44 (DB).

[But see AIR 1954 Bom 145 (148). (Contract by correspondence—Offer made by plaintiff by post from Bombay — Offer accepted by defendant at Belgaum by posting letter — Part of cause of action arises at Bombay — AIR 1945 Lah 260, Dissented from.) ]

(6) If the proposal and acceptance thereof are made in different places, the place of acceptance will be the place where the contract is made. AIR 1952 Vindh Pra 62 (65) * AIR 1948 Lah 56 (58) * AIR 1943 Mad 471 (473): ILR (1944) Mad 95 (DB) * (1905) 32 Cal 884 (889, 890) (DB). * AIR 1966 SC 543 (547): (1966) 1 SCR 656. (Proposal and acceptance by telephone conversation — Contract is made at place when acceptance is received and part of cause of action for suit for damages for breach arises at that place — Analogy of contract by post and telegram does not apply.) * AIR 1961 Cal 166 (168) * (1963) 65 Punj LR 681: 1963 Cur LJ 224. (Contract concluded at L Court at L has jurisdiction.) * AIR 1961 Raj 93 (95): 1960 Raj LW 397. (Cause of action cannot be held to have arisen at place where an offer is made.)

(7) Where the contract is entered into by postal communication, the contract will be deemed to be made where the letter of acceptance is posted, and not where it is received. AIR 1955 Madh B 96 (97): ILR (1955) Madh B 141 * AIR 1957 Mad 201 (204) * AIR 1954 Bom 491 (494): ILR (1954) Bom 1137 (DB) * ILR (1954) 4 Raj 252 (257) * AIR 1952 Mys 111 (112) (DB) * AIR 1945 Lah 260 (264) (DB) * AIR 1943 Mad 471 (473): ILR (1944) Mad 95 (DB). (AIR 1942 Mad 13: ILR (1942) Mad 243, Dissented from.)

[But see AIR 1954 Bom 145 (148). (AIR 1945 Lah 260, Dissented from.) ]

(8) If the acceptance of a proposal consists of the performance of a condition of the proposal, the contract will be deemed to be made where the condition is performed. (1905) 32 Cal 884 (888) (DB).

(9) If an agreement is to be executed by the plaintiff, part of the cause of action arises where the agreement is executed. (1906) 30 Bom 364 (377) (DB).

(10) Where the contract purports on the face of it to have been made at any particular place it will be presumed that the parties have agreed to that place being taken as the place of contract and it will be so treated. (1905) 28 Mad 19 (22) (DB). (English cases cited.)

(11) Seller taking goods to buyer without order — Suit for price — Suit for price lies at buyer's and not at seller's place of business. AIR 1960 Ker 188 (190): 1960 Ker LT 1.

**18. Place of breach or non-performance.** — (1) The place of breach furnishes the forum for a suit on contract, even though the place of making it be not within the forum. AIR 1955 Cal 626 (631) * AIR 1958 Pat 489 (491): 37 Pat 442 (DB) * AIR 1957 Mad 201 (204) * AIR 1954 Trav-Co 362 (363) : ILR (1954) Trav-Co 298 (DB)* AIR 1942 Oudh 250 (252): 17 Luck 733 (DB) * AIR 1927 Mad 1150 (1150) (DB) *

**Section 20 — Note 18 (contd.)**

(1904) 27 Mad 355 (358) (DB). * 1957 Ker LT 953: 1957 Ker LJ 821. (Performance of contract is part of cause of action — Suit in respect of breach can be filed at place where contract should have been performed.) * AIR 1957 Mad 201 (204) * AIR 1958 Pat 489 (491): 1958 Pat LR 58 (DB).

(2) The place of breach is the place where the contract is to be completely performed, or, where the performance is to be in several places, where it is to be completed. AIR 1952 Mys 111 (112) (DB) * AIR 1957 Andh Pra 530 (532) * AIR 1957 Mad 201 (204) * ILR (1957) Kar 932 (935, 936) * AIR 1949 Mad 145 (146) (DB). * AIR 1942 Oudh 250 (252) : 17 Luck 733 (DB) * (1860) 8 Moo Ind App 291 (307) (PC) * AIR 1924 Sind 64 (68) (DB) * AIR 1924 Sind 29 (31): 17 Sind LR 164 (DB). * 1963 Cur LJ 478 (Punj).

(3) A purchases goods of B at M but it is agreed that the delivery of the goods and the payment therefor should be made at N. The Court at N has jurisdiction to try a suit in respect of the breach of the contract. (1911) 5 Sind LR 97 (100) (DB) * AIR 1920 All 6 (8): 42 All 619 (DB) * AIR 1914 Sind 146 (147): 8 Sind LR 107.* 1964 Raj LW 416: ILR (1964) 14 Raj 1084.

(4) It is agreed that goods sent by B to A should be measured at M and delivered at P. B. fails to deliver the goods and A sues him for damages for non-delivery. The cause of action arises at P. (1868) 5 Bom HCR (AC) 33 (34) (DB).

(5) In cases of contracts for the sale of goods the place where the goods had to be delivered is the place of performance and the Court of that place will have jurisdiction. AIR 1955 Mad 271 (274) * AIR 1958 Pat 489 (491): 37 Pat 442 (DB) * AIR 1957 Mad 201 (204) * Madh BLJ 1955 HCR 743 (746) * Madh BLR 1954 (Civ) 477 (478) * ILR (1954) 4 Raj 252 (259, 260) * AIR 1953 Ajmer 29 (30) * 1950 All L Jour 145 (148) * AIR 1962 Mad 44 (46, 47, 48): 74 Mad LW 495 (DB).

[See AIR 1953 Mad 389 (390) * AIR 1951 Punj 378 (381) * AIR 1949 Mad 145 (146, 147) (DB) * AIR 1947 Mad 83 (84.)]

(6) A delivery to common carrier is, delivery to buyer. AIR 1941 Lah 223 (223) (DB) * AIR 1957 Mad 201 (204) * ILR (1957) Ker 932 (936) * AIR 1914 Mad 311 (311).

(7) Where defendants contracted at Bombay to sell goods to plaintiff at Amritsar, cause of action for breach of the contract would arise in Bombay, as the goods are delivered to the Railway Company at Bombay. AIR 1955 Madh B 96 (97): ILR (1955) Madh B 141 * AIR 1922 Lah 474 (474).

(8) Where the consignee is not buyer but the seller, delivery of goods to the Railway Company cannot be deemed to be delivery to the buyer. Madh BLJ 1955 HCR 743 (745). (Madh BLJ 1953 HCR 859, Rel. on.)

(9) Place of performance should be determined with reference to the intention of the parties as gathered from their acts, the terms of the contract and the surrounding circumstances. (1887) 11 Bom 649 (653) * AIR 1917 All 365 (365): 39 All 368 * (1860) 8 Moo Ind App 291 (307) (PC) * AIR 1935 Bom 283 (285): 59 Bom 365 * AIR 1938 Mad 977 (979) * AIR 1959 All 612 (613): 1957 All LJ 423 * AIR 1965 Punj 143 (145): 66 Pun LR 1183.

(10) Where no actual intention can be inferred, recourse may be had to presumptions. (1912) 15 Ind Cas 885 (886) (DB) (Cal).

(11) Place of performance may be determined by the course of business to which the contract relates or by the nature of the act to be done under the contract. AIR 1956 Nag 118 (120): ILR (1955) Nag 722. (Bilticut transactions.) * (1882) 4 All 423 (426) (DB). (Place of performance held to be plaintiff's place of business.) * (1907) 30 Mad 438 (448) (DB). (Service contract — Salary is payable at place of work.) * AIR 1934 All 549 (550). (Doctor treating a patient under agreement made at K where the treatment was made — Cause of action arose at K.)

(12) Contract of bailment. Remuneration of bailee is payable where the goods bailed are stored. AIR 1917 All 121 (122).

(13) Revocation of a contract being also part of the cause of action in a suit for breach of contract, the Court at the place where the revocation is communicated will have jurisdiction to try the suit. AIR 1956 Nag 118 (120): ILR (1955) Nag 722 * AIR 1957 Mad 201 (205) * AIR 1949 Pat 270 (276): 27 Pat 723 (DB). (AIR 1947 Pat 134: 25 Pat 292, Foll.) * AIR 1965 Punj 107 (109, 110).

(14) In a suit for the recovery of the price paid to defendant and for damages for breach of contract to supply goods a part of the cause of action arises where the plaintiff has paid the price. AIR 1952 Punj 381 (382) * AIR 1946 All 512 (514): ILR (1947) All 3 (DB) * 1959 Jab LJ 881: 1959 MPLJ 646.

(15) In a suit for damages for short delivery of goods by an endorsee of a railway receipt cause of action partly arises where the goods were consigned and partly where the short delivery took place. The endorsement of railway receipt in favour of plaintiff by a Bank on receipt of the price of the goods is no part of the cause of action. AIR 1954 Trav-Co 362 (363): ILR (1954) Trav-Co 298 (DB) * AIR 1960 Ker 257 (258): 1960 Ker LT 352.

**[See AIR 1965 Pat 53 (54) (DB).]**

**Section 20 (contd.)**

**19. Place where money is payable.** — (1) The payment of money under a contract being part of performance of contract furnishes a cause of action. 1953 BLJR 626 (627) * AIR 1958 Mad 482 (484) (DB) * AIR 1958 Raj 60 (61): ILR (1957) 7 Raj 819 * AIR 1957 All 799 (801): ILR (1957) 1 All (465) (DB). (Deposit in advance not appropriated — Claim for refund — Depositee becomes debtor — Place of suit is where depositor resides.) * AIR 1957 Madh B 90 (92, 93) (DB). (Cheque received at G and cashed at B — Part of cause of action arises at G — Court at G has jurisdiction to try suit.) * (1878) 3 Cal L Rep 459 (460) (DB) * AIR 1962 Raj 122 (125, 126): 1961 Raj LW 606 * AIR 1968 Raj 89: 1967 Raj LW 129 * AIR 1961 Pat 198 (199): 1960 BLJR 697 (DB).

[See 1961 Jab LJ 1235: 1961 MPLJ 1080.]

(2) The place where movey is expressly or impliedly payable will be a forum of action. AIR 1956 Punj 111 (111) * AIR 1957 Mad 201 (205) * AIR 1955 All 416 (416) (DB) * (1955) 8 Sau LR 13 (17) * AIR 1954 Pat 147 (149) (DB) * ILR (1954) 4 Raj 252 (257) * AIR 1953 Raj 134 (135) * AIR 1933 All 147 (148, 149). (Lease of property outside jurisdiction — There is an implied promise to pay at place of lessor's residence.) * AIR 1924 Mad 789 (790) * AIR 1925 Nag 408 (408) * (1868) 3 Agra 242 (244) (FB) * AIR 1960 Raj 243 (244): 1960 Raj LW 185 * 1961 Ker LT 695: 1961 Ker LJ 849. (English Common law rule of debtor seeking creditor is not applicable in India for determining forum — Place from which correspondence which led to contract, will not determine forum.)

(3) In case of goods sold and delivered, a suit for the price lies where the same is to be paid, even though both the sale and the delivery should have been made in another place. AIR 1953 Raj 134 (135) * AIR 1957 Andh Pra 530 (532) * 1952 Mys 111 (113) (DB) * AIR 1951 Kutch 8 (9) * AIR 1949 Mad 145 (146, 147) (DB) * AIR 1935 Mad 663 (664) (FB) * (1882) 4 All 423 (426) (DB).

(4) Action to recover money due on life insurance policy can be instituted in the place where death of assured takes place. AIR 1943 Cal 199 (201, 202): ILR (1943) 1 Cal 564 (DB) * AIR 1918 Mad 635 (635) (DB) * AIR 1932 Bom 392 (393) * AIR 1934 Sind 76 (76): 28 Sind LR 192.

(5) In contract of insurance against burglary, a claim for the insurance amount can be made at the place where the burglary was committed. AIR 1957 All 208 (211, 212): ILR (1937) All 234 (DB).

(6) Where the place of payment is not indicated in the contract, it is to be ascertained with reference to the intention of the parties and the circumstances of the case. AIR 1956 Nag 118 (120): ILR (1955) Nag 722 * AIR 1957 Mad 201 (205) * AIR 1952 Kutch 58 (59) * AIR 1919 Nag 135 (136) * (1912) 15 Ind Cas 885 (885) (Cal) * AIR 1951 Ajmer 83 (2) (83). (Issue as to whether the money claimed was payable at a place within the jurisdiction of the Court — Defendant ex parte — Suit decreed on plaintiff's affidavit — Decree held legal.) * AIR 1964 Cal 418 (421) (DB) * AIR 1966 Cal 259 (264) * AIR 1960 Punj 450 (453, 455): 62 Punj LR 462 (FB).

(7) Fact that actual part payment was made at a particular place is not decisive of the fact that payment according to agreement was to be made at that place. AIR 1954 Madh B 184 (190): ILR (1954) Madh B 343 (FB) * AIR 1958 Punj 361 (364): ILR (1958) Punj 682. ('Payable' excludes notion of fulfilment indicated by the word 'paid'.)

(8) The onus of proving that the money was payable at a particular place is on the plaintiff. As regards the rule that debtor must find the creditor, see Notes under Section 49, Contract Act, 1872. AIR 1954 Madh B 184 (190): ILR (1954) Madh B 343 (FB).

**20. Suits between principal and agent.**— (1) Suit for accounts against an agent can be filed where the contract of agency was made or where the accounts are to be rendered and payment made by the agent. ILR (1953) 2 Cal 279 (286) * AIR 1958 Madh Pra 409 (410) * AIR 1932 Bom 42 (44, 45) * AIR 1915 Mad 1001 (1002) (FB) * AIR 1938 Nag 186 (187): ILR (1939) Nag 648 * AIR 1932 Bom 291 (299): 56 Bom 324 (DB) * AIR 1958 Punj 361 (364): 60 Punj LR 161 * AIR 1962 Raj 247 (249, 250): 1962 Raj LW 389. (AIR 1924 Rang 2, Dissent. from.) * AIR 1962 Raj 122 (125, 126): 1961 Raj LW 606.

(2) Where the contract does not specifically provide for the place where the accounts are to be rendered, it is to be ascertained by reference to the intention of the parties as gathered from the circumstances of the case. AIR 1953 Ajmer 28 (2) (29) * (1871) 7 Beng LR (App) 35 (36, 37) (DB).

(3) A payment will be taken as intended to be made where the accounts are settled and the balance struck. 1874 Pun Re No. 22, p. 116 (118).

(4) In the case of pukka adatia and commission agents, in absence of a specific provision to the contrary, the place of business of agent is the place where money is payable. AIR 1955 All 669 (670) (DB) * AIR 1958 Punj 361 (364, 365): ILR (1958) Punj 682 * AIR 1924 All 530 (531): 46 All 465 (DB).

[See also AIR 1952 Punj 119 (120). (Suit for accounts against commission

**Section 20 — Note 20 (contd.)**

agent.)* AIR 1940 Lah 171 (172). (Do.) * AIR 1932 Bom 42 (45) * AIR 1928 Bom 548 (549, 550). (Mere sending of goods does not constitute part of the cause of action.)]

(5) A suit by an agent for the recovery of amount due to him in respect of business done by him lies at the place where he carried on such business. AIR 1937 Sind 317 (318) (DB) * AIR 1960 Punj 15 (16) * 1958 Ker LT 523: 1958 Ker LJ 1260.

(6) In a suit by principal for compensation against agent for loss suffered by the negligent act of the agent in conduct of business the cause of action arises, where the act of negligence is committed and not where the loss is discovered. ILR (1954) 6 Assam 260 (262).

(7) Suit by agent against principal for recovery of loss — Place of suit would be the place of residence of the defendant. AIR 1954 SC 500 (502): 1955 SCR 439.

(8) Agent from place B offering to sell goods of principal of place I — Principal accepting offer by despatching goods — Principal taking exception to certain debits contained in statement of account sent by agent — Suit for recovery of amount represented by those debits, is maintainable at place I. (1964) 77 Mad LW 458 (2).

(9) Suit for accounts by principal against agent — Place where account was demanded and refused does not give cause of action to file suit at that place. AIR 1961 Punj 567 (568): 63 Pun LR 867.

**21. Suit for partnership accounts.** — (1) The place of performance in the case of a contract of partnership is the place where the business of the partnership is carried on. (1860) 8 Moo Ind App 291 (307) (PC) * AIR 1929 All 236 (236). (Suit lies also at place where agreement of partnership was made.) * AIR 1921 Lah 673 (674). (Do.) * AIR 1914 Oudh 314 (315).

(2) Where the business is carried on in more places than one, a suit may be filed in any one of such places. Madh BLJ 1955 HCR 1074 (1075) (DB) * AIR 1926 Mad 427 (427) (DB). (Suit for dissolution of partnership.)

(3) A contract of partnership was entered into by P firm with D firm, both of whom had their head offices at Calcutta. P firm was to purchase jute at K in the Muzaffarpur District and to send it to Calcutta to the D firm for sale. Accounts of the partnership were kept at Calcutta. It was held that the Court at K had no jurisdiction to try a suit for dissolution of the partnership. AIR 1936 Pat 6 (7) (DB).

(4) A suit for dissolution of partnership and for accounts is governed by this section even if the suit involves immovable partnership property situate beyond the jurisdiction of the Court. Madh BLJ 1955 HCR 1074 (1075) (DB).

**22. Suits between banker and customer.** — **(1)** Where a deposit is made in a Bank the place of repayment is to be determined from the terms of the receipt. In the absence of such terms the money becomes repayable at the place where Bank does its business. AIR 1940 All 243 (245): ILR (1940) All 207 (DB).

(2) The rule that debtor must seek his creditor applies to a trader who receives deposits and to other cases of deposits which are not deposits received by a banker. AIR 1952 Mys 111 (114) * AIR 1933 Bom 179 (181): 57 Bom 306 * AIR 1917 All 128 (129).

(3) In the case of current account the obligation of banker to repay arises on demand and is limited to the office where the account is kept. The customer must make a demand for payment at the branch where his current account is kept before he can have a cause of action against the Bank. The rule is the same whether the account is a current account or whether it is a case of deposit. AIR 1955 SC 590 (598): 1955-2 SCR 402: ILR (1955) Punj 1127 * AIR 1955 Cal 413 (415).

[See AIR 1961 Punj 66 (73): 63 Pun LR 152 (DB). (Security deposit in branch office in Pakistan — Closure of branch office — Forfeiture of deposit — Demand at head office in India — Application for return was held cognizable by Courts of India.)]

(4) A loan by Bank on overdraft account is repayable at the office where the account is maintained and the state of accounts can be ascertained. The subsequent closure of the Branch office where the account is maintained and where breach of obligation to repay occurred will not shift the venue of breach. AIR 1955 Cal 413 (415) * AIR 1961 Mad 122 (124): (1961) 1 Mad LJ 323 (DB).

(5) Cash credit account opened with defendant's branch at Srinagar in pursuance of agreement executed at Jammu — Suit for recovery of sum due under that account — Court at Srinagar has jurisdiction to try suit as part of cause of action arises in Srinagar. AIR 1960 J and K 11 (12) (DB).

**23. Suits on negotiable instruments.**— (1) A suit may be filed where a promissory not is made or bill of exchange is drawn. AIR 1956 Mad 629 (630) (DB) * AIR 1916 Oudh 105 (106) * ('08) 31 Mad 223 (227) (DB). (Payee's place of residence not to be presumed to be the place of payment.) * AIR 1961 Cal 321 (328): 65 Cal WN 113 (DB). (Promissory note payable on demand — No place of payment indicated — Common law rule that debtor must seek creditor does not apply — Suit lies at place of execution or at place where debtor resides. AIR 1940 Cal 443, Dissent. from.)

**Section 20 — Note 23 (contd.)**

(2) Promissory note payable on demand — Suit on — Jurisdiction is governed by Section 20, Civil P. C. and not by provisions of Negotiable Instruments Act. ILR (1960) 2 Andh Pra 195.

(3) It may also be filed where the instrument is delivered to the promisee or where it is payable, though it is executed in a different district. AIR 1956 Mad 629 (630) (DB) * AIR 1942 Bom 251 (253): ILR (1942) Bom 620 (DB). (Per Wadia J.) * ILR (1954) Hyd 776 (781) * AIR 1939 Lah 498 (498) * AIR 1920 Pat 157 (159): 5 Pat L Jour 536 (DB) * AIR 1916 Bom 227 (228): 40 Bom 473 * AIR 1929 Cal 306 (307) (DB) * (1883) 9 Cal 105 (109) (DB) * (1901) 24 Mad 259 (261) (DB) * AIR 1915 Lah 481 (482): 1916 Pun Re No. 2 (DB) * 1962 RLW 282: ILR (1962) 12 Raj 652.

(4) A promissory note, which on its face purports to have been made at a particular place, will be presumed to have been made there. (1905) 28 Mad 19 (22) (DB).

(5) Where a promissory note payable on demand is executed and handed over by B to A at b, but the note describes A as a resident of M, only the Court at B and not at M has jurisdiction to entertain a suit on the note. AIR 1937 Nag 241 (242): ILR (1938) Nag 301.

[See also AIR 1942 Bom 251 (253, 255): ILR (1942) Bom 620 (DB). (Pro-note executed in A — No place of payment mentioned — Mere description of promisee as resident of B is not enough to show that it is payable in B.) * AIR 1951 Hyd 132 (133, 134): ILR (1951) Hyd 798 (DB). (Amount held payable at place of execution of pro-note.)]

(6) Where a negotiable instrument is drawn at one place and accepted at another, part of the cause of action will arise at the place of acceptance. AIR 1920 Cal 718 (720): 47 Cal 588 (SB) * AIR 1960 All 557 (558). (Acceptance of a hundi gives jurisdiction to a Court.)

(7) The endorsement of negotiable instrument or the assignment of a promissory note will also give rise to a cause of action at the place of endorsement or assignment. AIR 1953 Nag 192 (193). (1889) 22 QBD 128: 58 LJQB 190, Foll.) * AIR 1949 Cal 495 (497): ILR (1945) 2 Cal 333. (Case under Cl. 12 of the Letters Patent.) * AIR 1939 Bom 461 (464): ILR (1939) Bom 631 * AIR 1936 Cal 349 (350): 63 Cal 435 * ('05) 22 Cal 451 (453) * AIR 1917 Mad 221 (222) (DB) * AIR 1966 Andh Pra 334 (335): ('66) 1 An WR 282 * ('60) 1 Andh WR 222: (1968) 2 Andh LT 234. (S. 70 of Negotiable Instruments Act does not override Section 20, C. P. Code.)

(8) The dishonour of a negotiable instrument will also furnish a cause of action and a suit may be brought at the place where it was dishonoured. (1876) 1 Bom 23 (35, 43) (DB). (Even notice of dishonour is part of cause of action.) * (1875) 12 Bom HCR 113 (127).

(9) Rule that debtor to seek his creditor does not apply to promissory note. AIR 1952 Punj 128 (129).

(10) Promisee can select any place for performance of promise. (1963) 4 Guj LR 305.

[Overruled in AIR 1967 Guj 1 (DB). On the ground that the instrument in question in the suit was not a promissory note.]

(11) Execution of promissory note by first defendant within the territorial jurisdiction of Court. Debt guaranteed by second defendant outside the territorial jurisdiction. Suit for recovery against defendants is the place of execution of note. (1966) 1 Mad LJ 159: 76 Mad LW 176 (1).

**24. Suits on assigned debts or contracts.** — (1) An assignee of debt under bona fide voluntary assignment can sue his assignor and the original debtor in Court within whose jurisdiction the assignment is made. AIR 1955 Raj 53 (55): ILR (1955) 5 Raj 269 (277) (DB). (AIR 1924 Rang 2: 1 Rang 231, Dissented from.) * AIR 1949 Cal 495 (497): ILR (1945) 2 Cal 333 * (1962) 64 Punj LR 465: 1962 Cur LJ 173. (No cause of action arises where bogus assignment takes place.)

(2) The appointment of a receiver in respect of a debt is not tantamount to an assignment in his favour of the debt itself and the Court at the place where the appointment is made, has no jurisdiction to entertain a suit in respect of the debt. AIR 1955 Mad 526 (527): ILR (1956) Mad 171 (DB).

(3) An assignee of a right to purchase property can bring a suit against the vendor and the assignor in the Court within whose jurisdiction the assignment has taken place. AIR 1955 Punj 93 (96): ILR (1955) Punj 285.

(4) In a suit against the Union of India for short delivery by the assignee of the right, title and interest of the consignor in the goods despatched by railway where, by the assignment, the railway receipts or the claims thereunder are transferred to the assignee, the assignment is a part of the cause of action and the Court, within whose jurisdiction the assignment took place, is competent to entertain and try the suit. AIR 1959 Cal 563 (565): 63 Cal WN 806.

**25. Suits for contribution.**—(1) Where one of the co-owners of the mortgaged property gets the sale of the property under the mortgage decree set aside by depositing the entire decretal amount in Court and brings a suit against the other co-owners for contribution, the cause of action for the suit partly arises at a place where the deposit is made and the Court at that place has jurisdiction to entertain the suit. 1953 BLJR 707 (709) (DB).

**Section 20 (contd.)**

**26. Suit on torts.**—(1) Where there are several tort-feasors and some of them only reside within jurisdiction, a suit will be maintainable against them at the place where they reside. AIR 1928 Cal 887 (889) (DB).

(2) Court, within local limits of whose jurisdiction a tortious act is committed, is competent to try the suit. (1905) 3 Low Bur Rul 164 (165) * AIR 1957 Pat 128 (129). (Subsequent aggravation of damage caused by a tort, without any act or omission on part of defendant, does not furnish a cause of action.) * (1905) 29 Bom 368 (372). (Malicious prosecution — Place where extradition proceedings are taken will give jurisdiction.) * (1910) 5 Ind Cas 513 (513) (DB) (Mad). (Wrongful ex-communication — Cause of action arises where order of ex-communication is handed over to the community.) * AIR 1930 Pat 528 (529). (Railway collision — Cause of action is where it took place.) * AIR 1959 Raj 291 (293, 294): 1959 Raj LW 19.

[See AIR 1932 Bom 42 (44). (Negligence by Agent.)]

(3) Where the defendant instituted criminal proceedings at D against the plaintiff, who was residing at C, and the plaintiff suffered damages at C, suit for damages for malicious prosecution can be instituted at C. AIR 1933 Cal 706 (708): 60 Cal 918 * (1964) 6 OJD 218: ILR (1964) Cut 598.

(4) Suit for damages — Court at place where plaintiff was served with summons in criminal case has jurisdiction to entertain it. AIR 1961 Mys 188 (189): 39 Mys LJ 270.

**27. Suit for custody of minor.** — (1) Where the defendant removes a minor from the custody of his guardian from A to L, the Courts at both the places have jurisdiction to entertain a suit for the custody of the minor. (1890) 12 All 213 (217) (DB).

(2) Place of suit — Suit for custody of minor — Where minor ordinarily resides — Residence of minor is a question of fact. AIR 1954 Sau 152 (153): 7 Sau LR 123 (DB).

**28. Suits for restitution of conjugal rights.** — (1) The cause of action, in a suit for restitution of conjugal rights, is breach of marital obligations on part of either party. ILR (1954) Madh B 274 (276). (Any person who by words or conduct prevents wife from allowing her to live with her husband can be made party.)

(2) In a suit by a husband against his wife for restitution of conjugal rights the wife's absenting herself from her husband's residence without his consent will furnish a cause of action, and the suit can, therefore, be brought in the Court within whose jurisdiction the husband or the wife resides. AIR 1956 Pepsu 49 (49): ILR (1955) Patiala 518. (Place of actual residence and not permanent residence determines forum of suit.) * (1894) 18 Bom 316 (318) (DB) * AIR 1914 Bom 211 (214): 38 Bom 125 (DB) * AIR 1919 All 96 (96) * AIR 1936 Mad 288 (289): 59 Mad 392 (DB).

(3) In suits for restitution of conjugal rights what is material for giving jurisdiction to the Court is the residence of the parties within the jurisdiction of the Court at the time of the institution of the suit. AIR 1954 Nag 51 (53).

(4) A suit by the plaintiff against his wife's father for an injunction restraining him from preventing his daughter returning to the plaintiff is not a suit for the restitution of conjugal rights. AIR 1956 Madh B 160 (160): ILR (1955) Madh B 393 * AIR 1936 Mad 288 (290): 59 Mad 392.

(5) Suit for restitution of conjugal rights by a Muhammadan — Suit can be instituted where marriage took place. AIR 1960 Madh Pra 212 (213): 1960 Jab LJ 520.

**29. Suits for divorce.** — (1) In a petition for dissolution of marriage, it is not necessary to prove the place of marriage or that it took place in India. It is enough if the parties are domiciled in India. (1896) 20 Bom 362 (365) (FB).

(2) Where the parties to a suit for divorce were domiciled in India at the commencement of the suit, the Court will have jurisdiction to decide the suit, even though the parties have subsequently migrated to Pakistan. AIR 1954 Nag 51 (53).

(3) A suit for the recovery of dower debt on the divorce of the wife by the husband may be brought at the place where the divorce takes place. (1905) 32 Cal 146 (150) (DB).

(4) Marriage solemnised before partition of India at Karachi and parties separating there — After partition parties separately coming to India — Husband employed at Delhi and wife at Nagpur — Application by husband under Section 13 of Hindu Marriage Act — Nagpur Court has jurisdiction to entertain application. AIR 1963 Bom 176 (178): 64 Bom LR 712.

**30. Suits for maintenance.** — (1) A suit for recovery of maintenance can be instituted in a Court within whose jurisdiction the plaintiff was abandoned as the abandonment is a part of the cause of action for a claim for maintenance. 1955-1 Mad L Jour 397 (398).

(2) A suit for separate maintenance by a Hindu wife against her husband can be instituted in the place where the parties were married, as marriage forms part of the cause of action. AIR 1954 Mad 358 (360) * 33 Cut LT 1056: ILR (1966) Cut 926. (No distinction whether suit is against husband or against person

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possessing property of husband.) * (1963) 1 Mys LJ 223.

(3) Suit for maintenance by a wife — Charge on immovable properties claimed — Some of properties situated in C — Suit is triable by Court at C even though the defendant does not reside within the jurisdiction of the court. AIR 1953 Orissa 25 (28): 19 Cut LT 1 (DB).

(4) Suit for reduction of maintenance charged on landed properties by previous compromise decree in Court at P — Case held was covered by S. 20(c) and the Court at P had jurisdiction to entertain the suit—S. 20 is a residury Section. AIR 1961 Orissa 69 (70): 26 Cut LT 274.

**31. Administration suits.**—(1) In a suit to administer an estate, the grant of probate and the undertaking to administer will furnish parts of the cause of action. (1906) 29 Mad 239 (277) (DB) * AIR 1926 Lah 456 (456, 457).

(2) Court can grant letters of administration only if the deceased, at the time of his death, had any property or had a fixed place of abode, within its jurisdiction. (1896) 20 Bom 607 (609) (DB).

(3) Suit for administration of estate of deceased — One item of estate comprising of immovable property situate outside jurisdiction of Court — Suit is not one for determination of right to immovable property — It can be tried by Court if any part of cause of action arises within its jurisdiction. AIR 1960 Cal 691 (692): 64 Cal WN 711 (DB).

**32. Suit to set aside decree.**—(1) A suit to set aside a decree on the ground of fraud can be brought where the defendant actually and voluntarily resides or where the cause of action, wholly or in part, arises. AIR 1917 Pat 598 (599) * (1910) 5 Ind Cas 648 (649) (DB) (Cal).

(2) The cause of action in such cases is the commission of the fraud and the obtaining of the fraudulent decree. AIR 1940 Pat 444 (446) (DB). (Mere discovery of fraud is not part of cause of action.) * AIR 1914 All 93 (94): 36 All 564 * AIR 1923 Mad 272 (272) (DB).

(3) Where a part of the fraud is committed within the jurisdiction of a Court, that Court will have jurisdiction to entertain the suit. (1903) 30 Cal 369 (381, 382) (DB) * AIR 1958 Mad 516 (517) * ILR (1958) Mad 657 * AIR 1957 Cal 317 (318) (DB). (Suit challenging decree in Vizagapatam Court on ground of fraud — Fraudulently giving wrong name in service of summons published in Calcutta Newspaper stated as part of fraud — Calcutta High Court can entertain suit.) * AIR 1920 Lah 290 (291).

[See AIR 1960 J and K 76 (76, 77) (Decree obtained by fraud in Court A — Suit to set aside decree in Court B where no part of fraud committed — Court at B has no jurisdiction in the matter.) ]

(4) Where A obtains a fraudulent decree against B at X and executes or applies for execution of the decree at Y, part of the cause of action arises at Y. (1902) 25 All 48 (53) * AIR 1957 Cal 317 (318) (DB) * AIR 1915 Mad 915 (916) (DB) * AIR 1917 All 176 (177): 39 All 607 (DB) * AIR 1915 All 163 (164, 169): 37 All 189 (DB) * AIR 1933 Cal 274 (277, 278): 60 Cal 98 * AIR 1923 Cal 425 (425, 426) (DB) * AIR 1928 Oudh 88 (88): 3 Luck 142 (DB) * AIR 1924 Pat 831 (832) (DB) * AIR 1957 Cal 317 (318) (DB).

(5) A mere transfer for execution to another Court without anything more being done will not enable the latter Court to enterain the suit to set aside the decree, though a suit for an injunction restraining the defendant from executing the decree is maintainable in that Court. (1907) 29 All 418 (422) (DB) * AIR 1929 Lah 449 (453) * AIR 1924 Nag 413 (415).

[See also AIR 1918 Mad 711 (712): 41 Mad 213. (Declaratory suit — Inferior Court has jurisdiction to set aside decree of superior Court obtained by fraud, provided it is otherwise competent to try the suit.) ]

**33. Suit to set aside document.**— (1) A suit to set aside a document on the ground that it was obtained by fraud will lie where the fraud was committed. (1883) 5 All 589 (590) (DB). (Suit to set aside will as forged — Suit lies in Court where will is published.)

(2) Such a suit also lies where the fraudulent document takes effect against the plaintiff's interest. (1874) 13 Beng LR 91 (98, 99) (DB) * AIR 1952 Bom 365 (376). (Per Bhagwati J. (Obiter).)

(3) Where a deed of surrender relating to properties situated at C and S was sought to be declared as collusive and fraudulent on the allegation that it would affect the plaintiff's interest with regard to properties situate at C only, it was held that the Court at S would have no jurisdiction to try the suit. AIR 1950 Cal 510 (512): ILR (1951) 1 Cal 331.

(4) In a suit to declare a registered deed as fraudulent and collusive the suit can be brought in the place of registration even though it is executed elsewhere. AIR 1950 Cal 510 (512): ILR (1951) 1 Cal 331.

(5) A executed a letter in Delhi in favour of B, a resident of Delhi, as a result of undue influence and coercion exercised at Delhi. In a suit instituted by A at Madras for a declaration that the letter was not binding upon him and for injunction restraining B from taking steps to enforce the claim under the letter it was held that the cause of action wholly arose at Delhi and the Court at Madras had no jurisdiction to entertain the suit. AIR 1955 Mad 80 (81) (DB).

**34. Suit for infringement of copyright, trade-mark, etc.**— (1) A suit for infringe-

**Section 20 — Note 34 (contd.)**

ment of copyright, trade-mark, etc. can be brought at the place where the infringement takes place. AIR 1942 Mad 659 (660) * AIR 1915 All 262 (262): 37 All 446 (DB). * AIR 1967 Mad 381 (385): ILR (1964) 2 Mad 666 (DB).

(2) Where the suit is for infringement of copyright by hiring out a certain film for exhibition and the film is sent from M to R for exhibition at R, the hiring is to be held as taking place at R and the Court at R will have jurisdiction to entertain the suit. AIR 1942 Mad 659 (659).

(3) In a passing off action the Court in a district in which goods are supplied on a commercial scale to persons who are likely to offer the goods for sale to public has jurisdiction to entertain the suit. AIR 1947 Lah 289 (290).

(4) Suit for infringement of copyright— Cause of action for suit arising within area of ordinary original civil jurisdiction of High Court — High Court can be deemed to be District Court within meaning of S. 2(u) Civil P. C. and has power to try it. AIR 1967 Mad 381 (384): ILR (1964) 2 Mad 666 (DB).

**35. Suits against corporations.**—(1) The residence and domicile of a trading company is its principal place of business, i.e., the place where the administrative business of the company is conducted, which may not be the place where its manufacturing or other business operations are carried on. (1904) 27 Mad 315 (321) (DB) * AIR 1928 Sind 111 (113) (DB).

(2) A foreign company which got itself registered in British India and carried on business there must be deemed to have had its principal office in British India. AIR 1937 All 208 (217): ILR (1937) All 234 (DB).

(3) Where a cause af action arises at a place where the company has a subordinate office, that place will be deemed, in respect of such cause of action, to be the place where the company carries on business, irrespective of the location of its head office, or of the nature of work that is actually carried on in the subordinate office. AIR 1944 Cal 1 (3): ILR (1944) 1 Cal 101 * AIR 1918 Pat 126 (128): 4 Pat L Jour 141 (DB) * AIR 1943 Cal 199 (203): ILR (1943) 1 Cal 564 (DB). (Branch office of insurance company only collecting premia.)

(4) If no part of the cause of action accrues at the place of the branch office, the mere fact of the corporation having a branch office will not give the Court of that place jurisdiction to entertain a suit. AIR 1956 Nag 203 (204) (DB). (1941 Nag L Jour 37, Overruled.) * AIR 1948 Lah 56 (57).

(5) Where prior to Partition of India the principal office of a company was situated in territory which subsequently became Pakistan and after Partition, the principal office was shifted to a place in India, a suit against the Company based on a transaction entered into with the Company before Partition can be brought in the Court at the place to which its principal office has been shifted. ILR (1955) Punj 633 (638).

[See also AIR 1955 Punj 129 (129, 130) (DB).]

[But see AIR 1952 Punj 142 (142).]

(6) The Union of India or the Government of a State is not a corporation within the meaning of the explanation and they cannot be deemed to be carrying on business anywhere in India. AIR 1953 Cal 1 (10) * (1887) 14 Cal 256 (271) (DB) * AIR 1930 Lah 818 (819).

[See also AIR 1950 Cal 207 (209) (DB). (Dominion of India is not a Corporation.)]

[But see AIR 1956 Assam 85 (94): ILR (1956) 8 Assam 51 (DB).]

(7) Suit for declaration that new constituton framed for society is invalid — Terriorial jurisdiction to try suit is in the Court of the place at which the constitution was framed. AIR 1959 All 598 (604). (Reversed on another point in AIR 1962 All 610.)

(8) Suit against company filed in High Court in its original civil jurisdiction — S. 20 inclusive of Expl. II has no application. AIR 1967 Cal 205 (209): 71 Cal WN 458.

(9) Railway is corporation within meaning of explanation 2 to S. 20 — Suits against Union of India representing Western Railway Administration at Indore — Part of cause of action held arose at Indore — Though place of business of Administration was at Bombay, Indore Court held had jurisdiction. AIR 1966 Madh Pra 243 (246): 1966 MPLJ 1100.

(10) The deeming provision of Explanation II to Sec. 20: that a corporation shall be deemed to carry on business at its sole or principal office no matter that it does carry on business here, there and everywhere is not to be found in Cl. 12 of the Letters Patent. With no such legal fiction there the only test that has to be satisfied is, whether company carried on business where it has been sued at the time on commencement of suit. AIR 1967 Cal 205 (209): 71 Cal WN 458.

(11) "Appropriate Government" to make reference under S. 10, Industrial Disputes Act (1947) — Employer company having branches in more than one State — Provision under Expl. II to S. 20 must be taken resort to. AIR 1968 Punj 514 (517): 1968 Cur LJ 337.

**36. Suits against foreigners.** — (1) Jurisdiction over persons and property, apart from principles of international law, where foreign subjects are involved is governed by legislation passed in the country where it is sought to be exercised. In so far as suits are concerned the Code of Civil Procedure and the Letters Patent apply. ILR (1955) Punj 633 (639) * AIR 1957 Pat 256 (260) (DB). (The rule of Private International Law is, therefore, in

**21. Objections to jurisdiction.**—No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.

[But compare 1882, S. 16A (2).]

[Ss. 16-20; S. 99, C.P.C. and S. 11, Suits Valuation Act.]

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**Section 20 — Note 36 (contd.)**

this regard subject to the rules of Municipal Law.) * AIR 1952 Mad 481 (483).

(2) This section enables Courts in India to pass decrees which are capable of execution as domestic judgments, but as foreign judgments they are non est so far as the area outside the jurisdiction of adjudicating Courts is concerned, if they do not conform to principles of Private International Law. AIR 1962 Andh Pra 400 (403, 404): (1962) 1 Andh WR 272 (FB).

(3) The Code does not exempt foreigners from the jurisdiction of Indian Courts. AIR 1927 All 413 (414): 49 All 669 (DB) * AIR 1934 All 740 (743, 745): 56 All 828 (DB).

(4) As regards residence, even a temporary residence is sufficient to give jurisdiction. AIR 1955 Mad 96 (98, 100): ILR (1955) Mad 116 (FB). (Two month's residence prior to suit.) * AIR 1954 Trav Co 141 (142). (Voluntary presence of defendant, a foreigner, who has come on business within the jurisdiction of a Court at the time of suit.)

(5) Foreigner carrying on business through an agent within jurisdiction will become amenable to the jurisdiction of the Court. AIR 1924 Mad 158 (159) * AIR 1961 Andh Pra 476 (477) (FB).

[See also (1803) 26 Mad 544 (552): 30 Ind App 220 (PC).]

(6) Where the cause of action against a non-resident foreigner arises within jurisdiction, that, in itself, is a sufficient ground of jurisdiction. AIR 1955 Madh B 1 (11): ILR (1955) Madh B 31 (FB) * AIR 1953 Sau 16 (19) (FB) * AIR 1951 Bom 125 (127): ILR (1952) Bom 65 (FB)* AIR 1952 Mad 481 (483) * AIR 1951 Bom 190 (192): ILR (1950) Bom 640 (DB) * (1903) 26 Mad 544 (552): 30 Ind App 220 (PC) * AIR 1934 All 740 (746, 754): 56 All 828 (DB) * (1901) 25 Bom 528 (536) (DB) * (1903) 2 Low Bur Rul 47 (52) * AIR 1958 All 775 (785) (DB).

(7) Mere presence of immovable property within jurisdiction does not give rise to a cause of action for recovery of money on foreign judgment. AIR 1958 Mad 203 (204) (DB).

(8) A Court exercising jurisdiction over a foreigner should do so with caution and should protect his interests as if he were a British subject. (1907) 30 Mad 438 (440) (DB) * AIR 1926 Mad 584 (586): 50 Mad 27.

(9) The residence of the defendant in British India does not destroy the jurisdiction of the former Jodhpur Court, which passed the decree in view of the fact that the parties had their permanent place of abode within the local limits of the jurisdiction of the Jodhpur Court. AIR 1957 Assam 127 (130): ILR (1957) 9 Assam 278 (278) (DB).

**37. Revision.**— (1) Where the defendant is, by law, entitled to have the case tried at Patna, it will be a grave injusice to him to insist on its trial at Jagraon in the Punjab, and in such a case the High Court will interfere in revision. AIR 1923 Lah 565 (566) * AIR 1922 Lah 100 (101). (Seller sending quotations on enquiry — Order sent by buyer — Court wrongly hoiding that suit maintainable at buyer's place — High Court can interfere in revision.)

**38. Chartered High Courts.** — (1) The exercise of original civil jurisdiction of Chartered High Courts is governed by the Letters Patent granted to them. AIR 1955 Bom 55 (58) * AIR 1923 Mad 272 (274) (DB).

(2) Suits under S. 92 are governed by the specific provisions contained in that section which applies to chartered High Courts. AIR 1955 Bom 55 (58).

## SECTION 21 — SYNOPSIS

**1. SCOPE AND OBJECT.**
**2. JURISDICTION, MEANING OF.** See Section 9.
**3. OBJECTION TO JURISDICTION.**
**4. Objection as to place of suing.**
**5. Failure of justice.**
**6. EXECUTION PROCEEDINGS.**
**7. COLLATERAL PROCEEDINGS.**
**8. FOREIGN COURTS.**
**9. COURT TRYING A REMANDED CASE—JURISDICTION OF.**
**10. PROCEEDURE WHERE SUIT IS FILED IN A WRONG COURT.**

## TOPIC INDICATOR

Absence of jurisdiction. See Section 9.
Analogous Law — Section 11, Suits Valuation Act. See Note 1.
Waiver of jurisdiction. See Notes 1, 3, 4 and 6.
Submission to jurisdiction — See Notes 3 and 4.
Objection to jurisdiction in—
—Execution proceedings — See Notes 3 and 6.
—Appeal — See Notes 1 and 3.
—Second appeal. See Notes 1 and 3.
—Letters Patent appeal — See Note 3.
—Appeal after remand — See Note 3.
—Revision — See Note 3.

**Section 21 (contd.)**

**1. Scope and object.**— (1) It is a fundamental rule that a judgment of a Court without jurisdiction is a nullity and that want of jurisdiction cannot be waived. To this rule there are two exceptions recognised by the Indian law, Sec. 11, Suits Valuation Act, 1887 and S. 21, Civil P. C. AIR 1955 All 569 (571) (DB) * AIR 1941 Mad 129 (136) (DB) * AIR 1941 Nag 36 (44): ILR (1941) Nag 1 (FB) * AIR 1938 Mad 257 (259, 261) (DB) * AIR 1938 Pesh 77 (78) (DB) * AIR 1967 Ker 97 (99) (DB) * AIR 1960 Pat 136 (138) (DB) * 1956 Raj LW 268: ILR (1956) 6 Raj 102.

(2) Section 21 is framed on the analogy of S. 11 of the Suits Valuation Act 1887. AIR 1954 SC 340 (342): 1955-1 SCR 117 * AIR 1923 Cal 619 (622) (DB) * AIR 1914 Lah 385 (388): 1914 Pun Re No. 87 (DB).

(3) Under S. 21 an objection as to the place of suing cannot be entertained by an Appellate Court except under the circumstances mentioned in the section. AIR 1956 Mad 593 (594) * AIR 1952 Cal 473 (480): ILR (1953) 1 Cal 208 (DB) * AIR 1925 Mad 117 (119, 123) (DB) * AIR 1923 Cal 619 (622) (DB).

(4) The object of S. 21 is that when the Court of first instance after giving an affirmative finding on jurisdiction takes proceedings on the merits of the case, the latter should not be rendered abortive in case the higher Court comes to a contrary finding on the point of territorial jurisdiction. AIR 1954 SC 340 (342) : 1955-1 SCR 117 * AIR 1956 Mad 593 (594) * AIR 1914 Lah 385 (387, 388) : 1914 Pun Re No. 87 (DB) * ('62) 64 Punj LR 213 (220) (DB).

(5) Trial Court can raise the issue of jurisdiction and consider it whether the same was pleaded by the defendants or not. ILR (1958) Mys 736 (738).

(6) Section 21 applies to all objections as to the place of suing. AIR 1955 Madh B 193 (198): ILR (1956) Madh B 237 (FB)* AIR 1917 Mad 198 (200, 201) (DB) * AIR 1934 Sind 123 (129): 28 Sind LR 54 (DB)* AIR 1924 Mad 697 (701) (DB) * AIR 1920 Mad 1019 (1023, 1024): 43 Mad 675 (FB) * AIR 1931 Oudh 411 (411) (DB).

[But see AIR 1958 Punj 289 (293) (DB).]

(7) The effect of S. 21 is to cure, for all purposes, objections to territorial jurisdiction except under the conditions specified in the section. AIR 1920 Mad 1019 (1024): 43 Mad 675 (FB) * AIR 1955 Cal 331 (334) * AIR 1935 Oudh 358 (360): 11 Luck 187 (DB).

(8) Section 21 does not apply to an objection based on an agreement between the parties that the suit should only be filed in a particular Court. AIR 1955 Madh B 193 (198): ILR (1956) Madh B 237 (FB) * AIR 1964 Mys 147 (154) (DB). (AIR 1958 Punj 289, Dissented from.)

[But see AIR 1958 Punj 289 (292, 293) (DB).]

(9) This section does not apply to Chartered High Courts in the exercise of their original jurisdiction. AIR 1929 Cal 358 (364): 56 Cal 940 (DB) * ('36) 164 Ind Cas 907 (910) (DB) (Cal) * AIR 1935 Rang 517 (520) * AIR 1960 Cal 331 (339).

(10) Section 21 applies both to the appellate Court as well as to the revisional Court. 1965 Cur LJ 256: 67 Pun LR 488.

(11) The principle of S. 21 applies to appeals. AIR 1933 Nag 318 (321, 322): 29 Nag LR 342 * ('49) 1949 Trav-Co LR 70 (71) (DB).

(12) The underlying principle of the section is applicable to cases not falling strictly within its terms. AIR 1926 Mad 421 (422, 426): 49 Mad 746 (DB) * AIR 1930 All 873 (874): 52 All 947 * AIR 1964 Ker 206 (209) (DB). (Even if it be held that S. 21 does not in terms apply to proceedings in execution, the principle underlying it does so apply.)

(13) The section only applies to want of territorial jurisdiction. It does not apply to the inherent incompetency of a Court to deal with a cause. AIR 1947 Mad 347 (351) : ILR (1948) Mad 18 (FB) * AIR 1954 Cal 211 (212) * AIR 1940 Oudh 245 (247, 248) * AIR 1937 All 515 (525): ILR (1937) All 670 (DB) * AIR 1936 Nag 1 (3): 31 Nag LR (Sup) 57 (FB) * AIR 1935 Nag 250 (256): 31 Nag LR (Sup) 43 (FB).

(14) Section 21 does not apply to the want of pecuniary jurisdiction. AIR 1946 Sind 103 (107): ILR (1945) Kar 445 * AIR 1942 Oudh 481 (482) (DB) * AIR 1937 All 515 (525): ILR (1937) All 670 (DB) * AIR 1937 Mad 112 (113).

(15) Objection not of technical nature but relating to the very root of jurisdiction of Court—Provisions of section cannot be attracted. AIR 1965 Assam 35 (37) (DB).

(16) This section applies to proceedings under the U. P. Agriculturists' Relief Act or the U. P. Debt Redemption Act. AIR 1948 All 58 (59) (DB) * AIR 1945 All 309 (311): ILR (1945) All 217.

(17) In petition for divorce on basis of Court's earlier decree for judicial separation, objections as to validity of decree for judicial separation on ground of lack of territorial jurisdiction cannot be entertained. AIR 1965 Mys 110 (112) (DB). (AIR 1954 SC 340, Foll.; AIR 1923 Cal 619, Not foll.)

(18) States Reorganisation Act (1956) S. 125 — Appeal pending on relevant date stands transferred — Decree passed by Court after the date is without jurisdiction — S. 21 C. P. Code has no application to case. AIR 1961 Raj 287 (288).

**2. Jurisdiction, meaning of.**— See Section 9.

**3. Objection to jurisdiction.**— (1) An objection to the inherent jurisdiction of a Court to try a cause cannot be waived and can be raised at any stage of the proceedings. AIR 1955 Bom 75 (76): ILR (1954) Bom 1227 (DB) * AIR 1958 Mad 490 (494):

**Section 21 — Note 3 (contd.)**

ILR (1958) Mad 622 (DB) * AIR 1955 Vindh Pra 28 (30) * 1954 Raj LW 743 (744) (DB) * AIR 1953 Nag 136 (138) : ILR (1953) Nag 433 (DB) * AIR 1952 Trav Co 125 (128): ILR (1951) Trav Co 624 * AIR 1943 Bom 288 (290): ILR (1943) Bom 400 (DB) * AIR 1943 Lah 129 (134) (DB) * ('85) 7 All 230 (243) (DB) * AIR 1932 Bom 42 (45) (DB) * ('88) 16 Cal 13 (16) (DB) * AIR 1936 Nag 1 (3): 31 Nag LR (Sup) 57 (FB) * AIR 1931 Oudh 411 (411) (DB) * AIR 1935 Pesh 151 (153) (DB) * AIR 1935 Rang 174 (176) (DB). Can be raised in — AIR 1965 Pat 55 (57) * AIR 1962 Andh Pra 58 (63) * AIR 1959 Punj 646 (648) * 1967 Jab LJ 747 (750): 1966 MPLJ 459 (DB).

(a) Execution proceedings: AIR 1957 Madh Pra 71 (72) (FB) * AIR 1936 Nag 1 (3): 31 Nag LR (Sup) 57 (FB) * ILR (1955) 5 Raj 736 (740) * AIR 1942 Cal 496 (498): ILR (1942) 1 Cal 149 * ('65) 67 Pun LR 558 (564): ILR (1965) 1 Punj 717 (DB) * ('62) 40 Mys LJ 904 (906). (Validity of decree under execution challenged — Executing Court can go behind decree and refuse execution.)

(b) Appeal: AIR 1942 Pesh 81 (82) * AIR 1941 Mad 129 (134, 135) (DB) * AIR 1924 PC 95 (101): 51 Ind App 72 * AIR 1919 PC 150 (152): 42 Mad 813: 46 Ind Ind App 151 * AIR 1934 All 139 (140) (DB) * AIR 1931 All 490 (491): 54 All 25 (FB) * AIR 1931 All 406 (407) * AIR 1932 Bom 42 (45) * AIR 1929 Cal 358 (364): 56 Cal 940 (DB) * ('09) 36 Cal 193 (206, 207) (DB) * AIR 1934 Sind 123 (129): 28 Sind LR 54 (DB) * 1964 All LJ 696 * AIR 1963 Andh Pra 353 (355): (1963) 1 Andh WR 124 (DB).

(c) Second appeal: AIR 1942 Oudh 481 (482) (DB) * AIR 1932 All 701 (702): 54 All 998 (DB) * AIR 1923 Bom 321 (349): 47 Bom 843 (FB) * ('99) 26 Cal 598 (600) (DB) * AIR 1923 Lah 551 (553) (DB) * AIR 1936 Pat 177 (178) (DB) * AIR 1959 Punj 646 (648).

(d) Letters Patent appeal: AIR 1932 All 273 (276): 54 All 573 (FB) * AIR 1935 All 760 (761, 762): 57 All 916.

(e) Revision: ('85) 7 All 230 (243) (FB) * AIR 1956 Tripura 4 (6) * AIR 1930 All 873 (874, 875): 52 All 947 * ('09) 33 Bom 664 (667) (DB) * AIR 1969 Madh Pra 44 (45) (DB).

(f) Appeal after remand: ('99) 23 Bom 22 (26, 29, 30) (DB) * ('70) 14 Suth WR 288 (288) (DB) * ('82) 8 Cal 678 (685).

(g) Writ petitions: AIR 1967 Andh Pra 14 (18, 19) (DB) * AIR 1969 Andh Pra 371 (371) * AIR 1960 Bom 141 (143, 144): 61 Bom LR 1097 (DB).

(2) Objection raised at late stage and the jurisdiction is doubtful Court may proceed with trial. AIR 1952 Trav-Co 125 (128): ILR (1951) Trav Co 624.

(3) Where an objection as to jurisdiction is raised very late, the party may be made liable for costs. ('67) 7 Suth WR 490 (490) (DB) * ('71) 15 Suth WR 48 (49) (DB) * AIR 1936 Pat 177 (178) (DB).

(4) If a question as to jurisdiction is raised the Court should decide it first and then proceed to decide other points, if it holds that it has jurisdiction. AIR 1954 Hyd 39 (40): ILR (1953) Hyd 637 (DB) * AIR 1952 Punj 265 (266): ILR (1953) Punj 33 * AIR 1950 Cal 510 (511): ILR (1951) 1 Cal 331 * AIR 1933 Oudh 191 (192): 8 Luck 676 (DB) * AIR 1933 Pat 104 (107): 12 Pat 117 (DB) * AIR 1960 Orissa 130 (132) * ILR (1959) 9 Raj 60: 1959 Raj LW 50 * AIR 1960 Raj 208 (209).

(5) A defendant who objects to the jurisdictoon of a Court cannot be said to have acquiesced in the trial of the suit simply because be did not apply for a transfer. AIR 1915 Cal 62 (63) (DB).

(6) The proper way to plead to jurisdiction of the Court is to take the plea in the written statement. AIR 1932 Cal 146 (147): 59 Cal 150 (DB).

[See also AIR 1966 Mad 437 (438): (1966) 1 Mad LJ 196 (DB). (Estoppel by pleading.) ]

(7) The irregularity in assuming jurisdiction is waived if no objection is taken in time. AIR 1955 Cal 331 (334) * 1949 Trav Co LR 70 (71) (DB) * AIR 1943 Bom 288 (290): ILR (1943) Bom 400 (DB) * AIR 1943 Mad 449 (453): ILR (1942) Mad 804 (DB) * AIR 1942 Cal 496 (498): ILR (1942) 1 Cal 149 * AIR 1936 Nag 1 (3): 31 Nag LR (Sup) 57 (FB) * AIR 1935 Pat 439 (444): 14 Pat 356 (DB) * ('12) 13 Ind Cas 542 (544) (DB) (Cal). * AIR 1960 Pat 244 (247 to 249) : 1960 BLJR 162 (FB).

(8) Question of jurisdiction depending upon decision of some question of law or fact — Question not raised during trial — Question cannot be allowed to be raised after conclusion of proceedings. AIR 1940 Pat 406 (408) (DB).

(9) No inherent lack of jurisdiction to entertain appeal — Objection on ground of jurisdiction and limitation — Cannot be raised by way of review after decision 1960 Raj LW 527: ILR (1960) 10 Raj 1271: AIR 1961 Raj 186 (187).

(10) Objection to jurisdiction of Court — Should be raised at earliest possible stage — Cannot be allowed to be raised for first time in appeal so as to prejudice rights of plaintiff. AIR 1966 Andh Pra 197 (200) (DB).

(11) Objection as to jurisdiction waived at the lower Court, cannot be allowed to be raised at the Second Appeal. 1966 All WR (HC) 602 * 1958 All LJ 638 (639). (Though the revenue Court had jurisdiction over the matter but as no objection on ground of jurisdiction was raised in lower Courts second appeal would be disposed of as if the Civil Court had jurisdiction.)

(12) Objection to jurisdiction to entertain appeal neither taken before appellate Court nor in petition under Art. 226 of the Constitution but in Letters Patent appeal — Held, objector would be deemed to have waived objection and submitted to jurisdiction of appellate Court. (1967) 2 Andh WR 307 (308) (DB).

**4. Objection as to place of suing.**— (1)

**Section 21 — Note 4 (contd.)**

The expression "place of suing" means venue of trial and has no reference to the competency of the Court. AIR 1955 Madh B 193 (198): ILR (1956) Madh B 837 (FB) * AIR 1941 Nag 36 (51): ILR (1941) Nag 1 (FB).

[See also 1955 All WR (HC) 334. (Suit by Government — Person authorised to sign plaint — Plaint signed by D. C. at A presented to District Judge of A and N and sitting at N — Presentation is valid.)]

(2) Objection to jurisdiction of Labour Court on territorial grounds — Ought to be taken immediately — Cannot be allowed to be raised at later satge. 1968 Lab IC 86: 33 FJR 393: (1968) 2 Lab LJ 335.

(3) Objection to territorial jurisdiction not raised in trial Court — Decision of Court becomes final. AIR 1967 All 375 (377).

(4) Section 21 applies to cases in which issues are settled, if the territorial jurisdiction of a Court is transferred to another Court after the settlement of issues but the former Court nevertheless proceeds to act in the suit, and it is necessary to raise an objection to the jurisdiction at the earliest possible opportunity. AIR 1924 Mad 697 (699) (DB).

(5) Application to stay suit made under S. 34 Arbitration Act or appeal under S. 39 of that Act does not amount to waiver of territorial jurisdiction of Court. AIR 1966 SC 634 (636).

(6) Defendant getting ex parte decree set aside — This does not amount to submission to jurisdiction — Objection to the same can be taken at the trial. AIR 1954 Ajmer 25 (26).

(7) Defendant protesting jurisdiction and also pleading to merits — Such appearance amounts to submission to jurisdiction. AIR 1954 Raj 135 (137): ILR (1954) 4 Raj 262 (DB).

(8) Where the defendant raises the plea of jurisdiction along with the pleas as to bar of limitation and maintainability of suit, there is no submission to the jurisdiction of the Court so as to preclude the Court from giving a finding on the issue as to jurisdiction. AIR 1958 Mad 203 (205) (DB).

(9) Where the defendant allows the trial Court to proceed to judgment without raising the objection as to the place of suing and takes the chance of a verdict in his favour, he waives the objection, and will not be subsequently permitted to raise it. AIR 1966 SC 634 (636). (1965 Ker LT 110, Reversed.)

**5. Failure of justice.**—(1) Before an appellate or revisional Court could entertain an objection to jurisdiction it is necessary to show that the trial in the wrong Court has led to a failure of justice. AIR 1954 Trav-Co 362 (363): ILR (1954) Trav-Co 298 (DB) * AIR 1958 Punj 289 (292) (DB) * ILR (1955) 5 Raj 736 (741) * ILR (1953) 2 Cal 279 (286) * AIR 1952 All 564 (567): ILR (1952) 2 All 421 (DB) * AIR 1951 Punj 375 (376) * AIR 1934 All 226 (230) (DB) * AIR 1914 Lah 385 (388): 1914 Pun Re No. 87 (DB) * AIR 1937 Mad 571 (574): ILR (1937) Mad 990 (DB) * AIR 1967 Punj 163 (165): (1966) 68 Punj LR 214-D (DB) * AIR 1962 Punj 470 (473). (Objection to territorial jurisdiction taken at early stage but failure of justice not proved — Objection cannot be allowed by revisional Court.) * ('65) 69 Cal WN 692 * 1958 All WR (HC) 351: 1958 All LJ 876. (Objection as to place of suing raised in written statement but rejected by trial Court — High Court in revision not satisfied that there had been failure of justice — Objection not entertained.) * AIR 1963 Pat 221 (224) (DB) * 1965 Cur LJ 256: (1965) 67 Punj LR 488. (Defect of territorial jurisdiction is mere irregularity — No prejudice—Order not vitiated.) * ILR (1961) 1 Punj 508 (512) * ('61) 63 Punj LR 740 * AIR 1964 Pat 348 (350): 1964 BLJR 19 (DB) * 1962 MPLJ (Notes) 275: 1963 Jab LJ 741 * AIR 1959 Cal 257 (260). (Failure of justice not shown in second appeal — Objection to place of suing not allowed.) * ILR (1960) 10 Raj 43.

(2) The condition "unless there has been a consequent failure of justice" implies that at the time when the objection is taken in the appellate or revisional Court, the suit has already been tried on the merits. The section does not preclude the objection as to the place of suing, if the trial Court has not given a verdict on the merits at the time when the objection is taken in the appellate or revisional Court. AIR 1966 SC 634 (636).

(3) The question whether trial in the wrong Court has led to a failure of justice must be answered on a consideration of the merits of the case. AIR 1955 Madh B 193 (198): ILR (1956) Madh B 237 (FB) * AIR (1954) Trav-Co 362 (363): ILR (1954) Trav-Co 298 (DB) * AIR 1951 Punj 375 (376) * AIR 1934 Lah 233 (233, 234)* AIR 1939 All 163 (164): ILR (1939) All 67 (DB) * ('62) 64 Punj LR 213 (220) (DB). (What the Court normally examines in such cases is whether by reason of the suit proceeding in the wrong Court the parties were deprived of a proper opportunity to produce all the evidence that they wanted to produce and for that reason prejudice has been caused.)

(4) It is for the party who wants to oust the jurisdiction of the Court to show that a failure of justice resulted in the circumstances of the case. ('54) ILR (1954) 4 Raj 252 (261) * AIR 1961 Raj 235 (237): 1962 Raj LW 513 (DB) * (1962) 28 Cut LT 411: ILR (1962) Cut 299.

(5) Small cause suit —Objection taken to Court's jurisdiction at earliest stage — Court erroneously overruling objection and decreeing suit — Procedure itself occasions a failure of justice — Objection as to place of suing can be entertained in revision. (1968) 1 An WR 424 (426).

**Section 21 (contd.)**

**6. Execution proceedings.** — (1) Where a decree is passed by a Court which has no territorial jurisdiction over the suit without any objection by the defendant, Section 21, precludes him from raising the objection in execution proceedings. AIR 1954 Hyd 190 (192): ILR (1954) Hyd 353 (FB) * AIR 1956 Pat 280 (283): 85 Pat 610 (DB) * AIR 1955 All 569 (572) (DB) * AIR 1945 All 177 (182): ILR (1945) All 479 (DB) * AIR 1937 All 567 (569): ILR (1937) All 761 * AIR 1931 Sind 47 (50): 25 Sind LR 204 (DB) * AIR 1935 Oudh 358 (360): 11 Luck 187 (FB) * AIR 1920 Mad 1019 (1024): 43 Mad 675 (FB) * AIR 1959 Pat 484 (486, 487): 1958 BLJR 516 * (1962) 2 SCR 777: AIR 1962 SC 199 (200, 201). (Objection as to local jurisdiction — Does not go to root of jurisdiction such as the competence of the Court to try the case — Judgment-debtor held estopped from taking that objection in execution.) * AIR 1960 Pat 136 (139) (DB).

[But see AIR 1925 Cal 907 (909): 53 Cal 166 (FB) * AIR 1932 Cal 380 (380) (DB).]

(2) Where after a decree is passed by Court A, the territory with reference to which the suit was filed is transferred to Court B, Section 21 applies so as to compel the defendant to raise the objection to the jurisdiction of A at the earliest opportunity. AIR 1927 Mad 627 (630): 50 Mad 882 (DB) * AIR 1920 Mad 505 (506, 507, 508): 43 Mad 135 (DB) * AIR 1934 Mad 573 (575) (DB) * AIR 1926 Mad 421 (422, 426, 427): 49 Mad 746 (DB) * AIR 1964 Ker 206 (209) (DB). (A sale or delivery by a Court of a property outside its territorial jurisdiction conducted or made without objection cannot subsequently be objected on the ground of want of territorial jurisdiction.)

[But see AIR 1923 Cal 619 (622) (DB).]

(3) If the defendant did not take objection with regard to the jurisdiction of the Court and a decree was passed by a Court duly constituted for the purpose or, at any rate, regarding which the question was doubtful as to whether that Court had jurisdiction or a different kind of Court altogether, it is not open to the judgment-debtor, in the course of execution proceedings, to say that the Court had no jurisdiction to pass that decree. ('63) ILR 42 Pat 275 (283) (DB).

(4) Suit in Court having inherent competence to entertain it — Objection to Court passing decree for sum exceeding pecuniary jurisdiction taken — Decree cannot be challenged in execution. ('62) 66 Cal WN 476.

(5) Where a Court has no power to sell certain properties though within its territorial jurisdiction, the objection to jurisdiction cannot be deemed to have been waived by its not having been raised at the earliest possible opportunity. AIR 1928 Mad 746 (759) (DB) * AIR 1947 Mad 347 (351): ILR (1948) Mad 18 (FB) * AIR 1945 All 309 (311): ILR (1945) All 217.

(6) Where a Court sells properties without objection by the judgment-debtor after the territorial jurisdiction has been withdrawn from it, the estoppel against the judgment-debtor cannot be extended to apply to a subsequent purchaser of the same property at a sale held in execution of a decree against the same judgment-debtor in another suit. AIR 1920 Mad 505 (506, 507, 508): 43 Mad 135 (DB).

(7) The failure of a party to object to the territorial jurisdiction of a Court to pass a final decree does not amount to a waiver of objection to the Court's jurisdiction to sell the property in execution of that decree. AIR 1927 Mad 627 (630): 50 Mad 882 (DB).

(8) When a Court has jurisdiction over the subject-matter of an execution petion, the mere fact that the Court deals with the petition without a formal order of transfer of the decree by the Court which passed it, would not make the orders passed on such petition null and void. AIR 1943 Mad 449 (453): ILR (1943) Mad 804 (DB).

(9) Objection as to absence of jurisdiction taken at trial, but given up at later stage and consent decree passed — Execution cannot be objected on the ground that Court had no jurisdiction to pass a decree. 1961 MPC 852: 1961 Jab LJ 1484.

(10) Execution proceedings — Contention that debtor was agriculturist — Question not raised in suit and suit not got transferred to Debt Settlement Officer — Question of transferring execution proceedings to same officer is barred by res judicata. AIR 1955 Ajmer 43 (44).

(11) In the absence of any special provision lex fori exclusively governs execution proceedings. Judgment and execution of judgment are considered to be integral parts of the process which the plaintiff has elected to adopt and are necessarily subject to the lex fori. 53 CWN 700: AIR 1950 Cal 8 (10) (DB). (De la Vega v. Viana, (1830) 1 B and Ad 284: 8 LJKB 388 and Brettilot v. Sandos, 4 Scott 201, Ref.)

**7. Collateral proceedings.** — (1) An objection as to territorial jurisdiction of a Court, not raised at the proper time under Section 21, cannot be raised in any collateral proceeding or in a separate suit. AIR 1929 Lah 449 (452) (DB) * AIR 1925 Mad 117 (119, 123) (DB) * AIR 1919 Mad 242 (244) (DB) * AIR 1929 Mad 323 (324) (DB) * AIR 1941 Nag 36 (40, 45, 51): ILR (1941) Nag 1 (FB). (AIR 1935 Nag 250: 31 Nag LR (Sup) 43 (FB) should be deemed as overruled.) * ('54) ILR (1954) Cut 277 (280, 281) * AIR 1928 Pat 324 (326): 7 Pat

**22. Power to transfer suits which may be instituted in more than one Court.**— Where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, any defendant, after notice to the other parties, may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to have the suit transferred to another Court, and the Court to which such application is made, after considering the objections of the other parties (if any), shall determine in which of the several Courts having jurisdiction the suit shall proceed.

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**Section 21 — Note 7 (contd.)**

216 (DB) * AIR 1954 Cal 506 (509, 510) (DB) * AIR 1960 Cal 331 (340).

(2) Section 21 does not preclude an objection to territorial jurisdiction being raised in a separate suit. AIR 1926 Bom 481 (483) * AIR 1931 All 454 (458): 53 All 560 (DB) * AIR 1937 Cal 738 (739) * ('84) 10 Cal 697 (707) (DB).

(3) An objection to the territorial jurisdiction of a Court in a previous suit, which might and ought to have been raised therein, must be deemed to have been heard and decided in favour of the existence of jurisdiction and is barred from being raised again in a subsequent suit. AIR 1926 Bom 481 (484).

[But see AIR 1931 All 454 (458): 53 All 560 (DB).]

**8. Foreign Courts.** — (1) Section 21 has no application unless the place of suing is one to which the Code applies. AIR 1919 PC 150 (152): 42 Mad 813: 46 Ind App 151 * AIR 1928 Lah 297 (298): 9 Lah 445 (DB).

(2) Section 21 has no application to a case in which there has been usurpation by the lower Court of the jurisdiction of a foreign Court. AIR 1919 Mad 1043 (1043) (DB) * AIR 1928 Lah 297 (299): 9 Lah 445 (DB) * AIR 1925 Mad 788 (789).

(3) Where the defendant has submitted to the jurisdiction of the Court, he cannot subsequently challenge its decision for want of jurisdiction. AIR 1934 All 740 (757): 56 All 828 (DB).

**9. Court trying a remanded case, jurisdiction of.** — (1) Where a case is remanded to Court A for trial, Court B can have no jurisdiction to deal with it or pass any orders in it. Neither Section 21 in terms nor the principle underlying it is applicable to the case. AIR 1923 Mad 351 (351, 352).

(2) Where a case is remanded to Court A for trial on the merits, it cannot entertain a question as to jurisdiction for the first time. ('68) 5 Bom HCRAC 137 (138) (DB).

**10. Procedure where suit is filed in a wrong Court.** — (1) Where a Court finds that it has no jurisdiction to entertain the suit, the plaint should be returned under Order 7, R. 10 for presentation to the proper Court. AIR 1953 Sau 173 (174) * AIR 1940 Lah 171 (172) * AIR 1926 All 708 (709) * ('99) 23 Bom 756 (759) (DB) * ('99) 23 Bom 679 (681) (DB) * ('84) 8 Bom 313 (318) (FB) * ('87) 10 Mad 211 (212) (DB).

(2) The trial Court is incompetent to order the return of the plaint after the passing of the decree. AIR 1915 Nag 116 (117): 11 Nag LR 13 (DB).

## SECTION 22 — SYNOPSIS


1. Scope.
2. "Apply to have the suit transferred."
3. Notice to the other parties necessary.
4. Grounds for transfer. — See S. 24.
5. Objections to be heard before order.
6. Application, when to be made.
7. Transfer to Court subordinate to a different High Court. — See S. 23.
8. Stay of suit. — See S. 151 and Notes thereon.
9. Appeal.


TOPIC INDICATOR


Application how made — See Note 2.
Discretion when exercised — See Note 1.
"May be instituted." — See Note 1.
"Shall determine." — See Note 1.
Transfer where plaintiff has a choice of Courts — See Note 1.


**1. Scope.** — A plaintiff, as arbiter litis has a right to choose his own forum. AIR 1940 Nag 145 (149): ILR (1941) Nag 311 (DB) * AIR 1924 Lah 249 (250) * AIR 1928 Lah 183 (184, 185) * AIR 1960 Ker 91 (92): 1958 Ker LJ 1282.

(2) Very strong reasons must be shown to deprive the plaintiff of this right to choose his forum. AIR 1924 Lah 306 (310) * AIR 1953 Orissa 46 (47): ILR (1953) Cut 1 (DB) * AIR 1960 Ker 91 (92): 1958 Ker LJ 1282 * (1968) 70 Punj LR 1091. (Conditions in S. 22 are mandatory.)

[See also AIR 1962 SC 527 (534 to 537): 1962 Supp (1) SCR 460. (Court should not issue order restraining party from proceeding with suit at another Court. Remedy is either under S. 10 or S. 22.) * (1968) ILR 47 Pat 371 (DB).]

(3) The totality of circumstances should indicate the preponderance of the balance of convenience in favour of the suit being proceeded with in a Court different from that in which it has been instituted. AIR 1940 Nag 145 (149): ILR (1941) Nag 311 (DB) * AIR 1935 All 979 (980) * AIR 1960 Ker 91 (92): 1958 Ker LJ 1282; ((1906) 1 KB 141, Ref.) * (1968) 34 Cut LT 483: ILR (1968) Cut 121.

[See AIR 1961 Punj 560 (562). (Convenience of both parties and not only one of them must be considered.)]

**23. To what Court application lies.**—(1) Where the several Courts having jurisdiction are subordinate to the same Appellate Court, an application under Section 22 shall be made to the Appellate Court.

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**Section 22 — Note 1 (contd.)**

(4) This section applies only where the suit in its entirety is cognizable by either of the two Courts. AIR 1942 All 387 (388): ILR (1942) All 862 (DB) * (1968) 2 Andh WR 390 (393).

(5) This section has no application where the party applying for transfer pleads that the Court has no jurisdiction. AIR 1941 All 27 (28): ILR (1940) All 737 (DB) * ('35) AIR 1935 All 979 (980) * (1968) 70 Pun LR 1091.

(6) Where the plea as to want of jurisdiction has been heard and decided in plaintiff's favour and the defendant thereupon applies for transfer on the basis of the evidence of jurisdiction, the section will apply. AIR 1927 Lah 183 (184, 185).

(7) This section has reference only to cases which, at the option of the plaintiff, can be brought in more Courts than one. AIR 1914 All 351 (352) * AIR 1934 All 569 (571).

(8) This section does not apply to a case in which the question is whether a suit should be tried by the Court subordinate to a High Court or by a High Court. AIR 1934 All 14 (16): 56 All 201.

(9) Where some of the defendants to a suit are residents within the jurisdiction of one Court and others within the jurisdiction of another Court and the suit is instituted in the former Court by leave of Court granted under Section 20 (b), the proper remedy, where such leave has been granted without notice to the opposite party, is to apply to have the suit transferred. AIR 1938 Pesh 15 (17).

(10) Any declaration made under this section determining the Court in which the suit shall proceed, is in substance and in effect a direction that the suit shall be transferred to that Court. AIR 1958 Ker 82 (83) (DB).

**2. "Apply to have the suit transferred."** — (1) An application for transfer should ordinarily be made by petition and affidavits setting forth the grounds of ransfer. ('83) 9 Cal 980 (982).

(2) Where there are several suits to be transferred a separate application is necessary for each suit. ('70) 2 NWPHCR 147 (147, 148).

(3) Even before a guardian ad litem has been appointed to a minor defendant, any next friend of the minor may apply on his behalf for transfer of the case to another Court. ('89) 16 Cal 771 (776).

(4) Even assuming that provisions of Civil P. C. in Sections 22 to 24 are attracted in regard to the petitions under the Andhra Tenancy Act, these provisions do not vest the tribunal exercising original jurisdiction to transfer of its own accord a petition before it to another tribunal of co-ordinate jurisdiction. (1963) 1 Andh LT 50 (54).

**3. Notice to the other parties necessary.** — (1) The notice must be given prior to the making of the application. AIR 1916 Lah 95 (96): 1917 Pun Re No. 11 * AIR 1928 Lah 183 (183, 184).

[But see AIR 1935 All 979 (980).]

(2) An application made in the presence of the parties may be assumed to be made after the notice required by the section. ('78) 2 Cal L Rep 352 (353).

(3) Where the applicant has served notice on the plaintiff but not on the co-defendants the application cannot be entertained. AIR 1953 All 750 (751).

**4. Grounds for transfer.** — See Section 24.

**5. Objections to be heard before order.** — (1) Where a party does not file his objections on the first day, the Court may grant him further time to do so. ('78) 2 Cal L Rep 352 (353).

**6. Application, when to be made.** — (1) An application under the section must be made at the earliest possible opportunity and in cases where issues are settled, at or before such settlement. AIR 1953 All 772 (772) * AIR 1925 Lah 322 (322).

(2) 'At or before such settlement' when read with the requirement that the application should be filed at the earliest possible opportunity can mean only that the application shall be filed either before the settlement of issues or simultaneously with the settlement of issues. The language of Section 22 does not warrant any interpretation of the word 'at' to mean and include also 'after'. AIR 1968 Andh Pra 205 (206): (1968) 2 Andh WR 225.

(3) A party taking transfer proceedings in the trial Court and then approaching the High Court cannot be said to be guilty of laches. ('28) AIR 1928 Mad 15 (15, 16).

**7. Transfer to Court subordinate to a different High Court.** — See S. 23.

**8. Stay of suit.** — See S. 151 and notes thereon.

**9. Appeal.** — An order under this section is not an appealable one — See S. 104.

## SECTION 23 — SYNOPSIS

1. **Scope.**
2. **"Appellate Court," meaning of.**
3. **Applicability of section to Chartered High Courts.**
4. **High Court's power to transfer to Court subordinate to a different High Court.**
5. **"Subordinate," meaning of.** — See S. 3.

(2) Where such Courts are subordinate to different Appellate Courts but to the same High Court, the application shall be made to the said High Court.

(3) Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate.

[1882, Ss. 22, 23, 24; 1877, Ss. 23 and 24; 1859, S. 13.]

## OBJECTS AND REASONS

["Clause 23 — We have omitted the proviso, which compelled applications to High Courts under this clause to be made through the District Court. This in our opinion merely duplicates applications and is undesirable". — S. C. R.]

**24. General power of transfer and withdrawal.**—(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion, without such notice, the High Court or the District Court may, at any stage—

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

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**Section 23 (contd.)**

**1. Scope.** — (1) This section is not an independent section. It is supplemental to Section 22. AIR 1953 All 772 (772) * AIR 1968 Andh Pra 205 (206): (1968) 2 Andh WR 225 * (1968) 70 Punj LR 1091.

**2. "Appellate Court," meaning of.** — (1) The words "Appellate Court" mean the Court to which ordinarily appeals will lie from the Court in which the suit has been filed. AIR 1923 Rang 22 (22): 11 Low Bur Rul 446 (DB). (Overruled on another point in AIR 1934 Rang 265: 12 Rang 548 (FB).)

**3. Applicability of section to Chartered High Courts.** — (1) For the purpose of transfer applications from the original side of the High Court, the Judge sitting on the original side is not subordinate to the High Court. AIR 1934 Rang 265 (265): 12 Rang 548 (FB). (AIR 1923 Rang 22: 11 Low Bur Rul 446, Overruled.) * AIR 1915 Mad 608 (611) (DB) * AIR 1927 Cal 290 (291) (DB) * AIR 1929 Cal 358 (364): 56 Cal 940 (DB) * AIR 1920 Pat 365 (365) * AIR 1924 Lah 306 (306).

[But see AIR 1928 Lah 183 (184).]

**4. High Court's power to transfer to Court subordinate to a different High Court.** — (1) A High Court has power to transfer a suit pending in a Court within its appellate jurisdiction to a Court within the jurisdiction of another High Court. AIR 1927 Bom 79 (80): 51 Bom 26 (DB) * AIR 1928 Pat 640 (640) * AIR 1940 Nag 145 (148): ILR (1941) Nag 311 (DB). (AIR 1916 Nag 31: 13 Nag LR 81, Overruled.) * AIR 1960 Ker 91 (92): 1958 Ker LJ 1282 * (1968) 2 Andh WR 390.

[But see AIR 1920 Pat 138 (141) * (1907-09) 1907-09 Upp Bur Rul (CPC) 25 (25).]

(2) A High Court on whose original side a suit is pending has inherent power to transfer it to a Court subordinate to a different High Court. AIR 1934 Rang 265 (266): 12 Rang 548 (FB) * AIR 1934 All 14 (17): 56 All 201 (DB).

(3) When the plaintiff has chosen a forum in utter disregard of the convenience of both parties for some ulterior object and in abuse of his position as dominis litis, the High Court can, in the exercise of its inherent power, determine which of two Courts having jurisdiction should try the suit. AIR 1934 All 14 (17): 56 All 201 (DB).

[See also (1968) 34 Cut LT 483: ILR (1968) Cut 121.]

**5. "Subordinate," meaning of.** — See Section 3.

## SECTION 24 — SYNOPSIS

**1. Scope and applicability.**
**2. Transfer on application of parties.**
**3. "Of its own motion."**
**4. "District Court," meaning of.**
**5. "At any stage."**
**5A. "Transfer."**
**6. "Suit, appeal or other proceeding."**
**7. Transfer only of pending suits.**
**7A. "Try and dispose of the same."**
**8. "Court Subordinate to it" — Clause (3).**
**9. Notice of application necessary.**
**10. Transferee (Court) must be competent.**
**11. No transfer where Court of institution has no jurisdiction.**
**12. Grounds of transfer.**
**13. Absence of order for transfer — Effect.**
**14. Effect of transfer from or to a Court of Small Causes.**
**15. Power of Court from which suit is transferred.**
**16. Procedure of Court of transfer.**
**17. Appeal.**
**18. Revision.**
**19. Costs.**

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

(3) For the purposes of this section, Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

[1882, S. 25; 1877, Ss. 15 and 25; 1859, latter part of S. 6.]

## OBJECTS AND REASONS

["Clause 24 — The words "at any stage" have been added to remove the difficulty created by the view that a suit cannot be transferred after hearing has once commenced, as to which there is a conflict of decisions." — S. O. R.]

**Section 24 (contd.)**

**TOPIC INDICATOR**

"After hearing such of them as desire to be heard" — See Note 9.
Applicability of S. 476, Criminal P. C. — See Note 6.
Application for transfer — See Notes 1 and 2.
Chartered High Courts — See Note 1.
Defect in jurisdiction — If cured by subsequent transfer — See Note 11.
Form — See App. H, Form No. 2.
General power of transfer — See Note 1.
Power of transfer — Whether can be delegated — See Note 4.
Power to stay suit — See Note 1.
Power to transfer remanded case — See Note 5.
Re-transfer — See Note 5.
Sub-section (1) (a) — See Note 8.
Sub-section (1) (b) — See Note 8.
Sub-section (2) — See Note 16.
Sub-section (4) — See Note 10.
Transfer of application under special Acts — See Notes 6 and 1.
Transfer of review application — See Note 10.
Transferor and transferee Courts — Jurisdiction after transfer — See Notes 15 and 16.

**1. Scope and applicability.** — (1) Where application for transfer is made on ground which is covered by Sec. 22, power under Section 24 is not to be exercised. ('53) AIR 1953 All 772 (772).

(2) Under the Bombay Civil Courts Act there is only one Court of the Civil Judge, and all other Judges are attached to that Court to assist the Civil Judge's Court. An order for transfer from one Civil Judge to another under Section 24 of the Civil Procedure Code is not required to be made by the District Court or by the High Court, in cases governed by Section 37 of the Civil Courts Act. AIR 1968 Bom 439 (442): 70 Bom LR 100 (DB).

(3) Power exercised under section is more extensive than that under S. 39. ('26) AIR 1926 Mad 421 (425): 49 Mad 746 (DB).

(4) Section contemplates transfer of a particular case and differs in that respect from Section 150. ('17) AIR 1917 Mad 272 (273) (DB).

(5) If application to District Judge proves ineffective High Court may be moved by fresh application for transfer ('10) 5 Ind Cas 771 (771) (DB) (Cal).

**Note.** — Where, however, no application is made to the District Judge and no communication is made to the plaintiff, High Court will not exercise any special powers for that purpose. see ('69) 11 Suth WR 189 (189) * ('26) AIR 1926 Cal 326 (327) (DB) * (1962) 66 Cal WN 1078 * (1966) 1 Andh WR 384 (386): (1966) 2 Andh LT 372.

(6) Section applies to Small Cause Courts. ('99) 3 Cal WN 247 (248) (DB).

(7) Application to proceedings under Arbitration Act — Not barred. AIR 1967 All 504 (506): 1967 All LJ 24. (Case under Arbitration Act.) * 1966 Cur LJ 84 (1) (Punj). (Case under Displaced Persons (Debts Adjustment) Act 70 of 1951.) * AIR 1966 All 613 (615). (Case under Arbitration Act 10 of 1940.) * (1963) 1 Andh LT 50 (54). (Proceedings under Andhra Tenancy Act.)

[See also 1964 All LJ 980 (987). (Case under U. P. Civil Laws (Reforms and Amendment) Act 1963.]

(8) Section has no application to suits or proceedings under the Divorce Act,

**Section 24 — Note 1 (contd.)**

1869. AIR 1942 Cal 546 (549): ILR (1942) 2 Cal 461 (SB).

[See however ('49) AIR 1949 Lah 34 (34, 45): ILR (1947) Lah 867 (FB).]

(9) Suit instituted under Section 53 for piracy of design — Suit cannot be transferred by District Court suo motu to High Court — Section 29 (1) Proviso has no application to such suits — No help can be derived from general provisions of transfer under this section. AIR 1967 Mad 243 (244): (1966) 2 Mad LJ 318. (Case under Patents and Designs Act of 1911 Transfer by District Court to High Court.) * (1967) 1 Mys LJ 680 (682). (Case under Bombay Agricultural Debtors Relief Act.) * AIR 1964 Andh Pra 132 (134, 136, 137). (High Court cannot transfer case pending before Rent Controller to Civil Court or other Rent Controller.) * (1963) 1 Andh LT 338 (338). (Proceedings under Madras Civil Courts Act.)

(10) As Court has ample powers under section to make necessary and effective orders it is not necessary to allow application for amendment under Section 151 merely because case can fall under Article 227 also. ('57) AIR 1957 Pat 198 (199).

[See (1959) 1959-2 An WR 301. (Party entitled to invoke Sec. 24 cannot orally transfer on terms of Section 151).]

(11) Power of Court to transfer suit or proceeding under section prevails over right of litigant to have his suit determined by same Court where suit was instituted. ('55) AIR 1955 Mad 378 (382): ILR (1955) Mad 870 (DB). (('54) 67 Mad LW 767 and AIR 1953 Mad 214, Overruled.)

(12) Right to get appeals heard by High Court acquired prior to enforcement of U. P. Act 24 of 1954 can be taken away by Section 24, C. P. Code. AIR 1962 All 503 (504): 1962 All LJ 544 (DB).

(13) Proceeding under section is in nature of original proceeding within meaning of Section 141. AIR 1951 Mad 807 (808): ILR (1951) Mad 897 (DB).

(14) In proceeding under section Court has power to appoint interim receiver. AIR 1949 Mad 283 (285).

(15) "High Court" in section includes Chartered High Courts as well as other High Courts. AIR 1951 Mad 807 (807): ILR (1951) Mad 97 (DB).

(16) Application to Chartered High Court for withdrawal of suit to its own file need not be made on Original Side. AIR 1951 Mad 807 (808): ILR (1951) Mad 897 (DB).

[See also (1968) 2 Andh WR 390. (Transfer of suit from agency Court to Court outside Agency).]

(17) Chartered High Court trying suit withdrawn to itself exercises not its ordinary original civil jurisdiction but a special original civil jurisdiction. AIR 1951 Cal 170 (174): ILR (1949) 2 Cal 271.

(18) High Court's power under section is not affected by analogous power it possesses under Letters Patent. AIR 1950 Cal 65 (65) (DB).

(19) High Court has power under section to withdraw suit, pass interim order of injunction and re-transfer it for trial to same Court. AIR 1945 Mad 69 (70): ILR (1945) Mad 389 (FB). (AIR 1929 Mad 29: 52 Mad 52, Overruled.) * AIR 1951 Mad 807 (808): ILR (1951) Mad 897 (DB).

(20) High Court can withdraw suit from subordinate Court, vacate interim order passed by such Court and re-transfer suit to same Court. AIR 1945 Mad 69 (70): ILR (1945) Mad 389 (FB). (AIR 1929 Mad 29: 52 Mad 52, Overruled.)

(21) District Judge transferring pending suit from Munsif's Court cannot vacate interim order passed by that Court. ('51) 55 Cal WN (3 DR) 13 (14).

(22) Section 24 will apply to proceedings before a civil Court on a reference by Magistrate under Section 146, Cr. P. C. AIR 1961 Mad 247 (250, 251): 1961 (1) Cri LJ 821: (1961) 1 Mad LJ 342.

(23) Applicability and scope — Not restricted to miscellaneous suits — Applies also to appeals from decrees of Civil Judges. AIR 1962 All 503 (506): 1962 All LJ 544.

**2. Transfer on application of parties. —** (1) Transfer of several pending suits should be sought by separate application in each suit. ('19) AIR 1919 Pat 376 (377): 4 Pat L Jour 13 (DB) * ('70) 2 NWPHCR 147 (147, 148) (DB).

[See however AIR 1940 Cal 84 (85): ILR (1939) 2 Cal 264 (DB).]

(2) Court may in proper cases dispense with affidavit in support of transfer application. ('12) 14 Ind Cas 561 (561) (Lah).

[See also AIR 1959 Mad 331 (333): (1959) 1 Mad LJ 329 (FB). (Language of affidavit should not be assertive.)

(3) Delay in making application for transfer should be explained. ('09) 3 Ind Cas 539 (541) (DB) (Cal).

(4) "Parties" refers to those litigating suit, appeal, or other proceeding of which tansfer is sought. AIR 1919 Nag 123 (125): 13 Nag LR 203.

(5) Person acting on behalf of minor defendant in suit, before guardian ad litem is appointed, will be a "party." ('89) 16 Cal 771 (776).

(6) Even where High Court has refused to transfer case suo motu, it can do so on application for transfer. AIR 1923 All 153 (158) (DB).

(7) Application of section is not confined to Chartered High Courts which alone have ordinary and extraordinary original civil jurisdiction. AIR 1951 Mad 807 (807, 808): ILR (1951) Mad 897 (DB).

(8) Responsibility for allegations in an application for transfer is a responsibility

**Section 24 — Note 2 (contd.)**

of the litigant as well as the lawyer and it is therefore for a lawyer to remain alert as to what statement he is making and very much more so where the statement relates to allegations that would justify a petition for transfer. AIR 1963 Pat 353 (355): 1963 BLJR 772 (SB)

**3. "Of its own motion."** — (1) High Court or the District Court can transfer case suo motu without application by party. AIR 1941 Bom 69 (70, 71): ILR (1941) Bom 131 (DB) * AIR 1936 Mad 55 (56) (FB).

(2) Transfer erroneously made on application of non-party will be deemed to have been made suo motu. AIR 1916 Nag 123 (126): 13 Nag LR 203.

(3) Suo motu orders of transfers which are generally made for administrative reasons are still orders under section and hence judicial orders. AIR 1957 Raj 255 (256): ILR (1956) 6 Raj 209.

[See also AIR 1964 All 420 (421, 422). (Small Cause suit — Musif having jurisdiction succeeded by Munsif without Small Cause Court powers — Direction of District Judge to try it as regular suit — Not an order under S. 24.)]

(4) In all cases of transfer made by Court suo motu, notice of transfer must be given to parties or their lawyers. AIR 1968 Pat 439 (440).

**4. "District Court," meaning of.**— (1) "District Court" means the principal Civil Court of original jurisdiction. AIR 1936 Sind 160 (162) : 30 Sind LR 226 (DB).

[See AIR 1949 Lah 34 (35) : ILR (1947) Lah 867 (FB).]

(2) Only District Court or High Court can exercise powers under section. AIR 1935 Bom 286 (287) : 59 Bom 466 (DB).

(3) Assistant judge, appointed under Bombay Civil Courts Act, whose pecuniary jurisdiction is limited one, cannot order transfer under section. ('10) 34 Bom 411 (415, 416) (DB).

(4) Section 37, Punjab Courts Act (VI of 1918) authorises District Judge with previous sanction of High Court to delegate to Subordinate Judge in his District, powers of District Court under this section. AIR 1939 Lah 578 (579) * AIR 1917 Lah 37 (38).

(5) Senior Sub-Judge who because of High Court's notification issued under Section 39 (3) Punjab Courts Act (6 of 1918) is enabled to dispose of certain classes of appeals is not a District Court for purposes of this section. AIR 1939 Lah 578 (579).

**5. "At any stage."**— (1) District Court to which suit or appeal has been remanded by High Court has power to transfer it to Subordinate Court. AIR 1949 Mad 65 (65): ILR (1949) Mad 94 (DB) * AIR 1944 Mad 569 (570) * ('12) 9 Nag LR 40 (41). (3 Suth WR 147, Dissented from.) * AIR 1914 Cal 638 (640) (DB) * AIR 1914 All 236 (238).

[See however AIR 1922 All 35 (36): 44 All 211 (DB).]

(2) High Court has power to withdraw a suit from Subordinate Court, quash objectionable interim order passed by it and send case back for re-trial to same Court. AIR 1945 Mad 69 (70): ILR (1945) Mad 389 (FB).

(3) Execution proceedings may be transferred under Section 24 to a Subordinate Court. AIR 1925 All 276 (2) (277): 47 All 57 (DB) * AIR 1926 Mad 421 (425): 49 Mad 746 (DB).

[But see AIR 1956 Cal 655 (656) (DB).]

(4) "At any stage of the suit" will include execution proceedings also. AIR 1925 All 276 (2) (277): 47 All 57 (DB) * AIR 1961 Raj 157 (159 to 161): 1961 Raj LW 93.

(5) It is proper for one Court to decide some issues and leave it to transferee Court to decide remaining issues. AIR 1944 Bom 300 (303).

(6) Delay from which want of bona fides can be inferred, has to be taken into consideration in deciding whether application for transfer should be granted or not. AIR 1953 Kutch 45 (45).

**5-A. "Transfer."**— (1) Stay of proceedings under Bombay Tenancy and Agricultral Lands Act 1948, by High Court — Certain issues ordered to be decided by Civil Court — Does not amount to transfer of case. AIR 1965 Guj 131 (134, 135) : (1965) 6 Guj LR 99 (DB).

(2) The power to transfer is possessed by the District Court and the High Court. But the power to return the plaint because it is not triable by the Court to which it is presented is possessed by all the Civil Courts. When exercising that power, it is not their duty to decide to which Court it will go. AIR 1959 Manipur 9 (10).

**6. "Suit, appeal or other proceeding."** — (1) Procedure of section applies independently of S. 141 to miscellaneous proceedings. AIR 1939 Lah 463 (465) (DB).

(2) Power of District Judge under section is not affected by S. 28(2)(a), Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947). AIR 1956 Bom 481 (483): ILR (1956) Bom 776 (FB).

(3) Transfer of claim under U. P. Encumbered Estates Act from Court of one special Judge to Court of another is covered by this section. AIR 1938 Oudh 217 (218): 14 Luck 272.

(4) Section 24 indicates that whenever Legislature intended to include other proceedings as well with a suit, wording is express. AIR 1966 Ker 318 (320): 1966 Ker LJ 530. (In absence of such express wording in S. 6, word "suit" therein cannot be interpreted to include 'execution proceeding.)

(5) The expresion "or other proceeding" in clause (a) of sub-section (1) of S. 24 is comprehensive enough to cover an execution proceeding. ILR (1966) Andh

**Section 24 — Note 6 (contd.)**
Pra 1135 (1142) (DB). (ILR (1926) 49 Mad 746, AIR 1944 Mad 145, Foll.; AIR 1956 Cal 655, Dissented from.) * AIR 1964 Andh Pra 101 (104): (1963) 2 Andh WR 392 (DB) * AIR 1965 Mad 435 (437): (1965) 1 Mad LJ 75 (DB).

(6) Power of District Court under S. 24 to transfer appeal is not fettered by fact that appellate Court to which appeal is transferred has passed orders under O. 41, R. 25 or that trial Court has returned its findings to appellate Court. AIR 1962 Cal 265 (266, 267) : 1964 Cal LJ 154 (DB).

(7) The provisions of S. 24(1)(b) of the Code of Civil Procedure are available with respect to a proceeding arising out of a reference under S. 146(1), Criminal Procedure Code. Such proceeding can be transferred under S. 24 to another Subordinate Civil Court (Munsiff's Court) by the District Judge or High Court. AIR 1966 SC 1888 (1891) : 1966 Cri LJ 1514 : 1966 Supp SCR 393 * (1968) 34 Cut LT 43 (44) * AIR 1965 All 446 (450) : 1965 (2) Cri LJ 342 : 1965 All LJ 12. (Reference under S. 146, Cr. P. Code is not to persona designata but to Court subordinate within meaning of S. 24.)

[See also AIR 1968 Punj 301 (301) : 1968 Cri LJ 971: 69 Pun LR 641.) ]

[See however AIR 1959 All 467 (469 to 471): 1959 Cri LJ 912: 1959 All LJ 365. (Note — This case was dissented from in AIR 1961 Mad 247.) ]

**7. Transfer only of pending suits.**— (1) District Judge has power to transfer case pending before himself. AIR 1914 Lah 187 (190) : 1915 Pun Re No. 3 (DB).

(2) Bench on appellate side of High Court has power under Section to transfer suit pending on original side of High Court for trial to a Court in mofussil. AIR 1949 Bom 263 (264) (DB).

(3) Section has no application to proceeding which had terminated. AIR 1937 Nag 381 (383): ILR (1940) Nag 496 (DB).

[But see AIR 1938 Oudh 217 (218).]

**7-A. "Try or dispose of the same."**— (1) The jurisdiction to try a suit appeal or proceeding by a High Court under the powers reserved by S. 24(1)(v)(i) arises only if it is properly instituted in a Court subordinate to it and is, in exercise of the powers of High Court transferred to it. AIR 1965 SC 1449 (1450): 1965-2 SCR 800.

(2) High Court in the exercise of its extraordinary Original Civil jurisdiction can suo moto and without hearing parties transfer proceedings pending under Companies Act, 1913, in Court of District Judge to itself. Neither S. 24 C. P. C. or Cl. 9 of the Letters Patent is a bar to this power. AIR 1961 Punj 87 (91): ILR (1960) 1 Punj 341. (Proceeding pending under Sections 184, 195 and 196 Companies Act.) * AIR 1961 Punj 550 (552): 63 Pun LR 700. (Proceeding under Section 392, Companies Act.)

(3) Under S. 24, the High Court has power to transfer the appeal to itself even though no such application is presented, and there is no lack of jurisdiction in the High Court to hear the appeal even though the appeal lies to the District Court under S. 21 of the Rajasthan Civil Courts Ordinance. AIR 1961 Raj 186 (187): 1960 Raj LW 527 (DB).

**8. "Court subordinate to it."—Clause (3).** — (1) District or High Court can order transfer under section only to Court subordinate to it. AIR 1951 Mad 676 (677): ILR (1951) Mad 763 (DB) * ILR (1950) 1 Cal 430 (435) * AIR 1949 Bom 263 (264) * AIR 1919 Lah 27 (28): 1 Lah 158 * AIR 1916 Nag 31 (32): 13 Nag LR 81.

[See also (1956) 60 Cal WN 642 (643) (DB). (Therefore the order of the Court holding that it has no jurisdiction and directing the party to write to the District Judge to transfer the suit to file of another Court having jurisdiction is wrong.) ]

(2) Subordinate Court when performing by delegation some functions of District Court remains subordinate to District Court. AIR 1939 Lah 578 (579).

(3) District Judge can transfer case pending before him to Additional District Judge. ('12) 13 Ind Cas 6 (7) (DB) (Lah) * AIR 1965 Punj 472 (476, 477): 67 Pun LR 592 (FB). (AIR 1959 Punj 50, Overruled.)

(4) "Court" in section means Court to which the Code applies. ('95) 1894 Bom PJ 175 (175) (DB) * (1900) 23 Mad 329 (351) (DB).

(5) Decree passed in 'A' Court in 'M' district transferred to 'B' Court for execution in 'R' district— District Judge of 'R' district has power to transfer execution proceedings from 'B' Court to 'C' court in 'R' district. AIR 1965 Mad 435 (437): (1965) 1 Mad LJ 75 (DB).

(6) District Court or High Court cannot under the section transfer suit to Court beyond its local limits of jurisdiction. AIR 1924 Nag 152 (152) * ('82) 5 All 60 (62) (DB) * ('02) 29 Cal 498 (499) (DB).

(7) Cases or matters over which District or High Court has no jurisdiction cannot be transferred by them. ('04) 7 Oudh Cas 142 (143).

(8) High Court which has no power to act under Provincial Insolvency Act cannot transfer insolvency proceeding pending before District Court to High Court Judge exercising insolvency jurisdiction. AIR 1951 Mad 676 (677) : ILR (1951) Mad 763 (DB) * AIR 1927 Rang 105 (107) : 4 Rang 554 * AIR 1928 Mad 1091 (1092): 52 Mad 57.

(9) Section has no application to a proceeding pending before person acting as persona designata under a statutory power. AIR 1947 Mad 400 (400): ILR (1948) Mad 43: AIR 1945 Oudh 233 (234, 235) : 20 Luck 382 * AIR 1945 Sind 9 (11): ILR (1944) Kar 388 * 1964 Raj LW 1 (4) (DB).

**Section 24 — Note 8 (contd.)**

(10) Appeals pending in High Court — Counsel engaged there and expenditure undergone for getting record translated and printed — Transfer of appeals to District Judge — As against these matters expeditious disposal by District Judge and valuation for appeals should also be considered by High Court when transferring appeals to District Judges. AIR 1962 All 503 (506, 507): 1962 All LJ 544 (DB).

(11) See also the undermentioned cases as illustrations of Subordinate Courts. AIR 1966 Mys 49 (53): (1965) 2 Law Rep 234. (District Judge Mysore Division at Mysore functioning as District Judge for Kollegal Taluk has power to transfer the appeal transferred to it by District Judge Coimbatore in consequence of States Reorganisation to the Civil Judge Mysore as it was subordinate to it, according to the hierarchy of the Civil Courts under the High Court as mentioned in the Madras Civil Courts Act 1883.) * (1965) 31 Cut LT 375 (379) (DB). (Law Department's notification empowering all principal Subordinate Judges to act as Court under Section 3 (3) of the Land Acquisition Act. The Subordinate Judge even while exercising special powers under S. 3 (3) is under administrative control of the District Judge—District Judge transferring reference made to him under S. 18, to the Subordinate Judge — Subordinate Judge had jurisdiction to hear reference.)

[See also ILR (1967) Guj 1: (1967) 8 Guj LR 123 (132). (Suits referred to Joint Civil Judges, either Sr. Dn. or Jr. Dn. by Civil Judge Sr. Dn. or by District Judge and Court of Civil Judge, Sr. Dn. being only Court having jurisdiction to entertain and try suit arising under the Bombay Civil Courts Act — Joint Civil Judges can try and dispose of suit as may be referred to them either by the principal Judge of that Court or by the District Judge exercising powers under Section 23 of the Bombay Civil Courts Act or Section 24 of tht Code of Civil Procedure.) ]

**9. Notice of application necessary.**— (1) Where Court acts under section suo motu no notice need be given. AIR 1920 All 249 (249) * AIR 1936 Mad 55 (56) (FB) * (1966) 1 Andh WR 384 (386): (1966) 2 Andh LT 372.

(2) Though S. 24 clearly indicates that the District Court may transfer a proceeding without giving notice, Rule 48 of the Civil Rules of Practice contemplates two possible courses. viz. (1) if the transfer is done without giving notice to the parties, then the District Court shall record in writing its reasons for dispensing with notice; and (2) the District Court may transfer the suit of its own motion after giving notice: in which case there can be no occasion or need for writing reasons. (1961) 1 Andh WR 212 (216) : 1961 Andh LT 473 (DB). (ILR (1957) AP 165, Overruled.)

[See also AIR 1965 Pat 133 (139) (DB). (Transfer of suit under S. 11, Banking Companies (Amendment) Act, 1950 from a Court where originally instituted — Decree passed in favour of Bank — Decree challenged for want of notice of transfer — Onus lay on Judgment debtor to prove that no notice was issued.) ]

(3) After transfer of case suo motu parties should be informed of the transfer. AIR 1923 Lah 444 (445) * AIR 1958 Pat 9 (9) : 36 Pat 376 * AIR 1918 Pat 341 (342): 3 Pat L Jour 218 (SB).

(4) If party applies for transfer notice is imperative. AIR 1945 Mad 69 (70) : ILR (1945) Mad 389 (FB) * AIR 1958 Pat 9 (9): 36 Pat 376 * 1966-1 Andh WR 384 (386).

(5) Transfer or withdrawal on application without notice is bad for illegality or material irregularity. AIR 1916 Nag 123 (125, 126) : 13 Nag LR 203 * AIR 1933 All 178 (178) : 53 All 916 (DB) * AIR 1926 All 17 (18) (DB) * AIR 1916 Cal 859 (859) (DB) * AIR 1925 Lah 189 (189) * ('10) 8 Ind Cas 7 (7) (DB) (Mad) * AIR 1920 Oudh 213 (213) : 23 Oudh Cas 216 (DB).

[But see AIR 1932 Cal 265 (266.)]

(5) Notice of transfer may be waived by party entitled to it. ('89) 13 Mad 211 (213) (DB) * ('12) 14 Ind Cas 561 (561) (Lah).

(6) Notice of transfer is not a matter of jurisdiction; transfer without notice is only irregular exercise of jurisdiction. AIR 1916 Nag 123 (126): 13 Nag LR 203 * AIR 1932 Cal 265 (266).

[But see AIR 1920 All 249 (249) * ('26) AIR 1926 All 17 (18) (DB).]

(7) Transfer without notice on application which also prayed Court to act suo motu is not even material irregularity. ('10) 8 Ind Cas 7 (7) (DB) (Mad).

(8) Court can dismiss application under section without giving notice or hearing parties. AIR 1943 Pesh 71 (72).

**10. Transferee Court must be competent.**— (1) Case can be transferred only to Court which has jurisdiction only to Court which has jurisdiction to try it. AIR 1914 Mad 677 (677) : 38 Mad 472 (DB) * AIR 1935 All 696 (696) : 58 All 85 (DB) * AIR 1931 All 28 (29) : 53 All 62 (DB) * ('10) 34 Bom 411 (414, 415) (DB) * ('10) 37 Cal 574 (577) (DB) * AIR 1920 Pat 29 (30): 5 Pat L Jour 588 (DB) * AIR 1964 SC 489 (492): (1964) 1 SCR 362.

(2) Territorial jurisdiction over mortgaged properties transferred to another Court after the decree was passed — Execution application filed directly in the new Court without obtaining transmission of the decree — No notification under S. 24 transferring the business of the Court passing the decree to the newly established Court issued — Court passing the decree continuing to exist — Application for execution held filed in Court having no jurisdiction to entertain it. AIR 1964 Andh Pra 68 (69): (1963) 2 Andh

**Section 24 — Note 10 (contd.)**

WR 324 (DB). (ILR 55 Mad 801 (FB), Foll.)

(3) The word "competent" in section does not refer to territorial jurisdiction AIR 1949 Lah 34 (35): ILR (1947) Lah 867 (FB) * AIR 1956 Raj 192 (193): ILR (1956) 6 Raj 529. (AIR 1933 All 178(1) : 53 All 916 and AIR 1929 Pat 29 : 5 Pat L Jour 588, Dissented from.) * AIR 1942 Oudh 1 (8): 17 Luck 249 (DB) * AIR 1940 Rang 133 (134) (DB) * AIR 1926 Mad 421 (425) : 49 Mad 746 (DB) * AIR 1923 All 249 (249) (DB) * AIR 1933 Oudh 154 (155): 8 Luck 347 (DB) * AIR 1964 Orissa 167 (168): 33 Cut LT 1043.

[But see AIR 1933 All 178 (178) : 53 All 916 (DB).]

(4) The word 'competent' has to be given a sufficiently wide interpretation to include each and every Court within the jurisdiction of the superior Court, empowered to deal with such execution application. AIR 1965 Mad 435 (437): (1965) 1 Mad LJ 75.

(5) Court's competency for purposes of section refers to its power to try the suit with reference to its pecuniary value and its nature. AIR 1949 Lah 34 (35): ILR (1947) Lah 867 (FB) * AIR 1958 Andh Pra 218 (220): ILR (1958) Andh Pra 54 * ('85) 7 All 230 (239) (FB) * AIR 1956 Raj 192 (193): ILR (1956) 6 Raj 529 * AIR 1932 All 660 (661): 54 All 824 (DB) * AIR 1932 Bom 486 (487) : 56 Bom 387 (DB) * AIR 1914 Cal 616 (616, 617) : 41 Cal 866 (DB) * AIR 1919 Oudh 311 (313) 22 Oudh Cas 93.

(6) Small cause suit can be transferred to Court which is not invested with small cause powers. AIR 1940 Mad 9 (9) : ILR (1940) Mad 251 (DB) * AIR 1932 Nag 49 (49) : 27 Nag LR 307 * AIR 1932 Mad 683 (684): 55 Mad 860 (DB) * AIR 1935 All 690 (691) * AIR 1932 Bom 486 (488): 56 Bom 387 (DB).

[But see AIR 1918 Oudh 160 (161): 20 Oudh Cas 350 (DB).]

(7) Suit instituted in Court of Small Causes can be transferred to another Court having small cause powers although value of suit exceeds the limits of the small cause jurisdiction of such Court. AIR 1941 Mad 103 (105) * AIR 1939 Cal 345 (345)

(8) Where a suit rightly instituted in Court of lowest grade is transferred to Court of higher grade no question of latter Court having no jurisdiction, having regard to S. 15, to try the suit can arise at all. AIR 1958 Andh Pra 218 (220): ILR (1958) Andh Pra 54.

(9) Transferee Court should be competent when transfer is ordered and not when appeal is instituted. AIR 1962 All 503 (506): 1962 All LJ 544 (DB).

(10) The competency of the transferee Court under S. 24 C. P. C. is to be found otherwise and outside the section. Under S. 8(2) of Bengal, Agra and Assam Civil Courts Act, however, the District Judge can transfer to an additional Judge or Additional District Judge whose competency in that behalf flows from the assignment itself in view of the terms of S. 8(2) itself. AIR 1960 Cal 565 (570): 64 Cal WN 246.

**11. No transfer where Court of institution has no jurisdiction.** — (1) Section will apply only when Court in which suit was instituted is competent to try it. AIR 1954 Cal 140 (141) : ILR (1955) 2 Cal 239 * AIR 1954 Pat 60 (60) * AIR 1952 Pepsu 65 (65): ILR (1952) Patiala 43 * 1949 Bur LR (SC) 125 (129) * ('40) AIR 1940 Oudh 164 (169) : 15 Luck 619 (DB) * ('87) 9 All 191 (202): 13 Ind App 134 (PC). (6 Cal 30, entirely approved.)

[See also AIR 1931 All 574 (579) : 54 All 171 (FB). (The Court from which transfer is made must be in existence at the time of transfer.)]

[But see AIR 1955 Nag 44 (46) : ILR (1955) Nag 36. (AIR 1920 Pat 138 (2); AIR 1932 Sind 215 : 26 Sind LR 277 and AIR 1940 Oudh 164: 15 Luck 619 (DB), Dissented from.) * AIR 1934 All 569 (571.)]

(2) Suit under S. 92, instituted in Court lacking inherent jurisdiction — Withdrawal of suit by District Court under S. 24 is void and without jurisdiction. AIR 1962 Ker 28 (29): 1961 Ker LT 1. (Subsequent proceeding although by the District Court, is void especially in view of the express bar in sub-section (2) of S. 92.)

(3) Court of institution to be competent must have not only pecuniary jurisdiction and jurisdiction as regards nature of suit but also territorial jurisdiction. ('08) 35 Cal 571 (573) (DB).

(4) Defect of jurisdiction in institution of suit is not cured by its transfer. ('87) 9 All 191 (204): 13 Ind App 134 (PC) * AIR 1923 Rang 185 (187) : 1 Rang 225 (DB).

[But see AIR 1931 All 28 (29): 53 All 62 (DB).]

(5) Transfer of suit instituted in Court without jurisdiction does not confer jurisdiction on transferee Court. AIR 1919 Pat 345 (348, 349): 3 Pat L Jour 396 (DB).

[See however AIR 1940 Oudh 164 (170): 15 Luck 619 (DB).]

(6) Defendant objecting to jurisdiction of Court of institution cannot also apply for transfer of suit. AIR 1955 Mys 115 (116): ILR (1955) Mys 330 * AIR 1932 Sind 215 (215) : 26 Sind LR 277.

(7) Counsel to transfer of suit cannot operate as waiver of plea of want of jurisdiction in Court of institution. ('87) 9 All 191 (204): 13 Ind App 134 (PC).

(8) Plea of want of jurisdiction in Court of institution can be raised before transferee Court. ('98) 25 Cal 39 (44) (DB).

(9) Suit triable by Small cause Court tried by a regular Court in contravention of Section 16 of Small Cause Courts Act. Objection to jurisdiction can be taken even in appeal or revision. AIR 1969 Madh Pra 56 (58) : 1968 Jab LJ 566 (DB).

**Section 24 — Note 11 (contd.)**

(10) If Court has jurisdiction to entertain suit when filed that is sufficient to attract application of section. AIR 1955 Mad 378 (382): ILR (1955) Mad 870 (DB). (('54) 67 Mad LW 767 and AIR 1953 Mad 214, Overruled.) * 1949 Bur LR (SC) 125 (129) * AIR 1936 All 335 (336) (DB) * AIR 1960 Pat 244 (248, 249, 250): 1960 BLJR 162. (AIR 1919 Pat 345 Overruled.)

**12. Grounds of transfer.** — (1) Plaintiff's right as arbiter litis, to select his own forum should not be interfered with except on strong grounds. AIR 1944 Lah 400 (401) * AIR 1957 Pat 198 202) * AIR 1919 All 397 (397): 41 All 381 * ('09) 10 Cal L Jour 208 (211) (DB).

(2) Onus of establishing sufficient grounds for transfer of case lies heavily upon applicant. AIR 1956 Manipur 21 (22) * AIR 1957 Pat 198 (202) * ('54) Madh BLJ 1954 HCR 1433 (1436) * ('28) AIR 1928 Mad 15 (16) * ('83) 9 Cal 980 (982) (DB).

(3) Case should not be transferred on the mere ground that judge has given finding on identical question of fact in a previous case. AIR 1944 Lah 400 (401).

(4) Case can be transferred to another Court on ground of convenience of parties or cheapness of trial there. AIR 1927 Nag 219 (220) * AIR 1953 Kutch 45 (45) * AIR 1953 Orissa 46 (47): ILR (1953) Cut 1 (DB) * ('83) 9 Cal 980 (982) (DB) * AIR 1923 Oudh 30 (31) (DB) * AIR 1935 All 979 (980) (DB) * ('97) 24 Cal 183 (186) * AIR 1933 Lah 1033 (1034) * ('12) 1912 Pun Re No. 101: 15 Ind Cas 845 (846) (DB) * AIR 1938 Mad 745 (746) * AIR 1932 Nag 49 (49): 27 Nag LR 307 * AIR 1924 Oudh 410 (411) * AIR 1920 Pat 138 (141, 142) * AIR 1936 Pesh 5 (6, 7) * AIR 1914 Low Bur 37 (39): 7 Low Bur Rul 129 (133, 134) (DB) * AIR 1922 All 65 (66): 44 All 278 (DB). (Dissenting from AIR 1919 All 397: 41 All 381.) * AIR 1961 Punj 560 (562). (Convenience of both the parties and not only one of them has to be taken into consideration.) * AIR 1960 Ker 91 (92): 1958 Ker LJ 1282 * (1968) 34 Cut LT 483: ILR (1968) Cut 121.

[See also (1963) 67 Cal WN 1059 (1062, 1063). (The convenience of both the parties have to be weighed and the matter must turn ultimately on the balance of convenience.)]

[But see AIR 1919 All 397 (398): 41 All 381 * ('24) 2 Pat L Rep 111 (113) (DB) * AIR 1914 Sind 147 (147) : 8 Sind LR 43 (DB) * AIR 1920 Pat 365 (366).]

(5) Mere fact that it is convenient for defendant to have case tried elsewhere is not valid ground of transfer unless institution of the suit in Court from which transfer is asked for amounts to abuse of process of Court. AIR 1953 Orissa 46 (47): ILR (1953) Cut 1 (DB) * AIR 1958 Ker 82 (83) * AIR 1924 Lah 306 (310).

(6) Good grounds for transfer under section are:—

(a) Reasonable apprehension of litigant of failure of justice in Court in which suit is pending. ('54) Madh BLJ 1954 HCR 1433 (1436) * AIR 1958 Manipur 27 (28) * AIR 1957 Pat 198 (201) * AIR 1951 Trav-Co 12 (13) * AIR 1923 Lah 564 (565) * AIR 1933 Oudh 154 (155): 8 Luck 347 (DB) * AIR 1959 Mad 331 (333) : (1959) 1 Mad LJ 329 (FB) * AIR 1962 Manipur 42 (43-44). (Apprehension should be that of reasonable man about bias and not that of party — Mere passing of wrong orders does not necessarily lead to inference of bias.) * AIR 1964 Punj 277 (280): 66 Pun LR 331. (Long adjournment after close of evidence — Reasonable apprehension — Held could not arise.) * AIR 1961 Punj 560 (562). (Reasonable apprehension that petitioner would not get impartial treatment — Fact that opposite party is high Govt. Official is not sufficient.)

(b) Judge having a pecuniary or other interest sufficient to create bias. ('95) 19 Bom 608 (610) (DB) * ('12) 16 Ind Cas 859 (860) (Cal) * ('84) 10 Cal 915 (917) * ('83) 1883 Pun Re No. 7, p. 16 (19, 20) * ('03) 2 Low Bur Rul 281 (282).

(c) Judge being related to a party. AIR 1932 Sind 206 (207) * ('54) 1954 BLJR 286 (288).

(d) Importance and difficulty of question involved. ('86) 9 All 180 (184, 185) * ('72) 9 Beng LR (App) 10 (12) * ('97) 24 Cal 183 (186).

[But see ('10) 8 Ind Cas 444 (444), (Low Bur.)]

(e) Interest of justice. AIR 1941 Rang 3*2 (323, 324): 1941 Rang LR 512 (FB) * AIR 1936 Mad 55 (56) (FB) * AIR 1955 Nag 44 (46) : ILR (1955) Nag 36 * (1964) 66 Punj LR 620 (624) * AIR 1964 Punj 277 (280) : 66 Punj LR 331.

(f) Avoidance of possibility of conflicting decisions by two Courts on same question. AIR 1953 Kutch 45 (45) * AIR 1953 Orissa 46 (47): ILR (1953) Cut 1 (DB) * AIR 1949 Bom 263 (264) * AIR 1938 Mad 745 (745) * 1968 Pat LJR 614 * AIR 1960 Ker 199 (200) : 1959 Ker LJ 1219

(7) Grounds not sufficient for transfer are:

(a) Local influence of party. ('27) AIR 1927 Lah 80 (80) * AIR 1924 Oudh 372 (373): 27 Oudh Cas 401.

(b) Characters of disputed signatures being unknown to Judge. ('98) 20 All 395 (396).

(c) Judge having decided another similar case in one way. AIR 1944 Lah 400 (401). (AIR 1930 Lah 176 and AIR 1921 Lah 357, Distinguished.) * AIR 1938 Nag 126 (127): ILR (1939) Nag 631 * AIR 1955 Mys 115 (116) : ILR (1955) Mys 330.

(d) Prejudice of Judge against party's pleader not likely to affect party. AIR 1926 Mad 359 (360) * AIR 1934 Lah 593 (594).

(e) Expression of opinion by Judge as to character of plaintiff elicited by his own conduct. AIR 1916 Mad 763 (763).

**Section 24 — Note 12 (contd.)**

(f) Subordination of Judge in his executive capacity to authority whose order is challenged. AIR 1933 Pat 638 (639).

(g) Judge proceeding to decide case on local inspection in accordance with agreement of parties. AIR 1928 All 497 (498, 499.)

(h) Refusal of adjournments in absence of prejudice against party. AIR 1956 Manipur 21 (22).

(i) Where an action under S. 113 was open, an attempt to transfer a case to the High Court on the ground that the case involved an interpretation of the Constitution was held premature. AIR 1968 Pat 414 (414).

(8) Transfer will not be ordered where party's application has not been made bona fide. AIR 1938 Lah 95 (96).

(9) On application for transfer Court will not enter upon enquiry into conduct of Judge presiding over lower Court or the veracity of statements made by him. ('54) Madh BLJ 1954 HCR 1433 (1435).

(10) A transfer under S. 24 is intended for trial of a suit, but not for stay of suit under S. 34 Arbitration Act. (1962) 66 Cal WN 1078. (Case under S. 9 of West Bengal City Civil Courts Act 21 of 1953.)

**13. Absence of order for transfer — Effect.** — (1) Trying Court will not be presumed to lack jurisdiction by absence of order of transfer on record. ('88) 10 All 119 (121, 122).

(2) Where prior to remittal of certain issues to trial Court territorial jurisdiction of that Court had been transferred, order remitting issues will operate as transfer of case to it. ('10) 7 Ind Cas 864 (864) (Mad).

(3) Omission to assign reasons for transfer will not vitiate proceedings in transferee Court. (1865) 3 Suth WR 147 (149).

(4) What in circumstances of the case is an order under section is not rendered otherwise by the form in which it is communicated. AIR 1957 Raj 255 (256): ILR (1956) 6 Raj 209.

(5) Establishment of new Court after passing of decree — Execution levied at new Court — Decree not transmitted under Section 39 — Nor transferred under Section 24 — No transfer of pending business under Section 150 — Court which passed the decree held did not lose jurisdiction — New Court held not competent to execute decree. AIR 1964 Mys 34 (36) (DB).

**14. Effect of transfer from or to a Court of Small Causes.** — (1) "Court of Small Causes" in sub-section (4) includes Court vested with powers of Court of Small Causes. AIR 1940 Mad 9 (9): ILR (1940) Mad 251 (DB) * AIR 1932 Bom 486 (487): 56 Bom 387 (DB) * AIR 1917 All 62 (64): 39 All 214 (DB) * AIR 1929 Cal 354 (356): 56 Cal 588 (DB) * AIR 1918 Cal 187 (187) (DB). (Dissenting from 31 Cal 1057.) * AIR 1916 Mad 891 (894): 38 Mad 25 (DB) * AIR 1918 Oudh 160 (161): 20 Oudh Cas 350 (DB) * ('08) 31 Bom 314 (318) (FB).

[But see ('98) 23 Bom 382 (384) (DB).]

(2) Procedure of Court to which Small Cause suit is transferred is governed by provisions of Provincial Small Cause Courts Acts. AIR 1917 All 484 (485): 38 All 425 * ('93) 18 Bom 61 (64) (DB) * AIR 1925 Lah 561 (562, 563) (DB) * AIR 1955 Mad 625 (626): ILR (1955) Mad 1145 (FB). (AIR 1951 Mad 275, Overruled.) * AIR 1931 All 574 (578, 579): 54 All 171 (FB). (Overruling on this point, 13 All 324 (DB).) * AIR 1923 Pat 49 (50): 1 Pat 696 (DB).

(3) Suit instituted in Small Cause Court transferred to City Munsiff's Court — Decree passed by City Munsiff will be considered to be a decree of Small Cause Court. AIR 1966 J and K 127 (128): 1967 Kash LJ 149 (DB). (Hence revision against decree is maintainable.)

(4) Direction by District Judge that the small cause suit transferred is to be tried as regular suit is without jurisdiction. ('16) AIR 1916 Mad 891 (894): 38 Mad 25 (DB).

(5) Court to which execution proceedings are transferred from Court of Small Causes is Court of Small Causes for purpose of such proceedings. ('26) AIR 1926 Lah 465 (465).

(6) Court to which small cause suit is transferred not under this section but under some other provision of law, cannot be deemed a Court of Small Causes. ('35) AIR 1935 All 765 (766): 57 All 957.

(7) No finality can attach to decision of Court to which small cause suit was transferred under some other provision of law. ('21) 64 Ind Cas 335 (336) (Lah) * ('15) AIR 1915 All 219 (221): 37 All 450 (DB) * ('14) AIR 1914 Bom 302 (302): 38 Bom 190 (DB) * ('07) 11 Cal WN 861 (862) (DB) * ('16) AIR 1916 All 293 (294).

(8) Suit transferred from original side to small cause side of Court will have to be tried as original suit. AIR 1935 Mad 284 (285).

(9) Suit filed on the regular side of the Munsif Court transferred subsequently to Small Cause Court due to the increase of the jurisdiction of that Court — Held the suit instituted on regular side retained its character as original suit and its transfer to Small Cause Court was not warranted. 1958 Andh LT 557 (558).

(10) Decision in a suit transferred from Court which is not Small Cause Court to Court which is also not a Small Cause Court is appealable although suit itself is of small cause nature. AIR 1935 All 574 (575).

(11) Sub-section (4) cannot apply where Small Cause Court in which suit was instituted has ceased to exist or officer invested with Small Cause Court

**Section 24 — Note 14 (contd.)**

powers (before whom suit was instituted) has been transferred from district and there is no other officer possessing such powers. AIR 1936 Lah 883 (885) * AIR 1937 Oudh 398 (399): 13 Luck 369 (DB). (AIR 1931 All 574: 54 All 171 (FB), Rel. on.)

(12) If suit although of nature cognisable by Small Cause Court is tried by ordinary Court, decision of such Court will be appealable. AIR 1941 Mad 103 (105, 106) * ('36) AIR 1936 Lah 883 (885) * AIR 1937 Oudh 398 (399): 13 Luck 369 (DB).

**15. Power of Court from which suit is transferred.** — (1) Court which passed interim order of injunction ceases to have jurisdiction to enforce order when suit is transferred to another Court, such power lies in transferee Court. AIR 1941 All 140 (143): ILR (1941) All 295 (DB).

[See also AIR 1962 Cal 519 (520): 66 Cal WN 43. (Transfer of suit as a mere distribution of work — Section 150 not applicable — Application under Order 39, Rule 2 (3) filed in transferor Court — Transferee Court not empowered to act thereon — Proceeding should continue in transferor Court.)]

(2) Order passed for withdrawing case from Court of Subordinate Judge or for removing it for being tried in High Court as Court of extraordinary original jurisdiction immediately puts an end to jurisdiction of Subordinate Judge's Court. AIR 1954 Punj 46 (46, 47): ILR (1954) Punj 639 (DB).

(3) Order for withdrawal or for removal of a case for trial by High Court remains effective even if it is not conveyed to Court where suit is pending. AIR 1954 Punj 46 (46, 47) : ILR (1954) Punj 639 (DB).

(4) Order of stay of proceedings relating to permission to file a suit for eviction under Section 3 of Act 3 of 1947 by Court to which application for transfer of proceedings was made not communicated to Court granting permission —Appellant not applying for setting aside permission granted in ignorance of stay order — Appellant cannot challenge permission as nullity in a suit based on such permission. AIR 1967 SC 1386 (1390): (1967) 3 SCR 84.

(5) An order passed by the High Court withdrawing a case from a Subordinate Court operates from the date it is made and not from the date it is communicated and proceedings in the Subordinate Court after the passing of the order of transfer are without jurisdiction. AIR 1960 Punj 521 (522) (DB).

**16. Procedure of Court of transfer.** — (1) District Coourt withdrawing case may proceed with the trial in accordance with any mode of procedure recognised by the Code; and even refer case to arbitration. ('89) 1889 Pun Re No. 167 p. 579 (581, 582 and 583).

(2) District Court can amend issues, frame additional issues and decide all questions except those already decided in the suit withdrawn by it for trial. (1865) 3 Suth WR 147 (150).

(3) If suit is transferred subsequent to a conditional order for attachment transferee court can make further order regarding attachment. ('10) 6 Ind Cas 746 (746) (DB) (Mad).

(4) In a suit transferred after the passing of an order for injunction transferee court has power to punish breach of the injunction order. AIR 1957 Pat 73 (77, 78): 35 Pat 639 (DB) * AIR 1962 Pat 443 (446): 1962 BLJR 614 (DB) * AIR 1968 Punj 374 (376): 1968 Cur LJ 819. (AIR 1962 Cal 519: AIR 1914 Cal 815; (1910) 8 Ind Cas 7, Dissented from.)

(5) Transferee court has jurisdiction to pass decree in terms of award where suit was transferred subsequent to its being referred to arbitration. AIR 1933 Oudh 547 (548): 9 Luck 219.

(6) Although Court ordering transfer of case has power to order trial of suit de novo or from stage at which suit was transferred or withdrawn, it has no power, to direct the joint trial of transferred suit. AIR 1958 Andh Pra 218 (220): ILR (1958) Andh Pra 54.

(7) In a case transferred after preliminary decree for accounts transferee Court can hold de novo trial only from stage after the passing of preliminary decree. AIR 1929 Lah 107 (109, 110).

(8) Where transferree Court has jurisdiction over subject-matter of suit, defect arising from irregularities in commencement of proceedings such as that arising from transfer without authority may be waived by parties by their failure to object at proper stage. AIR 1939 Bom 485 (487): ILR (1939) Bom 472 * AIR 1919 Lah 27 (29): 1 Lah 158.

(9) Substantive law applicable to transferred case will be the law of Court from which it has been transferred. ('69) 4 Beng LR (OC) 1 (26) (DB).

(10) Where execution proceeding is transferred from one Court to another Court, latter Court may either re-try it or proceed from point at which it was transferrtd. AIR 1936 Pesh 56 (57).

(11) The application for transfer in High Court is not an appeal from the order of the District Judge declining to transfer the suit, with the result that an application in High Court which is an independent original proceeding should, generally speaking, be self-contained and, therefore, supported by a properly sworn affidavit presented in High Court; a departure from this rule can only be permitted — if at all — in special cases and for cogent reasons. AIR 1964 Punj 277 (279): 66 Punj LR 331.

**17. Appeal.**— (1) Order under section is not appealable. ('83) 1883 All WN 88 (88) (DB) * AIR 1935 Rang 267 (273):

**25. Power of State Government to transfer suits.**—(1) Where any party to a suit, appeal or other proceeding pending in a High Court presided over by a single Judge objects to its being heard by him and the Judge is satisfied that there are reasonable grounds for the objection, he shall make a report to the [a][aa][State] Government], [b][which] may, by notification in the [c][Official Gazette], transfer such suit, appeal or proceeding to any other High Court:

[d][Provided that no suit, appeal or proceeding shall be transferred to a High Court without the consent of the [aa][State] Government of the [State][e] in which that High Court has its principal seat.]

(2) The law applicable to any suit, appeal or proceeding so transferred shall be the law which the Court in which the suit, appeal or proceeding was originally instituted ought to have applied to such case.

[Compare 1882, Ss. 20, 21.]

[a] Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937 (1-4-1937) for "Governor-General in Council".

[aa] Substituted for "Provincial" by A.L.O., 1950 (26-1-1950).

[b] Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937 (1-4-1937), for "who".

[c] Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937 (1-4-1937), for "Gazette of India".

[d] Inserted by the Government of India (Adaptation of Indian Laws) Order, 1937 (1-4-1937).

[e] Substituted for "Province" by A.L.O., 1950 (26-1-1950).

### OBJECTS AND REASONS

"Clause 25 — Clause 25 of the Bill as introduced has been rendered unnecessary by the omission of Clause 22. We have accordingly taken it out and have put in its place a new clause taking power for the Governor General in Council to transfer cases from one High Court to another under certain circumstances. We think that the exercise of such a power may sometimes be necessary and it has been brought to our notice that the absence of any provision on the point in the existing Code has given rise to difficulty. The new clause proceeds on the analogy of Section 527 of the Code of Criminal Procedure 1898". — S. C. R.

## INSTITUTION OF SUITS

**26. Institution of suits.**—Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.

[1882, S. 48; See O. 4, R. 1.]

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**Section 24 — Note 17 (contd.)**

13 Rang 457 (FB).

(2) No Letters Patent appeal lies against order of High Court transferring suit under section. AIR 1935 All 750 (750) (DB) * AIR 1935 Rang 267 (272): 13 Rang 457 (FB).

**18. Revision.** — (1) Order for transfer is decision of 'case' within Section 115. AIR 1925 Lah 189 (189).

(2) Revision lies in cases where Court, in making order, has acted without jurisdiction or illegally or with material irregularity. AIR 1920 All 249 (249) * ('94) 18 Bom 61 (64) (DB) * AIR 1960 Pat 285 (287, 288): 1960 BLJR 99.

[But see AIR 1938 Lah 95 (95).]

(3) Where decree or order in transferred case is appealable, High Court will not interfere in revision with order for transfer. ('84) 6 All 233 (234) (DB).

**19. Costs.** — (1) On dismissal of application for transfer as frivolous, Court has power to award substantial costs to opposite party. AIR 1945 Oudh 233 (235): 20 Luck 382.

### SECTION 25 — SYNOPSIS

1. Scope.
2. Appeal from decree in transferred case.

**1. Scope.** — (1) The section does not apply to an objection to a particular Judge personally. The objection in question must be one which applies to the High Court as a whole. AIR 1924 Bom 90 (97, 98).

**2. Appeal from decree in transferred case.**— (1) The appeal from the decree in the transferred case does not lie to the original High Court, but only to the appellate side of the High Court, to which the case was transferred. AIR 1921 Mad 687 (687) (DB).

### SECTION 26 — SYNOPSIS

1. Institution of suit.
2. Plaint, meaning of.
3. Person to whom plaint should be presented. — See O. 4, R. 1.
4. Time of presentation. — See O. 4, R. 1.

**Section 26 — Synopsis (contd.)**

**5. Presentation of plaint with deficient Court-fee or with other defect.** — See Notes on S. 149 and O. 7, Rr. 1 and 11.

**6. Presentation of plaint in Revenue Courts.** — See O. 4, R. 1.

**TOPIC INDICATOR**

Application under S. 20, Arbitration Act — See Note 1.
Proceedings under Hindu Marriage Act, 1955 — See Note 1.
Proceedings in forma pauperis — See Note 1.
Probate proceedings — See Note 1.
Representation of plaint after amendment — See Note 1.
Written statement, claiming set off — See Note 2.

**1. Institution of suit.** — (1) A suit must commence with the presentation of a plaint. (1936) 164 Ind Cas 442 (443) (Cal) * AIR 1933 PC 63 (64): 35 Bom LR 319 * AIR 1962 Bom 162 (164): 63 Bom LR 985 (FB) * AIR 1967 Orissa 41 (43): 33 Cut LT 13 * AIR 1966 Bom 126 (131): 67 Bom LR 644 (DB).

[See also AIR 1962 Madh Pra 320 (330): 1962 Jab LJ 298 (DB). (Though the judgment and decree may be passed in terms of award given by the arbitrator, it is not a suit as there is no filing of a plaint.)]

(2) A proceeding under Section 12, U. P. Agriculturists' Relief Act (27 of 1934), which is instituted by the presentation of an application, is a 'suit'. (1949) AIR 1949 All 100 (101): ILR (1948) All 363.

(3) Application under Section 20, Arbitration Act (1940) can be considered as a suit but it is not a suit in the fullest sense of the term. Therefore, it is not a suit within meaning of Cl. 12 of the Letters Patent. AIR 1966 Cal 259 (266).

(4) Proceeding under Section 28, Hindu Marriage Act (1955) is suit, though initiated by application. 1967 Jab LJ 712 (716).

(5) A suit is instituted when the plaint is presented and not when it is registered. AIR 1952 Vindh Pra 12 (13) * (1935) 62 Cal 1115 (1117) * AIR 1921 Cal 277 (279) (DB).

[See also ILR (1965) Cal 457. ("Suit" in Section 80 has same meaning which it has in S. 26.)]

(6) Proceeding instituted on filing of an application under O. 33, R. 1 is a suit. AIR 1967 Pat 320 (322).

(7) Suit filed in forma pauperis — Application for permission to sue in forma pauperis allowed — Date of application is date of plaint — That fixes priority of suit for purpose of Section 10. 1962 Jab LJ 120 (122).

(8) Filing of application for permission to sue in forma pauperis — Suit commences for purposes of ordering attachment before judgment or granting interim injunction — Relief can be given even during pendency of enquiry about pauperism. (1961) 3 OJD 219: (1961) 27 Cut LT 256 (265, 266). (AIR 1952 Mys 76. Diss. from.) * AIR 1964 Raj 279 (280): 1964 Raj LW 422.

(9) Amedments made when some of the plaintiffs had gone out of suit — Date of institution of suit remains unaltered. AIR 1967 Mad 410 (413): (1967) 2 Mad LJ 265.

(10) Before a suit can be deemed to be instituted the plaint must be presented to a Court having jurisdiction. AIR 1941 Mad 711 (712) (DB).

(11) When a plaint has been presented to a Court of higher jurisdiction and the plaint is returned for presentation to the Court of lower grade, the suit must be held to be instituted. AIR 1941 Mad 711 (712) (DB).

[See however AIR 1956 Punj 30 (32).]

[Overruled on another point in AIR 1963 Punj 208.]

(12) There is no presumption of the filing of the plaint having taken palce at the earliest period of the day on which it was filed. (1913) 9 Nag LR 155 (156).

(13) Probate proceedings becoming contentious — Proceedings are not regular suit but assume such form under Section 295 of Succession Act. AIR 1967 Orissa 41 (43): 33 Cut LT 13.

(14) Political suit properly instituted in Special Court when transferred to Civil Court is to be deemed to have been instituted before the Court to which it is transferred. AIR 1952 Sau 102 (103) (DB).

(15) An application under Section 110 of Motor Vehicles Act (1939) is not a suit within the meaning of Section 527 of Bombay Municipal Corporation Act (3 of 1888). (1965) 67 Bom LR 903: 1966 Mah LJ 334 (DB).

**2. Plaint, meaning of.**— (1) A written statement claiming a set-off is a plaint. (1892) 15 Mad 29 (34) (DB) * AIR 1966 Bom 126 (131): 67 Bom LR 644 (DB).

(2) A petition for letters of administration with the will annexed is not a plaint. AIR 1956 Bom 45 (48): ILR (1955) Bom 912 (DB).

(3) There is nothing in Rule 151, Bombay High Court (O. S.) Rules which suggests that a third party notice must be treated as a plaint for all purposes and it is not a plaint at least for the purpores of the Bombay Court Fees Act (36 of 1959). AIR 1966 Bom 126 (132): 67 Bom LR 644 (DB).

(4) Partition suit — Written statement filed by defendant co-owner in which some relief is asked, is a plaint. AIR 1967 Mys 217 (219): (1967) 2 Mys LJ 49 (DB).

**3. Person to whom plaint should be presented.** — See O. 4, R. 1.

**4. Time of presentation.** — See O. 4, R. 1.

## SUMMONS AND DISCOVERY

**27. Summons to defendants.**—Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed.

[1882, S. 64; 1877, Ss. 64 and 68; 1859, S. 41. See O. 5.]

**28. Service of summons where defendant resides in another State.**—(1) A summons may be sent for service in another [a][State] to such Court and in such manner as may be prescribed by rules in force in that [a][State].

(2) The Court to which such summons is sent shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue together with the record (if any) of its proceedings with regard thereto.

[1882 and 1877, S. 85; 1859, S. 59.]

[a] Substituted for "Province" by A.L.O., 1950 (26-1-1950).

**29. Service of foreign summonses.**—[a][Summonses and other processes issued by—

(a) any civil or revenue Court established in any part of India to which the provisions of this Code do not extend, or

(b) any civil or revenue Court established or continued by the authority of the Central Government outside India, or

(c) any other civil or revenue Court outside India to which the Central Government has, by notification[b] in the Official Gazette, declared the provisions of this section to apply,

may be sent to the Courts in the territories to which this Code extends and served as if they were summonses issued by such Courts.]

[1882, S. 650-A.]

[a] Substituted by the Code of Civil Procedure (Amendment) Act (2 of 1951), S. 6 (1-4-1951).

The old Section 29 was as follows:—

"29. Summonses and other processes issued by any Civil or Revenue Court situate beyond the limits of the States may be sent to the Courts in the States and served as if they were summonses issued by such Courts:

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**Section 26 — Note 1 (contd.)**

**5. Presentation of plaint with deficient Court-fee or with other defect.** — See Notes on S. 149 and O. 7, Rr. 1 and 11.

**6. Presentation of plaint in Revenue Courts.** — See O. 4, R. 1.

**Section 27 — Note 1**

**1. "Duly instituted."** — (1) A suit cannot be said to have been duly instituted until, after scrutinising the plaint, the Court registers it as suit. AIR 1922 Cal 234 (235).

(2) When a plaint is returned for presentation to a competent Court the suit is to be considered as instituted on the date of presentation to such proper Court. AIR 1928 Bom 421 (422): 52 Bom 548 (DB).

(3) A suit against a dead person is not duly instituted. (1869) 12 Suth WR 45 (46) (DB) * (1908) 31 Mad 86 (89) (DB).

(4) Where the plaint is presented through post, and if the Court accepts it and registers it according to Order 4, Rule 2 and also issues a summons to the defendant it may be taken that the Court considered the suit to be duly instituted. (1955) Madh BLJ 1955 HCR 120 (122).

(5) Neither Rr. 142 to 148-A of the Ahmedabad City Civil Court Rules nor Order 37, Rules 1 and 2 as amended by Bombay High Court are inconsistent with Section 27 of the C. P. Code, and are not therefore ultra vires the rule making power of the High Court under S. 122 of the Civil Procedure Code — Such rules cannot however be justified under Article 227 of the Constitution. AIR 1968 Guj 223 (226, 227, 228): 9 Guj LR 177 (DB). (Civil Revision Appln. No. 196 of 1963 overruled.)

**2. "Summons may be issued".** — See O. 5, R. 1.

**3. Manner of service** — See O. 5, R. 10

**Section 29 — Note 1**

**1. Notifications.** — (1) For notifications issued under this section, see Appendix IV.

Provided that the Courts issuing such summonses or processes have been established by the authority of the Central Government or that the State Government of the State in which such summonses or processes are to be served has by notification in the Official Gazette declared the provisions of this section to apply to such Courts."

[b] For notification in respect of Sikkim, see G. S. R. 109 published in Gazette of India, 1961, Pt. 3 (i), Page 154, (as extended by G. S. R. 705, published in the Gazette of India, 13-5-1967, Pt. II, Sec. 3 (i), page 803, for five years from 3-5-1967), of Burma, see G. S. R. 935, published in ibid, p. 995.

**30. Power to order discovery and the like.**—Subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion or on the application of any party,—

(a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;

(b) issue of summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;

(c) order any fact to be proved by affidavit.

**31. Summons to witness.**—The provisions in Sections 27, 28 and 29 shall apply to summonses to give evidence or to produce documents or other material objects.

**32. Penalty for default.**—The Court may compel the attendance of any person to whom a summons has been issued under Section 30 and for that purpose may—

(a) issue a warrant for his arrest;
(b) attach and sell his property;
(c) impose a fine upon him not exceeding five hundred rupees;
(d) order him to furnish security for his appearance and in default commit him to the civil prison.

[See O. 16, Rr. 10 to 13, 17 and 21.]

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**Section 30 — Note 1**

(1) The antithesis that Section 32 draws between Section 27 and S. 30 is that an omission to appear in response to summons under Section 27 carries no penalty in the strict sense, while disregard of summons under Section 30 may entail punishment. AIR 1955 SC 425 (430): (1955) 2 SCR 1.

(2) Application for discovery of documents by party rejected on ground of vagueness — Court can even after such rejection and at any stage of suit issue directions suo motu within conditions and limitations prescribed by Rules in Code but not same directions which were earlier prayed for but rejected on merits. (1965) 69 Cal WN 242 (245, 247).

(3) In matters of discovery, production and inspection of documents an Industrial Tribunal has the same powers which the Civil Courts have under the C. P. Code. 1959 Ker LT 462 * AIR 1956 Cal 592 (593). (Inspection of documents not be ordered until affidavit of documents has been directed to be filed — Procedure applies to Industrial Tribunals.)

(4) Section 30 (c) lays down an exception to the general rule that on affidavit is not evidence within Section 3 of the Evidence Act. But an order of the Court is necessary to prove any fact by affidavit. 1962 Jab LJ 197 (199).

[See also AIR 1954 Nag 260 (263): 1954 Nag LJ 401 (DB). (Affidavit without order from Court — Allegations not controverted — Order receiving affidavit is tantamount to ordering it and complies with law: AIR 1953 Nag 135, Overruled.]

**Section 32 — Note 1**

**1. Applicability of the section.** — (1) A fine can be imposed only on a person who is required to attend the Court in connexion with a case and who does not appear in obedience to the summons of the Court and not on a person who, after his failure to attend on the date for which he was summoned, is not required to give evidence or produce a document

## OBJECTS AND REASONS

"Thinking it unnecessary to impose penal consequences for a default of the class indicated in this section, the committee have omitted the last paragraph of Section 136 of the Code of 1882, which provided that any party failing to comply with any order under Chapter III of that Code, to answer interogatories or for discovery, production, or inspection, which has been served personally upon him, shall be deemed guilty of an offence under Section 188 of the Penal Code". — See S. O. R.

## JUDGMENT AND DECREE

**33. Judgment and decree.**—The Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow.

[1882 and 1877, S. 198; 1859, S. 183. See O. 20.]

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**Section 32 — Note 1 (contd.)**

and has not been called upon to appear on a subsequent date. AIR 1929 All 850 (853) (DB).

[See also AIR 1959 Andh Pra 645 (646): (1959) 2 Andh WR 532. (Application by defendant for summoning plaintiff as witness — Proper procedure is to issue summons in compliance with Section 32 and Order 16, Rule 10 not to require the plaintiff to appear in person under O. 9, Rule 12.)

(2) A witness whose evidence is necessary and who appears on the adjourned hearing at the instance of the party concerned without any fresh summons can be fined by the Court for his failure to appear at the previous hearing. AIR 1951 All 415 (417) (DB).

(3) The exercise of the jurisdiction which has been conferred upon a Court under S. 32 and O. 16, R. 12 to impose a fine upon a witness who fails to appear on the day for which he is summoned is not dependant upon the issuing of a proclamation or an order of attachment or a warrant under Rule 10 (2) and (3) of Order 16. AIR 1951 All 415 (417) (DB).

[But see AIR 1929 All 850 (852) (DB).]

(4) An omission to appear in response to a summons under Section 27 carries no penalty in the strict sense, while disregard of a summons under Section 30 may entail punishment. The spirit of this distinction must be carried over to the First Schedule. AIR 1955 SC 425 (430): 1955-2 SCR 1.

### SECTION 33 — SYNOPSIS

1. Scope.
2. "After the case has been heard."
3. "A decree shall follow."
4. Contents of judgment — See O. 20, R. 4 and notes thereon.
5. Contents of decree — See O. 20, R. 6 and notes thereon.
6. Contents of appellate judgment — See O. 41, R. 31 and notes thereon.
7. Judgment to be based on case set up by parties — See O. 20, R. 4 and Notes thereon.

**1. Scope.** — (1) This section does not preclude the High Court from making a rule to the effect that in suits for money no decree need be drawn up if neither party has to recover anything unless the Judge otherwise directs. AIR 1934 Pat 266 (269): 13 Pat 371 (DB).

**2. "After the case has been heard."** — (1) The failure of a Judge to give the parties an opportunity of putting their case before him vitiates the judgment. AIR 1920 Lah 246 (247) * AIR 1959 Andh Pra 212 (214): ILR (1958) Andh Pra 129 (133) (DB).

**3. "A decree shall follow."** — (1) A party or his pleader is under no obligation to move the Court to draw up a decree. The drawing up of the decree is essentially the function of the Court and its office. AIR 1914 Bom 23 (25): 38 Bom 331 (DB) * AIR 1924 Nag 271 (274): 20 Nag LR 131 * AIR 1961 SC 832 (836): (1961) 2 SCR 918.

(2) Where a judgment is pronounced the Court has no power to direct that the preparation of the decree be stopped until the payment of deficit court-fees or until the disposal of the application by the judgment-debtor for scaling down the debt under the provisions of the Madras Agriculturists' Relief Act, 4 of 1938. AIR 1932 Pat 228 (231): 11 Pat 532 (DB) * AIR 1941 Mad 929 (932): ILR (1942) Mad 346 (FB). (AIR 1940 Mad 478, Overruled.)

(3) Even in a partition suit the decree sheet should be prepared and the Court is not concerned whether the decree will be executable or not. AIR 1957 Punj 65 (67, 68): ILR (1957) Punj 365.

(4) Where, after pronouncing judgment in a suit the Court fails to draw up a decree, the remedy of the party who wants the decree is to apply for it to the Court and if the application is refused, to move the High Court in revision. AIR 1955 Vindh Pra 39 (40) * ('57) 61 Cal WN 789 (793).

(5) Until the decree is drawn up, there can be neither appeal nor execution. (1912) 8 Nag LR 92 (95, 96) * (1883) 5 All 520 (526) (DB) * (1910) 34 Bom 182 (188) (DB) * (1905) 32 Cal 483 (491) (DB) * AIR 1920 Lah 395 (396): 1 Lah 223 (DB).

[But see AIR 1962 Pat 398 (399, 400): 1962 BLJR 434. (Filing of execution

## INTEREST

**34. Interest.**—(1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, [a][with further interest at such rate not exceeding six per cent per annum as the Court deems reasonable on such principal sum] from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.

**Section 33 — Note 3 (contd.)**

after pronouncement of judgment but before drawing up of formal decree is legal — AIR 1954 Pat 94, Rel. on.)]

[See however AIR 1956 Assam 120 (120) * AIR 1955 Raj 33 (34): ILR (1955) 5 Raj 269 (DB) * (1966) 2 Mys LJ 25 (29): (1966) 6 Law Rep 809. (Production of copy of decree along with execution application not a condition precedent to execution.)]

(6) Where in a judgment passed in favour of a party it is stated that he shall not get a decree unless he produces a succession certificate, a decree cannot be passed till a succession certificate is produced. AIR 1920 Nag 148 (149). * AIR 1961 All 86 (86, 87). (Court has jurisdiction to extend time for filing of succession certificate.)

(7) Where a suit comprises several distinct subject-matters, there can be a separate decree in regard to each of them. AIR 1940 Lah 1 (3): ILR (1940) Lah 171 (DB).

(8) Common judgment in two suits — Separate decrees must be drawn up. AIR 1965 Manipur 24 (25).

(9) Since after consolidation there is only one case, and the suit consolidated has no independent existence for trial the suits on consolidation should be tried in one trial and should be disposed of by one judgment and decree. 1961 Raj LW 473: ILR (1961) 11 Raj 1173.

(10) An order directing a decree to be drawn up cannot be treated as a decree. AIR 1958 All 720 (728) (DB).

(11) The 'decree' as defined in Section 2 (2) comes into existence as soon as the judgment is pronounced. It does not necessarily mean the formal decree which is prepared in accordance with Section 33 and O. 20, R. 6. AIR 1962 Pat 398 (399, 400): 1962 BLJR 454 * AIR 1969 Guj 152 (155, 158).

(12) Section 33 has no application to the decree passed under the Hindu Marriage Act (1955); hence adjudication under Sections 9, 10, 11 and 12 of the Act and need not necessarily be followed by a formal decree. AIR 1969 Punj 69 (71, 72): 70 Pun LR 643 (DB).

(13) Order under Hindu Marriage Act (1955) is not decree as referred to in Section 33 Civil P. C. Hence, appeal from such order need not be accompanied by copy of decree. (1968) 70 Pun LR 643: 1968 Cur LJ 622.

**4. Contents of Judgment** — See O. 20, R. 4 and notes thereon.

**5. Contents of decree** — See O. 20, R. 6 and notes thereon.

**6. Contents of appellate judgment** — See Order 41, Rule 31 and Notes thereon.

**7. Judgment to be based on case set up by parties** — See O. 20, R. 4 and Notes thereon.

### SECTION 34 — SYNOPSIS


1. SCOPE.
2. "DECREE FOR THE PAYMENT OF MONEY."
3. AWARD OF INTEREST UNDER THE SECTION IS A MATTER OF DISCRETION.
   4. Interest from date of suit to date of decree.
   5. Interest from date of decree to date of payment.
6. INTEREST PRIOR TO SUIT — GENERAL.
   7. Agreement express or implied to pay interest.
   8. Mercantile usage.
   9. Right to interest under statutory provisions.
   10. Interest as damages.
11. MORTGAGE SUITS. See O. 34, R. 11.
12. INTEREST, WHETHER PAYABLE AFTER TENDER.
13. INTEREST ON MESNE PROFITS, SEE O. 20, R. 12.
14. INTEREST ON ARREARS OF RENT.
15. INTEREST ON COSTS. See Sec. 35.
16. RULE OF DAMDUPAT.
17. DECREE SILENT AS TO INTEREST — SUB-SECTION (2).


### TOPIC INDICATOR


Cases under Interest Act — See Notes 7 and 9.

Compound interest — See Notes 3 and 6.

Contribution suit — See Note 10.

Court's power to reduce rate of interest in harsh and unconscionable bargains — See Note 7.

Interest on damages — See Note 2.

(2) Where such a decree is silent with respect to the payment of further interest [a][on such principal sum] from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie.

[1882 and 1877, S. 209; 1861, S. 10.]

[a] Substituted by the Code of Civil Procedure (Amendment) Act, 1956 (66 of 1956), Sec. 2 (1-1-1957).

## OBJECTS AND REASONS

"Clause 34 — The words "not being a decree for the enforcement of a mortgage or charge" have been omitted in this clause and elsewhere in order to make it clear that a decree for the payment of money does not include a decree for sale in enforcement of a mortgage or charge". — S. O. R.

**Section 34 — Synopsis (contd.)**

Interest on deposit of decretal amount — See Note 5.
Interest on legacies — See Note 9.
Interest prior to suit — See Notes 1, 3.
Interest when allowed and disallowed — See note 6.
Notice — See Note 12.
Post diem interest — See Note 9.
Powers of arbitrator — See Note 1.
"Reasonable" — See Notes 3 and 4.
Separate suit for interest — See Note 17.
Stipulation amounting to penalty — See Note 7.
Stipulation for enhanced interest — See Note 7.
Suit for unliquidated damages — See Note 2.

**1. Scope.**—(1) Interest prior to the date of suit, is a matter of substantive law and is outside the scope of this section. AIR 1938 PC 67 (70): ILR (1938) 2 Cal 72: 32 Sind LR 374 ° AIR 1957 Ker 3 (5): ILR (1957) Ker 13 (DB) * AIR 1931 Nag 161 (164): 27 Nag LR 312 (DB).

(2) The award of interest after institution of the suit is purely a matter of statutory power. AIR 1955 SC 468 (478): 1955-2 SCR 48: 34 Pat 359.

(3) Interest under this section is no part of the claim or relief as in the case of mesne profits. (1906) 33 Cal 1232 (1235) (DB).

(4) Future interest awardable under this section is really in the nature of damages granted by the Court on account of the plaintiff being kept out of the money due to him under the decree. AIR 1933 Lah 352 (354): 14 Lah 591.

(5) An arbitrator cannot award interest after suit on the analogy of Section 34. AIR 1955 SC 468 (478): 1955-2 SCR 48: 34 Pat 359 * AIR 1968 Pat 352 (363) (DB). (Provisions of the section do not apply to arbitration proceeding under S. 19 of Defence of India Act, 1939.) ° (1965) 1 Mys LJ 567. (Section is not applicable to award made by Arbitrator.) ° AIR 1964 Cal 240 (241) • AIR 1964 Punj 395 (397): 1964 (2) Cri LJ 335: 66 Pun LR 530. (Arbitrator is not a Court and as such he can award past interest but not future interest.) ° AIR 1960 Punj 623 (625): ILR (1960) 2 Punj 778 (DB).

(6) Where the award is given through the intervention of the Court, even if the arbitrators are not empowered to grant pendente lite and future interest the Court is competent to do so. AIR 1962 Raj 12 (19): ILR (1961) 11 Raj 76.

(7) Section in terms does not apply to Arbitrations but where there is an implied term of reference that arbitrator would give such relief with regard to pendente lite interest as court could give the arbitrator can award pendente lite interest. AIR 1967 SC 1030 (1032): (1967) 1 SCR 105 * AIR 1967 SC 1032 (1035): (1967) 1 SCR 324. (Though the section does not apply to arbitration proceedings, principle of that section can be applied by arbitrator for awarding interest where Court could have granted decree for interest.) ° AIR 1968 Bom 35 (39): 69 Bom LR 250 (DB). (Arbitrator is a Court — He has power to award interest.) * (1966) 70 Cal WN 363. (Requisitioning and Acquisition of Immovable Property Act (1952), Section 8 (1) (e) — Award of compensation for acquisition — Interest pendente lite can be granted though Section 34, C. P. Code does not apply to proceedings before arbitrator.)

(8) Amount of interest decreed for period subsequent to institution of suit — Appeal by defendant — Defendant not to pay Court-fee on amount of such interest. AIR 1964 SC 457 (459, 460): (1964) 5 SCR 230.

(9) Section 34 corresponds to Section 192 of the Ceylon Ordinance II of 1889. AIR 1967 SC 657 (661): (1967) 1 SCR 965.

(10) Suit on contract — Interest due on some contract cannot be reduced or increased by the Court. 1966 All LJ 907: 1966 All WR (HC) 702: ILR (1950) All 436. (There is no law by which interest may be increased or allowed in abrogation of contract providing that no interest shall be payable.)

[See however AIR 1967 Guj 276 (277): 8 Guj LR 307 (DB). (Court passing a money decree and postponing the payment of the decretal amount — Rate of interest may exceed six percent per annum as O. 20, R. 11 applies.)]

**Section 34 — Note 1 (contd.)**

(11) It is apparent from the language of Section 49 of the Bhopal C. P. Code that the Courts have no power to limit the rate of rent or interest already paid by one party to the other. It is only with regard to the rent claimed in the suit that the Courts have been given the power to limit the rate in the decree. (1963) MPLJ 157: 1963 Jab LJ 305 * AIR 1953 Bhopal 35 (36). (Bhopal Civil Procedure Code, S. 49 — Usufructuary mortgage — Possession continued under rent note executed on same day — Rent working out higher rate of interest — Transaction fell within purview of Section 49 and the rent could be reduced.)

(12) Interest on amount paid under interim orders of stay cannot be allowed when the proceedings have finally ended against the person obtaining stay order. AIR 1968 All 139 (146): ILR (1967) 2 All 129 (DB).

(13) Section 34 is not applicable to special tribunals like Special Officer under Andhra Electricity Supply Undertakings (Acquisition) Act — Special Officer has therefore no power to award interest on compensation. (1957) 2 Andh WR 344.

(14) Trav-Co. C. P. C. (8 of 1100 M. E.), S. 31 (1) — Decree in contravention of the provisions is not void. AIR 1959 Ker 194 (196): 1959 Ker LT 1 (DB).

(15) Under Section 31 (1), Travancore C. P. Code, the Court could not decree by way of interest up to the date of the suit anything in excess of a moiety of the principal sum. AIR 1956 Trav-Co 236 (237, 238): 1956 Ker LT 333 (DB). (Such an immunity from liability could not be taken away by replacement of Trav. Code by Indian Code.)

(16) Discharge of fixed deposit receipt — Purchase of fresh receipt — Transaction not continuous but new suit based on fresh receipt — Case is not of interest on interest. 1963 Lab LJ 779.

(17) High rate of interest — Claim by Municipality is not permissible. AIR 1968 Raj 327 (330) (DB).

**2. "Decree for the payment of money."**— (1) The word "money" will include unliquidated damages and interest on such damages can be awarded. AIR 1926 Mad 1021 (1023) (DB) ° AIR 1946 Bom 1 (7): ILR (1946) Bom 28 (DB) ° AIR 1940 Bom 369 (377): ILR (1941) Bom 71 (DB) * AIR 1953 Kutch 52 (53) ° AIR 1924 Cal 637 (638) (DB).

[But see AIR 1931 Bom 386 (387) (DB) ° AIR 1920 Cal 737 (739).]

(2) A personal decree in a mortgage suit is a money decree. AIR 1949 East Punj 213 (215).

(3) Decree for possession and for personal payment of past and future rent is one for payment of money. AIR 1966 Ker 192 (194): 1966 Ker LT 301 (FB).

(4) Unlike the order of costs under Section 35 an order as to interests forms part of a dispute between the parties and if a variation is made in regard to it, it is an integral part of the decision or the decree. AIR 1961 SC 1795 (1804): (1962) 2 SCR 452.

**3. Award of interest under the section is a matter of discretion.**— (1) The award of interest under this section after the date of suit is entirely in the discretion of the Court AIR 1942 PC 61 (64): ILR (1942) Kar (PC) 157 * AIR 1941 Pat 255 (258): 20 Pat 481 (FB) ° AIR 1931 PC 104 (107): 58 Cal 1281: 58 Ind App 141 ° (1886) 12 Cal 569 (579) (FB) ° AIR 1958 Raj 145 (150): ILR (1958) 8 Raj 510 ° 1958 BLJR 587 (588)° 1963 Ker LJ 754 * AIR 1959 Cal 213 (215).

(2) The discretion of the Court to grant interest is not excluded by—

(a) an agreement to pay a certain rate of interest till realization. AIR 1942 PC 61 (64): ILR (1942) Kar (PC) 157 • (1886) 12 Cal 569 (579) (FB) * ('91) 18 Cal 164 (180): 17 Ind App 201 (PC).

(b) the absence of contract to pay any interest. ILR (1950) 1 Cal 578 (580) (DB) • AIR 1924 Nag 348 (352) * AIR 1963 Mad 202 (203): 75 Mad LW 727 (DB). (Omission to calculate interest on deposits held not decisive to prove that there was agreement not to collect interest.) ° AIR 1961 Punj 442 (442): ILR (1960) 2 Punj 400 (DB). (Suit on pronote — Future interest — Court has discretion to award.)

(c) the plaint not claiming any interest. AIR 1943 Nag 240 (242): ILR (1943) Nag 555 (DB) * (1895) 17 All 511 (517): 22 Ind App 199 (201) (PC).

(d) the rule of damdupat. AIR 1929 Nag 355 (356).

(3) Interest under this section from the date of suit may be awarded though the plaintiff may not be entitled to any interest prior to the suit. AIR 1955 Nag 38 (41): ILR (1955) Nag 538 (DB) ° AIR 1964 Andh Pra 491 (498): (1966) 2 Lab LJ 350 (DB). (Future interest — Party in whose favour a decree is passed is entitled to future interest though he has not asked for the same.)

(4) For the award of interest in the decree the judgment need not make any reference to it. (1885) 7 All 755 (756) (DB) ° AIR 1916 All 303 (304) (DB).

(5) The discretion under this section must be exercised on sound judicial principles. AIR 1919 Cal 144 (150): 23 Cal WN 336 (344) (DB) * (1881) 3 All 91 (107): 7 Ind App 196 (PC) ° AIR 1958 Raj 145 (150): ILR (1958) 8 Raj 510.

(6) Interest antecedent to the suit is not a mere matter of procedure. The discretion of a Court has to be confined to certain specified considerations only. (1965) 2 Andh WR 510.

(7) Proper exercise of discretion will not be interfered with in appeal. AIR 1942 PC 61 (64): ILR (1942) Kar (PC) 157 ° ('51) AIR 1951 Raj 11 (13) * AIR 1950 Bom

Section 34 — Note 3 (contd.)
94 (101)' ILR (1949) Bom 741 (DB) ° AIR 1925 PC 280 (288): 5 Pat 135: 52 Ind App 418 ° AIR 1922 PC 46 (48).

(8) Ordinarily pendente lite or future interest should not be refused except for sufficient reasons. AIR 1949 All 440 (445): ILR (1949) All 735 (DB) * AIR 1957 Madh B 50 (52) (DB) ° ILR (1957) Bom 529 (531) (DB) ° ILR (1956) 8 Assam 268 (284) (DB) * AIR 1946 Pat 154 (155, 156) (DB) ° AIR 1939 Pat 323 (329, 330) (DB) ° AIR 1963 Assam 179 (180): ILR (1963) 15 Assam 309 (DB). (There must be reasons both for grant or refusal.) ° AIR 1964 Raj 72 (75): 1963 Raj LW 351. (Money decree — Pendente lite and future interest — Generally allowed in Rajasthan Courts.) * AIR 1963 Raj 93 (95): 1962 Raj LW 618. (Money decree — Refusal by Court to award pendente lite and future interest — Reasons must be recorded.) ° 1963 Jab LJ 779. (Where no reasons have been given for reducing the rate of interest the High Court can interfere. Normally, the plaintiff should be entitled to the interest at the contract rate." Where the defendant was responsible for the delay and for protracting litigation, the award of interest after passing of the decree at the rate of 6 per cent per annum is proper.) ° 1952 Raj LW 16: ILR (1951) 1 Raj 618. (Total interest upto suit equivalent to principal and not in excess awarded — Reasons given — No interference with discretion.)

(9) The Court has jurisdiction under S. 34 to give compound interest. AIR 1934 Bom 86 (89): 36 Bom LR 68 (DB).

(10) Where the lower Court has not considered the question of interest at all, the Appellate Court may grant it. AIR 1927 Lah 679 (680) (DB) * AIR 1936 Lah 668 (669).

(11) Money decree with future interest from date of suit till realization — Appeal against decree — Court-fees on amount of interest not payable. Since awarding of future interest is in the discretion of the Court and not a matter of right or dispute. AIR 1962 Bom 52 (53): 63 Bom LR 689.

(12) Section 30 of the Bengal Money-lenders Act, controls the discretion of the Court under this section. AIR 1943 Cal 629 (633): ILR (1944) 1 Cal 169 (DB).

(13) Section 36 of the Bengal Money-lenders Act does not abrogate this section. AIR 1942 Cal 610 (610).

(14) Section 15 of the C. P. Debt Conciliation Act does not fetter the discretion of the Court to award interest under this section except as to the rate of interest. 1941 Nag L Jour 591 (592) (DB).

(15) Discretion of Court — Fact that interest at 9 per cent had been awarded prior to date of suit is no ground for awarding future interest at that rate — Interest at usual rate of four per cent allowed. AIR 1964 SC 1658 (1663): (1965) 1 SCJ 243. (AIR 1962 Him Pra 43, Reversed.)

(16) The maximum interest that might be awarded under S. 34 (1), C. P. Code is 6 per cent. The Court has discretion to award a lesser rate of interest. But the Court must exercise a sound judicial discretion. (1960) 1 Andh WR 397: 1960 Andh LT 335.

(17) Agreement to sell land — Suit for specific performance or in alternative for refund of money — Agreement becoming unenforceable by reason of Ss. 63 and 64 of Bombay Act (67 of 1948) — Interest on such amount granted on the ground that it was a fit case where equitable jurisdiction ought to be exercised. AIR 1959 Bom 468 (470): 60 Bom LR 788 (DB).

(18) Pendente lite interest — No claim made — Court can award it. 1960 Raj LW 29: ILR (1959) 9 Raj 938.

**4. Interest from date of suit to date of decree.**— (1) The plaintiff is not entitled as of right to the contract rate after suit. AIR 1916 Mad 918 (918) (DB) * ('81) 3 All 91 (107): 7 Ind App 196 (PC) ° AIR 1935 Cal 39 (68): 61 Cal 711 (DB) ° AIR 1936 Pat 191 (193) (DB).

(2) The Court has full discretion in the matter of granting contract rate after suit. AIR 1955 Raj 70 (75): ILR (1954) 4 Raj 705 (DB) * AIR 1954 Nag 300 (304): ILR (1954) Nag 435 (DB) ° AIR 1922 PC 46 (48) ° (1913) 37 Bom 326 (338): 40 Ind App 68 (PC) * AIR 1963 Andh Pra 353 (357): (1963) 1 Andh WR 124 (DB).

(3) As a rule, the Court should award the contract rate till date of decree except where it would be inequitable to do so. ILR (1955) Nag 413 (424) ° AIR 1941 Pat 276 (280) (DB) ° AIR 1935 Cal 39 (68): 61 Cal 711.

(4) Where interest at contract rate is refused, the Court should give its reasons for such refusal. AIR 1916 Mad 918 (918).

(5) In an action for dissolution of a partnership and for accounts, interest should ordinarily be allowed only from the date of final decree. AIR 1952 Mad 769 (770, 771) * AIR 1930 PC 185 (187): 58 Cal 208: 57 Ind App 245: 24 Sind LR 328.

(6) When, on dissolution of partnership, one of the partners retains in his hands assets of the partnership for his own purposes without accounting for them or their proceeds, interest is properly chargeable against him even though he has not acted fraudulently. AIR 1955 Mad 442 (446). ILR (1955) Mad 1197 (DB) ° AIR 1942 PC 61 (64): ILR (1942) Kar (PC) 157 ° AIR 1915 PC 116 (118): 42 Cal 914: 42 Ind App 91.

(7) Interest awardable from the date of plaint to the date of the decree should be only upon the principal sum and not on the whole amount including interest claimed by the plaintiff. AIR 1943 Mad 216 (217) (DB).

**Section 34 — Note 4 (contd.)**

(8) Suit going on for eleven years because of defendant's incorrect attitude in resisting claim — Plaintiff is entitled to interest pendente lite, on amount decreed — Interest at 6 per cent. 1968 MPLJ 425: 1969 Jab LJ 304.

(9) In claim for compensation under S. 70 of Contract Act, pendente lite and future interest may be allowed. AIR 1964 Pat 225 (230, 231) (DB).

(10) Pendente lite interest in a suit on handnote providing for payment of interest has to be allowed — Rate of interest is within Court's discretion. AIR 1967 Orissa 107 (110) (DB).

(11) Interest calculated by lower Court upto date of suit and awarded — Further interest awarded on claim decreed from date of decree — No reason given for not awarding interest for period between date of a suit and date of decree — Plaintiff held entitled to such interest. (1951) 4 Sau LR 34 (45) (DB).

**5. Interest from date of decree to date of payment.**— (1) Under the amendment by Act 66 of 1956, interest after decree till payment can be awarded only on the principal and the rate of interest is not to exceed 6 per cent. Subject to the above limits, the question of interest after decree till payment is within the discretion of the Court. AIR 1953 Kutch 52 (53) * AIR 1957 Mad 680 (681): ILR (1957) Mad 759 (DB).

(2) Where interest is allowed up to date of realisation the judgment-debtor is liable to pay interest up to the date of confirmation of sale only and not thereafter unless it is shown that the judgment-debtor has been guilty of any act preventing or postponing the actual payment to the judgment-creditor. AIR 1942 Mad 442 (443, 444) (DB).

(3) Decree against defendants — Defendants depositing money in Court with prayer that money should not be paid out to creditors of plaintiff-insolvent's estate during pendency of appeal — Held Official Assignee decree-holder having actually taken the money and kept it, future interest could not be allowed for the period when he was keeping it. AIR 1953 SC 235 (241): 1953 SCR 789.

[See also AIR 1963 Punj 111 (112): ILR (1962) 2 Punj 36. (Stay of Execution pending appeal — Stay allowed subject to condition of deposit of money — Decree-holder allowed to withdraw money after furnishing security — Delay caused in furnishing security — Decree-holder is entitled to claim interest for period of delay caused. AIR 1944 Mad 46 and AIR 1950 Mad 807, Rel. on.) ]

(4) It cannot be said that because no subsequent interest was provided for in the judgment, it ought not to be included in the decree. AIR 1957 Andh Pra 476 (477).

(5) The person who is responsible for money being deposited in Court and who allowed it to lie in Court should bear the loss in the shape of interest. If the decree-holder is mainly responsible for money being brought into Court, interest ceases to run from the date of deposit. If on the other hand the judgment-debtor voluntarily deposits the money into Court with a request that the decree-holder should be called upon to draw it out on furnishing security and if the decree-holder is unable to comply with this request, interest does not cease to run on the decretal amount from the date of deposit. AIR 1965 Andh Pra 51 (52): (1965) 1 Andh LT 130 (DB).

(6) Principle of restitution — Decretal amount and costs deposited in pursuance of decree — Some of the decree-holders withdrawing amount of costs, some withdrawing decretal amount as well as costs and some unable to withdraw due to their inability to furnish security — Reversal of decree in appeal — Decree-holders who could not withdraw the amount ought not to be made liable for interest — Others are liable to pay interest from the date of withdrawal till the date of repayment — Interest awarded only upto date of decision of High Court is illegal. AIR 1965 Andh Pra 398 (402): (1965) 1 Andh WR 335 ° AIR 1954 Cal 544 (547): 58 Cal WN 424 (DB). (Certificate sale set aside — Right of auction-purchaser to interest on money deposited.) ° AIR 1963 Ker 148 (151): 1962 Ker LT 12. (Execution sale — J. D. having no saleable interest in property sold — Sale confirmed — Auction purchaser can file a suit for refund of purchase price — Cannot claim interest unless fraud is proved.)

(7) Section 34 has no application to cases of Land Acquisition — S. 34, Civil P. C. is not mandatory whereas S. 34 of Land Acquisition Act peremptorily provides for interest. AIR 1966 Madh Pra 270 (272, 273): 1965 Jab LJ 881 (DB) ° AIR 1964 Pat 159 (160): 1964 BLJR 199 (DB). (Land Acquisition Act (1894) — Court not granting interest under S. 28 — Judgment and award silent in respect of interest on amount of compensation from date of dispossession by Collector — Remedy of aggrieved person is by way of appeal and not by review.)

(8) For a period subsequent to the passing of a decree the Court cannot grant interest at a higher rate than 6 per cent. AIR 1962 Mad 301 (302): 75 Mad LW 76 (DB).

(9) Obstacle in withdrawing decretal amount — Interest can be awarded only from the date the obstacle is removed. AIR 1968 Raj 327 (330) (DB).

**6. Interest prior to suit — General.** — (1) Interest for the period prior to the date of the suit may be awarded, if there is an agreement for the payment of interest at a fixed rate, or it is payable by the usage of trade having the force of law, or under the provision of any substantive law entitling the plaintiff to recover interest. AIR 1938 PC 67 (70): ILR (1938) 2 Cal

Section 34 — Note 6 (contd.)

72: 32 Sind LR 374: 65 Ind App 66 * AIR 1918 PC 53 (56): 40 All 497 ° AIR 1958 Pat 489 (492): 37 Pat 442 (DB) ° AIR 1957 Punj 159 (161): ILR (1957) Punj 646 * AIR 1957 Raj 89 (95): ILR (1957) 7 Raj 204 (DB) ° ILR (1956) 8 Assam 268 (284) (DB) * AIR 1968 Pat 203 (207): 1968 BLJR 619 (DB). (Suit on entry in Chitha of creditor signed by debtor — Interest on amount claimed cannot be allowed when contract for payment of interest cannot be spelt out from the language of Chitha.) * 1968 MPLJ 425: 1969 Jab LJ 304. (Suit for amount for work done — Claim for interest as damages cannot be entertained in the absence of specific provision of law or usage.) ° AIR 1963 Ker 247: 1963 Ker LT 73. (Contract for sale becoming impossible by act of defendant-seller — He is liable to refund advance paid by plaintiff purchaser — In absence of contract interest for period before suit cannot be allowed.) * AIR 1963 Madh Pra 37 (41): 1963 Jab LJ 56 (DB). ° ILR (1963) Cut 779 ° AIR 1962 Pat 384 (392): 1962 BLJR 77 (DB). (In absence of any contract for payment of interest, where the whole claim is for damages, to allow interest on that will be damages on damages.) * AIR 1961 Punj 253 (268): 63 Pun LR 251 (DB). (Money payable upon insurance policy — No agreement between insured and insurer entitling former to any interest — No demand made by heir of insured that interest will be demanded from date of demand of money — No market usage pleaded — Interest held could not be allowed.) ° AIR 1960 Cal 190 (195): ILR (1960) 2 Cal 187 (DB) ° ILR (1960) Cut 600 * 1958 Ker LT 961: 1958 Ker LJ 1134 ° AIR 1955 Him Pra 57 (61). (Agreement to pay interest on debt created in 1936 — Suit instituted in 1942 — Suit remaining pending for about 9 years — Interest should be allowed.)

(2) No interest can be allowed on damages for any period prior to suit. AIR 1954 Pat 304 (308) ° AIR 1957 Pat 586 (605): 36 Pat 633 (DB) * AIR 1945 Lah 35 (42, 43): ILR (1944) Lah 578 (DB) ° AIR 1931 Bom 386 (387) (DB) ° AIR 1933 Oudh 259 (260, 261) (DB) ° AIR 1967 Punj 497 (501) (DB).

(3) Unless there is a contract to the contrary, only simple interest will be allowed as a general rule. AIR 1933 Mad 171 (172) ° ('04) 28 Bom 371 (377) (DB).

[See also AIR 1934 Bom (86) (89): 36 Bom LR 68 (DB). (The Court has jurisdiction under S. 34 to give compound interest).]

(4) When interest is not payable by agreement or under statute the mere detention by the defendant of money due to the plaintiff is not a ground for awarding it. AIR 1938 PC 67 (70): 65 Ind App 66: ILR (1938) 2 Cal 72: 32 Sind LR 374 ° ('55) AIR 1955 Nag 38 (41): ILR (1955) Nag 538 (DB) * AIR 1955 Pat 254 (256) (DB).

(5) In a suit for refund of money paid under a contract on failure of consideration, the plaintiff is not entitled to interest on the amount till the institution of the suit where the contract does not provide for the payment of such interest. AIR 1927 Mad 99 (105): 50 Mad 94 (FB) ° AIR 1956 Raj 137 (138): ILR (1956) 6 Raj 522 (DB) ° AIR 1955 Nag 38 (41): ILR (1955) Nag 538 (DB).

(6) In a suit against the principal by the agent for accounts the award of interest from the date of demand till the institution of the suit is proper. AIR 1954 Nag 300 (304): ILR (1954) Nag 435 (DB).

(7) Interest may be allowed even in a suit for accounts. 1963 Ker LJ 179: 1963 Ker LT 359. (14 Moo I A 209; AIR 1954 Nag 300, Foll.)

(8) Suit for accounts and recovery of money found due — Interest not claimed in plaint — Interest prior to suit held should not be allowed. AIR 1960 Punj 62 (65) (DB).

(9) In a suit for accounts of a dissolved partnership plaintiff is not necessarily entitled to interest from the date of dissolution. AIR 1955 Mad 442 (446): ILR (1955) Mad 1197 (DB).

(10) Apart from contract, there is no right to interest in respect of overdrawings by partners. AIR 1955 Mad 442 (446): ILR (1955) Mad 1197 (DB).

(11) In Kutch State, according to a book of Deshi Shiresta, within 16 years the creditor would lose all interest in a retrograde way and three years thereafter he would lose principal. This is how the principle called Junvat was applied in the matter of recovery of interest in case of old debts. Hence where for a period of 16 years after the death of the debtor no action was taken. Held that no interest could be allowed due to Junvat as there was no diligence. AIR 1953 Kutch 19 (21).

(12) Price of goods supplied by defendant to plaintiff agreed to be set off against advances by plaintiff — Supply stopped — Suit for recovery of balance due from defendant — Goods supplied by way of repayment of advances and not by way of independent obligation — Plaintiff not entitled to any interest prior to suit as it was not a suit for refund of price for breach of contract. AIR 1964 Pat 35 (40): 1963 BLJR 722 (DB).

(13) Sale of property — Suit to recover unpaid consideration — Future interest on any amount which consists of interest prior to due date of suit, cannot be awarded under S. 34 or O. 34, R. 11. AIR 1964 Punj 123 (128, 129): ILR (1964) 1 Punj 143.

(14) In a suit on a hypothecation bond containing a stipulation that arrears of interest will also be treated as principle carrying further interest, the plaintiff cannot be permitted to claim compound interest which

**Section 34 — Note 6 (contd.)**

is prohibited under the law. In view of S. 31 of the Travancore-Cochin Civil P. C. the interest due on such amount will have to be limited to a moiety up to the date of the suit. AIR 1951 Trav-Co 39 (39): 1950 Ker LT 487 (DB).

**7. Agreement express or implied to pay interest.**— (1) Where there is a stipulation to pay interest at a particular rate, that rate must be allowed, however high it may be except in certain cases. AIR 1920 Cal 881 (881) (DB) * (1904) 31 Cal 233 (239) (DB) ° ('02) 29 Cal 823 (825, 826) (DB) ° AIR 1935 Oudh 535 (535) (DB).

(2) Where the circumstances under which the agreement is entered into render it void or voidable under the Contract Act, the rate agreed upon will not be enforced. (1887) 9 All 74 (81) (DB) * (1886) 12 Cal 225 (239) : 12 Ind App 215 (PC) ° AIR 1918 Oudh 320 (321): 21 Oudh Cas 265 (267) * (1899) 2 Oudh Cas 209 (212) (PC).

(3) Where the rate agreed upon amounts to a penalty, it will not be enforced, but the Court has power to grant reasonable compensation instead under S. 74 of the Contract Act. AIR 1940 Sind 68 (73) (DB).

(4) The Court's equitable jurisdiction to grant relief against penalty is not excluded by the Usury Laws Repeal Act (XXVIII of 1855). (1873) 10 Bom HCR 382 (385) (DB) ° (1893) 17 Bom 106 (112, 114) (FB) ° AIR 1915 Cal 796 (799): 42 Cal 652 (661) (DB) * (1899) 26 Cal 300 (306) (DB).

(5) Where the rate agreed upon, though not amounting to penalty, is excessive and the transaction between the parties is substantially unfair, the Court can, under S. 3 of the Usurious Loans Act of 1918, relieve the debtor of all liability in respect of any excessive interest. AIR 1930 Cal 776 (777) ° AIR 1933 Nag 224 (225) ° AIR 1931 All 662 (662): 53 All 776 (DB) * AIR 1929 Pat 340 (341) (DB).

(6) The agreement to pay interest may be an implied one. AIR 1930 Lah 985 (991): 12 Lah 239 (DB) ° AIR 1931 Lah 457 (461) (DB) ° AIR 1932 Cal 521 (522): 59 Cal 662 (DB).

(7) Where there is an implied agreement that interest will be charged, a reasonable interest will be allowed. (1905) 27 All 361 (363) (DB).

(8) A had deposited certain sums with the State for securing liquor contracts the terms of which provided that A would be liable to pay interest at one per cent. per month on the dues to the State irrespective of the deposit. Later on A's agent authorised the adjustment of State dues as against A's claim for repairs and deposits. The State delayed such adjustment on paper. It was held that it was unjust for the State to foist a claim for interest at such a heavy rate by its own wrongful act in delaying adjustment on paper. AIR 1957 Madh B 50 (51) (DB).

**8. Mercantile usage.**— (1) Where there is no stipulation, express or implied, to pay interest, it will still be granted if it is allowed by mercantile usage in transactions of the kind in question. (1861) 9 Moo Ind App 256 (266) (PC) ° (1859) 7 Moo Ind App 263 (282) (PC).

**9. Right to interest under statutory provisions.**— (1) Under S. 80 of the Negotiable Instruments Act (XXVI of 1881) where no rate is specified in a negotiable instrument, the Court shall award interest at 6 per cent. per annum notwithstanding any agreement relating to interest between the parties. AIR 1938 PC 67 (70): ILR (1938) 2 Cal 72: 31 Sind LR 374 ° AIR 1929 Pat 365 (366).

(2) Sections 351 to 353 of the Succession Act (XXXIX of 1925) provide for payment of interest at 4 per cent. per annum on general legacies remaining unpaid, in certain cases, and 6 per cent. per annum in other cases. (1902) 25 Mad 361 (365) (DB) ° (1903) 26 Mad 155 (160) (DB).

(3) Section 1 of the Interest Act (XXXII of 1839) enacts that the Court shall award interest at a rate not exceeding the current rate on all debts or "sums certain" where such sums are payable by virtue of a written instrument at a certain time from the time when the sums were payable, or where such sums are payable otherwise from the time when demand for payment shall have been made in writing so that such demand shall give notice to the debtor that interest will be claimed from the date of such demand until payment. AIR 1942 Pat 417 (419) * AIR 1941 All 43 (48): ILR (1940) All 739 (DB) ° AIR 1930 Bom 444 (445) (DB) ° AIR 1931 Cal 140 (144): 58 Cal 290 * AIR 1933 Mad 320 (321): 56 Mad 391 (DB) ° AIR 1926 Nag 64 (65).

[But see AIR 1914 Lah 147 (147): 1914 Pun Re No. 9 (DB).]

(4) "Sums certain" do not include provisional payments to be made by one party to another. (1859) 7 Moo Ind App 263 (280) (PC) ° (1899) 26 Cal 955 (960) (DB).

(5) Sums certain do not include unliquidated damages or unascertained sums. (1872) 9 Bom HCR 7 (11) (DB) * AIR 1920 Cal 737 (739) (DB) * AIR 1919 Mad 164 (165): 42 Mad 661 (DB).

(6) Where a debtor is appointed as an executor under the will of creditor, he is liable to pay interest under S. 23 of the Trusts Act from the date of his appointment if he fails to invest the amount of the debt in approved securities. AIR 1958 Andh Pra 262 (266) (DB).

(7) Under S. 61 (2) of the Sale of Goods Act interest may be allowed at such rate as the Court thinks fit on the amount of the price. AIR 1957 Punj 159 (161): ILR (1957) Punj 646.

(8) Where interest could also be allowed under S. 61 of the Sale of Goods Act, but

Section 34 — Note 9 (contd.)
the Courts below did not purport to exercise their power under that law, the contention that interest having been allowed, it must be presumed that the Courts below allowed interest under S. 61 of the Sale of Goods Act cannot be upheld. The interest allowed on the basis of market custom or usage, was, therefore, disallowed. AIR 1954 Ajmer 42 (43).

(9) The Cochin Municipal Act (18 of 1113 M. E.) does not contain a provision for interest. Interest over the delinquent taxes cannot, therefore be allowed. ILR (1957) Ker 638 (646) (DB).

(10) Life Insurance Corporation Act — Compensation — Payment to Insurer — Delay in — Insurer is entitled to interest. AIR 1963 SC 1171 (1179): (1963) Supp 2 SCR 971.

**10. Interest as damages.** — (1) In the absence of any usage or contract express or implied or of any provision of law to justify the award of interest, interest by way of damages cannot be awarded. AIR 1966 SC 395 (401): (1966) 1 SCR 580 ° AIR 1967 SC 188 (191, 192): (1966) Sup SCR 164. (Interest for a period prior to the date of institution of suit — Grant of — Essentials — There should either be agreement providing for payment of interest at fixed rate or usage of trade having force of law contemplating payment of such interest or a provision of substantive law like S. 80, Negotiable Instruments Act or S. 23 of Trusts Act — Award of interest under Interests Act can be made if the amount claimed is a certain sum payable at a certain fixed time — Court can also award interest under the rule of equity.) * AIR 1968 All 139 (146): ILR (1967) 2 All 129 (DB). (In the absence of any contract express or implied or any provision of law to justify the award of interest, it cannot be allowed by way of damages for wrongful detention of money.) ° AIR 1968 Madh Pra 204 (208): 1968 Jab LJ 524 (DB) (Obiter.) ° AIR 1968 Pat 248 (253) (DB) ° AIR 1963 Raj 1 (2): 1962 Raj LW 220. (Suit to recover excess charges collected by the Railways according to Rules — Interest by way of damages cannot be allowed.) ° 1962 Raj LW 455. (Interest claimed on mercantile basis — Interest by way of damages cannot be allowed in law.)

(2) Where there is no agreement, express or implied, to pay interest, and it is not allowed by any statute or mercantile usage, no interest can be awarded as interest though it may be awarded as damages in proper cases. AIR 1947 Pat 81 (84) * AIR 1957 Madh B 50 (51) (DB) ° AIR 1942 All 96 (101): ILR (1941) All 777 (DB) ° AIR 1938 PC 67 (70): ILR (1938) 2 Cal 72: 32 Sind LR 374: 66 Ind App 66 * AIR 1942 PC 61 (64): ILR (1942) Kar (PC) 157 ° AIR 1939 Mad 531 (537, 538): ILR (1939) Mad 776 (DB) ° AIR 1918 Cal 448 (449) (DB) * AIR 1931 All 403 (404) (DB) ° AIR 1935 Cal 347 (355): 62 Cal 175 (DB) ° AIR 1919 Mad 164 (164): 42 Mad 661 (665, 667) * AIR 1961 SC 990 (993): (1961) 3 SCR 639 * AIR 1965 Assam 10 (12) (DB).

[But see AIR 1933 Pat 196 (199): 12 Pat 216 (DB).]

(3) Interest may be awarded by way of damages in cases where money due is wrongfully withheld, and there is some equitable ground for awarding interest. AIR 1953 SC 235 (240): 1953 SCR 789 ° AIR 1945 Mad 297 (298): ILR (1946) Mad 255 (DB) ° AIR 1958 Punj 111 (116): ILR (1958) Punj 294 (DB) * AIR 1957 Him Pra 35 (37) ° AIR 1957 Ker 3 (6): ILR (1957) Ker 13 (DB) ° AIR 1957 Mad 630 (631) * AIR 1933 All 186 (188): 55 All 164 (DB) ° AIR 1930 Cal 357 (360): 57 Cal 953 (DB) ° 1964 BLJR 810. (Future interest and pendente lite interest should not be refused where money has been held back for long time, particularly when there is agreement for payment of interest between parties on the loan dues.) * AIR 1961 Andh Pra 143 (155): 1960 Andh LT 524 (DB). (Interest as damages — Person preventing another from having use of his money is liable to pay interest as damages — There is ample discretion inhering in Court to award interest in cases where plaintiff has to be compensated for loss sustained by him consequent on conduct of defendant.) ° AIR 1952 Mys 90 (92): ILR (1952) Mys 176 (DB). (Interest by way of damages or compensation can only be awarded when the principal or corpus is withheld and usually follows a decree for the latter. It has to be calculated upto the date when such principal or corpus is delivered, and can only be granted at the time of the adjudication of the claim for the principal or corpus.)

[But see AIR 1946 Pat 154 (155, 156) (DB) ° AIR 1920 Cal 912 (913): 31 Cal L Jour 348 (350).]

(4) In cases of breach of contract where the non-payment of money due is itself the breach of contract and nothing else is proved to make out the claim for compensation for such breach, no interest can be awarded in addition to the recovery of money withheld. AIR 1933 Mad 729 (734): 57 Mad 205 (DB) * AIR 1929 Nag 170 (172): 25 Nag LR 81.

(5) If by reason of the breach the plaintiff has sustained special loss or damage for which the mere repayment of the amount due would not be adequate compensation, the Court can award interest as part of the damages. AIR 1933 Mad 729 (734): 57 Mad 205 (DB).

(6) A mere detention of a debt will not entitle the creditor to interest by way of damages. AIR 1949 Kutch 6 (7) ° AIR 1957 Ker 3 (6): ILR (1957) Ker 13 (DB) ° AIR 1957 Madh B 50 (51) (DB) ° 1957 MPLJ 77 (80) (DB) (Nag) ° AIR 1941 All 43 (48): ILR (1940) All 739 (DB) * AIR 1941 Nag 273 (277, 278): ILR (1942) Nag 294 °

**Section 34 — Note 10 (contd.)**
AIR 1938 PC 67 (70): ILR (1938) 2 Cal 72: 32 Sind LR 374: 65 Ind App 66 * 1958 Ker LT 961. (Interest cannot be allowed as damages for wrongful detention of a debt.)

**11. Mortgage suits.** — See O. 34, R. 11.

**12. Interest, whether payable after tender.**— (1) A tender of the amount due will stop the running of interest from the date of tender, though it does not extinguish the debt. (1907) 34 Cal 305 (321) (DB) * (1906) 2 Nag LR 62 (63).

(2) The tender must be a proper and a legal one. (1903) 7 Cal WN 720 (723) (DB) ° ('03) 27 Bom 23 (30) (DB).

(3) A tender before suit, in order to be effectual, must be accompanied by a deposit after the institution of suit. ('92) 16 Bom 141 (149, 150) ° AIR 1932 Mad 109 (111): 55 Mad 458 (DB) * (1883) 9 Cal 33 (35, 37) (DB) ° AIR 1915 Mad 210 (216): 38 Mad 959 (DB).

[But see AIR 1926 Cal 310 (311).]

(4) A tender must be unconditional and of the full amount. (1874) 2 Cal L Rep 183 (184) (DB) ° (1883) 9 Cal 33 (35, 37) (DB ° AIR 1930 Oudh 208 (209).

(5) The rule that a tender of a part of the amount due must be treated as never made, applies only when it is admitted that a larger, amount is due and not when it is bona fide asserted otherwise. ('92) 16 Bom 141 (149).

(6) A judgment-debtor is not liable to pay interest after deposit though the decree-holder could not withdraw it pending appeal without furnishing security. AIR 1929 Lah 316 (316).

**13. Interest on mesne profits.**— See O. 20, R. 12.

**14. Interest on arrears of rent.**— (1) As regards interest on arrears of rent, the mere omission to claim interest for past years at the stipulated rate cannot amount to a waiver of the landlord's right to recover at that rate. (1899) 26 Cal 160 (162) (DB) ° (1881) 5 Cal 102 (104, 105) (DB).

(2) Where rent is charged on land, interest can be granted on the arrears of rent on equitable grounds, although there are no words allowing interest in the instrument creating the charge. AIR 1930 Mad 727 (731): 53 Mad 549 (DB).

[But see AIR 1933 Mad 613 (617): 56 Mad 892 (DB).]

(3) In a suit for damages for use and occupation, no interest is claimable up to the date of the suit. AIR 1954 Pat 304 (308).

**15. Interest on costs.** — See S. 35.

**16. Rule of damdupat.** — (1) Rule of damdupat is a rule of Hindu law under which interest exceeding the principal sum cannot be rscovered at any one time. AIR 1946 Nag 210 (212): ILR (1946) Nag 407 (DB) * (1913) 37 Bom 326 (338): 40 Ind App 68 (PC) ° (1862) 1 Bom HCR (AC) 47 (49) (FB).

(2) The rule has not been abrogated by any statutory enactment. AIR 1946 Nag 210 (212): ILR (1946) Nag 407 (DB) ° (1907) 31 Bom 354 (365) (DB) * (1887) 14 Cal 781 (789) (SB) ° (1903) 26 Mad 662 (670) (SB) ° AIR 1959 Mys 102 (105): 36 Mys LJ 868 (DB).

(3) The rule applies when both the parties are Hindus. AIR 1931 Nag 144 (146): 27 Nag LR 144 * (1911) 35 Bom 199 (202).

(4) The principal sum is the amount of the current debt though in renewal of a prior debt. (1900) 24 Bom 305 (306) (DB).

(5) The principal sum includes expenses incurred by a mortgagee for repairs. 1888 Bom PJ 317 (DB).

(6) The rule applies even if the debt is repayable in kind. (1898) 22 Bom 761 (765) (DB).

(7) The rule does not prevent the conversion, by agreement, of arrears of interest into principal. (1900) 24 Bom 305 (310) (DB).

(8) The rule is no answer to a claim for interest when the principal has been paid off. (1906) 30 Bom 452 (454) (DB).

(9) The rule does not affect vested rights but only limits accruing rights. (1906) 30 Bom 452 (454).

(10) The rule has nothing to do with the legality or otherwise of a contract. (1880) 5 Cal 867 (868).

(11) The rule of damdupat applies to mortgage debts governed by the Transfer of Property Act. (1877) 1 Bom 577 (580) (DB) ° (1878) 3 Bom 312 (333) (DB) ° (1911) 35 Bom 199 (203) * (1900) 24 Bom 114 (119) (DB) ° (1896) 20 Bom 711 (727) (FB) ° (1891) 15 Bom 84 (85) (DB) * (1868) 5 Bom HCR (AC) 196 (198) (DB) ° (1887) 14 Cal 781 (787, 791) (SB) * AIR 1916 Cal 542 (543): 42 Cal 826 (829)) * AIR 1928 Nag 126 (126) ° (1911) 5 Sind LR 245 (246, 247).

[But see (1903) 26 Mad 662 (670) (SB) ° (1865) 2 Suth WR 289 (290) (DB).]

(12) Where the mortgagee has been placed in possession and is accountable for the rents and profits collected by him, towards interest due, the rule of damdupat is not applicable . ILR (1953) 3 Raj 591 (601) * (1900) 24 Bom 114 (119) (DB) ° (1896) 20 Bom 721 (728) (FB) ° (1865) 5 Bom HCR (AC) 196 (198) ° AIR 1915 Nag 108 (108): 12 Nag LR 1.

(13) The rule of damdupat ceases to operate after the date of suit. ILR (1955) Nag 413 (424) (DB) * 1952 Raj LW 16 (16) ° (1898) 22 Bom 86 (87) (DB) ° ILR (1951) 1 Raj 618 (620) ° (1913) 37 Bom 326 (339): 40 Ind App 68 (73) (PC) * AIR 1925 Bom 362 (362) (DB) ° 1952 Raj LW 16: ILR (1951) 1 Raj 618. (Rule of damdupat can be applied upto date of suit — After that it is the matter under S. 34.)

(14) The rule ceases to apply when the matter has passed into the realm of judgment. (1913) 40 Cal 710 (715) * ('77) 1 Bom 73 (74) (DB).

Section 34 — Note 16 (Contd.)

(15) In a mortgage suit the rule applies to the interest payable till the date fixed in the decree for the payment of the mortgage-money, but not to the interest that may be payable subsequently. AIR 1946 Nag 210 (213, 214): ILR (1946) Nag 407 (DB) * AIR 1930 Pat 442 (449): 10 Pat 63 (DB).

[But see AIR 1922 Nag 155 (156): 17 Nag LR 200.]

(16) Where Civil P. C. applies interest pendente lite is awarded according to statutory provisions — Principle of damdupat which is rule of pure Hindu law cannot apply in cases for which there are statutory provisions. ILR 33 Cal 1269, Rel. on. MBLJ 1955 HCR 2136: Madh Bha LR 1955 Civil 684.

(17) Principal claimed in the suit being Rs. 217-87 — Total amount claimed Rs. 732-70 — Plaintiff, held, could not claim more than double the principal amount. AIR 1967 Orissa 169 (171): ILR (1967) Cut 157.

(18) Where, at the time of the institution of the suit for redemption the plaintiff mortgagors were entitled to redeem the morgage of the house on payment of the principal amount and the interest calculated as per rule of Damdupat which then obtained in Marwar, the mortgagees cannot deprive the plaintiff-mortgagors of the right which had accrued and which they sought to enforce by a suit on the basis of a position which came into existence only after the coming into force of the Constitution. The rule of Damdupat having already come into play, the claim to interest could not be retrospectively revived because under the Constitution the rule in question was held to be void as it clearly amounts to giving retrospective effect to a principle arising under the Constitution. 1960 Raj LW 239: ILR (1960) 10 Raj 309.

(19) The rule of 'Damdupat' applies no doubt to a mortgage of immovable property, but a distinction has been made as to whether the mortgage is with or without possession and if it is with possession whether account has to be taken of the profits or not. In the case of a mortgage without possession, the rule of 'Damdupat' applies, because there is no question of accountability by the mortgagee for profits which can be received by him. (1949) 2 Sau LR 146.

**17. Decree silent as to interest — Sub-section (2).** — (1) Where the decree does not provide for interest it will be deemed to have been refused. ILR (1951) 1 Raj 618 (620, 621) ° AIR 1943 Nag 240 (242): ILR (1943) Nag 555 (DB) ° AIR 1940 Mad 29 (30) (DB) * (1913) 37 Bom 326 (329): 40 Ind App 68 (PC) ° (1883) 5 All 589 (590, 591) (DB) ° AIR 1918 Cal 151 (153) ° (1913) 20 Ind Cas 319 (320) (DB) (Lah) ° AIR 1963 Cal 416 (417): 67 Cal WN 467 (DB). (Preliminary decree in mortgage suit — Prayer for subsequent interest not at definite rate but left to the discretion of Court — Court not applying its mind to question of rate — Interest must be deemed to have been disallowed.) ° 1952 Raj LW 16: ILR (1951) 1 Raj 618. (Judgment of lower appellate Court silent as to pendente lite and future interest — It must be considered to have refused such interest.)

(2) The silence must not be due to oversight or mitake. AIR 1918 Low Bur 136 (137): 9 Low Bur Rul 78 (81) * AIR 1957 Madh B 50 (52) (DB).

(3) Interest not awarded by the decree cannot be awarded in execution. AIR 1954 Trav-Co 473 (486): ILR (1954) Trav-Co 427 (FB) ° AIR 1949 East Punj 213 (216) ° AIR 1926 Cal 505 (506): 53 Cal 42 (DB) * (1900) 22 All 262 (264, 265) ° (1882) 8 Cal 332 (335, 336): 9 Ind App 1 (PC) ° AIR 1934 Pat 192 (194): 13 Pat 21 (DB) * (1898) 22 Bom 42 (46) (DB) ° AIR 1931 Mad 650 (652): 54 Mad 955 (FB). (Overruling AIR 1927 Mad 954.)

(4) Interest not awarded by the decree cannot be awarded by way of amendment of the decree. AIR 1940 Mad 29 (30) (DB) ° ('93) 15 All 121 (123) (DB).

(5) Where no further interest has been allowed in a previous money decree obtained in satisfaction of the claim arising under the mortgage, it cannot be allowed in a suit under O. 34, R. 14. AIR 1952 Raj 9 (10): ILR (1951) 1 Raj 353 (DB).

(6) Interest can be granted in appeal. AIR 1952 Raj 159 (160): ILR (1952) 2 Raj 319 (DB) ° AIR 1943 Nag 240 (242, 243): ILR (1943) Nag 555 (DB) ° AIR 1963 Guj 253 (254): (1963) 4 Guj LR 939. (Suit for sale of charged property — Interest from date of suit till realization — Inclusion of such interest in preliminary decree is not optional or discretionary but obligatory — Such interest declined by trial Court — Appellate Court can award it. AIR 1953 Bom 445, Diss. from.)

(7) Interest on decretal amount not claimed in plaint nor in the cross-objection — Such claim cannot be accepted in appeal, for the first time. AIR 1963 Assam 179 (180): ILR (1963) 15 Assam 309 (DB).

(8) Where the judgment-debtor in consideration of the forbearance shown by the creditor, agrees in Court to pay him interest, the creditor, in virtue of such promise, is entitled to ask the Court to execute his decree for the decree amount with interest from the date of such promise. (1866) 5 Suth WR (Misc.) 1 (2) (SB) ° (1884) 7 Mad 400 (401) (DB) * (1912) 17 Ind Cas 936 (939) (DB) (Cal).

(9) Compromise decree stating that amounts as per plaint shall be recoverable — Plaint claiming future interest — Decree cannot be interpreted to mean that plaint claim did not carry interest. 1959 Ker LR 230.

## COSTS

**35. Costs.**—(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

(2) Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing.

[a](3) [ ° ° ° ° ° ]

[1882, Ss. 218 to 222; 1877, Ss. 219 and 220; 1859, S. 187, R.S.C., O. 65, R. 1; Jud. Act, 1890, S. 5.]

[a] Omitted by the Code of Civil Procedure (Amendment) Act, 1956 (66 of 1956), Sec. 3 (2-12-1956).

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**Section 34 — Note 17** (contd.)

(10) If interest is allowed in execution by way of compromise, the Appellate Court will not interfere. (1877) 3 Cal 602 (609): 5 Ind App 78 (PC) ° (1877) 3 Cal 161 (173): 4 Ind App 137: 1877 Pun Re No. 1 (PC).

(11) Where there was no provision for interest after the date fixed for the payment of a sum under a compromise decree, it was held that the decree-holder could claim post diem interest at the rate mentioned in the decree. AIR 1940 Mad 893 (896).

(12) Where a Court has awarded interest by its decree at a particular rate, it cannot be reduced or denied in execution proceedings. (1879) 3 Cal L Rep 523 (524) (DB) ° (1894) 16 All 270 (273).

(13) It cannot be said that because no subsequent interest was provided for in the judgment, it ought not to be included in the decree. AIR 1957 Andh Pra 476 (477).

(14) Where, the decree is not for a definite sum of money but is one for accounts and partition, Section 34 (2) does not apply and a suit for interest is not barred. AIR 1925 Bom 406 (409): 49 Bom 282 (DB).

(15) Though no subsequent interest was provided for in the judgment, it can be included in the decree. AIR 1957 Andh Pra 476 (477).

(16) Where in a suit on mortgage the judgment inadvertently omits to make provision for the payment of interest subsequent to the date fixed for redemption, the Court has power to correct the record and provide for the payment of interest from the date fixed for redemption. AIR 1956 Nag 239 (240) (DB).

(17) A combined reading of Section 34 with Rules 6 and 8-A of Order 34 and the use of form 8 in Sch. D makes it more than evident that the award of interest at the stipulated rate is not what is intended in the case of personal decrees; but interest is awardable as in the case of a decree for the payment of money even when that amount becomes due as balance which remains unrealised even after the hypotheca has been sold.

Where, therefore, a personal decree under Order 34, Rule 6 provides for the contractual rate of interest which is in excess of that allowable under the statute, relief can be given by allowing amendment of the decree and judgment even if an appeal has not been filed against the decree and judgment. AIR 1959 Andh Pra 619 (620, 621, 622).

(18) Error in preliminary decree — Plaintiff not asking for rectification — Application for final decree — Case remitted for rectification — Interest not allowed up to date of rectification but only from date of amendment of decree till realization of decretal amount. AIR 1968 J and K 85 (86).

(19) Compromise decree — Decree passed in terms of award mentioning principal amount due on mortgage with interest and also providing that the debtor should pay the amount with interest at 12 p. c. within a year by a certain date and get the property redeemed — Default — Debtor is liable to pay interest even after date fixed in decree at the rate stipulated in decree till payment — Provisions of Section 34 (2) and Order 34, Rule 11 (b) cannot be invoked as decree is not passed on judgment but on compromise. (1956) 9 Sau LR 138.

### SECTION 35 — SYNOPSIS

1. SCOPE AND OBJECT.
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3. COSTS IN PROCEEDINGS UNDER S. 476, CRIMINAL PROCEDURE CODE.
4. COSTS — DISCRETION OF COURT.
5. Principle that costs shall follow the event.
5A. Maintenance suit.
6. Mortgage suits — See O. 34, R. 10.
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Section 35 — Synopsis (contd.)
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17. Official Liquidator and Official Assignee.
18. Partition suits.
19. Partnership suits.
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24. Separate costs, when may be allowed.
25. SEPARATE SUITS FOR COSTS.
26. COURT HAVING NO JURISDICTION TO TRY SUIT — COSTS.
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29. REVISION.
30. LETTERS PATENT APPEAL.
30A. APPEAL BEFORE SUPREME COURT.
31. RIGHT OF CONTRIBUTION FOR COSTS PAYABLE UNDER JOINT DECREE.
32. ENFORCEMENT OF ORDER OR DECREE AS TO COSTS.
33. ENFORCEMENT OF SOLICITOR'S LIEN FOR COSTS.
34. CONSTRUCTION OF DECREE AS TO COSTS.
35. WRIT PROCEEDINGS.

## TOPIC INDICATOR

Agency — Suits for — See Note 8.
Apportionment of costs — See Note 4.
Calculation of costs — See Note 23.
Co-defendants — See Note 7.
Costs when party withdraws from suit or appeal — See Note 34.
Disposal, ex parte — Question of costs not affected — See Note 5.
Disposal on preliminary and technical points — Rule as to costs — See Note 5.
Intervenor — See Note 4.
Meaning of "Costs in the cause" "Costs to abide the result" "Costs to abide and follow the event" — See Note 2.
"Costs incurred in lower Court" (in the appellate decree) — See Note 34.
"Appeal allowed or dismissed with costs" See Note 34.
Nature and conduct of parties and costs — See Notes 4 and 5.
Party creating difficulty must pay costs — See Note 7.
Proportionate costs — See Note 23.
Refund of costs — See S. 144.
Refusal of tender — See Note 5.
Salvage suits — See Note 9.
Stranger — See Note 7.
Successful party denied his costs — Court Must record reasons — See Note 5.
Successful party saddled with costs — See Note 5.
Taxation of costs between attorney and client — Method of enforcement — See Note 33.

**1. Scope and object.**—(1) The object of S. 35 in awarding costs to a litigant is to secure to him the expenses incurred by him in the litigation. AIR 1921 Cal 185 (191): 48 Cal 427 (DB).

(2) The object of Section 35 is not to enable a litigant to make anything, in the way of gain or profit, over and above the expenses for maintaining or defending the action, nor to give exemplary damages or smart-money, by way of penalty or punishment on the opposite party. AIR 1954 SC 26 (28) ° AIR 1921 Cal 185 (191): 48 Cal 427 (DB).

(3) The award of costs is entirely in the discretion of the Court. (1900) 2 Bom LR 254 (260) (DB) * AIR 1959 Mad 12 (14) ° AIR 1958 Pat 557 (557) ° AIR 1957 Pat 79 (81).

(4) The discretion of Court in awarding costs is subject "to such conditions and limitations as may be prescribed". AIR 1937 Mad 145 (145).

(5) Apart from Section 35, the High Court has wide discretion in exercise of its inherent powers to award costs in suitable cases. AIR 1955 Orissa 65 (65): 1955 Cri L Jour 823: ILR (1954) Cut 623 (SB).

(6) The discretion of the Court under Section 35 can only be taken away by conditions and limitations which may be prescribed by law and not by conditions and limitations which may be prescribed by contract between the parties. AIR 1953 Bom 445 (447): ILR (1954) Bom 29 (DB) ° ILR (1965) Andh Pra 68.

(7) Power under Section 13 (2) of the Mysore Village Panchayats and Local Boards Act does not include power to award cost under Section 35 or 35A of the Code. AIR 1965 Mys 62 (64): (1964) 1 Mys LJ 357 (DB). (Rejection of nomination paper by Election Officer — Candidate making allegation against Election Officer — Allegation proved false, vexatious and mischievous — Election Officer claiming compensatory costs — Compensatory costs cannot be granted.)

(8) So far as Bombay City is concerned, in proceeding under Fatal Accidents Act (1855). Costs should be taxed as in the City Civil Court in the trial Court and in High Court as in regular appeal on the appellate side. AIR 1968 Bom 267 (272): 69 Bom LR 848 (DB).

**Section 35 — Note 1 (contd.)**

(9) Deletion of Section 35 (3) in 1956 does not affect the right of a party to claim interest by way of restitution. AIR 1969 Mad 212 (213).

(10) Order 33, Rule 14 will not be attracted to an order made under Section 35. AIR 1960 Mys 95 (96, 97): ILR (1958) Mys 649 (DB).

(11) A decree-holder who files an execution petition before expiry of period specified for satisfaction of decree or before having necessary alterations made in a case where no time is specified as required by Section 82 will not be entitled to execution cost. AIR 1959 Andh Pra 165 (166): (1958) 2 Andh WR 513 (DB).

**2. "Costs of and incident to all suits."**— (1) The words "incident to all suits" are wide enough to cover costs incurred by party before the filing of the suit, but naturally or intimately connected with the suit. (1936) 40 Cal WN 762 (764).

(2) The words 'costs of and incident to all suits' occurring in Section 35 of the Code are wide enough to include not only court-fees payable on the plaint, but also court-fees payable on application filed by a plaintiff, and as such, court-fees payable by a pauper plaintiff are covered by Section 35. AIR 1959 Pat 384 (386, 387, 388): 1958 BLJR 447.

(3) When an application is disposed of the Court may make no order as to costs incurred therein, or may make a specific order as to costs at the time of the disposal of the application or may reserve it for a future occasion. (1895) 22 Cal 387 (391) (DB).

(4) Where, in a preliminary decree certain matters of detail are referred to a referee the practice on the original side of Calcutta High Court is to reserve the costs of reference till the result of the reference is known. It is at that stage that the Court is in a position to decide whether the plaintiff should pay the costs or the defendant should pay the cost or each should pay part of the costs. AIR 1960 Cal 190 (196): ILR (1960) 2 Cal 187.

(5) The words "to abide and follow the result" convey the suggestion that the successful party must be given his costs. But the words "abide the result" only connote that the order as to costs is to await till decision is given in the case. AIR 1956 Pepsu 103 (104): ILR (1956) Patiala 121 * AIR 1916 Mad 621 (621): 39 Mad 476 (DB) ° AIR 1919 Mad 795 (796) ° AIR 1964 Pat 161 (161). (Appellate Court remanding suit to trial Court with observation that 'costs will abide the result' — It means that costs of appeal are subject to the order as to costs by trial Court after remand.)

(6) Costs of interlocutory application ordered to be costs in cause — Party getting general costs of action is entitled to such costs — Judge hearing case cannot interfere with that order. AIR 1956 Pepsu 103 (104): ILR (1956) Patiala 121. (AIR 1926 Bom 596: 50 Bom 430, Foll.) ° AIR 1926 Bom 596 (598): 50 Bom 430 (DB). (Overruling 25 Bom 230).

(7) Where the Court makes a specific order as to costs on an application, the general order for costs of the suit will not displace it. (1882) 9 Cal 797 (801): 10 Ind App 113 (PC).

(8) The powers of the Court in awarding costs are wide and there is no warrant for holding that when a Court accords permission for institution of a fresh suit under Order 23, Rule 1, it cannot award costs of the suit and it can only make the payment of such costs conditional upon the institution of fresh suit. AIR 1952 Pepsu 67 (68): ILR (1952) Patiala 95.

(9) Suit on original side of High Court— Ex parte application for injunction and motion for injunction which is subsequently heard are distinct matters and separate orders as to costs should be made. AIR 1936 Bom 310 (311): 60 Bom 861 (DB) ° ILR (1965) Andh Pra 68.

**3. Costs in proceedings under S. 476, Criminal Procedure Code.**—(1) The Civil Courts have jurisdiction to award costs in a proceeding under Section 476 where the parties are the same as those in the Civil litigation. AIR 1940 Bom 131 (136): ILR (1940) Bom 403 ° AIR 1928 All 588 (590): 51 All 338.

(2) Where the District Magistrate, who is not a party to the civil litigation, files an application under Section 476, costs cannot be awarded against him. AIR 1928 All 588 (590): 51 All 338.

(3) The Civil Court has no power to award costs in proceedings under S. 476. AIR 1948 Pat 225 (228): 27 Pat 52 (FB). (AIR 1947 Pat 106, Overruled.) * AIR 1947 Pat 138 (138, 139).

**4. Costs — Discretion of Court.**—(1) Costs awardable under this section are in the discretion of the Court. AIR 1946 Cal 249 (258): ILR (1944) 2 Cal 487 (DB) ° AIR 1959 Mad 12 (14) ° AIR 1958 Pat 557 (557) * AIR 1957 Pat 79 (81) ° (1878) 7 Bom 19 (33): 9 Ind App 86 (PC) ° AIR 1929 Lah 129 (134): 10 Lah 816 (DB) ° (1904) 27 Mad 341 (343) (DB) * AIR 1969 SC 255 (257): (1969) 1 SCJ 344.

(2) Where in land acquisition proceedings though compensation awarded by land Acquisition Officer is substantially enhanced by trial Court and High Court and the parties are directed by both the Courts to bear their own costs after giving good reasons in support of their order as to costs, those being essentially in the discretion of the courts, the Supreme Court will not interfere with the order in appeal under Article 133 (1) (a) of Constitution. AIR 1969 SC 255 (257): (1969) 1 SCJ 344.

(3) Discretion in awarding costs must be a judicial discretion exercised on sound legal principles. AIR 1954 Mad 100 (100) ° AIR 1959 Mad 12 (14) ° AIR 1958 Mad 515 (515)

Section 35 — Note 4 (contd.)
* AIR 1958 Pat 557 (557) ° AIR 1957 Madh Pra 8 (9) ° AIR 1957 Pat 79 (82) ° AIR 1953 Bom 445 (447): ILR 1954 Bom 29 (DB) * AIR 1953 Cal 37 (39) ° AIR 1952 J and K 17 (17): 10 J and K LR 62 ° AIR 1945 Pat 184 (184): 23 Pat 927 (DB) ° AIR 1966 Andh Pra 28 (29): (1965) 1 Andh WR 433 * AIR 1963 Andh Pra 31 (37).

(4) The exercise of the discretion depends upon the circumstances of each particular case. AIR 1942 All 233 (237): ILR (1941) All 832 (FB) ° AIR 1928 Sind 173 (174) ° (1865) 10 Moo Ind App 229 (251) (PC) * 1892 All WN 215 (216) (DB) ° (1881) 6 Cal 394 (406): 7 Ind App 240 (PC) ° (1865) 3 Suth WR (PC) 33 (36) (PC) * AIR 1918 Mad 816 (821) (DB) ° AIR 1956 Ajmer 31 (32).

(5) While exercising the discretion under Section 35, the Court will consider the length of trial, the complicated questions involved and the conduct of the parties both before and after suit. AIR 1952 Trav-Co 571 (573) (DB) ° AIR 1941 Oudh 447 (449) (DB) * AIR 1941 Pat 416 (416) (DB) ° AIR 1940 Mad 739 (743) (DB) ° AIR 1921 Cal 185 (190, 191): 48 Cal 427 (DB) ° AIR 1933 Rang 337 (338) (DB) * AIR 1930 Bom 152 (152) ° AIR 1925 Cal 569 (570) (DB) ° AIR 1923 Pat 420 (422, 423) (DB) * (1963) ILR (1963) Mys 1133 ° AIR 1966 Andh Pra 28 (29): (1965) 1 Andh WR 433. (Conduct of party both antecedent to suit as well as in suit itself can be considered.) * AIR 1953 Trav-Co 286 (294): ILR (1953) Trav-Co 118.

(6) The discretion under the section is very wide. AIR 1940 Mad 519 (520) * AIR 1920 Mad 567 (568): 43 Mad 61 (DB) ° AIR 1928 Nag 171 (171, 172) * ('02) 1902 All WN 98 (98).

(7) The discretion under Section 35 extends to disallowance of the costs of the successful party. (1892) 19 Cal 253 (266): 19 Ind App 48 (PC) ° AIR 1957 Trav-Co 310 (312) ° 1958 Ker LT 534 (537) ° 1957-2 Mad L Jour 586 (587) * AIR 1923 Oudh 8 (8) * (1910) 7 Ind Cas 75 (79) (DB) (Cal).

(8) Under Section 35, even a successful party, may be made to pay the costs of losing party. AIR 1949 Mad 874 (875) ° AIR AIR 1942 Mad 478 (480, 481) (DB) ° AIR 1934 All 948 (950) * AIR 1939 Bom 198 (200) ° AIR 1936 Cal 593 (618) (DB) ° (1894) 21 Cal 680 (683) (DB) * (1893) 20 Cal 762 (771) (SB) * AIR 1965 Mys 102 (105): (1964) 1 Mys LJ 488 (DB). (Costs granted to unsuccessful respondent—Acceptance of costs will not operate as estoppel.) Case under Representation of the People Act (1951).) ° AIR 1961 All 418 (421).

(9) A Court may, under Section 35 apportion the costs between the parties. AIR 1950 Kutch 90 (92) * (1863) 10 Moo Ind App 563 (576) (PC) ° AIR 1928 Mad 16 (17).

(10) Where each party is partly successful, the Court should apportion the costs between them. AIR 1944 Mad 511 (512) ° AIR 1944 Nag 279 (279, 280): ILR (1944) Nag 749 * AIR 1944 Oudh 57 (59) (DB) ° AIR 1925 Cal 297 (299) (DB) ° AIR 1923 Cal 306 (307) (DB).

(11) In the absence of any agreement between several parties defending an action or proceeding the costs allotted to them are to be apportioned proportionately. (1955) Madh B LJ 1955 HCR 269 (270).

(12) A person wrongfully or unnecessarily made a party is entitled to his costs. (1879) 4 Bom 619 (622) ° AIR 1924 Mad 476 (478) (DB) * (1891) 13 All 290 (295) ° (1865) 2 Suth WR 33 (34) (DB) ° AIR 1930 Mad 913 (913) ° AIR 1930 Mad 195 (197) * (1901) 24 Mad 377 (386, 387): 28 Ind App 46 (PC) ° AIR 1936 Nag 285 (288): ILR (1937) Nag 61 ° AIR 1963 Ker 306 (309). (Suit against several defendants — One of the defendants unnecessarily impleaded — Plaintiff ordered to pay cost of that defendant.)

[But see (1883) Bom LJ 231 (231) ° AIR 1929 Mad 738 (741): 52 Mad 845 (DB).]

(13) A person who intervenes for no sufficient reason and defends the case separately should be made to bear his costs even if the plaintiff is unsuccessful in his action. AIR 1942 FC 27 (33): ILR (1942) Kar (FC) 40: ILR (1942) Lah 623: (1942) FCR 53 ° AIR 1941 FC 47 (52): ILR (1941) Kar (FC) 25: 1940 FCR 188 ° AIR 1951 Trav-Co 40 (42): 1950 Trav- Co LR 489 (DB) * AIR 1921 Cal 222 (224): 48 Cal 352 (DB).

(14) Ordinarily when a party is given up behind his back and no notice of this fact is given to him with the result that he appears in Court to defend the cause, he is entitled to costs. AIR 1952 Pepsu 102 (103): ILR (1952) Patiala 250.

(15) When both parties are guilty of acts of bad faith, the proper order will be to deprive both of them of their costs. ILR (1952) 2 Raj 681 (686)° AIR 1940 Oudh 266 (267) ° AIR 1932 All 128 (130): 53 All 54 (DB) * AIR 1929 All 134 (136, 137) (DB) ° (1892) 19 Cal 253 (266): 19 Ind App 48 (PC) ° (1887) 14 Cal 99 (108): 13 Ind App 116 (PC) * AIR 1937 Mad 223 (227) (DB).

(16) In a test case there should be no order for costs. AIR 1954 SC 596 (600): 1954 SCR 206 * AIR 1939 Rang 432 (433): 1939 Rang LR 504.

(17) Ordinarily costs must generally be on the contested scale unless there are compelling reasons for the Court to order otherwise. AIR 1954 Mad 100 (100).

(18) It is not a sound exercise of discretion to order costs to be paid by a minor suing as a pauper. AIR 1949 PC 35 (39): ILR (1948) Bom 639: 75 Ind App 259.

**5. Principle that costs shall follow the event.**—(1) The general rule is that a successful party is entitled to his costs unless

**Section 35 — Note 5 (contd.)**

he is guilty of misconduct or there is other good cause for depriving him of it. AIR 1954 Bom 125 (128): ILR (1954) Bom 187 ° AIR 1957 SC 577 (584): 1957 SCR 775 * AIR 1957 Madh Pra 90 (92): ILR (1957) Madh Pra 6 (DB) * AIR 1954 Nag 306 (319): ILR (1954) Nag 514 (DB) ° ILR (1955) 1 All 772 (792) (DB) ° AIR 1949 Mad 675 (683): ILR (1950) Mad 59 (DB) * AIR 1944 Oudh 139 (147): 19 Luck 515 (DB) ° AIR 1943 Mad 552 (553) (DB) ° AIR 1942 All 331 (333): ILR (1942) All 745 (DB) * AIR 1940 All 171 (172, 173) (DB) ° (1885) 13 Ind App 20 (31) (PC) ° (1854) 6 Moo Ind App 289 (308) (PC) * AIR 1949 All 453 (455): 40 All 558 (562) (DB) ° AIR 1935 Bom 403 (407): 60 Bom 193 (DB) ° AIR 1923 Bom 265 (268): 47 Bom 637 (DB) * (1898) 25 Cal 187 (189): 24 Ind App 191 (PC) * (1889) 16 Cal 173 (183, 184): 15 Ind App 186 (PC) ° (1883) 9 Cal 797 (802): 10 Ind App 113 (PC) * AIR 1921 Lah 104 (105) ° (1904) 27 Mad 341 (342) ° AIR 1936 Pesh 48 (51) (DB) * AIR 1937 Sind 159 (160) (DB) ° AIR 1968 Bom 208 (219): 69 Bom LR 394 (DB) * AIR 1967 Madh Pra 237 (239): (1966) Jab LJ 1069 (DB) ° (1966) 2 Andh WR 46 (53): ILR (1967) Andh Pra 968 ° 1958 Jab LJ 802: 1959 MPLJ 802. (Suit for ejection of tenant—Decree in favour of landlord—Mere existence of circumstance of a possibility of tenant being able to take premises again on lease as provided for in Rent Control legislation is not sufficient ground for depriving landlord of his costs.) ° 1958 MPC 585.

(2) A plaintiff who substantially succeeds in his case is entitled to his costs, although he may not have got the precise form of relief he wanted. (1894) 18 Bom 474 (494, 495) (DB) * (1868) 9 Suth WR 61 (63) ° (1910) 37 Cal 760 (779) (DB) ° AIR 1923 Lah 513 (514) ° AIR 1915 Lah 346 (349): 1915 Pun Re No. 71 (DB).

(3) Plaintiff not getting whole of amount claimed — Still he is entitled to costs. AIR 1920 Cal 1009 (1013) (DB) * AIR 1929 Lah 129 (135): 10 Lah 816 (DB) ° AIR 1916 Oudh 279 (281).

(4) When the plaintiff succeeds only on part of his claim but fails on the most important heads of controversy, the defendant will be entitled to the whole costs of the suit. AIR 1941 Mad 31 (32): ILR (1941) Mad 300 (DB) ° (1866) 10 Moo Ind App 454 (476) (PC) ° AIR 1936 Cal 277 (279) (DB).

[But see (1875) 14 Suth WR 312 (315) (DB).]

(5) Where the applicants in proceedings under Fatal Accidents Act (1855) have succeeded in a large measure it is proper to direct that the applicants will get the costs on the claim decreed to them and as to the rest, the parties will bear their own costs. AIR 1968 Bom 267 (272): 69 Bom LR 848 (DB).

(6) The following are not grounds for disallowing costs:—

(a) The fact that a party succeeded on a technical plea in bar. (1881) 6 Cal 418 (421) (DB) ° AIR 1914 Cal 746 (751) (DB) * AIR 1919 All 453 (455): 40 All 558 (562) (DB) ° (1886) 12 Cal 271 (272) (DB). (Jurisdiction.) ° AIR 1942 Mad 713 (714) (DB) * AIR 1963 Mad 97 (98) : (1963) 2 Mad LJ 17. (Maintainability of suit by an unregistered firm — Plea in defence succeeding — Defendants should not be deprived of costs — (1942) 2 MLJ 515, Foll.)

[See however AIR 1958 Him Pra 1 (4).]

(b) Party succeeding on admissions. (1904) 27 Mad 341 (343) * AIR 1921 Lah 104 (105).

(c) Party succeeding on mistakes. (1891) 13 All 290 (295).

(d) Party succeeding on false evidence. AIR 1927 Mad 474 (475).

(e) Party refusing tender which the Court considers insufficient. (1877) 3 Cal 468 (472) (DB) * AIR 1939 Cal 131 (134): ILR (1938) 2 Cal 337.

(f) Party failing to issue notice to defendant before suit. AIR 1942 All 331 (333): ILR (1942) All 745 (DB) ° 1961 Raj LW 628.

(g) Defendant remaining ex parte. AIR 1925 Cal 569 (570) (DB).

(h) Unsuccessful party having no previous information of objection. (1889) 11 All 328 (329) (DB).

(i) Unsuccessful party led to institute proceedings through error of Court. (1886) 9 All 11 (19) (DB).

(j) Fact that amount claimed as costs is paltry and that suit was uncontested. AIR 1945 Pat 184 (185): 23 Pat 927 (DB).

(k) Fact that a petition is dismissed at preliminary stage. AIR 1968 Goa 53 (58). (Case under Representation of the People Act, 1951.)

(l) Parties are related to each other. AIR 1965 Orissa 211 (212) (DB).

(7) The Court must under Clause (2) give reasons in writing for depriving a successful party of his costs. AIR 1953 Trav-Co 130 (140): (1953) Cri L Jour 752: ILR (1952) Trav-Co 884 (FB) ° AIR 1958 Mad 515 (515) * AIR 1953 Mad 313 (315): ILR (1953) Mad 615 (DB) ° AIR 1943 Sind 242 (247): ILR (1943) Kar 315 (DB) ° AIR 1943 All 115 (123): ILR (1943) All 453 (FB) * AIR 1942 Cal 257 (260): ILR (1941) 2 Cal 556 (DB) ° AIR 1942 Cal 180 (204) (DB) ° AIR 1942 Mad 713 (714) (DB) * AIR 1939 Cal 387 (393): ILR (1938) 2 Cal 492 (DB).

(8) Where in land acquisition proceedings the claim by the claimants are highly exaggerated and the bulk of evidence adduced by them is found to be unacceptable and under these circumstances the courts think that the claimants should not be granted any costs, the Supreme Court will not interfere with that order in appeal

**Section 35 — Note 5 (contd.)**

under Article 133 (1) (a) of the Constitution. AIR 1969 SC 255 (257): (1969) 1 SCJ 344.

(9) The facts must show something which makes it more just that an exceptional order should be made than that the case should be left to the operation of the general rule. AIR 1920 Cal 1009 (1013) ° (1855) 6 Moo Ind App 232 (250) (PC) * AIR 1936 Bom 342 (343) (DB) ° AIR 1926 Bom 189 (195) (DB) ° AIR 1918 Cal 180 (182) (DB) * AIR 1935 Mad 342 (344) (DB) ° AIR 1936 Rang 419 (421) (DB).

(10) The following instances will illustrate the grounds on which a successful party may be disallowed his costs:

(a) Where the action brought by the party is frivolous or vexatious. (1903) 25 All 287 (295): 30 Ind App 66 (PC) ° (1890) 17 Cal 620 (630, 631) (DB) * (1876) 1 Cal 385 (388) (DB).

(b) Where some of the points urged by the counsel of the successful litigant result in considerable loss of public time and are frivolous and without substance. AIR 1952 Pepsu 12 (15): 3 Pepsu LR 465.

(c) Where he omits to make a clear statement of his case. AIR 1942 Bom 95 (97) (DB) ° AIR 1933 All 216 (217) (DB) ° AIR 1922 PC 177 (178) * (1882) 8 Cal 332 (337): 9 Ind App 1 (PC) ° AIR 1930 Mad 218 (221): 53 Mad 480 (DB) ° AIR 1926 Mad 642 (643) (DB) * AIR 1925 Oudh 561 (564, 565): 28 Oudh Cas 203 (DB) ° AIR 1916 Mad 429 (430) (DB) * AIR 1959 Madh Pra 232 (234): 1959 Jab LJ 718 (DB). (Suit against two Railways — Non-disclosure by Railways as to how consignment was dealt with — Suit against one of the Railways dismissed — Still it was not entitled to costs.)

(d) Where the contentions are often changed. (1911) 33 All 344 (355, 356): 14 Oudh Cas 133: 38 Ind App 104 (PC) * AIR 1952 Trav-Co 498 (500): ILR (1952) Trav-Co 477 (DB).

(e) Where he causes unnecessary delay in the conduct of the litigation. AIR 1940 Nag 8 (13) (DB) * (1870) 13 Moo Ind App 560 (572) (PC) ° AIR 1916 PC 110 (113): 44 Cal 186: 43 Ind App 249 ° AIR 1931 PC 289 (293): 55 Mad 93: 58 Ind App 381 * AIR 1930 PC 42 (44) ° AIR 1922 PC 361 (364) ° AIR 1922 PC 17 (19): 25 Oudh Cas 8: 44 All 185: 49 Ind App 60 ° AIR 1921 PC 6 (7): 45 Bom 718: 48 Ind App 181 ° (1904) 31 Cal 332 (339): 31 Ind App 57 (PC) * AIR 1939 Pat 68 (70) (DB) ° AIR 1960 J and K 91 (97). (Negligence in not raising plea at earlier stage.)

(f) Where he makes dishonest pleas and untrue statements. AIR 1951 Orissa 248 (251): ILR (1950) Cut 532 (DB) * AIR 1947 All 345 (348): ILR (1946) All 850 (DB) ° AIR 1917 PC 80 (84) ° AIR 1916 Cal 675 (676): 43 Cal 190 (193) ° AIR 1915 Mad 210 (217): 38 Mad 959 (DB) ° AIR 1925 Oudh 301 (309) (DB) ° AIR 1966 Andh Pra 28 (29): (1965) 1 Andh WR 433 * 1965 All LJ 1019 (1026): ILR (1965) 2 All 980.

(g) Where he causes unnecessary matter to be printed in the record or introduces unnecessary things therein. AIR 1919 PC 83 (84): 47 Cal 415: 46 Ind App 299 ° (1884) 11 Cal 244 (250): 12 Ind App 7 (PC) ° (1885) 8 Mad 219 (229): 12 Ind App 16 (PC).

(h) Where a proper tender is refused. AIR 1939 Cal 131 (134): ILR (1938) 2 Cal 337 * AIR 1918 Cal 464 (465) (DB) ° (1878) 3 Cal 468 (472) (DB) ° (1881) 3 Mad 224 (229) (DB) ° AIR 1935 Pat 101 (102).

(i) Where the offer of a proper compromise is refused. AIR 1939 Bom 198 (202).

(j) Where he is guilty of fraudulent conduct in inducing litigation. AIR 1917 PC 80 (84) * (1885) 13 Ind App 20 (31) (PC) ° (1898) 25 Cal 371 (395) (SB) ° AIR 1922 Oudh 271 (273): 25 Oudh Cas 237.

(k) Where he acts unscrupulously or with malice or malevolence. AIR 1944 Bom 59 (63) * AIR 1943 Pat 403 (405) (DB) ° (1872) 18 Suth WR 14 (15) (DB) ° (1886) 12 Cal 18: 12 Ind App 137 (PC) ° AIR 1930 Mad 154 (158) (DB).

(l) Where he raises objections at a very late stage. AIR 1950 Mys 63 (64) (DB) * AIR 1947 Nag 175 (176): ILR (1947) Nag 254 ° AIR 1944 Cal 385 (388) (DB) ° AIR 1944 Mad 429 (430) ° AIR 1943 Bom 362 (365) ° AIR 1940 Nag 8 (13) (DB) ° (1870) 14 Moo Ind App 203 (208) (PC) ° AIR 1933 All 120 (122) (DB).

(m) Where he adopts a wrong procedure for vindicating his rights. AIR 1950 Mad 582 (585): ILR (1951) Mad 375 ° AIR 1922 PC 17 (19): 25 Oudh Cas 8: 44 All 185: 49 Ind App 60 ° AIR 1928 Bom 539 (545).

(n) Where he abuses his right to select his own forum. AIR 1921 Bom 84 (35): 45 Bom 1236 (DB) * AIR 1918 Lah 246 (247): 1918 Pun Re No. 81 (DB) ° AIR 1965 Cal 59 (67): 69 Cal WN 545.

(o) Where the case of the opposite party fails owing to the fact that the decision on the basis of which the case was filed was, subsequent to the institution thereof overruled. AIR 1920 Mad 567 (568): 43 Mad 61 (64) (DB) ° AIR 1923 Bom 206 (206, 207): 47 Bom 559 (DB) * AIR 1930 All 167 (168) ° ('90) 1890 All WN 183 (183) (DB).

(p) Where the point is raised is of first impression. AIR 1954 Him Pra 63 (65) ° ILR (1954) Bom 960 (970) (DB) * AIR 1953 Bom 270 (271) ° AIR 1946 Cal 370 (375) (DB).

(q) Everything which increases the litigation and the costs and which places an unnecessary burden on the opposite party is a good cause to deprive a party of his costs. AIR 1949 Pat 93 (96) ° AIR 1920 Cal 1009 (1013) * AIR 1924 All 808 (809): 46 All 733 (DB) ° AIR 1934 Mad 665 (669) (DB) ° AIR 1929 Lah 879 (880) (DB).

**Section 35 — Note 5 (contd.)**

(r) Where a suit has been necessitated by the conduct of a third party, e. g., a Returning Officer, each party may be ordered to pay his own costs. AIR 1920 Cal 669 (673): 47 Cal 524 (536, 537) (DB).

(s) Where a person is impleaded as pro forma defendant to a suit and the suit is dismissed, Court is justified in disallowing costs to such defendant. AIR 1962 Ker 313 (318): 1962 Ker LT 243 (FB).

(t) Unnecessary cross-examination. AIR 1962 Cal 325 (338): (1963) 33 Com Cas 1 (DB).

(11) Where the action involves several issues and the costs of a particular issue can be separated from the costs of the suit it is usual to allow them to the party who is successful on that issue irrespective of the ultimate result of the suit. (1893) 20 Cal 762 (769, 770) (SB) ° AIR 1933 Nag 49 (50): 29 Nag LR 8 ° AIR 1957 Pat 79 (81).

**5A. Maintenance suit.**— (1) So long as the claim to maintenance is genuine and true and the amount claimed is not out of all proportion to the amount that is found to be due, the widow claiming maintenance ought not to be mulcted in costs when she has established her right to maintenance. AIR 1940 Mad 547 (553): (1940) 1 Mad LJ 608 (DB) ° AIR 1949 Mad 31 (39): (1948) 1 Mad LJ 30 (DB).

(2) When the rate of maintenance previously awarded to a widow has to be substantially enhanced, plaintiff cannot be asked to pay costs to defendants. AIR 1967 Andh Pra 40 (41): (1966) 2 Andh WR 196. (Plaintiff claiming high rate of maintenance — Defendants pleading ridiculously low and starvation rate of maintenance — Rate of maintenance enhanced — Plaintiff cannot be asked to pay any costs to defendants — Proper order to pass is to direct each party to bear its own costs.)

(3) The principle as enunciated in AIR 1940 Mad 547 in respect of widow is also applicable to a suit for maintenance by a wife against her husband. (1966) 1 Andh WR 227 (231, 233).

**6. Mortgage suits.**— See O. 34, R. 10.

**7. By whom costs are to be paid. — General.**—(1) As a general rule an order for costs can be made only against a party to the proceeding. (1876) 2 Cal 233 (259): 4 Ind App 23 (PC) ° (1873) 11 Beng LR 37 (39) (DB) ° AIR 1936 Lah 382 (384) ° AIR 1930 Mad 195 (196) * AIR 1936 Pat 151 (151) ° AIR 1966 Goa 1 (8, 17) (FB) ° AIR 1962 Mad 313 (313): (1962) 1 Mad LJ 372. ('Dispute' contemplated by Sec. 30, Land Acquisition Act includes even any controversy with regard to title of a single claimant — Collector in such a case is not a party to reference — Collector cannot be made liable for costs.)

[See also AIR 1968 Bom 439 (443): 70 Bom LR 100 (DB). (Unwarranted reference — Direction to referring the judge to pay personally costs of plaintiff's counsel made.)]

(2) The Court is bound to decide which of the parties shall bear the costs. (1874) 23 Suth WR 89 (90) (DB) * AIR 1936 All 127 (128).

(3) It is a general rule that it is the unsuccessful party that will have to bear the costs. (1866) 3 Mad HCR 113 (115) (DB) ° (1885) 12 Cal 179 (181) (DB) ° (1883) 9 Cal 797 (802): 10 Ind App 113 (PC) * AIR 1936 Lah 607 (608): 17 Lah 520 (DB) ° AIR 1931 Bom 554 (556): 55 Bom 649 (DB).

(4) A party by whose act or by the act of whose counsel a difficulty has arisen, must pay the costs occasioned by the difficulty. AIR 1955 Andhra 36 (40) ° (1904) 30 Bom 173 (189) (DB) * AIR 1925 Bom 471 (472) (DB) ° (1903) 27 Bom 124 (125) (DB) ° (1904) 6 Bom LR 301 (303) * (1905) 32 Cal 62 (72) (DB) ° (1902) 4 Bom LR 818 (820) (DB).

(5) The Court has a discretion in a proper case to order that each party should bear his own costs. AIR 1954 Mys 134 (137): ILR (1953) Mys 554 * AIR 1958 SC 512 (518) ° AIR 1958 Cal 730 (733) (DB) ° AIR 1958 Ker 368 (374) (DB) * AIR 1957 Bom 138 (142): ILR (1958) Bom 556 (DB) ° AIR 1957 Him Pra 70 (72) * AIR 1957 Mad 622 (622): ILR (1958) Mad 201 ° AIR 1957 Punj 310 (312): ILR (1957) Punj 656 (DB) * AIR 1957 Raj 180 (182): ILR (1955) 5 Raj 971 (DB) ° ILR (1954) Cut 450 (459) (DB) ° AIR 1951 Trav-Co 39 (40) (DB) * AIR 1947 Pat 345 (349): 25 Pat 666 (DB) ° AIR 1943 Pesh 65 (66) (DB) ° AIR 1934 Lah 262 (264) (DB) * AIR 1938 Pat 613 (618): 17 Pat 594 (DB) ° AIR 1936 Pat 570 (571) (DB) * AIR 1928 Cal 819 (820): 56 Cal 507 (FB). ° AIR 1965 All 228 (231): (1964) All LJ 1057 * 78 Mad LW 301: ILR (1965) 1 Mad 722. (Suit dismissed — Indulgence shown by Court in favour of defendant — Defendant also not without fault or laches — Parties should bear their own costs — Advocate's fee need not be determined at higher figure) ° (1962) 66 Cal WN 1083 (1118) ° (1962) 64 Punj LR 498 ° AIR 1960 Bom 532 (542, 543): 62 Bom LR 277 (DB) * AIR 1960 Madh Pra 263 (265): 1960 Jab LJ 419. (Both parties not coming to Court with clean hands — Both parties left to bear their own costs.) * (1960) 38 Mys LJ 622. (Luxury litigation — Plaintiff co-owner instead of asking for partition suing for permanent injunction restraining defendants from putting up building on suit property — Allegation of sole ownership found false — Injunction however granted in favour of plaintiff on the basis of lesser right found in his favour — Parties directed to bear their own costs in all Courts.) ° 1960 Nag LJ 106 (113): 62 Bom LR 547. (Mortgage suit.) ° AIR 1959 Mad 253 (257): (1961) 1 Mad LJ 404 (DB). (In a case, where the law is settled for the

**Section 35 — Note 7 (contd.)**

first time, it is only proper that all the parties should be directed to bear their own costs.) * AIR 1953 Bilaspur 7 (9).

[See also (1965) 67 Pun LR 824. (Suit for refund of advance decreed — Court, however, leaving parties to bear their own costs, on ground of friendly relations between parties — Held, costs should have been allowed to abide event, as it was difficult to understand value of those friendly relations when defendants had betrayed friendship by refusing to refund amount advanced.)]

(6) The Court may order that one defendant should pay the costs of another defendant. AIR 1950 Kutch 69 (78) ° AIR 1947 Cal 213 (221) * AIR 1946 Nag 152 (159): ILR (1946) Nag 73 ° (1946) 50 Cal WN 296 (299) (DB) ° AIR 1944 Nag 98 (99): ILR (1944) Nag 170 * AIR 1938 Mad 117 (124): ILR (1938) Mad 233 ° AIR 1963 Cal 163 (178): 1963 Cal LJ 43 ° AIR 1962 Mad 309 (312): 75 Mad LW 156. (Suit for damages against defendant 1 for causing death of plaintiff's son in motor accident — Defendant 2 an insurance company impleaded at instance of Defendant 1 — Defendant 2 found to be not liable — Award of costs of defendant 2 against defendant 1 is proper.) * AIR 1962 Cal 12 (19): ILR (1961) 2 Cal 558 (DB).

[See also 1958 Ker LT 957 (958). (Direction to pay cost on behalf of State who was co-defendant and had practically supported defendant — Direction held not justifiable.)]

[But see 1908 Pun WR No. 57, p. 216 (217).]

(7) In a proper case the Court may order the unsuccessful defendant to pay in addition to the costs payable by him to the plaintiff the costs of the successful defendants. AIR 1953 Bom 209 (214).

(8) In exceptional cases, the Court may make even a stranger to a suit liable for the costs of the litigation, but great caution must be exercised before any such order is passed. AIR 1942 All 233 (234): ILR (1942) All 832 (FB) ° AIR 1953 Cal 37 (39) ° AIR 1941 Mad 750 (751) (DB) * AIR 1941 Mad 198 (199) ° AIR 1934 Nag 250 (250): 20 Nag LR 76 * AIR 1930 All 225 (241): 52 All 619 (FB) ° (1883) 7 Bom 484 (486) ° AIR 1966 Andh Pra 28 (29): (1965) 1 Andh WR 433.

(9) Where the party in the case is T, and objections to attachments are filed by that party through the Sarbarakar S. and are dismissed with costs, in the absence of any express order by the Court imposing the liability for costs on the Sarbarakar personally, it is the party in the case, namely T, that would be liable to pay the cost and not the Sarbarakar. AIR 1961 All 563 (564).

(10) A legal practitioner may be held liable for costs where they are the direct result of an unjustifiable initiation and prosecution of the proceedings by him. AIR 1942 Oudh 279 (281) (DB).

(11) A solicitor who purports to act for a non-existing party is personally liable for the costs of the opposite party. AIR 1933 Bom 317 (319, 322): 58 Bom 1 (DB).

**8. Account suits.** —(1) In suits for accounts the general rule that costs follow the event applies. AIR 1930 All 72 (72) ° AIR 1929 Cal 719 (723) (DB).

(2) The costs will follow the result of the account unless the defendant has falsely denied his liability to account. (1887) 14 Cal 147 (159): 13 Ind App 123 (PC) ° AIR 1934 Pat 146 (147) (DB) * AIR 1917 Cal 557 (558).

(3) Where the preliminary decree completely omits to mention the subject of costs, the order of the Court which passed the final decree granting costs should be taken as meaning that the costs granted are the costs of the whole suit. AIR 1939 Lah 255 (256).

(4) The Court can grant a decree for costs even at a preliminary stage where the defendant disputes his liability to account and contests the maintainability of the suit. AIR 1943 Pat 218 (227): 22 Pat 114 (DB).

(5) Where the plaintiff's valuation of the suit is not arbitrary, he can be awarded costs on the basis of his valuation of the suit. AIR 1943 Pat 218 (227): 22 Pat 114 (DB).

**9. Admiralty and vice-admiralty cases.**— (1) Where, in an action of salvage, a ship is arrested and the bail asked for is found to be excessive, the promovents must pay the impugnants the costs of the excessive bail. (1890) 17 Cal 84 (114) (DB) ° (1900) 24 Bom 55 (65).

**10. Arbitration cases.**—(1) Where there is an award on a reference through Court, the Court has power to award costs of the arbitration. AIR 1940 Sind 190 (190): ILR (1940) Kar 34 (DB) * (1912) 6 Sind LR 226 (227) (DB) * AIR 1968 Bom 347 (361): 70 Bom LR 20.

(2) Where the fight that is raised by opposite party against an award is unjustified and it leads to unjustified expenditure by applicant, applicant should be given costs of revision and those incurred in courts below. AIR 1963 All 602 (606): 1963 All LJ 147 (DB).

(3) Where all the questions in dispute between the parties are referred to arbitration, the Court's discretion in the matter of costs would be removed by the award. AIR 1936 Pesh 37 (37).

(4) Where the Court holds that there is no valid reference to arbitration, it has no jurisdiction to pass an order as to costs of the award. AIR 1928 Mad 370 (370, 371) (DB).

**11. Contempt of Court cases.**—(1) Where the person charged with contempt is proved to have done the act complained of and

**Section 35 — Note 11 (contd.)**
the question merely is whether it amounted to contempt or not, it may not always be proper to make an order for costs, even if the decision be in favour of the respondent. But where no connection with the persons charged with the acts complained of has been attempted to be established, the persons so unreasonably treated should be indemnified in costs. AIR 1952 Cal 919 (926): 1953 Cri L Jour 136: ILR (1953) 1 Cal 355 (DB).

**12. Divorce cases.**—(1) The general rule is that in all matrimonial causes where the wife is shown to have no separate property of her own, the husband must pay the wife's costs or give adequate security for the same. (1902) 29 Cal 619 (621, 622) ° (1886) 9 Mad 12 (13) ° AIR 1922 All 504 (505): 44 All 745 (FB) ° AIR 1922 All 243 (243) (DB) ° AIR 1914 Bom 211 (213): 38 Bom 125 (152, 153) (DB) ° AIR 1930 Cal 558 (558, 559): 57 Cal 1089 * AIR 1924 Mad 150 (150) (DB).

[But see (1880) 5 Cal 357 (362, 363) (DB).]

(2) The rule that husband must pay wife's costs is not applicable to the case of Mahomedans. (1897) 21 Bom 77 (84).

(3) The discretion of the Court is not taken by the rule that the husband must pay the wife's costs. (1887) 14 Cal 580 (583) ° AIR 1931 Cal 206 (208): 57 Cal 1350 (DB).

(4) In proper cases an order on the husband to pay costs may be refused. AIR 1949 Bom 31 (32, 33) (DB) ° AIR 1917 Cal 65 (69): 44 Cal 35 (SB) ° AIR 1933 Cal 388 (391): 60 Cal 318 (DB) * AIR 1935 Oudh 133 (139): 10 Luck 627 (DB).

(5) A decree for costs in a matrimonial cause cannot be executed until it is confirmed by the High Court. 1887 Pun Re No. 35, p. 75 (76).

(6) Costs will not be granted to the husband against a co-respondent when the former has condoned the adultery of the wife with the latter. (1901) 28 Cal 221 (222).

(7) Costs granted to the husband against a co-respondent will include costs as between attorney and client. (1901) 28 Cal 84 (85).

(8) Where in a divorce case the Court awards party and party costs to the unsuccessful wife her solicitor can sue for and recover solicitor-and-client costs against the husband. AIR 1944 Bom 189 (190, 191).

**13. Order for costs, out of estate.**—(1) In the case of suits by or against trustees, executors and administrators the costs, where such persons are unsuccessful, are made payable out of the estate unless they are guilty of vexatious conduct, or neglect or misconduct in filing the suit. AIR 1948 Oudh 203 (214): 23 Luck 193 (DB) ° AIR 1944 All 231 (231) (DB) ° AIR 1942 Bom 125 (128): ILR (1942) Bom 293 * AIR 1939 Nag 274 (277) (DB) ° AIR 1917 Cal 795 (796) (DB) ° (1898) 26 Cal 133 (139) (SB) * (1885) 11 Cal 628 (632) ° AIR 1936 Mad 495 (497) (DB) ° (1912) 17 Ind Cas 441 (442) (PC) ° AIR 1929 Pat 401 (404): 8 Pat 419 (DB) * AIR 1931 Sind 17 (23): 25 Sind LR 72 (DB).

(2) Unless the Court orders that the costs should come out of the estate, a trustee incurring liability for costs is personally liable for them. AIR 1949 Mad 789 (799) (DB) ° AIR 1935 Mad 5 (5) (DB) ° AIR 1934 All 793 (794) * AIR 1934 Mad 430 (431): 58 Mad 160.

(3) Where a suit abates on the death of the plaintiff the Court may order the costs to be paid out of the estate of the plaintiff. AIR 1920 Mad 289 (290): 43 Mad 284 (287) (DB) ° AIR 1934 All 1 (4): 55 All 687 (DB).

(4) Where a suit abates because no representative of a deceased defendant has been brought on the record, the Court cannot award costs to the heirs of the defendant against the plaintiff. (1912) 22 Mad L Jour 439 (440).

(5) Mortgage suit — Some defendants discharged as having no interest in mortgaged property — Costs of such defendants cannot be ordered to be paid out of mortgaged estate — Plaintiff should be ordered to pay same. AIR 1934 Nag 264 (268): 30 Nag LR 331 (DB).

(6) In a proper case a Court can pass a personal decree for costs against the legal representative of a deceased debtor. AIR 1947 Oudh 217 (218).

**14. Administration suits.**— (1) A plaintiff in an administration suit may be granted his costs out of the estate. (1894) 21 Cal 832 (837) * AIR 1935 Bom 178 (181): 59 Bom 397.

(2) When orders for costs are made in administration suits, the correct course is to make them in such a form that the person who has not encumbered his share shall be relieved as far as possible in the matter of costs. AIR 1929 Cal 477 (478): 56 Cal 447 (DB).

(3) A claimant in an administration suit is not liable to pay costs of the intervenor, where the character and scope of the suit was not changed by such intervention. AIR 1921 Cal 222 (224): 48 Cal 352 (DB).

(4) Where a suit for administration and partition of an estate is wholly occasioned by the defendant's failure to pay the plaintiff's dues, the defendant must pay the court-fee on the amount found due to the plaintiff from him. AIR 1945 Sind 11 (21): ILR (1944) Kar 325.

(5) The Administrator-General is entitled to recover his costs from the losing claimant and, falling such recovery, from out of the estate. (1886) 10 Bom 350 (357) ° (1886) 13 Cal 193 (196, 197) (DB).

**15. Suits for construction of wills.**— (1) Suit for construction of will — Construction

**Section 35 — Note 16 (contd.)**
necessitated by reasonable doubt — Costs are usually made payable out of estate. (1889) 16 Cal 383 (396): 16 Ind App 29 (PC) ° (1890) 17 Cal 122 (130): 16 Ind App 166 (PC) * AIR 1936 Mad 388 (393, 397) ° ILR (1968) 1 Mad 138.

(2) Suit for construction of will — Construction necessitated by difficulties caused by testator — Costs will be made payable out of estate. AIR 1946 Bom 12 (17): ILR (1946) Bom 295 (DB) ° (1888) 15 Cal 725 (750): 15 Ind App 127 (PC) ° AIR 1932 PC 269 (275): 60 Cal 554: 59 Ind App 419 * AIR 1914 PC 149 (150): 41 Cal 1007: 41 Ind App 176.

(3) Construction of will not requiring assistance of Court — Estate will not be liable for costs of suit. (1894) 21 Cal 688 (694) (SB).

(4) Suit ostensibly for construction of will but really to oust person in possession — Estate is not liable for costs on plaintiff's failure. (1897) 24 Cal 406 (412) (DB).

(5) Suit for construction of will — Advocate-General appearing in support of bequest to charity — Estate is liable to pay his costs. AIR 1936 Bom 13 (15).

**16. Suits by or against minors.** — (1) Where a proceeding is conducted on behalf of a minor bona fide, but ends unsuccessfully, costs will, as a rule, be made payable out of the estate of the minor. AIR 1939 Bom 350 (352) ° (1876) 25 Suth WR 316 (316) (DB) ° AIR 1934 Cal 474 (477): 61 Cal 227 * AIR 1961 Andh Pra 446 448): (1961) 2 Andh WR 15 (DB). (Dismissal of suit on behalf of minor for laches of next friend — Court should record reasons — AIR 1949 Mad 46 Foll.)

[See however AIR 1941 Cal 272 (286): ILR (1940) 2 Cal 285.]

(2) Where the suit or proceeding is unnecessary or improper costs may be made payable by the next friend or guardian personally. AIR 1943 Nag 329 (329, 330): ILR (1943) Nag 775 ° ('39) AIR 1939 Bom 271 (277): ILR (1939) Bom 396 (DB) ° (1886) 10 Bom 248 (253) (DB) * (1885) 11 Cal 213 (218, 219) ° AIR 1935 Mad 886 (887): 59 Mad 415.

(3) Next friend or guardian of minor guilty of improper conduct — He may be made personally liable for costs. (1884) 8 Bom 391 (393, 394) ° AIR 1929 Mad 782 (782) (DB) * AIR 1930 All 577 (578): 52 All 907 (DB).

[But see (1881) 3 Mad 263 (264) (DB) ° AIR 1929 All 18 (25): 50 All 773 (DB).]

(4) The words "by whom" in S. 35 are wide enough to cover guardians and next friends. AIR 1929 Mad 782 (782) ° AIR 1934 Cal 474 (477): 51 Cal 227.

(5) Where a suit is dismissed, the defendant is entitled to get his costs from the next friend irrespective of any question as to the suit being for the benefit of the minor. AIR 1935 Bom 112 (119): 59 Bom 35.

(6) Unless the liability to pay costs is expressly placed on the next friend they cannot be recovered from him. AIR 1944 Bom 100 (102, 104): ILR (1944) Bom 12 (DB) * AIR 1959 Andh Pra 662 (663, 664): (1959) 1 Andh WR 92.

(7) As a general rule, a minor cannot be made to pay costs personally. AIR 1935 Bom 112 (118): 59 Bom 35.

(8) Minor coparceners of a Hindu joint family as defendants to a suit, are liable for costs only to the extent of their interest in the joint family property and not personally. (1936) 162 Ind Cas 848 (849) (Nag).

(9) It is not a sound exercise of discretion to order costs to be paid by a minor suing as a pauper. AIR 1949 PC 35 (39): ILR (1948) Bom 639: 75 Ind App 259.

**17. Official Liquidator and Official Assignee.**— (1) The costs of an unsuccessful litigation incurred by a liquidator are payable out of the assets of the company in priority to the costs of the liquidation. AIR 1928 Bom 252 (259): 52 Bom 477 (DB).

(2) The costs incurred in a bona fide application by the liquidator will be a first charge on the estate. (1899) 11 All 349 (360) (DB).

(3) A trustee in bankruptcy or the Official Assignee is personally liable for costs. AIR 1929 Mad 105 (106): 52 Mad 263 (DB) ° AIR 1932 All 288 (289): 54 All 444 (DB ° AIR 1919 Cal 337 (339) * AIR 1931 Nag 143 (144).

(4) Estate insufficient to pay costs in full — Trustee in insolvency or Official Assignee is personally liable to pay deficiency, unless he gets guarantee of indemnity from parties setting him in motion. (1883) 7 Bom 484 (486).

(5) The circumstance that the Official Receiver has obtained the leave of the Court would only entitle him to claim reimbursement out of the estate or from the creditors in whose interest he was acting, but will not take away the personal liability for the costs ordered. AIR 1929 Mad 105 (108, 109): 52 Mad 263 (DB).

(6) In an appeal against an order of adjudication, the Official Assignee, if successful, is entitled to his costs. (1890) 14 Bom 189 (195) (DB).

(7) Where in appeals pending before the Supreme Court, the respondent, the Official Receiver intimated that none of the creditors had come forward to finance the defence of the appeals and the funds of estate were insufficient to defend the appeals, it was held that there was no reason to absolve the respondent from liability to pay the costs. AIR 1957 SC 577 (584): 1957 SCR 775.

**18. Partition suits.**— (1) The parties to a partition suit will ordinarily have to bear their own costs up to the preliminary decree. AIR 1956 Bom 129 (139) (DB) ° AIR 1956 Madh B 115 (117): ILR (1956)

**Section 35 — Note 18 (contd.)**
Madh B 435 (DB) ° AIR 1953 Cal 164 (167): ILR (1954) 2 Cal 85 (DB) * AIR 1915 Cal 618 (619): 42 Cal 451 (453, 454) (DB) ° AIR 1923 Bom 464 (466) (DB) ° (1936) 40 Cal WN 1237 (1246) (DB) * (1909) 3 Ind Cas 247 (Cal) ° AIR 1962 Pat 300 (302).

(2) In a partition suit the institution fee should be borne proportionately by all the parties. AIR 1923 Bom 464 (466).

(3) Partition suit — No party guilty of unfair contention — Costs should come out of estate. AIR 1920 Mad 149 (150) (DB).

(4) Defendant's objection to partition based on clause in will — Objection not allowed — Defendant is not personally liable for costs. (1936) 40 Cal WN 1237 (1246).

(5) The question whether in a partition suit parties should bear their costs up to the preliminary decree would depend upon the nature of dispute raised. AIR 1942 Pat 76 (77) (DB) * AIR 1963 Andh Pra 31 (37).

(6) Where one party has been successful in a matter the costs of which are severable from the general costs of the suit, he will be entitled to such costs. (1893) 20 Cal 762 (769, 770).

(7) The Court has always a discretion to saddle a party with the costs of the suit where he unreasonably contests the plaintiff's right to claim a partition. AIR 1956 Madh B 115 (117): ILR (1956) Madh B 435 (DB) * AIR 1930 Lah 229 (230) ° (1909) 3 Ind Cas 247 (Cal) ° (1936) 40 Cal WN 1237 (1246) * AIR 1931 Cal 573 (574).

(8) If a question of title is raised in issue for decision before the preliminary decree is passed, the Court takes the result on the issue into consideration for determining whether costs are to be made payable by one party to the other. AIR 1953 Cal 164 (167): ILR (1954) 2 Cal 85 (DB).

(9) Where one of the parties to a partition suit bears all the costs which are to be borne by all the parties, the former is entitled to get the Court's order directing the others to pay their respective shares. (1891) 18 Cal 199 (200).

**19. Partnership suits.**— (1) The costs in partnership suits will ordinarily be made payable from the assets of the partnership. AIR 1950 Madh B 56 (57) ° (1881) 7 Cal 428 (434) (DB).

(2) When any partner denies the partnership or places obstacles to the taking of accounts, he will be made to pay the costs. AIR 1952 Mad 769 (771) ° AIR 1950 Madh B 56 (57) ° ('81) 7 Cal 428 (434) (DB) * (1881) 6 Cal 811 (812).

(3) An order for costs out of the estate of a deceased partner will be invalid where he has not been properly represented in the suit. (1892) 16 Bom 515 (517, 519).

**20. Probate cases.**— (1) The costs of taking out probate must primarily come out of the residuary estate. (1897) 21 Bom 75 (76) (DB) ° AIR 1957 Madh B 31 (32) (DB) * (1895) 19 Bom 770 (775) (DB).

(2) Where a plaintiff seeks to establish a will under which he has been given a legacy and he is merely put to proof of it, the costs should be awarded to both parties from and out of the estate. AIR 1941 Mad 502 (504) (DB).

(3) The rule that costs should be awarded to both the parties from the estate may be departed from where the party is guilty of misconduct or there is other good cause for doing so. 1900 Pun Re No. 63, p. 241 (275) ° (1898) 25 Cal 553 (555) * (1910) 7 Ind Cas 301 (313, 314) (Bom) ° (1909) 13 Cal WN 557 (563, 564).

**21. Representative suits.**— (1) The order for costs in a representative action should clearly specify who should bear the costs. AIR 1917 Bom 141 (148): 42 Bom 556 (578).

(2) The power conferred by O. 22, R. 3 (2) on the Court of original jurisdiction to award costs against the estate of a deceased plaintiff may also be taken to be conferred on the Appellate Court. (1882) 8 Cal 440 (441) (DB).

(3) In a representative suit involving a caste question the costs of both parties may be ordered to be paid out of the caste property. AIR 1935 Bom 268 (282).

**22. Pre-emption suits.** — (1) Where in a suit for pre-emption, the plaintiff has been guilty of very much understating the value of pre-emption, he should be saddled with the costs of the defendant. If on the other hand, the value stated in the sale deed has been very much inflated, the defendant must be made to bear the costs of the plaintiff. AIR 1953 Nag 376 (376): ILR (1954) Nag 124.

**23. To what extent costs are to be paid.** —(1) The Court has full power to determine to what extent the costs in a suit or proceeding are to be paid. AIR 1942 Mad 713 (714) (DB) * AIR 1914 Lah 268 (269): 1914 Pun Re No. 35 (DB) * (1896) 20 Bom 167 (172) (DB) * (1969) Jab LJ 304: 1968 MPLJ 425 (DB). (Court can award successful plaintiff pleader's fees to the extent of his success.)

(2) The Court cannot award any costs not actually incurred in the suit or proceeding. (1955) Madh B L J 1955 HCR 269 (270) ° 1887 All WN 227 (228) (DB).

(3) A successful party is not entitled to anything more than the necessary and reasonable costs incurred in the litigation. (1894) 18 Mad 128 (129) (DB) * AIR 1925 PC 169 (170): 47 All 459 ° AIR 1929 All 214 (218): 51 All 509 (DB) * AIR 1930 Bom 24 (27): 54 Bom 62 ° AIR 1921 Bom 71 (72): 45 Bom 1177 (SB) * AIR 1928 Lah 800 (801) * AIR 1928 Mad 216 (223) (DB) ° AIR 1921 Mad 544 (545): 43 Mad 898 (DB) ° AIR 1924 Oudh 218 (222) (DB) * AIR 1914 Oudh 118 (122) (DB) ° AIR 1962 Pat 356 (357).

Section 35 — Note 23 (contd.)

(4) Where it is difficult to apportion costs between the parties in view of the peculiar nature of the disputes between the parties, each party may be allowed to bear his own costs. (1911) 21 Mad L Jour 730 (742) (DB) * AIR 1929 Mad 493 (495) (DB).

(5) Where a suit contains several distinct items against separate defendants, the amount of costs allowed to or against each will be in proportion to the plaintiff's claim failing or succeeding against him. AIR 1956 Nag 76 (80): ILR (1955) Nag 744 (DB).

(6) Where a suit against the Government is dismissed, costs should be taxed in the usual way irrespective of any arrangement between the Government and its legal advisers. (1894) 17 Mad 162 (165) (DB) * AIR 1916 Bom 258 (260): 40 Bom 588 (597, 598) * (1892) 15 Mad 405 (411).

(7) Where a person is allowed to continue an appeal on an application under O. 22, R. 10 and the appeal is dismissed with costs he is liable for the full costs of the respondents. AIR 1933 Mad 411 (413): 56 Mad 469 (DB).

(8) In a suit for damages or for maintenance, the plaintiff should be given his full costs provided the claim is genuine and the amount claimed is not unreasonable. AIR 1949 Mad 31 (39): ILR (1948) Mad 803 (DB) * AIR 1940 Mad 547 (553) (DB) * AIR 1940 Mad 879 (880): ILR (1941) Mad 255 (DB).

**24. Separate costs when may be allowed.** —(1) Separate costs should not be allowed to defendants if their defence is a common one. AIR 1942 Cal 257 (260): ILR (1941) 2 Cal 556 (DB) * AIR 1932 PC 13 (21): 59 Ind App 1 * (1887) 9 All 205 (210) (DB) * AIR 1933 Oudh 242 (246) (DB) * AIR 1934 Rang 259 (260) (DB).

[But see AIR 1932 All 337 (340): 54 All 490 (DB).)]

(2) Where the defences raised are different, separate costs can be awarded. AIR 1956 Nag 76 (80): ILR (1955) Nag 744 (DB) * 1954 Ker L Tim 618 (620) (DB) * AIR 1942 Bom 284 (288, 289): ILR (1942) Bom 782 (DB) * AIR 1941 Oudh 251 (252): 16 Luck 697 (DB) * (1887) 9 All 655 (659) (DB).

(3) Separate costs cannot be awarded where separate appearances of defendants are found unreasonable. AIR 1941 Bom 16 (16): ILR (1940) Bom 837 (DB) * AIR 1964 Mad 260 (263): 76 Mad LW 772 (DB). (Suit against several defendants dismissed with one set of costs — One defendant claiming separate sets of cost on ground that trial of suit was undertaken by him — Defendant in question having common cause with other defendants — He is not entitled to separate sets of costs.)

(4) The expression "suit dismissed with costs" means that all the defendants appearing separately are entitled to their costs separately. AIR 1942 Bom 284 (288): ILR (1942) Bom 782 (DB) * AIR 1942 Bom 81 (82): ILR 1942 Bom 163 * AIR 1941 Bom 16 (17): ILR (1940) Bom 837 (DB) * AIR 1939 Bom 338 (338): ILR (1939) Bom 478 (DB).

(5) Where a declaratory suit under S. 62 of Hindu Religious and Charitable Endowments Act is dismissed and defendants 1 and 2 happen to be members of the Tribunal, there is no question of awarding any separate costs to them. AIR 1966 Andh Pra 123 (128): (1965) 2 Andh WR 203.

(6) Where there are several plaintiffs, they cannot be allowed separate costs even if they are represented by separate pleaders. AIR 1939 Rang 108 (111): 1938 Rang LR 252.

(7) Where a plaintiff seeks to avoid a number of alienations to different persons the decree for costs passed against the alienees would be a several one. AIR 1949 Mad 113 (114).

(8) Where in a suit by certain coparceners against trespassers and some coparceners who are arrayed on the side of defendants, and such coparceners are found to have title to property equal to and joint with plaintiffs, a decree may be given for benefit of all coparceners. One of such defendants is not entitled to any separate costs. AIR 1960 All 339 (350): ILR (1960) 1 All 481 (DB).

**25. Separate suit for costs.**— (1) Court having jurisdiction to pass order as to costs making no such order — Suit to recover costs is barred by res judicata. (1878) 2 Bom 360 (362) (DB) * 1908 All WN 18 (19) * (1887) 9 All 474 (476).

(2) Court awarding particular amount of costs — Suit for costs not awarded will be barred by res judicata. (1886) 8 All 452 (461) (DB) * (1876) 1 Bom 467 (468) (DB) * AIR 1932 Lah 257 (258): 13 Lah 551 (DB) * AIR 1959 Andh Pra 601 (603, 604): (1959) 2 Andh WR 371 (DB). (26 Deccan LR 890 Dissented from.)

(3) When the Court in the prior proceeding had no jurisdiction to order costs, a subsequent suit will lie for its recovery. (1886) 8 All 452 (461).

[But see AIR 1922 All 143 (144).]

(4) Where costs are awarded by an executable decree or order, no suit will lie to recover the costs so awarded as the same will be barred by S. 47. AIR 1946 Mad 345 (346) * AIR 1932 Lah 257 (257, 258): 13 Lah 551 * AIR 1925 Mad 279 (280): 48 Mad 482 * (1902) 24 All 288 (291).

(5) Where costs are awarded by a decree or order which is not executable an independent suit upon the judgment to recover the amount will lie. AIR 1925 Mad 279 (280, 281): 48 Mad 482 * (1906) 33 Cal 560 (564).

(6) A suit for costs against a third person on the ground that he was the mover of, and had an interest in the suit, does not

**Section 35 — Note 25 (contd.)**
lie in the absence of malice and want of probable cause. AIR 1942 All 233 (234, 237): ILR (1942) All 832 (FB) • ('78) 2 Cal 233 (260): 4 Ind App 23 (PC).

(7) An auction-purchaser of property in execution cannot sue the judgment-debtor for costs of defending a suit by a third person claiming the property to be his. AIR 1954 Mad 129 (131).

(8) Suit based on injury to property because of wrongful attachment under S. 145, Cr. P. C., is maintainable though there is provision for award of costs in respect of proceedings under S. 145, Cr. P. C AIR 1968 Pat 248 (252, 253) (DB).

**26. Court having no jurisdiction to try suit — Costs.** — (1) The Court returning a plaint for presentation to the proper Court can direct the plaintiff to pay the costs of the other side. AIR 1945 Mad 168 (169) • AIR 1942 Mad 35 (35).

(2) A Court while returning a plaint for presentation to the proper Court cannot direct that Court to make any order as to costs. AIR 1946 Mad 345 (346) ° AIR 1945 Mad 168 (169).

(3) Where the Court returning the plaint for presentation to proper Court evidently does not consider it proper to award costs to the defendant, the Court has jurisdiction to pass such order and the exercise of discretion is not in any way capricious or arbitrary. AIR 1960 All 529 (529, 530).

**27. Appeal and second appeal against order as to costs.**— (1) Where the direction as to costs is contained in a non-appealable order, the direction will not be appealable. AIR 1948 Oudh 220 (221) • AIR 1918 Upp Bur 14 (14): 3 Upp Bur Rul 61 (62) ° AIR 1932 Mad 714 (715) ° (1898) 21 Mad 421 (422).

[But see (1873) 20 Suth WR 123 (125).]

(2) Where the direction as to costs is contained in an appealable order, the direction will be appealable. AIR 1922 All 90 (90): 44 All 209 (DB) ° (1892) 16 Bom 241 (242) (DB) • (1881) 8 Bom 368 (370) (DB) ° (1886) 12 Cal 271 (272) (DB) • (1882) 8 Cal 91 (94, 95) (DB) ° (1907) 31 Mad 328 (329).

(3) Where the direction as to costs is contained in a decree an appeal from the direction will lie only—

(a) where the Court has not exercised any real discretion in making the direction. AIR 1956 Andhra 113 (113) • ILR (1953) 3 Raj 187 (188) ° AIR 1940 Mad 620 (621) • AIR 1939 Bom 271 (277): ILR (1939) Bom 396 (DB) • AIR 1925 Cal 1085 (1086) (DB) ° AIR 1918 Cal 180 (182) (DB) • 1959 Jab LJ 217.

(b) where the exercise of discretion is not judicial; in other words, where the direction involves a matter of principle. • AIR 1956 Andhra 113 (113) • AIR 1959 Mad 12 (14) ° AIR 1958 Pat 557 (557) ° AIR 1957 Pat 79 (82) • AIR 1954 Mad 100 (100) • ILR (1953) 2 Cal 362 (372) (DB) • ILR (1953) 3 Raj 187 (188) ° AIR 1951 Bom 394 (396): ILR (1951) Bom 768 ° AIR 1943 Mad 122 (127) (DB) • AIR 1942 Cal 257 (260): ILR (1941) 2 Cal 556 (DB) • AIR 1939 Pat 517 (518) (DB) ° AIR 1920 Pat 622 (625): 5 Pat L Jour 472 (FB) • AIR 1933 All 299 (301) (DB) ° AIR 1931 All 126 (128) (DB) • AIR 1919 All 453 (455): 40 All 558 (562) (DB) ° (1891) 13 All 290 (294, 295) • AIR 1929 Bom 63 (65): 53 Bom 178 (DB) ° (1900) 2 Bom LR 254 (255) (DB) • AIR 1918 Cal 526 (527) (DB) ° (1866) 6 Suth WR 187 (188, 189) (FB) • AIR 1915 Nag 65 (66): 11 Nag LR 189 • AIR 1965 Punj 367 (369): 67 Pun LR 634 (DB) • ILR (1959) Cut 602.

(c) where the direction is based on a misapprehension of fact or law. AIR 1956 Andhra 113 (113) • AIR 1944 Oudh 57 (59) (DB) • AIR 1939 Mad 654 (655) ° (1892) 16 Bom 676 (682) (DB) ° AIR 1930 Lah 234 (234) • AIR 1935 Mad 342 (344) (DB) ° AIR 1937 Oudh 282 (283): 13 Luck 171 (DB) • AIR 1925 Oudh 699 (699, 700) (DB).

(4) It is open to the appellate Court to come to a different conclusion on the facts on which the Court below exercised its discretion, and interfere with the order for costs made by the Court below. AIR 1953 Mad 833 (833) (DB).

(5) Discretion as to costs exercised reasonably — Appellate Court will not interfere. AIR 1949 Bom 277 (292): ILR (1950) Bom 1 (DB) • AIR 1958 Mad 515 (515) • AIR 1957 Pat 79 (81) • AIR 1946 Cal 249 (258): ILR (1944) 2 Cal 487 (DB) • (1946) 50 Cal WN 296 (299) (DB) ° AIR 1937 Mad 40 (44): ILR (1937) Mad 479 (DB) ° AIR 1936 Pat 68 (70) (DB) • AIR 1936 Pat 513 (520): 15 Pat 510 (DB) ° AIR 1963 Ker 348 (349): 1963 Ker LT 656 (DB). (Suit for money under single mortgage — Defendant not allowed costs as he was not 'agriculturist' on date of suit — Defendant becoming 'agriculturist' retrospectively from date of Kerala Agriculturists Debt Relief Act (31 of 1958) by virtue of amendment in 1961 — Defendant cannot claim interference in appeal with decree for costs on basis of legal fiction.) • AIR 1962 Cal 325 (338): (1963) 33 Com Cas 1 (DB) • AIR 1962 Cal 12 (19): ILR (1961) 2 Cal 558 (DB) • AIR 1962 Madh Pra 368 (369): 1962 Jab LJ 1128 (DB).

(6) As a general rule, it will be assumed that the Court has exercised its discretion properly. AIR 1914 Mad 418 (420) (DB) • (1900) 2 Bom LR 254 (260) • AIR 1959 Mad 82 (86) (DB).

(7) Appeal against substantive portion of decree and direction as to costs — Appeal against substantive portion abandoned — Appeal against direction as to costs can be heard. (1892) 16 Bom 241 (242) (DB) ° AIR 1930 Bom 445 (447) (DB).

(8) Where costs have been awarded jointly against A and B, and A acquiesces

Section 35 — Note 27 (contd.)
in the order, B cannot in an appeal question the validity of the order as to costs passed against A. AIR 1942 Oudh 279 (281) (DB).

(9) A second appeal will lie in respect of a direction as to costs where a second appeal will lie from the decree itself. AIR 1956 Andhra 113 (113) ° AIR 1940 Mad 620 (621) * AIR 1940 Mad 589 (589) ° AIR 1939 Mad 654 (655, 656) ° AIR 1919 Cal 947 (947) (DB) ° AIR 1919 All 214 (216); 41 All 254 (257, 258) (DB) * (1893) 15 All 333 (333, 334) ° AIR 1921 Cal 604 (605) (DB) ° (1903) 7 Cal WN 647 (648) * AIR 1917 Mad 876 (877) (DB) ° AIR 1929 Oudh 406 (412): 6 Luck 497 (FB) * (1903) 6 Oudh Cas 52 (55, 57) ° AIR 1920 Pat 622 (624): 5 Pat L Jour 472 (480, 489) (FB).

(10) The Court in second appeal will not examine the reasons or review the discretion exercised. (1912) 15 Ind Cas 429 (429, 430) (FB) (Low Bur) ° 1955 Andh WR 779 (783) * (1912) 13 Ind Cas 201 (203) (Cal) ° AIR 1915 Lah 378 (379): 1915 Pun Re No. 62 (DB).

(11) Where in second appeal the respondent by way of cross--objections urged that the lower Appellate Court has erred in not allowing the costs to respondent particularly when it had allowed the appeals and decreed the plaintiff's suit, in absence of any circumstance which would compel the Court to deprive the plaintiff of his cost, the second Appellate Court must interfere and allow costs to plaintiff accordingly. (1966) 2 Andh WR 46 (53): ILR (1967) Andh Pra 968.

(12) An appellate Court can, where necessary, pass an order of costs in favour of a person who was a party to the suit but not to the appeal. AIR 1942 Cal 257 (260): ILR (1941) 2 Cal 556 (DB) ° AIR 1939 Bom 271 (277): ILR (1939) Bom 396 (DB).

(13) Where an appeal against a summary dismissal of an appeal succeeds, costs allowed throughout to the successful appellant include the costs of the appeal which was summarily dismissed. AIR 1939 Bom 493 (494).

(14) Where direction in decree allows parties to bear their own costs, no appeal or cross-objection lies on question of costs. AIR 1965 All 228 (231): 1964 All LJ 1057.

(15) When an appeal is allowed mainly on ground not taken specifically by the defendant either in trial Court or in appeal until pointed out by Court, it will be proper to make costs easy in appellate Court as well as in trial Court. AIR 1960 All 420 (429): 1960 All LJ 193 (DB). (Parties directed to bear their own costs in the circumstances of the case.)

(16) Where in suit for ejectment and arrears of rent, trial Court dismissed relief for ejectment and decreed arrears of rent but the appellate Court decreed ejectment vacating decree in respect of arrears because they were deposited in Court, decree for costs passed in favour of plaintiff, plaintiff is entitled to costs. AIR 1953 All 218 (219): 1952 All LJ 727.

(17) As regards order of costs to be passed by appellate Court, provision is made in S. 107, O. 41, Rr. 33 and 35. Section 35 does not apply to order passed in appeal regarding costs. (1965) 6 Guj LR 474: ILR (1965) Guj 297 (299).

**28. Review.**— (1) A Court can, when a strong case is made out, review a direction as to costs. AIR 1922 Pat 1 (1, 2): 6 Pat L Jour 284 (DB) ° AIR 1926 Bom 367 (367) (DB).

(2) The taxation of the costs is in the discretion of the Taxing Master and the Courts will not interfere with it on review unless the taxation has proceeded on an erroneous principle. AIR 1942 Bom 90 (93): ILR (1941) Bom 606 (DB) * AIR 1926 Bom 18 (22, 23): 50 Bom 69 (DB) ° AIR 1921 Bom 87 (87): 45 Bom 1234 ° (1908) 32 Bom 262 (267).

(3) Where application for review on ground of mistake apparent on face of record is allowed, the mistake being one that is shared by Court, there will be no order as to costs. AIR 1967 Cal 518 (522).

**29. Revision.**— (1) A mistake committed by a Court on the point of costs is hardly a ground for revision. AIR 1951 Ajmer 98 (98) * AIR 1928 Lah 800 (803) ° AIR 1930 Mad 72 (74).

(2) The High Court will not interfere in revision unless it is satisfied that the discretion has been exercised arbitrarily. AIR 1956 Bhopal 1 (2) ° AIR 1953 Mad 12 (12) ° AIR 1952 Kutch 23 (24) * (1965) 67 Punj LR 499 ° ILR (1959) 9 Raj 1012.

(3) A revision will lie when a Court having no jurisdiction makes an order of amendment relating to costs. AIR 1955 Ajmer 25 (1) (25).

(4) Where fight raised by opposite party against an award is unjustified and it leads to unjustified expenditure by the applicant, the applicant should be given costs of revision and those incurred in Courts below. AIR 1963 All 602 (606): 1963 All LJ 147 (DB).

(5) Where a revision by plaintiff against payment of deficit court-fees is allowed and the Government is not represented in trial Court and does not support order of trial Court before Court of revision, no order as to costs should be passed against Government. AIR 1966 Goa 1 (8, 17) (FB).

(6) If a wrong principle has been adopted by the Court below in matter of awarding costs either under S. 35 or under O. 6, R. 17 or O. 9, R. 9 or O. 9, R. 13 Civil P. C. or any other provision, the revisional Court will be entitled to interfere as that will be procedural irregularity falling under S. 115 (c). AIR 1961 Madh Pra 169 (171): 1961 Jab LJ 931.

**Section 35 — Note 29 (contd.)**

(7) Where a revision petition arising from a sales tax case involving complicated question is allowed which otherwise but for Government Counsel and another counsel would have been dismissed as the case was argued by junior in absence of petitioner's lawyer, the petitioner is entitled to costs. AIR 1963 Mys 141 (147): 40 Mys LJ 774 (DB).

(8) A successful respondent to a revision petition must have his costs where the revision has been filed to delay the proceedings. 1965 Cur LJ 256: 67 Punj LR 488.

**30. Letters Patent Appeal** — (1) An order as to costs is a judgment within the meaning of Cl. 15 of the Letters Patent. AIR 1919 Mad 678 (678): 42 Mad 352 (FB). (Overruling (1907) 17 Mad L Jour 569 (FB).) ° AIR 1954 Bom 35 (37): ILR (1954) Bom 21 (DB).

(2) The question that no costs should have been awarded by the first appellate Court cannot be raised in Letters Patent Appeal when it was not urged before the Single Judge. AIR 1942 Pat 317 (319) (DB).

**30A. Appeal before Supreme Court.**— (1) Costs are essentially in the discretion of the courts. Orders disallowing costs to parties supported by good reasons are not interfered in appeal before Supreme Court AIR 1969 SC 255 (257): (1969) 1 SCJ 344 * AIR 1969 SC 493 (496): (1969) 1 SCJ 706.

(2) Where the appeal in Supreme Court is allowed but the appellant had not appeared before the High Court to assist the Court, there will be no order as to costs to the appeal in Supreme Court. AIR 1968 SC 438 (441): (1968) 1 SCR 536 * AIR 1969 SC 586 (590).

(3) Where controversy arises because of ambiguity in relevant provisions of certain Act, it is a fit case where the parties may be directed to bear their own costs throughout. AIR 1966 SC 1358 (1361): (1966) 1 SCR 695.

(4) There will be no order as to costs throughout where the main respondent in the Supreme Court and below was a Court itself, and ordinarily no costs are granted against a Court. AIR 1964 SC 489 (492): (1964) 1 SCR 362.

(5) Where in appeal with special leave before Supreme Court, there has been negligence in drawing up the statement of the case and an attempt has been made by several endorsements to support a claim for costs for drawing up the statement of the case as well as for settling the statement, in taxing the bill of costs as between advocate and client the Taxing Officer will not award any cost to the advocate. AIR 1963 SC 1182 (1184): (1962) Suppl 3 SCR 476.

(6) Where a manufacturer of a groundnut oil filed appeal by special leave against order of High Court rejecting his petition to review his claim for benefit of exemption under Madras General Sales Tax Act, and Turnover and Assessment Rules for certain years on basis of decision in AIR 1961 SC 412, and the Respondent State having failed in the objections raised the appeal of the manufacturer is allowed, there is no justification for the plea of Respondent State that costs should not allow events and that the appellant should be deprived of its right to costs. AIR 1964 SC 1372 (1379): (1964) 5 SCR 174.

**31. Right of contribution for costs payable under joint decree.**— (1) Where A and B join and sue C and the suit is dismissed with costs and such costs are paid by A alone, he will be prima facie entitled to claim contribution from B for his share of the costs. AIR 1923 All 67 (70, 71): 45 All 99 (DB) ° AIR 1924 Oudh 48 (49): 26 Oudh Cas 196 * AIR 1921 All 372 (373, 374): 43 All 77 (DB) ° (1911) 9 Ind Cas 1023 (1023) (Mad).

(2) Where A and B join together and bring a suit against C which is false to their own knowledge, and the suit is dismissed with costs, A and B are in the position of joint tort-feasors and there is no right of contribution between them. AIR 1923 All 67 (70, 71): 45 All 99 (DB) ° AIR 1920 Pat 185 (186) (DB).

(3) Where C sues A and B and the suit is decreed with costs, and A, after paying the whole costs sues B for contribution, there is no right of contribution between A and B unless there is an express contract or some equity between them, which gives a right of contribution. AIR 1923 All 67 (70, 71): 45 All 99 (DB) * (1912) 22 Mad L Jour 406 (408) (DB) ° (1910) 32 All 585 (588) (DB) ° AIR 1932 Mad 146 (147).

[See also AIR 1969 SC 552 (555): (1968) 2 SCWR 351.]

(4) Where the parties stand on an equal footing, the fact that one judgment-debtor has been compelled to pay the entire amount due, in itself may constitute an equity between them. AIR 1921 Oudh 128 (129): 24 Oudh Cas 148 (DB). (Overruling (1907) 10 Oudh Cas 108.) * AIR 1934 Cal 709 (710): 61 Cal 864 ° AIR 1930 Bom 506 (507): 55 Bom 94.

(5) Defences of A and B antagonistic — There is no right of contribution. AIR 1923 All 67 (70, 71): 45 All 99 (DB) ° AIR 1918 All 328 (329): 40 All 672 (DB) * (1897) 19 All 462 (464) (DB).

(6) A and B colluding or conspiring together and raising defences — A who has paid whole costs cannot compel contribution from B. (1897) 24 Cal 330 (334) (DB).

(7) Suit against A and B — A admitting claim and B contesting suit — Suit decreed with costs against both — B paying whole costs — B cannot sue A for contribution. AIR 1937 All 227 (228).

**32. Enforcement of order or decree as to costs.** — (1) A decree in a probate case directing that the costs of both the parties

Section 35 — Note 32 (contd.)
should be paid out of the estate cannot be executed by one party against the other; the proper course is to sell or mortgage a sufficient portion of the estate to pay off the costs of the parties. AIR 1914 Cal 827 (828).

(2) Where a District Judge while acting under a scheme of management of a charitable institution made an order as to costs, it was held that the order was not executable in a Civil Court. AIR 1942 Bom 97 (98) (DB).

(3) Where legal representatives of deceased appellant is brought on record on his application, and his application for stay of execution of decree against which appeal is pending, is dismissed by order simpliciter with direction to pay costs, the order is executable by applicant's arrest and detention in civil prison. (1965) 6 Guj LR 474: ILR (1965) Guj 297 (300, 301).

**33. Enforcement of solicitor's lien for costs.**— (1) A solicitor has a lien for his costs on any funds or sum of money reserved for, or which became payable to his client in the suit. AIR 1955 Bom 126 (131): ILR (1954) Bom 1432 (DB) ° AIR 1939 Bom 250 (252): ILR (1939) Bom 307 (DB) ° AIR 1924 Mad 793 (795) (DB) * AIR 1932 Bom 363 (365) ° AIR 1931 Cal 734 (734): 58 Cal 1034 (DB) * AIR 1931 Mad 183 (184).

(2) Where the amount reaches the hands of the client, there will be no question of declaring a lien thereon or giving a charging order thereon. In such an event the solicitor must obtain a pay order and execute the same against his client. AIR 1959 Bom 162 (166, 167): 60 Bom LR 999.

(3) The High Court has a summary jurisdiction over its suitors for the purpose of enforcing solicitor's lien. AIR 1955 Bom 126 (131, 132): ILR (1954) Bom 1432 (DB) ° (1909) 30 Bom 27 (33) ° (1891) 16 Bom 152 (157) ° AIR 1941 Cal 144 (146): ILR (1940) 2 Cal 102 * AIR 1920 Cal 122 (124): 46 Cal 1070 ° (1872) 9 Beng LR (App) 19 (19).

[But see (1894) 21 Cal 85 (91, 92) ° (1881) 7 Cal 401 (402) ° (1908) 35 Cal 171 (174).]

**34. Construction of decree as to costs.**— (1) An order by a Court returning the plaint for presentation to proper Court that "costs will be costs in the cause" cannot be construed as giving the defendant in the suit absolute right to the costs irrespective of the result of the subsequent proceedings. AIR 1946 Mad 345 (346).

(2) Where there are several defendants and there is no specific direction for separate costs only a single set of costs will be payable. (1878) 2 Cal L Rep 152 (153, 154) ° AIR 1924 Bom 317 (318): 48 Bom 348 ° AIR 1935 Pat 41 (41, 42).

(3) Where costs are awarded against a number of defendants without indicating the proportion, the order is taken to mean that the defendants are jointly and severally liable. AIR 1955 Mad 721 (721) * AIR 1923 Pat 215 (216) (DB).

(4) Where a suit by a junior member of a Malabar sub-tarwad is simply "dismissed with costs" the natural inference is that the Court which passed the decree intended that the plaintiff alone should be made liable for the costs and not his tarwad. AIR 1956 Trav-Co 271 (272): ILR (1956) Trav-Co 873 (DB).

(5) A Court cannot import into the decree for costs anything which is not expressly or by necessary implication specified therein. AIR 1944 Bom 100 (102, 104): ILR (1944) Bom 12 ° AIR 1927 Cal 906 (907) * AIR 1930 Cal 465 (466): 57 Cal 469.

(6) Where a decree directs "the plaintiff to pay the costs of the defendant" the fact that the plaintiff was permitted to file the suit in forma pauperis and the fact that the Government waived the collection of court-fees from him are matters extraneous to the consideration of the question of construction of the decree. AIR 1949 Mad 789 (790).

(7) A final decree in a suit for mesne profits providing for payment of court-fee by the plaintiff implies that if the plaintiff pays the same the defendant would be liable for the same. AIR 1943 Mad 689 (689, 690).

(8) Where in an interlocutory application or in an appeal on a preliminary question the order is that the costs shall be costs in the cause, then such costs follow the general costs of the action. AIR 1956 Pepsu 103 (104): ILR (1956) Patiala 121.

(9) Where A obtained a decree with costs against B and on appeal B was allowed to withdraw from the appeal and was dismissed from the suit, no order being made as to the costs of the appeal, it was held that the order of the Appellate Court was not to absolve the defendant from his liability for costs under the decree of the first Court. (1912) 16 Ind Cas 381 (382) (DB) (Cal) * AIR 1923 Bom 206 (206, 207): 47 Bom 559 (562).

(10) If a judgment includes costs, it implies costs allowed by the rules. If costs which are not permissible under the rules are included in the decree it is the duty of the Court to correct the decree so as to make it in conformity with the judgment. AIR 1935 Cal 619 (620): 63 Cal 181 (DB) ° AIR 1966 Orissa 225 (227): (1965) 7 OJD 275 ° AIR 1962 Pat 36 (38, 39): 1961 BLJR 530. (As duty to amend decree primarily rests with Court even in the absence of application from interested party, plea of laches or plea of failure of applicant to object at the time of preparation of decree is not available against his application. AIR 1932 All 337 and AIR 1945 Pat 184, Rel. on.)

(11) Where judgment of Supreme Court awarded costs of appeal in High Court,

**35A[aa]. Compensatory costs in respect of false or vexatious claims or defences.**— (1) If in any suit or other proceeding, [a][including an execution proceeding but excluding an appeal], any party objects to the claim or defence on the ground that the claim or defence or any part of it is, as against the objector, false or vexatious to the knowledge of the party by whom it has been put forward, and if thereafter, as against the objector, such claim or defence is disallowed, abandoned or withdrawn in whole or in part, the Court, [a][if it so thinks fit], may, after recording its reasons for holding such claim or defence to be false or vexatious, make an order for the payment to the objector by the party by whom such claim or defence has been put forward, of costs by way of compensation.

(2) No Court shall make any such order for the payment of an amount exceeding one thousand rupees or exceeding the limits of its pecuniary jurisdiction, whichever amount is less:

Provided that where the pecuniary limits of the jurisdiction of any Court exercising the jurisdiction of a Court of Small Causes under the Provincial Small

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**Section 35 — Note 34 (contd.)**

costs of application for leave to appeal are also included therein. (1959) 63 Cal WN 403 (403) (DB).

(12) The expression 'the contesting defendant shall pay the costs of plaintiff' in a judgment in a pauper suit should be assigned its natural meaning as entitling the plaintiff to recover from the defendant full costs of the suit, including the court-fee payable on the plaint. Court's direction to plaintiff to pay Court-fee to Government will not prevent Court from requiring defendant to pay full costs of plaintiff including court-fee. AIR 1962 Mys 201 (203): 40 Mys LJ 295.

(13) Expression "expenses of commission" denotes only fees paid to Commissioner and other expenses directly incidental to the issue and execution of commission and does not include costs of opponent's pleader or expenses which the opponent himself may have to incur to go to the place where commission is to examine witness. 1969 Jab LJ 304: 1968 MPLJ 425 (DB).

(14) Where an appellate decree confirms the decision of the trial Court but merely makes a variation in regard to the order as to costs either in favour of a party or the other, such a variation will not affect the character of the decree which in law amounts to a decree of affirmance. AIR 1961 SC 1795 (1804): (1962) 2 SCR 452.

**35. Writ proceedings.** — (1) No doubt the rule that costs should follow the event would apply even to proceedings under the writ jurisdiction unless of course some special reason can be shown for making an order otherwise. In a mandamus proceeding it is not proper that a decision on question of damages which the petitioner may eventually suffer should be given. AIR 1959 All 226 (229, 230): 1958 All LJ 879 (DB) * AIR 1965 Cal 281 (282): 68 Cal WN 1028. (Suspension of Government employee from service — Allegations found untenable — Reinstatement — Proceedings under Art. 226 by employee for direction to pay arrears of salary — Writ allowed — Employee entitled to cast.) * AIR 1965 Punj 379 (380): 67 Pun LR 319. (Where petitioner was a poor lady and was holding a minor job of which she had been deprived.)

(2) When in petition under Art. 226, new law point is raised by respondent and the petition is dismissed on that, peitioner cannot be saddled with costs. (1966) 68 Pun LR 888.

## SECTION 35A — SYNOPSIS

1. Scope and object.
2. "Party by whom such claim or defence has been put forward."
3. Appeal.
4. Revision.
5. Limitation.

## TOPIC INDICATOR

Writ Petitions — See Note 1.
Proceedings before Election Tribunal — See Note 1.
Proceedings under Provincial Insolvency Act — See Note 1.

**1. Scope and object.**— (1) Section 35A is intended to deal with cases for which the exercise of the ordinary discretion of the Court under S. 35 would not afford a sufficient compensation. AIR 1953 Mad 583 (587): ILR (1953) Mad 722 (DB) * 1963 Ker LT 558.

(2) The costs that can be awarded under this section are compensatory and not penal. (1949) ILR (1949) All 135 (143) * AIR 1967 Mys 65 (66): (1965) 2 Mys LJ 93 * AIR 1966 Andh Pra 179 (180): (1964) 2 Andh WR 400. (No specific finding by court that claim was false or vexatious to the knowledge of plaintiff — Appellate Court not entitled to exercise discretion vested under S. 35A and award costs.)

(3) The claim must be false or vexatious to the knowledge of the party raising it and it must have been disallowed, withdrawn or abandoned. AIR 1953 Mad 583 (587): ILR (1953) Mad 722 (DB) * AIR 1952 Mad 609 (613) (DB) * AIR 1947 All 147 (149): ILR (1947) All 186 (DB) * AIR 1936 Oudh 67 (72): 11 Luck 486 (DB) * AIR 1937 Pat 477 (479) * AIR 1930 Nag 133 (134) * AIR 1959 Andh Pra 204 (206): 1959 Cri LJ 428:

Cause Courts Act, 1887, [b][or under a corresponding law in force in [c][any part of India to which the said Act does not extend]] and not being a Court constituted [d][under such Act or law], are less than two hundred and fifty rupees, the High Court may empower such Court to award as costs under this section any amount not exceeding two hundred and fifty rupees and not exceeding those limits by more than one hundred rupees:

Provided, further, that the High Court may limit the amount which any Court or class of Courts is empowered to award as costs under this section.

(3) No person against whom an order has been made under this section shall, by reason thereof, be exempted from any criminal liability in respect of any claim or defence made by him.

(4) The amount of any compensation awarded under this section in respect of a false or vexatious claim or defence shall be taken into account in any subsequent suit for damages or compensation in respect of such claim or defence.

[aa] Inserted by the Civil Procedure (Amendment) Act, 1922 (IX of 1922), Sec. 2, which under S. 1 (2) thereof may be brought into force in any State by the State Government on any specified date. It has become operative throughout the territories to which the Code extends from the date referred to in S. 1 (2) of that Act—See Sec. 19 of the Code of Civil Procedure (Amendment) Act, 1951 (II of 1951).

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**Section 35-A — Note 1 (contd.)**

ILR (1957) Andh Pra 399 (DB) ° 1963 Ker LT 558 ° (1969) 1 Andh WR 307. (Awarding costs against witnesses is something foreign to the scope of S. 35-A.)

(4) The awarding of compensatory costs under this section is not obligatory. The Court may refuse to grant compensatory costs in the circumstances of a case. AIR 1946 Cal 163 (167): ILR (1944) 2 Cal 346 * AIR 1938 All 266 (271): ILR (1938) All 370 (DB) ° 64 Bom LR 29: 1962 Nag LJ 118.

(5) The past activities of the plaintiff in filing suits and his propensity to file suits for getting properties, should not be considered in awarding costs under this section. AIR 1952 Mad 609 (613) (DB).

(6) The highest altruistic motives would be no defence against a claim under S. 35-A. (1950) 54 Cal WN (2 D R) 71 (88) (DB).

(7) An order under this section has to be passed after recording reasons for holding the claim or defence to be false or vexatious. AIR 1943 Mad 286 (288).

(8) The High Court has no power to award compensatory costs in respect of revision proceedings. (1938) 42 Cal WN 658 (659).

(9) Where an application for transfer of a case under S. 24 is found to be frivolous, the opposite party must be allowed substantial costs. AIR 1945 Oudh 233 (235): 20 Luck 382.

(10) Application for writ of certiorari — Application for temporary injunction pending grant of writ — Suppression of material facts in application — Exemplary costs awarded. AIR 1953 Trav-Co 26 (31): ILR (1951) Trav-Co 667.

(11) The section does not apply to proceedings under the C. P. and Berar House Rent Control Order. ILR (1954) Nag 567 (570) (DB).

(12) Section 35A applies to proceedings under the Provincial Insolvency Act (1920). AIR 1935 Nag 207 (208): 31 Nag LR 365.

(13) In mandamus proceedings it is not proper that a decision on the question of damages which the petitioner may eventually suffer should be given. AIR 1959 All 226 (229): 1958 All LJ 879 (DB).

(14) Election Tribunal has no jurisdiction to award costs. 1961 All LJ 368 (369). (Case under S. 12 (c) U. P. Panchayat Raj Act, 26 of 1947.) ° AIR 1965 Mys 62 (64): (1964) 1 Mys LJ 357 (DB). (Case under S. 13 (2) of Mysore Village Panchayats and Local Boards Act, 1959.)

(15) Where claim of plaintiff is based upon injury to property attached under S. 145, Cr. P. C. and there is no claim for damages for malicious prosecution, the suit is maintainable, though there is provision for award of cost under S. 145, Cr. P. C. AIR 1968 Pat 248 (252, 253) (DB).

(16) Court exercising the jurisdiction of Court of Small Causes has the power under sub-sec. (2) of Sec. 35-A to award compensatory costs within the limits of its own pecuniary jurisdiction and so long as that power is exercised within its own limits, no question of empowering by the High Court arises. ('55) 8 Sau LR 202 (204). (AIR 1926 All 554, Dissented from.)

**2. "Party by whom such claim or defence has been put forward."**— (1) The section empowers a Court to pass an order for compensatory costs against the party by whom the false claim has been put forward. The next friend of a minor plaintiff can, therefore, be made liable for such costs. AIR 1944 Mad 81 (81).

(2) Where one of the defendants is the real actor or instigator behind the plaintiff's

[a] Substituted by the Code of Civil Procedure (Amendment) Act, 1956 (66 of 1956), Sec. 4 (1-1-1957).
[b] Inserted by the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), S. 7 (1-4-1951).
[c] Substituted for "a Part B State" by A.L.O. (No. 2), 1956 (1-11-1956).
[d] Substituted for "under that Act" by the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), S. 7 (1-4-1951).

### STATE AMENDMENT

**Uttar Pradesh**

In Section 35-A, for the existing sub-section (1), the following shall be substituted:—

"(1) If in any suit or other proceeding, including proceedings in execution, but not being an appeal or revision, the Court finds that the claim or defence or any part thereof is false or vexatious to the knowledge of the party by whom it has been put forward and if such claim or defence or such part is disallowed, abandoned or withdrawn in whole or in part, the Court may, after recording its reasons for holding such claim or defence to be false or vexatious, make an order for the payment to the successful party of costs by way of compensation irrespective of the decision on other issues in the case."—U. P. Act 24 of 1954, Sec. 2 and Schedule, Item 5, Entry 1 (30-11-1954).

## PART II
## EXECUTION
### GENERAL

**36. Application to orders.**—The provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders.[a]

[Compare 1882, S. 649, para. 1.]

[a] Section 36 is extended to Amindivi Islands which now form part of the Union Territory of Laccadive, Minicoy and Amindivi Islands, to which the Code is extended by Reg. 8 of 1965 and to the East Godavari, West Godavari and Visakhapatnam Agencies which are now districts in the State of Andhra Pradesh : See Section 1 (3), Proviso.

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**Section 35A — Note 2 (contd.)**

vexatious claim, the Court can pass an order for compensatory costs both against the plaintiff and the defendant. AIR 1945 Mad 84 (85): ILR (1945) Mad 407 (DB).

**3. Appeal.**— (1) There is no right of appeal against an order refusing to grant compensatory costs. ('54) AIR 1954 Nag 192 (192): ILR (1954) Nag 280.

(2) An order under this section passed by a Small Cause Court is appealable to the District Judge under S. 24 of the Provincial Small Cause Courts Act. AIR 1926 All 554 (555).

(3) Grant of interest pendente lite—Exercise of discretion by lower Court in favour of contract rate — No interference in appeal — Lower Court is justified in taking into consideration the filing of vexatious defences taken while awarding interest. 1963 Jab LJ 779 (781) (DB).

**4. Revision.**— (1) An order for compensatory costs in a case to which this section does not apply is one without jurisdiction and can be set aside in revision. AIR 1937 Pat 477 (479).

(2) A revisional Court will not interfere with an order under the section unless the Court has proceeded on some perverse or wrong consideration or has disregarded the ordinary rule of law relating to the awarding of costs. AIR 1954 Nag 192 (192): ILR (1954) Nag 280 * AIR 1951 Mad 655 (655).

(3) In the case of an order under this section passed by a Court of Small Causes, even though an appeal lies to the District Judge under S. 24 of the Provincial Small Cause Courts Act, the High Court may entertain a revision application under S. 25. (1955) 8 Sau LR 202 (204) * 1963 Ker LT 558. (AIR 1926 All 554 and AIR 1933 Oudh 477, Rel. on.)

**5. Limitation.**— (1) An order for payment of special costs, when it forms part of a decree, is entitled to the benefit of Art. 182 (2) of the Limitation Act of 1908. AIR 1954 Nag 272 (274): ILR (1954) Nag 418 (DB).

### SECTION 36 — SYNOPSIS

1. Principle and scope.
2. "Execution," meaning of.
3. "Orders."
4. What decrees may be executed. See S. 38.
5. Who may apply for execution. See O. 21, R. 11.
6. Against whom execution may be had.— See O. 21, R. 11.

## TOPIC INDICATOR

Amended decrees and forms — See S. 38.
Executability of orders like decrees does not make the former decrees — See Note 1.
Execution of order — See Note 3.
Mesne profits, decree or order for — See Section 38.
Mode of execution — See Note 2.
Orders under other enactments — See Note 3.

**1. Principle and scope.**—(1) The principle underlying the section is that every Court has an inherent power to have its orders carried out. AIR 1956 Madh B 229 (230) • (1907) 34 Cal 860 (862) (DB) * AIR 1921 Pat 152 (154): 6 Pat L Jour 304 (DB) ° (1910) 6 Ind Cas 386 (387) (DB) (Cal).

(2) The fact that the provisions applicable for the execution of decrees apply to the execution of orders, does not make such orders "decrees" for all purposes. Where an order is itself not appealable an order passed in execution of that order cannot also be appealable. Where a non-appealable order, for costs, is sought to be executed and on objection being raised thereto the matter is decided under S. 47, such decision will not be appealable as a "decree". AIR 1919 Mad 23 (23) (DB).

(3) An order dismissing an application for execution of an order for costs would be one under Section 47. AIR 1925 Cal 57 (58, 59): 52 Cal 269 (DB).

[But see AIR 1915 Mad 1222 (1223) (DB) * AIR 1947 Cal 18 (19): ILR (1946) 2 Cal 444 (DB).]

(4) By virtue of Section 36, Order 21, Rule 35 (2) applies to an order for joint possession. AIR 1966 SC 470 (475): (1966) 1 SCR 628.

**2. "Execution", meaning of.**—(1) Execution is the enforcement of decrees and orders by process of Court, so as to enable the judgment-creditor to recover the fruits of the judgments. (1882) 9 Cal 773 (776, 777) (DB).

(2) The rateable distribution of the proceeds of an execution sale among a number of rival decree-holders is a mode of execution and hence Section 73 applies to the execution of orders by virtue of this section. AIR 1954 Cal 6 (7): ILR (1955) 1 Cal 148 ° AIR 1941 Lah 273 (273, 274): ILR (1942) Lah 460 (DB).

(3) The functions of an executing Court are judicial and not merely ministerial. (1870) 7 Bom HCR (AC) 37 (41) (DB).

**3. "Orders."**—(1) This section is applicable to all orders which can be included in the definition of the term "order" in Section 2, Clause (14). AIR 1956 Madh B 229 (230) ° AIR 1954 Cal 6 (7) * (1949) 53 Cal WN 310 (317) ° AIR 1915 Mad 1222 (1223) (DB) * AIR 1934 Bom 452 (457): 59 Bom 10 ° AIR 1925 Cal 57 (58, 59): 52 Cal 269 (DB). (Dissenting from 10 Cal WN 234.) * AIR 1936 Lah 696 (698) (DB) ° AIR 1919 Mad 894 (895) (DB) ° AIR 1925 Rang 189 (191): 2 Rang 673 (DB) ° AIR 1926 Sind 119 (120): 20 Sind LR 216.

[But see AIR 1956 All 79 (80) (DB). (AIR 1934 Bom 452: 59 Bom 10 and ('49) 53 Cal WN 310, Dissented from.)]

(2) Section is not limited to orders made under the Code. AIR 1934 Bom 452 (457): 59 Bom 10.

(3) In view of Section 36, orders of the Court executing award under the Bombay Agricultural Debtors' Relief Act (28 of 1947) holding that application for execution is not maintainable, or that satisfaction alleged is not proved, fall under Section 47, Civil P. C. ((1957) 59 Bom LR 610, Overruled; (1957) 59 Bom LR 689, Rel. on.) ° AIR 1969 Bom 74 (76): 70 Bom LR 438 (DB).

(4) A payment order under Section 186 of the Companies Act, 1913, is to be regarded as equivalent to a decree and enforceable as such by reason of Section 199 of that Act. AIR 1941 Lah 273 (274): ILR (1942) Lah 460 (DB) ° AIR 1918 Lah 211 (212): 1918 Pun Re No. 92.

(5) An order under Section 34, Cl. (e) of the Guardians and Wards Act is not executable as a decree. AIR 1918 Mad 389 (391): 41 Mad 241 (DB).

(6) An order under the Guardians and Wards Act directing the guardian to bring in the money which is due from him upon a proper scrutiny of account is not executable as a decree, since the Guardians and Wards Act provides a special procedure of enforcing orders passed under it by proceeding under Section 45 of that Act. AIR 1942 Pat 422 (424, 425): 21 Pat 223 (DB).

[But see AIR 1925 All 457 (457).]

(7) An order for costs passed by a District Judge not in his judicial capacity but as a persona designata under a scheme framed by a Court for regulating and managing a charitable institution is not capable of execution under this Code. AIR 1942 Bom 97 (98) (DB).

(8) An order by the Court after the issue of a commission, that a further sum should be deposited to cover the expenses of a commission cannot be enforced as a decree. AIR 1947 Sind 1 (2): ILR (1946) Kar 349 (FB).

(9) An order for payment of the expenses of the commission in a partition suit is an "order" within Section 2 (14) and is executable under this section. AIR 1957 Pat 501 (502) (DB). (AIR 1947 Sind 1, Not Followed.)

(10) Execution of pre-emption orders for delivery of possession under Section 24 (8) of the West Bengal Non-Agricultural Tenancy Act, 20 of 1949, will be levied in the Civil Court and in accordance with the Code of Civil Procedure. AIR 1957 Cal 335 (335) (DB).

(11) As to procedure for punishing for disobedience of order of temporary injunction under Order 39, Rule 1, see Order 39, Rule 1, Order 39, Rule 2 and the follow-

**37.**[a] **Definition of Court which passed a decree.**—The expression "Court which passed a decree," or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include,—

(a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

(b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

[1882, S. 649, para. 2; 1877, S. 649; 1859, S. 296.]

[a] Section 37 is extended to Amindivi Islands which now form part of the Union Territory of Laccadive, Minicoy & Amindivi Islands, to which the whole Code is extended by Reg. 8 of 1965 [1-10-1967], and to the East Godavari, West Godavari and Visakhapatnam Agencies in the State of Andhra Pradesh, see Proviso to Sec. 1 (3). With effect from 1-11-1956 jurisdiction of Kerala High Court has been extended to the Union Territory of Laccadive, Minicoy and Amindivi Islands, see Sec. 60 of Act 37 of 1956.

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**Section 36 — Note 3 (contd.)**

ing cases. ILR (1952) 1 Cal 21 (25) * AIR 1961 Andh Pra 482 (483). (Disobedience of mandatory injunction — O. 21, R. 32 (1) applies.) ° AIR 1963 Andh Pra 136: (1962) 2 Andh WR 25 (DB).) * AIR 1969 Guj 28 (DB).

**4. What decrees may be executed.**—See Section 38.

**5. Who may apply for execution.**—See Order 21, Rule 11.

**6. Against whom execution may be had.**—See Order 21, Rule 11.

## SECTION 37 — SYNOPSIS

**1. Scope and object.**
**2. Decree by appellate Court.**
**3. Court of first instance ceasing to exist.**
**4. Court of first instance ceasing to have jurisdiction to execute decree.**

## TOPIC INDICATOR

"Court which passed a decree" — See Note 1.
Decree for money — See Note 4.
"Deemed to include" — See Note 1.
Distribution of business by District Judge — See Note 4.
Transfer of area in which the judgment-debtor lives — See Note 4.
Special class of persons — Jurisdiction over — See Note 4.

**1. Scope and object.**—(1) Under S. 38 a decree may be executed either by the Court which passed the decree or by the Court to which it is sent for execution. A decree cannot ordinarily be executed by any other Court. AIR 1952 Pat 4 (7): 30 Pat 1135 (DB) * AIR 1958 Andh Pra 763 (765) (DB).

(2) The expression "Court which passed the decree" includes the Courts mentioned in Clauses (a) and (b). The classification of Civil Courts under the Civil Courts Acts (e. g. S. 3 of Bengal, Agra and Assam Civil Courts Act) is hardly a relevant consideration. AIR 1952 Pat 4 (7): 30 Pat 1135 (DB) * 1965 BLJR 628: ILR 44 Pat 742.

(3) The object of the section is to avoid the cumbrous procedure which would result if the Court which actually passed the decree be held to be the only Court which could execute it. (1908) 35 Cal 974 (978) (DB).

[See also Madh B LJ 1954 HCR 1571 (1575).]

(4) The definition is only an extension of the literal meaning of the expression and it does not exclude the Court which actually passed the decree. AIR 1920 Mad 427 (433): 42 Mad 821 (FB) * AIR 1932 Mad 260 (262) ° (1901) 28 Cal 238 (241) (DB).

[But see AIR 1942 Cal 321 (322, 323): ILR (1942) 1 Cal 289 (DB).]

(5) The following Courts fall under the definition:

(1) The Court of first instance which actually passed the decree.
(2) The Court of first instance in the case of appellate decrees.
(3) Where the Court of first instance has ceased to exist, the Court which would have jurisdiction to try the suit at the time of execution.
(4) Where the Court of first instance has ceased to have jurisdiction to execute the decree, the Court which, at the time of execution, would have had jurisdiction to try the suit. Madh B LJ 1954 HCR 1571 (1575) * Madh B LJ 1955 HCR 1597 (1599, 1600) (DB).

(6) Registrar of Co-operative Societies who passes an award in a dispute between a Co-operative Society and a member thereof is not a Court passing a decree. AIR 1952 Mys 105 (106): ILR (1952) Mys 253 (DB).

(7) Where the Privy Council had passed the decree on appeal a certificate under

**Section 37 — Note 1 (contd.)**

Section 10 of Bombay Hereditary Offices Act (1874) had to be addressed to the Privy Council as a "court which passed the decree". Where, however, the jurisdiction of the Privy Council was abolished by constitutional changes it was now the Supreme Court which passed the decree. AIR 1960 SC 808 (810): (1960) 3 SCR 221.

(8) Ex parte decree passed by Gwalior Court on 18-11-1948 against resident of Allahabad — Decree is nullity as passed by a 'foreign court' — Decree transferred to Court at Allahabad on 14-9-1951 — Court held could not do so, nor Court at Allahabad could execute decree. AIR 1962 SC 1737 (1739): (1963) 2 SCR 577.

(9) A combined reading of Ss. 37 and 38 indicates that the Court of first instance is the Court which passed the decree under Section 38 and an application for execution of the decree can be filed therein. AIR 1965 SC 1477 (1485): (1965) 2 SCR 436.

(10) The expression 'jurisdiction to execute' as used in Section 37 (b) does not mean to exclude the competency of Court to entertain an application for execution of the decree. A Court which passed the decree would still have jurisdiction to entertain the application. 1968 All LJ 669 (672) (DB).

(11) There is a distinction between jurisdiction to entertain an application for execution and jurisdiction to execute the decree. The object of Section 37 was to give greater facilities to the decree-holder for executing his decree than were allowed to him under Section 38. Section 39 deals with the transfer of decrees. Now an application for execution can always be entertained by the Court which passed the decree. This is provided for by Section 38, but under Section 37 the decree-holder may in addition present his application to another Court if the original Court cannot execute the decree. AIR 1959 Punj 350 (351, 352): ILR (1958) Punj 378.

(12) A decree passed by Court A and being executed by Court B, was, due to the abolition of Court B, transferred to Court C for execution. However as court C could not have tried the suit which was decreed by the Court A, Court C could not be regarded as a 'Court' which passed the decree within the meaning of section 37. AIR 1963 Raj 4 (5): 1962 Raj LW 353. (AIR 1934 Cal 4, Dissented from.)

(13) If the executing court is the transferee court, it would have jurisdiction only to execute the decree. It would not acquire the entire jurisdiction of the Court which passed the decree", as the transferee court is not the court which passed the decree within the meaning of Section 37. AIR 1968 Orissa 140 (143): 34 Cut LT 560.

**2. Decree by Appellate Court.**—(1) Where a decree was passed in second appeal, it is the Court of first instance that is to execute the decree. AIR 1956 Madh B 229 (230) ° AIR 1957 Trav-Co 69 (72): ILR (1956) Trav-Co 1314 (FB) ° AIR 1957 Andh Pra 403 (405, 406) * AIR 1939 Mad 483 (484): ILR (1939) Mad 520 (DB) ° AIR 1936 Oudh 5 (6): 11 Luck 511 (DB).

[See also AIR 1963 Andh Pra 452 (454, 455): (1963) 1 Andh WR 261 (DB). (Appellate Court cannot entertain execution petition.) ° 1961 All LJ 597 (DB). (Case under Section 4, U. P. Zamindari Debt Reduction Act, 15 of 1953).]

(2) An appellate decree of the Privy Council was to be executed only by the Court of first instance and not by the High Court to which the decree was transmitted by the Privy Council. AIR 1914 Mad 222 (224): 38 Mad 832 (DB).

(3) An order for costs, passed by the High Court in refusing leave to appeal to the Privy Council, was not passed by that Court in appeal but in a special jurisdiction. The trial Court, therefore, had no jurisdiction, under this section, to execute that order unless it was transferred to it by the High Court for execution. AIR 1944 Cal 301 (301).

[See also AIR 1960 Mad 54 (54, 55): (1959) 2 Mad LJ 422. (Preliminary decree modified in cross objection in appeal in favour of decree-holder by allowing him costs — In execution, decree-holder can claim such costs.)]

(4) Where a decree is transferred for execution to another court, and after the transfer the decree is modified or affirmed by the appellate Court, the appellate decree can be executed by the transferee Court, which is in seisin of the execution and exercises all the powers of the Court that passed the decree. AIR 1957 Andh Pra 403 (406) ° AIR 1963 Madh Pra 154 (154, 155): 1961 Jab LJ 1270. (The transferee Court has jurisdiction to allow the amendment of the execution application to give effect to the appellate decree. It is not necessary for the decree-holder to apply again to the transferor Court to amend the decree and then send a fresh certificate of the amended decree to the transferee Court.)

(5) The words 'Appellate Jurisdiction' in Section 37 (a) are comprehensive enough to include revisional jurisdiction. Hence, where a decree for costs is passed by the High Court in revision, the Court of first instance, viz., the Munsiff's Court and not the High Court would have jurisdiction to execute that decree in view of Section 38 read with Section 37 (a). AIR 1959 All 92 (92, 93): 1958 All LJ 702. (AIR 1944 Cal 301 (1), Disting.; 8 Mad LJ 231 (FB), Rel. on.

**3. Court of first instance ceasing to exist.**—(1) A Court ceases to exist if it is abolished. Madh B LJ 1954 HCR 1571 (1575). (Special Court of the Panchayat Board ceased to exist when Kanun Panchayat Board, Chamber of Commerce, Ratlam was repealed.) * (1881) 6 Cal 513 (518) (DB) °

**Section 37 — Note 3 (contd.)**

(1867) 7 Suth WR 124 (125) (DB).

(2) Court which has been abolished can be revived and on such revival becomes again the same Court which passed the decree, and cannot be taken to have ceased to exist. AIR 1926 Pat 209 (210): 4 Pat 688 (DB) ° AIR 1953 All 201 (203).

(3) If a special jurisdiction vested in a Court has been withdrawn after decree it ceases to exist. See AIR 1919 Pat 237 (238).

(4) A Court vested with the powers of a Court of Small Causes ceases to exist as a Court of Small Causes when those powers are withdrawn. (1896) 19 Mad 445 (447, 448) (DB).

(5) A Court does not cease to exist for the purposes of this section in the following cases:

(a) By ceasing to have local jurisdiction after decree. (1881) 6 Cal 513 (515) (DB) ° AIR 1957 Trav-Co 69 (72): ILR (1956) Trav-Co 1314 (FB). ((1901) 28 Cal 238 and (1908) 35 Cal 974, Dissented from.)

[But see AIR 1944 Sind 173 (175, 176): ILR (1944) Kar 33 (DB) ° AIR 1943 Pat 423 (424) (DB).]

(b) By the pecuniary limits of its jurisdiction being altered. AIR 1950 Assam 115 (116): ILR (1950) 2 Assam 132 (DB) ° AIR 1916 Pat 3 (3): 2 Pat L Jour 113 (DB). * AIR 1960 All 730 (731, 732): 1960 All LJ 220.

(c) By getting a different designation though with the same local and pecuniary jurisdiction. AIR 1940 Lah 97 (98) ° AIR 1915 Oudh 170 (170) ° ILR (1966) Andh Pra 1135 (1143) (DB).

(d) By a different officer presiding over it. AIR 1926 Pat 209 (210): 4 Pat 688 (DB).

(e) By a removal of its headquarters to another place within the same jurisdiction. (1881) 6 Cal 513 (515, 519) (DB).

**4. Court of first instance ceasing to have jurisdiction to execute decree.**—(1) Where once a Court has jurisdiction to entertain a suit it does not ordinarily lose such jurisdiction by reason of subsequent events. AIR 1950 Assam 115 (116): ILR (1950) 2 Assam 132 (DB) * AIR 1914 Bom 180 (181): 38 Bom 662 (DB) ° AIR 1933 Cal 684 (687) (DB) ° AIR 1933 Lah 687 (687): 14 Lah 457 * AIR 1916 Pat 3 (3): 2 Pat L Jour 113.

(2) Court does not cease to have jurisdiction by the transfer to a different Court by the State Government of the area in which the property in respect of which the decree was passed is situated or the area in which the judgment-debtor lives, or the transfer by the District Judge of the business of the Court to another Court. (1907) 30 Mad 537 (539) (DB) ° AIR 1957 Trav-Co 69 (72, 73, 75, 76): ILR (1956) Trav-Co 1314 (FB). (Observations of Garth, C. J. to the contrary (1881) 6 Cal 513 held obiter; (1901) 28 Cal 238 and (1908) 35 Cal 974, Dissented from.) ° (1898) 25 Cal 315 (316, 319) (DB) * AIR 1921 Pat 152 (154): 6 Pat L Jour 304 (DB) ° AIR 1964 Ker 206 (207, 208, 209) (DB) ° AIR 1964 Mys 34 (35, 36) (DB). (Observation of Garth, C. J. in ILR 6 Cal 513, held obiter and Diss. from.; AIR 1959 Punj 350 and ILR 28 Cal 238 and ILR 35 Cal 974 and AIR 1944 Sind 173, Dissented from.)

[See also AIR 1942 Cal 321 (323): ILR (1942) 1 Cal 289 (DB).]

(3) Where the Political Agent at Kolhapur who had jurisdiction only over Sirdars passed a decree against a Sirdar and the latter thereafter died leaving heirs who were not Sirdars, it was held that the Political Agent's Court "ceased to have jurisdiction to execute" the decree. (1893) 17 Bom 162 (164) (DB).

(4) It was held on a consideration of the Government notifications that on the Court of the Subordinate Judge of B becoming a Court within the jurisdiction of the newly constituted Province of Orissa, it ceased to have jurisdiction to execute a decree passed by it while it had been in the Presidency of Madras but that the Court did not cease to exist. AIR 1939 Mad 463 (464) (DB) * AIR 1943 Pat 423 (424) (DB).

(5) The expression "ceased to have jurisdiction to execute" is intended to meet such a case as where an Additional or Subordinate Judge attached to more than one district, having passed a decree in one district leaves such district and sits in another district. Under the provisions of Section 15 of the Bengal Civil Courts Act, such Additional or Subordinate Judge is a Court. Where such a Court is sitting in a district other than that in which the decree was passed it has not ceased to exist, but it has ceased to have jurisdiction to execute that particular decree. (1881) 6 Cal 513 (519) (DB).

(6) Where a decree is passed in respect of a certain property and subsequent thereto the area within which such property is situate is transferred to the jurisdiction of another Court, the Court which actually passed the decree nevertheless does not cease to have jurisdiction to execute it. The Court to whose jurisdiction the subject-matter of the decree is transferred does not become the Court "which passed the decree". AIR 1956 SC 87 (93): 1955-2 SCR 938 ° AIR 1957 Trav-Co 69 (72, 73, 74): ILR (1956) Trav-Co 1314 (FB) ° 1950 Ker L Tim 474 (476) (DB) * AIR 1942 Cal 321 (323): ILR (1942) 1 Cal 289 (DB) ° AIR 1925 Bom 414 (414) (DB) ° AIR 1934 Pat 192 (194): 13 Pat 21 (DB) * AIR 1931 Cal 312 (316, 317, 318): 58 Cal 832 (DB) ° (1881) 6 Cal 513 (515, 519) (DB) ° AIR 1935 Mad 935 (935) * AIR 1920 Mad 427 (433): 42 Mad 821 (FB). (AIR 1914 Mad 162: 37 Mad 462; AIR 1915 Mad 602; AIR 1918 Mad 401; AIR 1917 Mad 257,

Section 37 — Note 4 (contd.)
Overruled in so far as they held that the original Court cannot even entertain an application for execution.) • (1928) 107 Ind Cas 195 (197) (Nag) • (1906) 9 Oudh Cas 281 (283) • AIR 1968 Mad 99 (101): (1967) 1 Mad LJ 281.

[But see AIR 1944 Sind 173 (175, 176): ILR (1944) Kar 33 (DB).]

(7) The Court from whose jurisdiction the subject-matter of a decree passed by it is transferred to the jurisdiction of another Court can entertain execution application but cannot sell the property which is situate outside the local limits of its jurisdiction. AIR 1947 Mad 347 (351): ILR (1948) Mad 18 (FB) • (1908) 35 Cal 974 (978) (DB) • (1890) 17 Cal 699 (703, 704) (FB). (15 Cal 667, Overruled.) * AIR 1927 Mad 627 (629): 50 Mad 882 (DB). (View of Venkatasubbarao, J., holding contrary in AIR 1926 Mad 421: 49 Mad 746 criticised. Note—AIR 1927 Mad 627: 50 Mad 882 is overruled by AIR 1932 Mad 418: 55 Mad 801 (SB) on another point.) • AIR 1924 Mad 457 (457) (DB) • AIR 1930 Oudh 305 (308, 309) (DB).

(8) The Court to which the local area where the subject-matter of the decree is situate, is transferred can also entertain an application to execute the decree. (1908) 35 Cal 974 (977, 978) (DB) * (1881) 6 Cal 513 (515, 519) (DB) • (1901) 28 Cal 238 (240, 241) (DB) * AIR 1969 Guj 141 (144, 145).

(9) Court to which the local area is transferred cannot execute the decree unless the Court which passed it has sent it for execution to it. AIR 1932 Mad 418 (419): 55 Mad 801 (FB) * AIR 1958 Andh Pra 763 (765) (DB) • AIR 1942 Cal 321 (323, 324): ILR (1942) 1 Cal 289 (DB) • AIR 1964 Andh Pra 68 (69): (1963) 2 Andh WR 324 (DB).

(10) Court to which the area has been transferred acquires inherent jurisdiction to execute the decree and so the absence of an order of transfer by the Court which passed the decree will at the worst amount only to an irregularity in the assumption of jurisdiction by the Court to whose jurisdiction the subject-matter of the decree is transferred and will not make its orders null and void. AIR 1943 Mad 449 (450, 453): ILR (1943) Mad 804 (DB) * AIR 1956 SC 87 (93): 1955-2 SCR 938. (If objection is not taken at earliest opportunity, it must be deemed to have been waived.) • AIR 1920 Mad 427 (432): 42 Mad 821 (FB). (Obiter, Per Wallis, C. J.) • AIR 1924 Mad 32 (32) (DB) * (1906) 9 Oudh Cas 281 (283) • AIR 1944 Sind 173 (175, 176): ILR (1944) Kar 33 (DB) • AIR 1952 Trav-Co 390 (390) (DB) * AIR 1925 Bom 414 (414) (DB) • AIR 1967 Ker 81 (82): 1964 Ker LT 690 • AIR 1959 Punj 350 (351, 352): ILR (1958) Punj 378.

[See also AIR 1919 Mad 192 (193): 42 Mad 461.]

[But see AIR 1932 Mad 418 (419): 55 Mad 801 (SB). (AIR 1927 Mad 627: 50 Mad 882, Overruled.) * AIR 1928 Mad 746 (751). (Dissenting from AIR 1927 Mad 627: 50 Mad 882, Approved in AIR 1932 Mad 418: 55 Mad 801 (SB).) * AIR 1935 Mad 935 (935).]

(11) The mere fact that a temporary Court which passed the decree is established for a certain period and is thereafter continued cannot deprive that Court of its character of the Court which passed the decree. Hence, such Court has jurisdiction to entertain an application for the execution of the decree. AIR 1935 Mad 849 (849): 58 Mad 1009 (DB).

(12) Where the Court is one and the same but is presided over by several Judges, the decree passed by one can be executed by the other. Section 37 (b) does not apply to such a case. (1941) 73 Cal L Jour 351 (353) (DB) • AIR 1919 Pat 367 (369) (DB).

(13) Where, there are two or more Courts competent, at the date of the execution application to try the suit as contemplated by Section 37 (b), any one of them would have power to execute the decree in the suit. It is not necessary that the execution application must be filed in the Court of the lowest grade. AIR 1944 Bom 300 (302).

(14) Where a decree has been transferred to another Court for execution, within whose jurisdiction the property is situate, the Court which passed the decree does not cease to have jurisdiction to execute the decree. AIR 1958 Madh Pra 131 (133) * AIR 1957 Trav-Co 69 (75, 76): ILR (1956) Trav-Co 1314 (FB).

(15) Where, after a court had passed a decree the territory from which the case arose was assigned to another court, the Court passing the decree does not cease to have jurisdiction to execute the decree. AIR 1961 Cal 170 (171, 172): 65 Cal WN 766 (DB).

(16) Where after a decree for possession to property and mesne profits has been passed, the local area, in which the property is situated, is transferred to a different Court, it is open to the decree-holder to apply for execution of the decree in the latter Court, to which the local area has been transferred, and the Court can directly entertain an application for execution without an order of transfer by the Court which had in fact passed the decree. AIR 1962 Punj 394 (395, 396, 397, 398): 1961 Cur LJ 22 (FB). (AIR 1959 Punj 350, Affirmed. AIR 1932 Mad 418 (SB) and AIR 1957 Trav-Co. 69 (FB) and AIR 1942 Cal 321, Diss. from.)

## COURTS BY WHICH DECREES MAY BE EXECUTED

**38.[a] Court by which decree may be executed** — A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution.

[1882 and 1877, S. 223, para. 1; 1859, Parts of Ss. 285 and 286.]

[a] Section 38 is extended to Amindivi Islands and the East Godavari, West Godavari, and Visakhapatnam Agencies in the State of Andhra Pradesh : See Proviso to S. 1 (3). See note (a) to S. 36.

### SECTION 38 — SYNOPSIS


1. Scope and object.
2. "May be executed."
3. Court which passed the decree. See S. 37.
4. Powers of transferee Court. See Note 9 and Ss. 41 and 42 and O. 21, R. 16.
5. Powers of transferor Court after transfer of decree. See Ss. 42 and 46; O. 21, Rr. 10, 16, 22 and 28.
5A. Procedure for sending decree for execution to another court. See Notes to O. 21, R. 6.
6. Executable decrees.
7. Territorial jurisdiction.
8. Pecuniary jurisdiction.
9. Decree binding.
10. Power to construe decree.
11. Power to declare decree inexecutable.
12. Power to fix order of sale of mortgaged properties.
13. Power under rent decree.
14. Power to enforce agreements. See S. 47.
15. Simultaneous executions.


### TOPIC INDICATOR


Charge decree — See Note 6.
Executing Court, if can go behind decree. — See Note 9.
Execution of foreign decrees — See Ss. 13 and 14.
Execution proceedings and res judicata — See S. 11.
Inconsistent decisions in execution — See S. 11.
Interest or mesne profits when added exceeding jurisdiction — See Note 8.


**1. Scope and object.**— (1) Under this section a decree may be executed by the "Court which passed the decree" or by the Court to which it is sent for execution. (1912) 35 Mad 588 (590) • AIR 1958 Andh Pra 763 (765) (DB) • AIR 1922 Nag 189 (191) • AIR 1935 Mad 849 (850): 58 Mad 1009 (DB).

See also Ss. 37 and 39.

(2) Court which is neither the one which passed the decree nor the one to which the decree is transferred for execution cannot, as a general rule, execute the decree. AIR 1955 Bom 93 (95): ILR (1954) Bom 1173 (DB) • AIR 1957 Pat 654 (655, 656) (DB) • AIR 1936 Pat 615 (616): 15 Pat 439 (DB).

[See AIR 1949 Nag 359 (360): ILR (1949) Nag 187.]

(3) A decree may be executed also by the Court to which the execution proceedings may be transferred under the provisions of Section 24. AIR 1925 All 276 (277): 47 All 57 (DB).

[See (1881) 5 Bom 680 (681) (DB).]

(4) Where there are two independent Courts within the same territorial limits having concurrent jurisdiction, either of them can execute the decree of the other. AIR 1919 Pat 367 (369) (DB).

[See also (1909) 4 Ind Cas 510 (511) (Cal) • AIR 1935 Pat 468 (469) * 1965 BLJR 628 • ILR 44 Pat 742 (DB).]

[But see (1941) 73 Cal L Jour 351 (354, 355) (DB).]

(5) The execution to which this section refers is an execution under the Code. Where a decree-holder Co-operative Society applies to the Registrar of Co-operative Societies for recovery of the money under S. 57A of the Madras Co-operative Societies Act, 6 of 1932 it is not necessary that the decree should be transferred to the Registrar before he can take action. AIR 1950 Mad 234 (235): ILR (1950) Mad 692 (DB).

(6) Where a Court has at the time of the presentation of an execution petition, no jurisdiction over it or could only exercise its jurisdiction irregularly it is not bound to dismiss the execution petition if it afterwards obtains jurisdiction. AIR 1934 Mad 283 (286): 57 Mad 795 (DB).

(7) Section 45B of the Banking Companies Act (1949) is not inconsistent with and does not override Sections 38 to 42 of the Code. (1954) 53 Cal WN 641 (647).

(8) Application for execution or to take some steps in aid of execution made to appellate Court will not save limitation for execution. Ss. 37 and 38 are not attracted. AIR 1963 Andh Pra 452 (454, 455): (1963) 1 Andh WR 261 (DB).

**2. "May be executed".**— For the meaning of the term 'execution', see section 36.

**3. Court which passed the decree.**—See Section 37.

**4. Powers of transferee Court.**—See Note 9 and Sections 41 and 42 and Order 21, Rule 16.

**5. Powers of transferor Court after transfer of decree.**—See sections 42 and 46; O. 21, Rr. 10, 16, 22 and 28.

**6. Executable decrees.**—(1) Where a decree is reversed or modified or affirmed on appeal, the only decree capable of execution is the appellate decree. AIR 1954 Pat 497 (502) (DB) • AIR 1933 Lah 859 (859)

Section 38 — Note 6 (contd.)
* (1872) 14 Moo Ind App 465 (489, 490, 491) (PC) * (1901) 23 All 152 (158): 27 Ind App 209 (PC) * (1889) 11 All 314 (318) (FB) * (1889) 11 All 267 (274) (FB) ° ('82) 4 All 376 (379) (FB) ° AIR 1930 Bom 225 (227) (DB) ° (1882) 8 Cal 218 (224) (FB) * ('71) 7 Beng LR 704 (714) (FB) ° AIR 1931 Pat 27 (29): 9 Pat 829 (DB) ° (1966) 2 Mad LJ 575: (1966) 79 Mad LW 273 (274) ° AIR 1964 All 337 (338): 1963 All LJ 685 ° AIR 1964 Guj 277 (277, 278). (Execution application, even if it does not mention the fact that trial Court's decree has been confirmed by the appellate Court, can be treated as an application for executing appellate Court's decree.) ° AIR 1960 Mad 54 (54): 1959-2 Mad LJ 422.

[See AIR 1933 PC 68 (70): 60 Cal 662: 60 Ind App 83 * (1912) 39 Cal 925 (929): 14 Ind Cas 299 (300).]

[See also AIR 1954 Bom 370 (382): ILR (1954) Bom 615 (DB) ° 1965 All LJ 363 (369): 1965 All WR (HC) 299 ° AIR 1963 SC 1124 (1126). (Case under Article 226 of Constitution.) ° AIR 1953 TC 385 (385).]

(2) Though the decree of the appellate Court supersedes decree passed by the trial Court, the execution proceedings already instituted do not become dead. On and from the passing of the appellate decree the application for execution of the trial Court's decree becomes an application for the execution of the appellate Court's decree. Where the appeal is dismissed, there is obviously no difficulty in the procedure. Where in an appeal the decree is modified in such a manner that the proceedings can still go on, the Court may decide whether it will allow necessary amendment of the application for execution in order that it may become properly an application for execution of the appellate Court's decree. Where the lower Court's decree has been reversed, the execution proceedings cannot obviously go on. AIR 1959 Cal 73 (74) (DB).

(3) In exceptional cases, where the appellate judgment does not even affirm the decree of the lower Court, but simply dismisses the appeal, the general rule that the appellate decree alone is the one to be executed does not apply and the Courts should allow execution of the decree of the original Court. AIR 1955 Cal 14 (16): ILR (1956) 1 Cal 341 (DB) * AIR 1921 Low Bur 37 (42): 11 Low Bur Rul 163 (DB) ° AIR 1914 PC 65 (66): 36 All 284: 41 Ind App 104 * AIR 1914 PC 66 (67): 36 All 350 ° ('91) 15 Bom 370 (373) (DB) ° AIR 1917 Cal 728 (730): 44 Cal 954 (DB).

[See also AIR 1942 Oudh 84 (87) (DB).]

(4) Where the appellate decree affirms the lower Court's decree with all its specifications, it would be competent to the executing Court to look at the latter decree for information as to its contents. (1884) 6 All 48 (49) (DB) * (1882) 4 All 376 (378) (FB) ° AIR 1958 Pat 506 (508).

(5) It is always desirable that the appellate decree should embody so much of the lower Court's decree as it is intended to affirm, as this avoids the necessity of reference to the superseded decree. (1873) 14 Moo Ind App 465 (492): 10 Beng LR 101 (114) (PC) ° AIR 1958 Pat 506 (508).

(6) A purely declaratory decree is not capable of execution. (1870) 2 NWPHCR 303 (304) (DB) * AIR 1957 All 575 (582) (DB) * AIR 1966 J and K 13 (21): 1965 Kash LJ 369 (DB) ° 1962 All WR (HC) 693: 1962 All LJ 646 (648) (DB).

(7) The question whether a compromise decree is a declaratory one or is one capable of execution depends on the terms of the compromise and the intention of the parties ought to be deduced from the language used in the compromise without any aid from oral evidence. AIR 1960 Andh Pra 56 (57, 58) (DB) ° 1963 Mys LJ (Supp) 421 (423).

(8) A decree originally capable of execution may subsequently become incapable of execution. (1913) 19 Ind Cas 375 (376) (All) ° AIR 1934 Cal 402 (404): 61 Cal 148 * (1895) 19 Bom 546 (549) (DB) ° AIR 1921 Lah 376 (377) ° (1882) 4 Mad 219 (220) (DB) ° AIR 1926 Nag 158 (160): 21 Nag LR 148.

[See AIR 1967 Pat 4 (4). (In view of decree in suit for divorce, decree in suit for restitution of conjugal rights held to be infructuous.)]

[See also (1880) 5 Cal L Rep 176 (178).]

(9) A decree was passed for specific performance of a contract to sell a certain share in a partnership business on payment of a certain sum. After the decree the partnership was dissolved. It was held that the defendant could not apply to recover by execution the price mentioned in the decree as he was not in a position to perform his reciprocal obligation of executing a conveyance under the decree. AIR 1956 SC 359 (362): 35 Pat 347: 1956 SCR 62.

(10) The question whether a decree is executable has to be settled primarily upon the form of the language of the decree itself. The test is whether there is a direct and definite order to a definite person to do or to refrain from doing a definite thing. AIR 1934 Mad 680 (680, 681).

[See also AIR 1942 Oudh 1 (3): 17 Luck 249 (DB) ° AIR 1941 Oudh 587 (589, 590): 17 Luck 121 (DB) ° AIR 1963 Assam 22 (24): ILR (1963) 15 Assam 12 (DB) (Compromise decree providing for arbitration and fixing one month as period for giving award — Default clause that on failure of arbitration to give award within one month plaintiffs to execute the decree — Arbitrators failing to settle matter within one month — Execution of decree held was maintainable.)]

(11) Future maintenance awarded by a decree can, when falling due, be recovered in execution of that decree without fur-

**Section 38 — Note 6 (contd.)**

ther suit. (1892) 19 Cal 139 (146) (FB) ° AIR 1967 Mad 126 (127): (1966) 2 Mad LJ 245.

(12) A decree creating a charge on property is executable by sale of the charged property but a decree which merely declares a certain allowance to be a charge on property but does not direct the sale of property in enforcement of the claim, cannot be executed. For enforcement of such a decree a suit has to be instituted. AIR 1957 Punj 92 (94): ILR (1957) Punj 938. (Decree creating charge is executable — No separate suit is required.) ° AIR 1957 All 575 (582) (DB). (Declaratory charge decree cannot be executed.) * 1968 Pat L JR 391: 1968 BLJR 991 (DB). (Charge created under Section 60 of Chota Nagpur Tenancy Act (6 of 1908) is not charge within Ss. 4 (d) and 14 of Bihar Land Reforms Act — Decree obtained for rent held executable even in spite of vesting of estate.) ° AIR 1965 Orissa 74 (74, 75): ILR (1963) Cut 914 (DB).

(13) In the case of a charge decree for maintenance obtained by a Hindu wife, the fact of the death of her husband by itself does not in any way alter the foundation of the decree and does not make it inexecutable. Prima facie, such a decree enures for the life time of the decree-holder as against the charged property. AIR 1951 Punj 129 (130, 131) ° AIR 1951 Orissa 306 (311): ILR (1949) 1 Cut 336 (DB).

(14) Where the terms of a compromise are annexed to a decree as a schedule, the decree is executable as if the terms are incorporated into the decree. AIR 1953 Mys 153 (154): ILR (1953) Mys 267.

(15) Every decree to be executed must, as a rule, be a subsisting decree. AIR 1925 Mad 80 (84) * (1903) 30 Cal 718 (721) (DB) ° AIR 1933 Lah 859 (859).

(16) Held, on facts that a decree for possession was obtained by consent and that could not be challenged in appeal. And the application for execution of trial Court's decree was held competent. AIR 1954 Bom 370 (382): 56 Bom LR 365 (DB).

(17) Before integration of Hyderabad State with Indian Union, the Nizam was the supreme legislature, supreme executive and supreme judiciary in the State — His firman therefore had the effect of decree capable of execution. AIR 1955 SC 352 (363). (ILR (1954) Hyd 658, Reversed.)

(18) Where the suit is filed against all the persons constituting a joint family and all the partners are duly served with summons, the contention that the amount of the claim laid against them was in respect of the money misappropriated by the karta of the family, and therefore, the other members were not liable, is a question which should have been agitated in the suit itself. This question cannot be considered collaterally in the execution proceeding and the decree cannot be said to be unenforceable, unless on that ground the decree is set aside in an appropriate proceedings. AIR 1959 Pat 484 (486): 1958 BLJR 516.

(19) A compromise decree in a mortgage suit was in the following terms '(1) That the defendants herein agree to a decree being passed as prayed for. (2) That the mortgaged properties are hereby sold for the amount of the decree in full satisfaction thereof. The defendants will execute a regular sale deed within ten days from this date.' The defendants not having executed the regular sale deeds, the decree-holder applied for execution of the decree which the defendants opposed. Held the terms of the compromise 'related' to the suit. The decree-holders were accordingly entitled to execute the term for executing the sale deed. AIR 1964 SC 874 (876, 877): (1963) Supp 2 SCR 46.

(20) If a preliminary decree is passed in a mortgage suit from which an appeal is filed and in the meantime a final decree is also passed then (i) if the preliminary decree is reversed in appeal the final decree passed in the meantime cannot be executed; (ii) if the preliminary decree is affirmed in toto in the appeal then the final decree passed in the meantime can be executed; (iii) and if the preliminary decree is modified in appeal and there is no direction for preparation of a fresh final decree, the final decree prepared in the meantime with variations indicated in the appeal can be executed. AIR 1967 SC 1236 (1241, 1242, 1244): (1967) 3 SCR 101.

(21) Where, in execution of a decree for possession of lands, the schedule lands formed part of a minor inam and the judgment-debtor was in occupation of the land on the date of commencement of Andhra Pradesh Inams (Abolition and Conversion into Ryotwari) Act, the judgment-debtor was entitled to the benefit of Section 4 (2) (c) and the decree could not be executable to the extent of two-third even though the judgment-debtor had not applied before the Revenue Court under Section 5 (2). (1958) 2 Andh WR 134, Disting. (1964) 2 Andh WR 73: (1964) 2 Andh LT 148.

(22) A compromise decree provided that if the judgment-debtor paid into Court a certain lesser amount within one month from 27-4-1956 the entire decretal amount would be deemed to be satisfied but in default of payment as aforesaid, the decree-holder would be entitled to execute the decree for the full amount and costs. The judgment-debtor remitted the stipulated amount by postal money-order on 26-4-1956 but it was received by the Court on 30-4-1956. The decree-holder treating this as a default sought to execute the decree for the full amount.

Held, that the handing over the money-order to the post office on 26th April 1956, failed to satisfy the requirement of paying

**Section 38 — Note 6 (contd.)**

the amount into Court as was required by the decree. AIR 1960 All 747 (748): 1960 All LJ 522. (AIR 1954 SC 429, Dist.)

(23) Relief in respect of two distinct claims to be stated separately — Relief for possession does not include demolition of structures — Decree for possession against trespasser — No separate decree for demolition of structures necessary — The decree for possession can be executed. J. D. cannot contend that because there was structure erected by him on land and there was no decree for demolition of it the decree for possession could not be executed. 1967 All WR (HC) 199 (201).

(24) For execution of foreign decrees, See Sections 13 and 14.

**7. Territorial jurisdiction.**—(1) As a general rule, territorial jurisdiction is a condition precedent to a Court executing a decree and neither the Court which passed the decree nor the Court to which it is sent for execution can execute it in respect of property lying outside its territorial jurisdiction. AIR 1958 All 425 (426, 427) (DB) * AIR 1950 Nag 46 (49): ILR (1950) Nag 18 ° AIR 1929 Cal 818 (818): 57 Cal 67 (DB) ° (1881) 7 Cal 410 (412) (DB) * AIR 1930 Cal 502 (503, 504): 57 Cal 964 (DB) ° (1911) 39 Cal 104 (109) (DB) * (1891) 18 Cal 526 (530) (DB) ° (1890) 17 Cal 699 (703) (FB) * AIR 1932 Pat 148 (149): 11 Pat 476 (DB) ° AIR 1947 Mad 347 (351): ILR (1948) Mad 18 (FB) ° AIR 1939 Pat 532 (533): 18 Pat 670 (DB) ° AIR 1920 Mad 505 (506): 43 Mad 135 (DB).

[But see AIR 1938 Pat 237 (238) (DB).]

(2) Ex parte decree passed by Gwalior Court on 18-11-1949 against resident of Allahabad — Decree is nullity — Decree transferred to Court at Allahabad on 14-9-1951 — Court held could not do so — Court at Allahabad could not execute decree. AIR 1962 SC 1737 (1749): (1963) 2 SCR 577.

(3) The Court at Morena in Gwalior State not being a Court in British India the decree by a court in British India could not be transferred to it under the Indian Code of Civil Procedure and Sections 38 and 39 were inapplicable to justify such a transfer. AIR 1963 SC 1180 (1181, 1182): (1963) 2 SCR 619 ° AIR 1964 Madh Pra 78 (81): 1964 MPLJ 11 (DB).

(4) Where the suit is instituted, under Section 17, in Court A in respect of properties situated within the jurisdiction of Courts A and B, the decree passed in the suit can be executed by Court A even in respect of properties situated within the jurisdiction of Court B. The reason is that where a Court has acquired jurisdiction in a suit, such jurisdiction will continue in execution procedings also. Court A can also send the decree for execution to Court B and the latter Court can then execute the decree against such property. AIR 1947 Mad 347 (349): ILR (1948) Mad 18 (FB) * AIR 1944 Mad 446 (447): ILR (1945) Mad 257 (DB) * (1887) 14 Cal 661 (668) (DB) ° AIR 1939 Cal 403 (409): ILR (1939) 1 Cal 493 ° 107 Ind Cas 195 (197) (Nag) * AIR 1925 Pat 139 (139, 140) (DB).

(5) In the event of a transfer of the subject-matter of the decree it cannot be said that the jurisdiction of the Court which passed the decree is limited to entertaining an application for execution. The Court which passed a decree charged on property has power to execute the decree to its logical termination, notwithstanding the transfer of the property to the jurisdiction of another Court. AIR 1967 Ker 81 (82): 1963 Ker LT 690 ° AIR 1964 Ker 206 (207) (DB) * 1962 Ker LT 794 (797) ° AIR 1960 Pat 285 (286): 1960 BLJR 99.

[See also AIR 1969 Andh Pra 207 (208). (Liquidation proceedings before Madras High Court — Order for payment of call money against J. D. — Order sent to Andhra Pradesh High Court for execution — D. J. in Andhra Pradesh has jurisdiction to execute such order. AIR 1927 Mad 271, Rel. on.) ° AIR 1960 Guj 141 (144, 145). (Execution application in Court B is maintainable.) ° AIR 1939 Rang 433 (434): 1939 Rang LR 587 * AIR 1958 Andh Pra 763 (765) (DB).]

[But see AIR 1957 Trav-Co 69 (73, 75): ILR (1956) Trav-Co 1314 (FB). (Where subsequent to the passing of a decree by Court A in respect of certain properties, the territory within which such properties are situate is transferred to the jurisdiction of Court B, Court A, nevertheless, does not cease to have jurisdiction to execute the decree and can entertain an application for execution. But it cannot sell the property or order its delivery to the decree-holder. 28 Cal 238 and 35 Cal 974, Dissented from.)]

(6) Decree for possession of property — Transfer of local area in which property is situated to different Court — Application for execution direct to Court to which local area has been transferred — Maintainable — Scope of Ss. 37 to 39. AIR 1962 Punj 394 (398): ILR (1962) 2 Punj 445 (FB) * AIR 1968 Mad 99 (102): (1967) 1 Mad LJ 281 (DB) ° AIR 1959 Punj 350 (352): ILR (1958) Punj 378.

(7) In the case of money decree if there is a change in the territorial jurisdiction of the Court which passed and the executing court is not the decreeing Court the decree must be transferred to it by a proper transmission of the decreeing Court before it can be executed. AIR 1968 Mad 99 (102): (1967) 1 Mad LJ 281 (DB) ° 1968 Cur LJ 326: 70 Punj LR 502 (505). (Decree passed by Court A was however not transferred to Court B though the territory had passed in the jurisdiction of B Court — Execution application made to Court B is one made to wrong Court and cannot save limitation.)

**Section 38 — Note 7 (contd.)**

(8) Where the transfer of the case was completed when both the Independence Act and the Indian Independence (Legal Proceedings) Order (1947) were in force, notwithstanding the subsequent repeal of the Independence Act and consequent lapse of the Indian Independence (Legal Proceedings) Order, the execution, proceeding transferred before the repeal retained its validity and could be continued in the transferee Court by virtue of S. 6 of the General Clauses Act read with Art. 367 of the Constitution. AIR 1957 Assam 155 (156): ILR (1955) 7 Assam 147 (DB). (AIR 1951 All 703, Dissented from.)

(9) Where an application for execution pending in one Court is transferred by the High Court under S. 24 to another Court in another district, the latter Court gets jurisdiction to execute the decree in its entirety and thus obtains the same territorial jurisdiction as the former Court for purposes of executing that decree. AIR 1942 Oudh 1 (8): 17 Luck 249 (DB).

(10) Where a single revenue paying estate is situate within the jurisdiction of Court A and of Court B, Court A can execute a decree for money passed by it by attachment and sale of the whole property. AIR 1947 Mad 347 (349): ILR (1948) Mad 18 (FB) ° (1886) 12 Cal 307 (312) (DB).

[See also (1878) 2 Cal L Rep 334 (336).]

(11) The salary of a public officer or of a servant of a railway company or of a local body may be attached by a Court although the disbursing officer is outside the limits of its local jurisdiction. See O. 21, R. 48.

(12) The executing Court can appoint a receiver in connection with the execution of a decree in respect of property outside the jurisdiction of the executing Court. AIR 1958 All 425 (427, 428) (DB).

(13) Where O. 21, R. 48 is applicable and where there is to be an attachment of salary or allowances of public officers or servants of Railway company or local authority, even though the judgment-debtor or the disbursing officer is not within the jurisdiction of the Court, an order can issue under O. 21, R. 48. AIR 1958 All 425 (428) (DB).

(14) A direct attachment can be levied under O. 21, R. 52 by the Court which passed the decree acting on its execution side against property which is beyond its jurisdiction but is in the custody of a Court or an officer. AIR 1958 All 425 (429) (DB). (AIR 1950 Nag 46, Not foll.) ° AIR 1965 Raj 41 (42): 1964 Raj LW 500.

**8. Pecuniary jurisdiction.**— (1) The pecuniary jurisdiction to entertain the suit would be the criterion for determining the jurisdiction for executing the decree passed thereon. The amount in decree for which the execution is laid on transfer does not determine the pecuniary jurisdiction of the executing Court to which the decree is transferred for execution under S. 39 (2). AIR 1957 Orissa 177 (180): ILR (1957) Cut 287. (Madras and Allahabad views, Not followed.)

(2) Court can execute the decree even when the decretal amount plus the interest or mesne profits exceeds the limits of its pecuniary jurisdiction. (1886) 10 Bom 200 (202) (DB) ° AIR 1933 Sind 128 (128) (DB) ° (1912) 40 Cal 56 (61) (DB) ° AIR 1939 Rang 115 (117): 1939 Rang LR 134 (DB).

(3) Where a Court having inherent competence to entertain a suit passes a decree for a sum in excess of its pecuniary jurisdiction without an objection from the judgment-debtor that objection cannot subsequently be raised at the stage of execution. (1962) 66 Cal WN 476 (483). (AIR 1962 SC 387, Rel. on; 53 Cal 166 (FB) held overruled to that extent by AIR 1962 SC 387.)

(4) The Court, which has higher pecuniary jurisdiction at the time it passes the decree, has power to execute the decree even though its pecuniary powers are afterwards reduced. 1954 Raj LW 571 (573) ° AIR 1960 All 730 (731): 1960 All LJ 220.

(5) The Court, which has competently passed a decree, does not lose jurisdiction to execute it, merely by reason of loss of territorial or pecuniary jurisdiction in the meantime. But this 'jurisdiction to execute' means merely jurisdiction to entertain the execution application and to transfer it to the proper Court for execution, and it does not extend beyond that. AIR 1961 Cal 183 (185): ILR (1961) 1 Cal 341 (DB)

(6) Madhya Bharat Civil Courts Ordinance, 1949, S. 3 (2) — Suit pending before District Judge at time of passing of Ordinance — Decree by District Judge — Civil Judge, First Class, can execute. ILR (1955) Madh B 180 (183) (DB).

(7) Court by which decree may be executed — Decree passed by Second Judge, City Civil Court may be executed by first Additional Judge of that Court — Court is same and not separate — Hyderabad Civil Courts Act (36 of 1954), Ss. 11 and 12. AIR 1964 Andh Pra 101 (104): (1963) 2 Andh WR 392 (DB).

(8) City Civil Court — Decree passed by one Judge — Execution proceeding can be started before another Judge of same Court who has concurrent local and pecuniary jurisdiction and when he is not precluded from entertaining execution application — 4 Ind Cas 510: AIR 1919 Pat 367, Foll. AIR 1964 Andh Pra 101 (105): (1963) 2 Andh WR 392 (DB).

**9. Decree binding.** — (1) An executing Court cannot go behind the decree. AIR 1956 SC 359 (362): 35 Pat 347: 1956 SCR 62 ° AIR 1958 Andh Pra 417 (418) * AIR 1957 Orissa 14 (15): ILR (1956) Cut 630 (DB) ° AIR 1957 Raj 131 (132): ILR (1957) 7 Raj 366 (DB) * AIR 1956 Assam 166 (169, 170) (DB) ° AIR 1955 All 552 (553)

**Section 38 — Note 9 (contd.)**

(DB) ° ILR (1955) Trav-Co 942 (944) * AIR 1954 All 739 (741) ° AIR 1954 Hyd 219 (220): ILR (1954) Hyd 279 (DB) * AIR 1954 Kutch 19 (19) ° AIR 1954 Mad 878 (879) (DB) * 1954 All L Jour 245 (246) ° AIR 1953 Ajmer 2 (2) (4) ° ILR (1953) Madh B 260 (262) * AIR 1932 Bom 483 (483) ° AIR 1938 PC 93 (100): 33 Sind LR 401 ° AIR 1931 All 38 (40) (DB) * AIR 1922 Bom 195 (196): 46 Bom 243 (DB) ° AIR 1915 Cal 122 (123) (DB) * AIR 1936 Lah 704 (704): 17 Lah 187 (DB) ° AIR 1935 Lah 549 (550) * AIR 1938 Mad 809 (809) ° AIR 1937 Mad 134 (136): ILR (1937) Mad 329 (DB). (AIR 1935 Mad 647, Reversed.) ° ('33) AIR 1933 Mad 175 (176) (DB) * AIR 1925 Nag 361 (362) ° AIR 1932 Pat 184 (185) (DB) ° AIR 1964 Andh Pra 236 (244) (FB): (1963) 2 Andh WR 147 (166) * AIR 1969 Bom 84 (88): 70 Bom LR 373 ° AIR 1969 Pat 70 (71): 1969 Cri LJ 398 (DB). (Legality of High Court's order challenged without success in Supreme Court — It is not open to executing Court to go behind the order on ground of jurisdiction.) ° (1968) 34 Cut LT 908 (911). (Transfer by Hindu widow — Contention of reversioners that point of legal necessity for transfer was not agitated in second appeal.) * AIR 1964 Andh Pra 236 (244): (1963) 2 Andh WR 147 (FB). (Executing Court cannot go behind decree unless it is a nullity.) ° (1963) 4 Guj LR 721 (723) * ILR (1961) 2 All 224 (227) (DB) ° AIR 1961 Madh Pra 67 (73): 1960 MPLJ 1287 ° 1961 Raj LW 676 (678) ° 1961 Raj LW 503 (505): ILR (1961) 11 Raj 1066 ° 1959 All LJ 221 (223): 1959 All WR (HC) 189 * AIR 1959 Ker 194 (195): 1959 Ker LJ 20 (DB). (Question raised and decided in suit cannot be agitated in execution.)

(2) An executing Court cannot go behind the decree except for certain limited purposes. When there is a question of want of jurisdiction involved, it is open to the executing Court to go behind, the decree for the purpose of finding out whether in fact the decree was passed without jurisdiction. But beyond that the executing Court cannot go. The remedy in such a case, if at all is by a separate suit. AIR 1960 Cal 81 (84, 85): 63 Cal WN 21. (Questions whether the managing partner had express authority to enter into the compromise or the solicitor had such authority or not cannot be gone into in application for execution.) * (1962) 40 Mys LJ 904 (906).

(3) The jurisdiction of the Court executing a decree must be determined with reference to and is circumscribed by the directions contained in the decree. It has no power to go behind it or question its legality or correctness. AIR 1954 Hyd 190 (193): ILR (1954) Hyd 353 (FB) * AIR 1957 All 285 (285) ° AIR 1957 Raj 131 (132): ILR 7 Raj 366 (DB) * ILR (1955) Bom 386 (395) (DB) ° AIR 1954 Cal 205 (207) ° AIR 1954 Madh B 89 (92): ILR (1953) Madh B 265 (DB) ° ILR (1954) Hyd 42 (44) (DB) * ILR (1954) Mad 1247 (1253, 1254) ° AIR 1953 Mad 1007 (1007) ° AIR 1953 Mys 62 (64): ILR (1952) Mys 368 (DB) ° AIR 1952 Mys 3 (4): ILR (1952) Mys 147 (DB) ° AIR 1951 Bom 426 (427): ILR (1952) Bom 1 ° AIR 1951 Pepsu 46 (48): 2 Pepsu LR 602 * AIR 1950 All 655 (657): ILR (1952) 1 All 600 ° AIR 1949 Nag 338 (339) ° AIR 1948 Mad 397 (399) * AIR 1947 Oudh 217 (218) ° AIR 1945 All 400 (401): ILR (1945) All 914 (DB) ° AIR 1945 Bom 20 (21) * AIR 1942 Pat 348 (348, 349) (DB) ° AIR 1943 Nag 165 (165): ILR (1943) Nag 293 (DB) * AIR 1942 Pat 264 (265) (DB) ° AIR 1940 Bom 277 (278): ILR (1940) Bom 633 ° AIR 1940 Mad 628 (629) ° AIR 1935 Bom 95 (96) (DB) * AIR 1933 Cal 85 (89): 60 Cal 191 ° AIR 1917 Cal 844 (845): 44 Cal 627 (DB) ° AIR 1934 Lah 438 (439): 15 Lah 772 (DB) * AIR 1935 Mad 598 (599) ° ('34) AIR 1934 Mad 40: 57 Mad 426 ° AIR 1918 Oudh 105 (108) ° AIR 1934 Pat 203 (204): 13 Pat 17 (DB) * (1911) 5 Sind LR 71 (74).

[See also 1958-1 Mad L Jour 314 (315) ° (1960) 1 Ker LR 333: 1960 Ker LT 255 (DB).]

(4) A proceeding to enforce a judgment is collateral to the judgment, and, therefore, no inquiry into its regularity or validity can be permitted in execution proceeding. ILR (1953) Madh B 260 (262, 263) ° AIR 1940 Mad 628 (629, 631) * (1940) 44 Cal WN 392 (393) ° AIR 1917 Cal 844 (847): 44 Cal 1627 (DB).

[See also AIR 1964 Punj 311 (313): 65 Pun LR 1077.]

(5) The executing Court must execute the decree as it stands and according to its terms. AIR 1951 SC 189 (192): 1951 SCR 292 * AIR 1956 Trav-Co 271 (271): ILR (1956) Trav-Co 873 (DB) ° 1956 Madh B LR (Civ) 433 (437) ° AIR 1955 Bhopal 3 (5) * ILR (1955) Bom 386 (395) (DB) ° Madh B LJ 1954 HCR 569 (571) ° AIR 1953 All 710 (711) (DB) ° AIR 1952 Mys 3 (4): ILR (1952) Mys 147 (DB) * AIR 1952 Trav-Co 504 (506) (DB) ° AIR 1951 Kutch 45 (45) ° 1951 Ker L Tim 106 (108) (DB) * AIR 1950 Trav-Co 7 (7) (DB) ° AIR 1944 Lah 302 (310): ILR (1944) Lah 79 (DB) ° (1898) 20 All 397 (399) (DB) ° AIR 1935 All 359 (360) (DB) * AIR 1933 All 743 (744) (DB) ° AIR 1932 Bom 462 (463) ° AIR 1934 Lah 438 (439): 15 Lah 772 (DB) * AIR 1926 Mad 1144 (1144) ° AIR 1926 Mad 113 (113) (DB) ° AIR 1916 Mad 795 (798) (DB) ° (1887) 10 Mad 283 (288) (FB) * AIR 1915 Oudh 142 (143) ° AIR 1937 Pat 618 (619) (DB) ° (1910) 4 Sind LR 244 (246) (DB) ° AIR 1960 SC 388 (390). (Cannot give relief to the plaintiff which was denied to him in suit.)

[See also 1958-1 Mad L Jour 314 (315). (Execution of certificate under Section 87, Madras Hindu Religious Endowments Act.) ° AIR 1936 Lah 448 (449) * * (1967) 8 Guj LR 986: ILR (1967) Guj 795 808) ° 1959 Ker LJ 1227 (1228): 1959 Ker LT 1094 (DB).]

**Section 38 — Note 9 (contd.)**

(5) The executing Court cannot:

(a) enter into a criticism of the decree. (1887) 11 Bom 528 (532) (DB) * AIR 1924 Nag 378 (381).

[See also AIR 1954 Madh B 89 (93): ILR (1953) Madh B 265 (DB).]

(b) give relief against its rigour. (1901) 28 Cal 353 (361): 28 Ind App 57 (PC) * AIR 1932 Pat 237 (238) (DB) ° AIR 1935 Sind 140 (141) (DB).

(c) add to or alter the decree even in the light of subsequent events. AIR 1956 SC 359 (362, 363): 35 Pat 347: 1956 SCR 62 ° 1954 All L Jour 621 (622) (DB) * AIR 1952 All 27 (28). (AIR 1949 Mad 429: ILR (1949) Mad 613, Foll.) ° AIR 1950 All 688 (690) * 1950 Ker L Tim 252 (255) (DB) ° AIR 1949 Mad 429 (430): ILR (1949) Mad 613 ° AIR 1940 Bom 10 (11): ILR 1939 Bom 708 ° (1874) 2 Ind App 219 (228) (PC) * AIR 1933 Pat 161 (163): 12 Pat 77 (DB) ° AIR 1922 All 27 (28): 44 All 350 (DB) ° (1902) 26 Bom 707 (710) (DB) * AIR 1935 Cal 245 (246) (DB) ° AIR 1922 Cal 311 (313) (DB) ° (1878) 3 Cal 161 (170, 171): 4 Ind App 137 (PC) ° AIR 1927 Lah 894 (895) (DB) ° AIR 1937 Mad 109 (109) (DB) * AIR 1935 Mad 429 (430) (DB) ° AIR 1937 Nag 120 (121): ILR (1937) Nag 344 ° AIR 1926 Pat 411 (412) (DB) * AIR 1924 Pat 263 (264): 3 Pat 221 (DB) ° ('16) AIR 1916 Cal 923 (923) (DB) * 1966 All WR (HC) 770 (771). (Execution Court cannot alter relief granted under decree — Implications of certain direction in decree — Recourse to pleading and judgment when not permissible — Remedy of aggrieved party is to ask for amendment of decree.) ° AIR 1962 Raj 54 (56): 1961 Raj LW 382. (Time granted under decree cannot be extended by executing Court.) ° AIR 1961 Assam 157 (158) (DB). (Mere payment of the amount as rent by itself might or might not create a tenancy but that cannot be a subject for consideration in executing a decree if otherwise enforceable since it does not come within the scope of Section 47 of the Civil Procedure Code.)

[See (1897) 19 All 480 (481) * AIR 1933 Cal 627 (629): 60 Cal 753 ° AIR 1924 Nag 419 (421): 22 Nag LR 121.]

[See also AIR 1941 Cal 530 (532): ILR (1941) 2 Cal 402 (DB).]

(d) correct errors. AIR 1953 Trav-Co 32 (33): ILR (1951) Trav-Co 352 (DB) ° AIR 1957 All 285 (285) * ILR (1953) 3 Raj 914 (921) (DB) ° AIR 1922 Mad 186 (186) (DB) ° AIR 1935 Oudh 57 (58): 10 Luck 508 (DB) ° 1968 Ker LT 577 (588).

[But see (1942) 46 Cal WN 509 (509).]

(e) grant a relief not contemplated by the decree, such as allowing costs or interest or mesne profits. AIR 1956 Trav-Co 271 (272): ILR (1956) Trav-Co 873 (DB) ° 1958 MPC 315 (316). (Interest cannot be reduced.) ° AIR 1951 Punj 132 (133) * AIR 1942 Pat 196 (197) (DB) ° (1926) 94 Ind Cas 212 (212) (Lah) ° AIR 1935 All 186 (187) * AIR 1951 Trav-Co 80 (81): 1950 Trav-Co LR 472 (DB) ' AIR 1950 Trav-Co 7 (8) (DB) * AIR 1949 East Punj 213 (215) ° AIR 1922 All 27 (28): 44 All 350 (DB) * (1877) 3 Cal 161 (171): 4 Ind App 137 (PC) ° (1881) 8 Cal 332 (335, 336): 9 Ind App 1 (PC) ° AIR 1917 Mad 212 (213) * (1883) 5 All 53 (54) (DB) ° AIR 1925 Pat 807 (809, 810): 4 Pat 440 (DB).

(f) question the right of the person whose name is on the record to execute the decree. AIR 1955 Pat 284 (287) (DB) ° AIR 1957 Raj 253 (255): ILR (1956) 6 Raj 217 (DB) * (1900) 27 Cal 488 (491) (DB) ° (1874) 21 Suth WR 141 (142) (DB) ° AIR 1914 Mad 222 (224): 38 Mad 832 (DB).

[See also O. 21, R. 16.]

(g) go into the question whether the decree was a valid one or was obtained by fraud. AIR 1956 Ajmer 55 (56) ° AIR 1958 Andh Pra 417 (418) * AIR 1956 Bom 513 (516): ILR (1956) Bom 193 (DB) ° (1955) 8 Sau LR 256 (263) ° AIR 1946 Nag 311 (313): ILR (1946) Nag 583 * (1901) 23 All 181 (190): 28 Ind App 35 (PC) ° AIR 1937 All 567 (568): ILR (1937) All 761 ° AIR 1924 All 689 (689): 46 All 571 (DB). (Overruled on another point in AIR 1933 All 252: 55 All 334 (FB)) ° AIR 1921 Bom 301 (302) (DB) ° (1896) 22 Bom 475 (479) (DB) ° (1911) 10 Ind Cas 532 (534) (DB) (Cal) * AIR 1936 Mad 618 (622, 623): 59 Mad 642 (DB) ° AIR 1935 Mad 236 (238): 58 Mad 752 (DB) ° AIR 1925 Nag 377 (378) * AIR 1938 Pat 594 (596) (DB) ° (1891) 15 Bom 307 (308) (DB) * (1886) 9 Mad 80 (82, 83) (DB) ° AIR 1931 All 92 (94): 53 All 125 (DB) ° (1906) 30 Bom 101 (107, 108) (DB) * AIR 1965 Guj 282 (282). (It is not open to the executing Court to say that a part of the decree violates the provisions of S. 23, Bombay Money Lenders Act (31 of 1947) and, therefore, should not be executed.)

[See also AIR 1936 Lah 442 (442, 443).]

[See however O. 21, R. 7.]

(h) refuse to execute a decree, on the ground that it is not properly drawn up. AIR 1953 Mys 153 (154): ILR (1953) Mys 267 (DB) ° AIR 1958 Bom 471 (473).

(6) The executing Court can go into the question of the executability of the decree and consider whether by any subsequent developments the decree has ceased to be executable according to its terms. AIR 1956 SC 359 (362, 363): 35 Pat 347: 1956 SCR 62 ° AIR 1962 Madh Pra 318 (319, 320): 1961 Jab LJ 1443.

(7) When a decree imposes obligations on both sides which are so conditioned that performance by one is conditional on performance by the other, execution will not be ordered unless the party seeking execution not only offers to perform his side but, when objection is raised, satisfies the executing Court that he is in a position to do so. There may of course be decrees where the obligations imposed on each side are distinct

**Section 38 — Note 9 (contd.)**

and severable and in such a case each party might well be left to its own execution. The executing Court including the Court to which the decree is transferred for execution can go into the question whether the decree remains capable of execution according to its terms and whether in a case of specific performance the party applying for execution is in a position to perform his part of the decree. AIR 1956 SC 359 (362): 35 Pat 347: 1956 SCR 62.

[See AIR 1963 All 49 (50, 51, 52): 1962 All LJ 1082.]

(8) The transferee Court cannot question the jurisdiction of the transferor Court which passed the decree. For cases, see O. 21, R. 7.

[See also 1967 BLJR 973. (Transferee Court cannot stay execution under O. 21, R. 29.)]

[But see AIR 1943 Bom 404 (406): ILR (1943) Bom 665.]

(9) Where the execution Court is the very Court which passed the decree, it has been generally held that a question of territorial or pecuniary jurisdiction of the Court which passed the decree cannot be allowed to be raised in execution proceedings before it. AIR 1954 Hyd 190 (192): ILR (1954) Hyd 353 (FB). (38 Deccan LR 455, Overruled.) * AIR 1956 Pat 280 (283): 35 Pat 610 (DB) ° 1955-2 Mad L Jour 16 (17) ° ILR (1955) 5 Raj 736 (738) * AIR 1951 Bom 426 (428): ILR (1952) Bom 1 ° AIR 1948 Cal 111 (112): ILR (1947) 1 Cal 486 * AIR 1942 Pat 152 (155, 156) (DB) * AIR 1941 Nag 36 (45, 52, 60): ILR (1941) Nag 1 (FB) ° AIR 1920 Mad 1019 (1023, 1024): 43 Mad 675 (FB) ° AIR 1931 Rang 252 (257): 9 Rang 480 (FB) * AIR 1932 Cal 380 (381) (DB) ° AIR 1932 Lah 289 (290): 13 Lah 25 (DB) ° AIR 1935 Oudh 358 (360): 11 Luck 187 (FB) * AIR 1962 SC 199 (201): (1962) 2 SCR 747. (Objection regarding territorial jurisdiction waived — Does not go to root of jurisdiction — Validity of decree cannot be challenged on that ground in execution proceedings — Judgment-debtor held estopped from taking that objection in execution.) ° 1961 Raj LW 676 (679). (It makes no difference whether the want of territorial or pecuniary jurisdiction is latent or patent.)

[See AIR 1957 Pat 87 (92): 35 Pat 1175 (DB).]

[See also AIR 1940 Lah 280 (280, 281).]

[See however AIR 1952 All 196 (198) (DB).]

(10) A question as to the jurisdiction of the Court in matters other than territorial or pecuniary jurisdiction rendering the decree a nullity on the face of it can be entertained by the executing Court. AIR 1956 Bom 513 (516): ILR (1956) Bom 193 (DB) ° AIR 1956 Pat 57 (60) * AIR 1955 Trav-Co 113 (117): ILR (1954) Trav-Co 1151 (DB) ° ILR (1955) 5 Raj 736 (738) ° (1955) 8 Sau LR 256 (259) * AIR 1954 Madh B 89 (92): ILR (1953) Madh B 265 (DB) ° AIR 1953 Orissa 3 (5): ILR (1953) Cut 473 (DB) ° ILR (1953) Madh B 260 (263, 264) * AIR 1951 Bom 426 (427): ILR (1952) Bom 1 ° AIR 1950 Trav-Co 72 (73): 1950 Trav-Co LR 15 (DB) ° AIR 1949 East Punj 94 (101, 102): ILR (1949) East Punj 143 (FB) * AIR 1949 Nag 106 (108): ILR (1948) Nag 376 ° AIR 1946 Pat 385 (388): 25 Pat 7 (DB) ° AIR 1942 Lah 237 (238): ILR (1943) Lah 553 (DB) * AIR 1933 All 751 (752) (DB) ° AIR 1918 All 226 (237): 40 All 423 (DB) ° AIR 1931 Bom 295 (296) ° AIR 1929 Nag 357 (357, 358): 26 Nag LR 60 (DB) * AIR 1932 Cal 9 (10, 11): 58 Cal 1018 (DB) ° AIR 1933 Nag 211 (212, 213) (DB) ° AIR 1935 Oudh 358 (360): 11 Luck 187 (FB) * AIR 1934 Oudh 75 (84, 85): 9 Luck 435 (DB) ° AIR 1937 Pat 618 (619) (DB) ° AIR 1936 Pat 303 (305) (DB) * AIR 1919 Pat 430 (431): 4 Pat L Jour 240 (FB) ° (1967) 8 Guj LR 986: ILR (1967) Guj 795 (817) ° AIR 1962 Andh Pra 500 (505, 506): (1962) 2 Andh WR 71 (FB). (Decree contravening the provisions of O. 20, R. 12 and hence invalid.) * AIR 1969 Madh Pra 35 (41): 1969 MPLJ 17 (DB) ° AIR 1966 Him Pra 77 (79) ° AIR 1965 Bom 129 (130): 1964 Mah LJ 528 * AIR 1961 All 287 (287): (1961) 2 Lab LJ 191. (Judgment-debtor can raise objection during execution that decree cannot be executed, having been passed by court having no jurisdiction, even though he had not raised it during suit.) ° AIR 1959 Pat 484 (486): 1958 BLJR 516.

[See AIR 1953 Sau 129 (129) ° AIR 1949 Nag 131 (132): ILR (1948) Nag 864 ° AIR 1942 Lah 260 (263): ILR (1942) Lah 307 (FB).]

[See also AIR 1965 Pat 134 (134): 1965 BLJR 690. (Onus lay upon judgment-debtor to prove that no notice was issued.) ° 1968 Ker LR 145 (147).]

[But see AIR 1941 Rang 163 (165): 1941 Rang LR 90 (DB) ° AIR 1923 All 141 (144): 45 All 198 (DB) ° AIR 1930 Bom 141 (144): 54 Bom 96 * AIR 1917 Cal 844 (847): 44 Cal 627 (DB) ° AIR 1936 Lah 766 (767) ° AIR 1932 Lah 291 (292) * ('26) AIR 1926 Mad 128 (128) ° AIR 1932 Mad 7 (8) * AIR 1915 Mad 683 (684) (DB) ° AIR 1936 Rang 87 (88): 14 Rang 94 (SB).]

(11) An executing Court can refuse to execute a decree on the ground that it was passed by a Court having no jurisdiction. AIR 1942 Cal 496 (497, 498): ILR (1942) 1 Cal 149 ° AIR 1925 Cal 907 (909): 53 Cal 166 (FB) * AIR 1958 Mad 490 (494): ILR (1958) Mad 622 (DB) ° AIR 1957 Pat 87 (92): 35 Pat 1175 (DB) ° AIR 1957 Pat 4 (6). (Decree passed in spite of S. 69 (2), Partnership Act — Decree is not nullity.) * AIR 1957 Raj 131 (132): ILR (1957) 7 Raj 366 (DB) ° AIR 1937 Cal 481 (482) ° AIR 1956 Bom 268 (269) * ILR (1955) Bom 386 (395) (DB) ° ILR (1953) Madh B 260 (263) ° AIR 1943 Bom 404 (406): ILR (1943) Bom 665 * AIR 1960 Punj 610 (610, 611, 612): ILR (1959) Punj 1588 (DB).

**Section 38 — Note 9 (contd.)**

[See AIR 1931 Cal 546 (548). (The question as to whether an appeal is competent or not to a higher Court cannot be gone into in the execution proceeding.)]

[See also AIR 1938 Cal 575 (576) * AIR 1937 Cal 565 (568) ° AIR 1933 Cal 267 (268) * AIR 1952 Raj 62 (63) (DB.]

Also see S. 47.

(12) The expression "the Court which made the decree had no jurisdiction to make it" means that the Court had not such territorial jurisdiction as would authorize it to make the decree and not that having jurisdiction it exercised it erroneously. AIR 1957 Pat 4 (6).

(13) Where there is an express prohibition by any enactment against the sale of any property in execution, the executing Court cannot sell such property although the decree may direct such sale. The same principle would apply to cases whether the objection as to inalienability was taken on the ground of public policy, or where there is a statutory prohibition against the execution of a decree for eviction. AIR 1956 Pat 57 (60) (DB) ° AIR 1943 Bom 54 (55, 56): ILR (1943) Bom 19 (DB) * AIR 1921 All 118 (119): 43 All 547 (SB) ° AIR 1947 Mad 341 (342). (Objection to inalienability.) ° AIR 1937 Mad 918 (921) * AIR 1953 Orissa 3 (6): ILR (1953) Cut 473 (DB). (Public policy.) ° AIR 1956 Trav-Co 1 (7): ILR (1955) Trav-Co 953 (FB). (Statutory prohibition.) ° AIR 1960 Mad 377 (382 to 384): (1960) 2 Mad LJ 30 (FB). (AIR 1958 Andh Pra 1 (FB) Dissented from.)

[See also ILR (1950) All 326 (329).]

[But see AIR 1949 East Punj 94 (101, 102): ILR (1949) East Punj 143 (FB). (AIR 1933 Lah 397; AIR 1936 Lah 845: ILR (1937) Lah 48 and AIR 1937 Lah 194, Overruled; AIR 1934 Lah 609 (1), impliedly overruled.) ° AIR 1931 Lah 545 (545).]

(14) Where the want of jurisdiction is not apparent on the face of the decree the party in execution cannot raise a disputed point of fact which, if his contention is true, would have deprived the Court of its jurisdiction to pass a decree in that matter. AIR 1956 Bom 268 (269) ° AIR 1957 Madh B 56 (58) (DB) * AIR 1954 Madh B 89 (92): ILR (1953) Madh B 265 (DB) ° ILR (1955) 5 Raj 736 (738) ° AIR 1949 Nag 131 (132): ILR (1948) Nag 864 * (1946) 50 Cal WN 307 (308) ° AIR 1943 Bom 288 (291): ILR (1943) Bom 400 ° AIR 1943 Nag 325 (327): ILR (1943) Nag 757 * AIR 1942 Pat 152 (155) (DB) ° AIR 1940 Mad 628 (631) ° AIR 1933 Mad 362 (363) * AIR 1961 Cal 92 (92, 93) (FB) ° (1967) 8 Guj LR 986: ILR (1967) Guj 795 (897) ° AIR 1967 Andh Pra 188 (189): (1966) 1 Andh WR 281 ° (1964) 66 Pun LR 347 (349) ° AIR 1959 Andh Pra 159 (163, 164): (1959) 1 Andh WR 275 (DB) * AIR 1959 Pat 484 (486): 1958 BLJR 516.

[See also AIR 1950 All 688 (690) ° 1961 Jab LJ 1476 (1479): 1961 MPLJ 959.]

[But see AIR 1937 Mad 918 (921).]

(15) The principle that an executing Court cannot challenge the validity of the decree holds good only between the parties to the decree. When a third party against whom an order is served moves the executing Court, the Court has inherent jurisdiction to decide the validity of the decree. AIR 1950 Bom 155 (157): ILR (1950) Bom 185 (DB) ° AIR 1957 Raj 131 (132): ILR (1957) 7 Raj 366 (DB).

(16) It is not open to the executing Court to go behind the order of amendment of a decree and to enquire whether the amendment was a substantial amendment or merely an amendment of a clerical or arithmetical nature. It is also not open to the executing Court to go into the question whether the amendment was necessary or not necessary or whether the Court of the Munsif was competent to make the amendment or not. AIR 1960 Pat 126 (128): 1959 BLJR 622 (DB).

(17) The executing Court is not precluded from finding out whether any decree had been passed at all, where there is no judgment to support the so-called decree which is merely something written on a decree form, the decree is a complete nullity and the executing Court can disregard it. AIR 1938 Rang 372 (375) (DB).

(18) It is in no sense going behind the decree to hold that the judgment-debtor, a disqualified proprietor whose property is under the Court of Wards, is not properly before the Court when the manager of the Court of Wards has not been made a party to the execution. AIR 1925 Pat 160 (160) (DB).

(19) Where in a suit, which was cognizable exclusively by a Revenue Court, and was instituted in a Civil Court, no objection was taken in the trial Court or if taken was disallowed, the objection cannot again be raised in the execution proceedings. AIR 1934 All 609 (611, 613, 614): 57 All 1 (FB).

[See also (1963) 4 Guj LR 400 * 1956 Raj LW 4 (5).]

(20) Although compromise and consent decree also cannot be challenged by the executing Court, such decrees are subject to the exercise of powers of a Court of equity to relieve against forfeiture and penalties. AIR 1954 Madh B 89 (93): ILR (1953) Madh B 265 (DB) ° AIR 1954 Mad 870 (872) (DB) ° AIR 1953 Mys 153 (156): ILR (1953) Mys 267 (DB) * AIR 1952 Punj 155 (155) ° AIR 1951 Assam 27 (28): ILR (1950) 2 Assam 175 (DB) ° AIR 1950 Pat 440 (443) (DB) * AIR 1948 Nag 388 (390): ILR (1948) Nag 174 ° AIR 1944 Bom 46 (49, 50) ° Madh B LJ 1954 HCR 569 (571). (Court can grant relief against forfeiture.) * AIR 1916 Cal 391 (392) (DB). (Do.) * AIR 1914 Mad 18 (18) (DB). (Do.) ° AIR 1935 All 862 (868): 58 All 230 (DB). (Do.) ° AIR

**Section 38 — Note 9 (contd.)**
1937 Pat 542 (544): 16 Pat 395 (DB). (Do.) * AIR 1964 All 37 (38) ° AIR 1962 Mys 9 (10): 39 Mys LJ 539 ° 1961 Raj LW 676.

[See also AIR 1962 Cal 272 (275): ILR (1962) 2 Cal 254 (DB). (Where the compromise decree contains a stipulation by way of penalty then in the event of a default the judgment-debtor is entitled to relief in execution in respect of the same as part of a contract providing for penalty even though the said contract has been incorporated into decree of the Court.) ° AIR 1951 Madh B 62 (63).]

[See however AIR 1952 All 196 (198) (DB).]

(21) A decree given on the basis of an unregistered award is not a nullity and cannot be questioned in execution. AIR 1965 Madh Pra 75 (77): 1965 Jab LJ 147 (FB) ° AIR 1954 Sau 22 (24). (AIR 1946 Nag 311: ILR (1946) Nag 583 and AIR 1937 All 282, Dissented from.)

[See also AIR 1959 Madh Pra 415 (418). 1959 Jab LJ 734. (Decree assailed on the ground that the Court had no jurisdiction to pass the decree on award.) ]

[But see AIR 1946 Nag 311 (313): ILR (1946) Nag 583. (An executing Court can question the validity of a decree on an award on the ground that the award though compulsorily registrable was not registered, in such a case the decree being a nullity).]

(22) Where the executing Court has to decide upon a question of fact which is inadequately recited in the decree but about which there is no adjudication in the decree, it can examine the record and ascertain for itself what the actual facts are. AIR 1921 Pat 360 (361): 5 Pat L Jour 402 (DB).

(23) Conflict between description of area given in compromise and that given in decree based upon compromise — Former prevails — No question of rectification of error arises — Decree is to be deemed for area given in compromise and in doing so, executing Court does not exceed its jurisdiction. AIR 1958 Punj 13 (14).

(24) Where the provision to refer to arbitration formed part of a compromise decree and this part was carried out, the terms of the award do not form part of the decree. The execution Court has only to execute the decree as it stands. 1957 Ker L Jour 747 (749).

(25) Judgment and decree on award — Application under S. 33, Arbitration Act, by person alleged to be party to arbitration agreement for declaration of its non-existence on ground that it was fabricated and that he was no party to it, is maintainable — No separate suit is maintainable. AIR 1957 Pat 417 (424): 36 Pat 35 (DB).

**10. Power to construe decree.**— (1) Although an executing Court cannot go behind a decree, but must execute it as it stands, yet, when the terms of a decree are ambiguous, it can construe the decree to ascertain its precise meaning. (1889) 16 Cal 173 (183): 15 Ind App 186 (PC) * AIR 1957 Pat 87 (92): 35 Pat 1175 (DB) * (1896) 18 All 344 (347) (SB) ° AIR 1917 PC 197 (200) ° AIR 1956 Trav-Co 271 (271): ILR (1956) Trav-Co 873 (DB) * ILR (1955) Trav-Co 942 (944) ° (1880) 2 All 497 (498) (FB) ° AIR 1925 Cal 1243 (1243) * AIR 1929 Lah 437 (438) ° AIR 1935 Mad 576 (577) * AIR 1938 Pat 195 (196) (DB) ° AIR 1930 Pat 536 (537): 9 Pat 499 (DB) ° AIR 1966 Orissa 203 (204): 32 Cut LT 805. (Decree that suit stood decreed means that all reliefs asked for had been decreed.)

[See AIR 1932 Oudh 77 (78): 7 Luck 421.]

(2) Where the decree is ambiguous and where therefore it is necessary to construe the decree, it is competent to the executing Court to refer not only to the judgment but also to the pleadings in the case. AIR 1955 Cal 14 (15): ILR (1956) 1 Cal 341 (DB) ° AIR 1957 Ker 31 (32) (DB) * AIR 1957 Pat 575 (580): 36 Pat 323 (DB) ° AIR 1957 Pat 8 (9, 10) * AIR 1942 Pat 196 (197) (DB) ° AIR 1933 Lah 41 (42): 14 Lah 230 ° AIR 1926 Nag 480 (482) * AIR 1935 Oudh 39 (40): 10 Luck 416 ° AIR 1932 Pat 12 (13) (DB) * AIR 1960 SC 388 (390) ° AIR 1966 Mad 319 (320): (1965) 2 Mad LJ 551 ° AIR 1961 Cal 92 (92, 93) (FB). (AIR 1932 Cal 380, Rel. on.) * AIR 1964 Pat 525 (526): ILR 44 Pat 738 (DB).

[See AIR 1941 Pat 566 (569) (DB) ° AIR 1940 Bom 277 (278): ILR (1940) Bom 633 ° AIR 1963 Mad 175 (178): (1963) 1 Mad LJ 46 (FB). ]

(3) The Court should, if possible, adopt such a construction of the decree as will make the decree in accordance with law. (1901) 23 All 220 (226): 28 Ind App 28 (PC) * AIR 1952 Trav-Co 547 (549) (DB) ° (1899) 21 All 361 (373) (FB) ° (1903) 5 Bom LR 802 (803) (DB) * AIR 1963 All 49 (52): 1962 All LJ 1082 ° 1963 Ker LJ 812 (814): ILR (1964) 1 Ker 181 ° (1960) 1 Mad LJ 391.

(4) Court must adopt a construction which will make the decree in conformity with the judgment. AIR 1930 Mad 458 (460) * 1959 Ker LT 1010.

(5) Executing Court cannot make a new decree for the parties under the guise of interpretation. AIR 1951 SC 189 (192): 1951 SCR 292 ° AIR 1957 Pat 87 (92): 35 Pat 1175 (DB) ° (1965) 67 Punj LR 569.

**11. Powers to declare decree inexecutable.**— (1) Where a decree affecting immovable property is compulsorily registrable but is not registered, the executing Court can declare that the decree is not capable of execution. AIR 1937 All 282 (284).

[But see (1940) 42 Bom LR 1123 (1129).]

(2) Where a partition decree is drawn up without proper stamp and the executing Court without objection proceeds to execu-

**Section 38 — Note 11 (contd.)**

tion, there is no lack of inherent jurisdiction in the executing Court but there is an illegality or error affecting its jurisdiction. AIR 1942 Lah 260 (263, 264): ILR (1942) Lah 307 (FB).

[But see AIR 1948 All 375 (378): ILR (1949) All 49 (DB).]

(3) Where a decree imposes mutual obligations on both the plaintiff and the defendant which are dependent and conditional on each other, and one of the parties applies for execution, the executing Court can consider whether he is in a position to perform his part of the decree and whether, for any reason, it has become impossible for him to do so. AIR 1956 SC 359 (363): 35 Pat 347: 1956 SCR 62.

(4) A distinction has to be drawn between the two positions, namely where there is a decree which is incapable of execution on the ground that it is a nullity because the Court which passed it had no inherent jurisdiction and the case where all that can be said is that the Court passing the decree had irregularly assumed jurisdiction. In the latter case, it would not be competent to the executing Court to question the existence of jurisdiction in the Court which passed the decree. AIR 1958 Bom 30 (32): ILR (1957) Bom 786 * AIR 1958 Andh Pra 1 (8): ILR (1957) Andh Pra 326 (FB) ° AIR 1958 Andh Pra 417 (418) ° AIR 1958 Mad 490 (494): ILR (1958) Mad 622 (DB) * AIR 1957 Pat 87 (92): 35 Pat 1175 (DB) * AIR 1957 Pat 4 (5). (Decree in spite of S. 69 (2), Partnership Act, is not nullity.) ° AIR 1957 Raj 131 (132): ILR (1957) 7 Raj 366 (DB).

(5) Misdescription or insufficient description of property in decree — Boundaries not given — Executing Court can hold enquiry to ascertain subject-matter of decree instead of holding the decree inexecutable. 1961 Raj LW 128 (131).

**12. Power to fix order of sale of mortgaged properties.**—(1) Where a mortgage decree itself fixes the order in which the mortgaged properties are to be sold, the executing Court cannot go behind the decree and sell the properties in a different order. AIR 1944 Mad 465 (467) * AIR 1933 Pat 161 (163): 12 Pat 77 (DB) ° AIR 1960 Pat 378 (380): ILR 38 Pat 1 (DB).

[See AIR 1964 Mad 547 (548, 549): (1965) 1 Mad LJ 199 ° AIR 1961 Andh Pra 305, (308, 309, 310): (1961) 1 Andh WR 202. (There is nothing in the Code which prevents the Court from directing the decree-holder to execute and satisfy his decree from any particular property situate either within its local limits or outside. (1932) 63 Mad LJ 843: ILR 56 Mad 343 and (1953) 2 Mad LJ 110, re-affirmed.) * AIR 1959 Punj 490 (496).]

[But see AIR 1955 Trav-Co 92 (97) (DB). (AIR 1944 Mad 465, Dissented from).]

(2) Where the mortgage decree does not fix any order in which the mortgaged properties are to be sold, the executing Court has the power to prescribe such order. AIR 1931 All 657 (658, 659) (DB) ° AIR 1960 Pat 378 (380): ILR 38 Pat 1 (DB). (The executing Court has in exceptional cases where equity demanded it to regulate the order in which the mortgaged properties ought to be sold.)

**13. Power under rent decree.** — (1) A Court executing a rent decree has no jurisdiction to refuse execution of the decree against the property of the judgment-debtor other than the tenure in arrears or to direct that the decree-holder must proceed in the first instance against the tenure in arrears. AIR 1935 Cal 544 (544) (DB).

(2) Where a Rent Reduction Officer, having jurisdiction in the matter, reduces the rent due under a decree the executing Court cannot ignore his order and execute the decree as it stood originally. AIR 1941 Pat 390 (393) (DB).

(3) In execution of rent decree sale of portion of plot in contravention of proviso to S. 162-A of Bihar Tenancy Act (8 of 1885) is not void but operates as money sale and not rent sale. AIR 1961 Pat 279 (284, 285): ILR 40 Pat 146 (FB). (AIR 1947 Pat 303 (FB) and AIR 1947 Pat 334 (FB), Overruled.)

**14. Power to enforce agreement.**—See Section 47.

**15. Simultaneous executions.**— (1) There is nothing in law to prevent the simultaneous execution of decrees in more than one Court. AIR 1956 Pat 269 (270) (DB) ° AIR 1955 All 382 (383, 384) (DB) * AIR 1950 Ajmer 3 (3) ° AIR 1950 Mad 582 (585): ILR (1951) Mad 375 ° AIR 1917 All 129 (130) * (1872) 14 Moo Ind App 529 (540) (PC) ° AIR 1936 All 655 (656) (DB) ° AIR 1929 Bom 418 (419): 53 Bom 844. (Dissenting from AIR 1922 Bom 359.) * AIR 1937 Nag 305 (307): ILR (1937) Nag 440 (DB) ° AIR 1952 Pat 213 (218): 31 Pat 56 (FB).

[See AIR 1946 Pat 365 (369): 25 Pat 145.]

[See also AIR 1956 Pat 223 (227) (DB).]

[But see AIR 1950 Madh B 120 (120) ° AIR 1923 Pat 384 (384): 2 Pat 247 (DB) * AIR 1925 All 276 (2) (277): 47 All 57 (DB) ° AIR 1922 Bom 359 (360): 47 Bom 56 (DB). (Dissented from in AIR 1929 Bom 418.) ° AIR 1936 Oudh 64 (65) (DB) * AIR 1925 Oudh 428 (428): 29 Oudh Cas 84 ° AIR 1939 Pat 289 (290) (DB).]

(2) It is a matter for the discretion of the Court to permit or refuse concurrent execution and in practice concurrent execution is not generally carried out. AIR 1921 Low Bur 25 (26): 11 Low Bur Rul 15 * 1869 Pun Re No. 49 ° AIR 1923 Pat 224 (224, 225): 2 Pat 328 (DB). (Power should be sparingly used.) * (1882) 8 Cal 687 (690) (DB). (Power should be sparingly exercised.) * AIR 1934 Rang 231 (232) (DB).

[See also AIR 1929 Cal 529 (530): 56 Cal 1176.]

**39.**[a] **Transfer of decree.**—(1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court,—

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

(b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(c) if the decree directs the sale or delivery of immoveable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

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**Section 38 — Note 15 (contd.)**

(3) A decree-holder is entitled to proceed simultaneously against different properties. AIR 1957 Orissa 274 (275): ILR (1957) Cut 446 * AIR 1960 All 558 (559).

(4) A decree cannot be executed against the same property in more than one Court. (1909) 3 Ind Cas 105 (108) (DB) (Cal).

(5) Simultaneous execution one in the Court to which the decree has been transferred for execution under S. 39 and the other in the original Court which passed the decree is permissible. AIR 1962 All 619 (619): 1962 All LJ 104. (AIR 1936 All 655; AIR 1960 All 558, Foll.; AIR 1957 All 336, Overruled.) ° AIR 1961 Raj 157 (159, 160, 161): 1961 Raj LW 93 (DB).

(6) Where the Court at A sends a decree for execution to the Court at B within whose jurisdiction the property to be proceeded against is situate, and an application for sale of such property is made to Court at A it was held that it was not made to a "proper Court" within the meaning of Art. 182 of the Limitation Act, the reason being that Court at A cannot sell immoveable property situated outside its territorial jurisdiction. AIR 1916 PC 16: (1918) 39 Mad 640: 45 Ind App 238.

(7) Their Lordships' observations in AIR 1916 PC 16, that the tendency of the Code is against, concurrent executions, must be taken to refer to concurrent executions against the same property. AIR 1954 Mys 1 (4): ILR (1954) Mys 193 (FB).

(8) Held on facts that the defect of granting final decree allowing personal execution even before sale of the mortgaged property could not make the decree void and therefore, the executing Court could not take notice of it. As the decree allowed unconditional concurrent execution against the mortgaged property as also by personal execution, it was not necessary for the executing Court to wait until the property had been sold and had proved insufficient before ordering personal execution as the executing Court could only follow the decree. AIR 1965 Ker 16 (18): 1964 Ker LT 1101 (AIR 1918 PC 159, Disting.)

(9) See for further Notes O. 21, R. 21 and also Section 42.

## SECTION 39 — SYNOPSIS

1. Scope.
2. "Court which passed a decree."
3. When and to what Court a decree may be sent for execution.
4. Residence outside jurisdiction — Clause (a).
5. Having property outside jurisdiction — Clause (b).
6. Decree for sale or possession of property outside jurisdiction — Clause (c).
7. Court considering that execution should be in another Court — Clause (d).
8. Transfer of small cause decree for execution.
9. Transfer when takes effect.
10. Appeals from orders under this section.
11. Notice of transmission.
12. Form of application under the section.

## TOPIC INDICATOR

"Another Court" — See Note 3.
Award — See Note 2.
Court passing decree subsequently losing territorial jurisdiction — See Note 6.
Court to which decree is sent for execution — See Sections 38 and 42.
Execution Court — Going behind decree— See Section 38.
Transferee Court — Jurisdiction of—When ceases — See Sections 38 and 42.
Jurisdiction of executing Court — See Notes 4, 5 and 6.
"May" — See Note 1.
Power of transferring Court — See Note 7 and Section 42.

**1. Scope.**— (1) The section is directory and not mandatory. AIR 1944 Mad 73 (74) (DB) * AIR 1939 Cal 403 (439): ILR (1939) 1 Cal 493 (DB) ° AIR 1961 Andh Pra 305 (309): (1961) 1 Andh WR 202.

(2) Where on the date of the application for transfer, the execution of the decree is not barred the Court cannot refuse the ap-

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

[1882 and 1877, S. 223, paras. 2 and 3; 1859, Parts of Ss. 285 and 286. See Section 20, O. 21, Rr. 35, 36, 82 to 103 and Order 34.]

[a] Section 39 is extended to Amindivi Islands and the East Godavari, West Godavari and Visakhapatnam Agencies in the State of Andhra Pradesh: see Proviso to S. 1 (3). See note (a) to S. 36.

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**Section 39 — Note 1 (contd.)**

plication on the ground that the application under O. 21, R. 10 which would be put into the transferee Court is likely to be barred by the rule of limitation contained in S. 48. AIR 1959 All 466 (467) (DB).

(3) The section gives the Court a discretion either to execute decree itself or to send it to another Court for execution. AIR 1939 Cal 651 (654, 655) (DB) ° AIR 1957 Pat 654 (655) (DB) ° AIR 1959 Punj 71 (72): ILR (1958) Punj 2430 (DB). (Jurisdiction of transferring Court continues even after transfer.)

(4) The test of the applicability of the section is to see whether the Code regulates the procedure of both the transferor and the transferee Courts. AIR 1950 Mad 234 (235): ILR (1950) Mad 692 (DB) ° AIR 1955 Assam 12 (14, 15) (DB) ° AIR 1952 Kutch 34 (35) * AIR 1949 Cal 681 (682, 683) ° (1907) 34 Cal 576 (581, 582) (DB) ° AIR 1962 SC 1737 (1741, 1742, 1743,, 1744): (1963) 2 SCR 577. (Ex parte decree passed by Gwalior Court while governed by M. B. Code of Civil Procedure against resident of Allahabad — Decree is nullity — Decree transferred to Court at Allahabad on 14-9-1951 — Court held could not do so — Court at Allahabad could not execute decree.)

(5) Where there is no power to make a transfer at all, the proceedings of the transferee Court will be void ab initio. AIR 1944 Cal 301 (301).

(6) A transfer under this section must be of the whole decree and not only a part thereof. AIR 1917 Pat 70 (71) (DB) * AIR 1935 Cal 118 (119) (DB).

(7) The transfer under the section cannot be for a limited purpose only. AIR 1917 Pat 221 (222) (DB).

(8) The mere fact that a decree has been transferred to another Court on the ground of the judgment-debtor having immovable property within the jurisdiction of such Court, does not preclude such Court from arresting the judgment-debtor. AIR 1938 Mad 27 (28).

[See AIR 1963 Pat 461 (464 to 466): ILR 42 Pat 70. (Non-compliance with O. 21. Rr. 5 and 8 amounts to mere irregularity and does not affect jurisdiction of transferee Court.)]

(9) This section does not apply to a case decided by the Gram Cutchery under Bihar Panchayat Raj Act (7 of 1947). AIR 1958 Pat 370 (371).

(10) Where a decree of a trial Court has become merged in that of the Appellate Court, the latter decree is the only decree which can be transferred under this section. AIR 1933 Mad 873 (873).

(11) The decree itself is to be sent for execution to another Court. A mere order directing the decree to be transferred for execution in another Court is not sufficient as it has not by itself the effect of transferring the decree for execution. AIR 1961 Madh Pra 158 (160, 161): 1961 Jab LJ 204. (AIR 1947 Mad 431, Dissented from.)

(12) The section does not permit the transfer of a pending execution proceeding to another Court. AIR 1939 Bom 468 (470) * AIR 1958 Andh Pra 763 (764) (DB).

(13) An order of transfer of a decree for execution is a judicial order. AIR 1955 Bom 93 (95): ILR 1954 Bom 1173 (DB) ° AIR 1957 Andh Pra 544 (546) (DB) * AIR 1956 Pat 269 (270) (DB) ° AIR 1956 Sau 1 (4).

[But see AIR 1951 All 362 (365): ILR (1953) 1 All 159 (DB).]

(14) Rules not framed under Section 40 — Absence of rules does not affect Court's jurisdiction to execute transferred decree. AIR 1963 Madh Pra 153 (154): 1962 Jab LJ 511.

(15) Powers of the transferee Court — It can only execute the decree and not transfer it to Civil or revenue Court for execution. ILR (1967) 1 Punj 564 (567).

(16) Decree passed by Court in reciprocating territory — Can be transferred under this section by such Court to District Court in India for execution. AIR 1962 Punj 228 (229, 230): ILR (1961) 2 Punj 166.

(17) The issue of a precept under S. 46 has not the effect of transfer of a decree for execution to the Court to which the precept is issued. AIR 1959 Madh Pra 397 (398): 1960 Jab LJ 33.

**2. "Court which passed a decree."** — (1) An award passed under rules framed under S. 43 of the Bombay Co-operative Societies Act can be transferred by a Civil Court having jurisdiction for execution to another Court. AIR 1922 Bom 377 (377, 378): 46 Bom 128 (DB).

(2) A Civil Court has no jurisdiction to execute an award under Rule 46 (3) of the Rules made under Gwalior State Co-operative Societies Act (1997 Sm.) unless the award is transferred to it for execution by the Government Inspector of Co-operative Societies. AIR 1958 Madh Pra 199 (199, 200) (DB).

(3) A decree passed under S. 14, U. P. Encumbered Estates Act, can be sent for execution, by the Court of the Special

**Section 39 — Note 2 (contd.)**

Judge which passed it, to another Court. 1954 All L Jour 473 (473, 474).

(4) Decree of Special Judge under S. 14 of U. P. Encumbered Estates Act (25 of 1934) can be sent to a Court outside the United Provinces for execution. Transferee Court has jurisdiction to execute such decree. No question of extra-territorial application of Act arises. AIR 1959 SC 809 (812, 813): 1959 Supp (2) SCR 364. (AIR 1954 Pat 164, Reversed.)

(5) The Registrar of the High Court (Allahabad) is competent to transfer a decree for execution to the District Court. AIR 1951 All 362 (365): ILR (1953) 1 All 159 (DB).

(6) The jurisdiction of the Court which actually passed the decree to execute the same is not lost merely because a new Court is established which Court if it had been in existence on the date of the suit would have had jurisdiction to try the same. AIR 1964 Mys 34 (35) (DB).

(7) An order for payment of call moneys against J. D. in liquidation proceedings before High Court can be enforced as a decree by virtue of S. 199 of Companies Act (1913) and under Ss. 38 and 39 Civil P. C. High Court can transfer such order for execution to competent subordinate Court. AIR 1969 Andh Pra 207 (210). (AIR 1927 Mad 271, Foll.)

**3. When and to what Court a decree may be sent for execution.** — (1) Where the transfer is made on an application by the decree-holder, one or other of the conditions in cls. (a) to (d) of sub-sec. (1) must be satisfied. (1939) 41 Pun LR 186 (187) * AIR 1964 All 480 (480, 481) (DB). (Transfer of decree — Circumstances for — Decree-holder has legal right — Motive of decree-holder not material if demand for transfer is lawful.)

(2) Where the transfer is made on the Court's own motion the conditions in sub-sec. (2) must be satisfied. AIR 1953 Cal 610 (612) ° 1954 Raj LW 571 (573) ° AIR 1927 Pat 38 (40): 5 Pat 714 (DB).

(3) Where the Court of transfer has inherent jurisdiction, if the objection on the ground of the Court of transfer not being subordinate to the transferring Court is not taken at the earliest opportunity, it will not be allowed to be taken subsequently. 1954 Raj LW 571 (574).

[See also AIR 1956 SC 87 (93): 1955-2 SCR 938. (AIR 1943 Mad 449: ILR (1943) Mad 804, Approved.) ]

(4) The competency of the Court under sub-sec. (2) of this section must be determined by reference to its competence to try a suit of valuation similar to the suit in which the decree was passed. AIR 1940 Bom 277 (279): ILR (1940) Bom 633 * 1957 Jab LJ 261 (262) (DB) ° 1940 Nag L Jour 244 (251) (DB).

[See also 1969 Andh Pra 207 (209, 210) (Case under S. 3(1), Companies Act, 1913).]

(5) Provisions of this section are controlled by S. 6 and a decree cannot be transferred under sub-sec. (1) for execution to another Court if the amount or value of the decree exceeds its pecuniary jurisdiction. AIR 1940 Cal 161 (161) (DB) ° (1910) 37 Cal 574 (577) (DB) * 1901 Pun Re No. 9, p. 35 (39) (FB). ((1887) Pun Re No. 31, Overruled.) ° (1889) 16 Cal 465 (467) (DB) ° (1966) 2 Mad LJ 5 (6): (1966) 79 Mad LW 269.

[But see AIR 1914 Mad 206 (206) (DB) * (1910) 5 Ind Cas 155 (155) (DB) (Mad).]

(6) The value of the suit in which the decree was passed must be within the pecuniary limits of the jurisdiction of the Court to which the decree is proposed to be sent. AIR 1936 Pat 177 (178) (DB) ° AIR 1957 Orissa 177 (180): ILR (1957) Cut 287 ° AIR 1922 Pat 188 (189): 1 Pat 651 (DB) * (1889) 16 Cal 457 (461 to 463) (DB).

[But see AIR 1940 All 331 (334): ILR (1940) All 318 (DB). (AIR 1939 All 57: ILR (1939) All 97, Dissented from.) ° AIR 1966 Ker 318 (319): 1966 Ker LT 600. ((1889) ILR 16 Cal 465; AIR 1940 Cal 161; AIR 1936 Pat 177; AIR 1939 All 57; AIR 1940 All 331 and AIR 1962 All 586, Dissent from). * AIR 1962 All 586 (588): 1962 All LJ 707 (DB). (ILR 7 Mad 397, ILR 15 Mad 345, ILR 17 Mad 309 and 7 Mad LT 132, Followed; AIR 1922 Pat 188, AIR 1932 Pat 309, ILR 16 Cal 457 and ILR 37 Cal 474, Not followed.)]

(7) Where a decree passed by a Court of higher pecuniary jurisdiction is attached in execution of another decree passed by a Court of lower pecuniary jurisdiction and the attached decree is transferred to the latter Court for purposes of execution of its own decree, the latter Court has jurisdiction to execute the attached decree even though its value exceeds its pecuniary jurisdiction. AIR 1946 Sind 103 (106, 107): ILR (1945) Kar 445.

(8) It is not necessary that the transferee Court should be of the same kind as the transferor Court. (1892) 15 Mad 345 (347) (DB) ° AIR 1939 Cal 600 (601): ILR (1939) 1 Cal 233 (235) (DB).

(9) A Civil Court may transfer its decree to a Revenue Court and vice versa. (1883) 9 Cal 295 (303): 9 Ind App 174 (PC) * (1909) 36 Cal 252 (254) (DB).

[But see (1894) 16 All 496 (497, 498) (DB).]

(10) The Court referred to in this section is a Court governed by the Civil Procedure Code. AIR 1950 Mad 234 (235): ILR (1950) Mad 692 (DB).

(11) The failure to raise the objection to the executability of the decree in the transferring Court will not preclude the objection being taken in the executing Court. AIR 1956 SC 359 (363): 35 Pat 347: 1956 SCR 62.

**Section 39 — Note 3 (contd.)**

[See however AIR 1960 Mad 343 (344): 73 Mad LW 230.]

(12) There is nothing in S. 39 to compel the transferor Court to decide questions of limitation or of like nature before transferring a decree to another Court for any of the reasons mentioned in S. 39. The mere fact that an application filed before the transferor Court is called an execution petition under R. 138 (1) of the Madras Civil Rules of Practice, cannot convey the idea that it is an execution petition in itself. AIR 1960 Andh Pra 321 (323): (1959) 2 Andh WR 303 (FB).

(13) When decree passed by transferor Court is a foreign decree passed against non-resident foreigner and as such a nullity according to the Code governing the Court to which it is transferred, such transferee Court is incompetent to execute such a decree passed under different Code. AIR 1964 Madh Pra 78 (81): 1964 MPLJ 11 (DB).

**4. Residence outside jurisdiction. — Clause (a).**— (1) Under cl. (a) it is sufficient if it is shown that the judgment-debtor resides within the jurisdiction of the Court to which the transfer is sought. ('44) AIR 1944 Mad 73 (74).

(2) The decree-holder is not bound to state the mode in which the decree is sought to be executed. AIR 1929 Cal 529 (529, 530): 56 Cal 1176 (DB).

(3) The fact that the judgment-debtor is not liable to arrest in execution of the decree is not in itself a good ground for refusing to transfer the decree under this clause. AIR 1944 Mad 73 (74).

(4) Where a prohibitory order is to be served on the garnishee of the judgment-debtor, the decree may be transferred to Court within whose jurisdiction the garnishee resides. (1911) 39 Cal 104 (108, 109) (DB).

**5. Having property outside jurisdiction— Clause (b). —** (1) Where property sought to be attached is bona fide outside the jurisdiction of the Court which passed the decree, that Court must transfer the case to the Court within whose local jurisdiction the property is situated. AIR 1947 Mad 347 (350): ILR (1948) Mad 18 (FB) ° AIR 1918 Pat 126 (127): 4 Pat L Jour 141 (DB) ° AIR 1932 Cal 213 (214): 59 Cal 199 (DB).

(2) The decree of a temporary Court, which has no local jurisdiction, must be transferred for execution to the Court which has local jurisdiction over suits in respect of such property. AIR 1917 Mad 272 (273) (DB) * AIR 1932 Cal 213 (214), 215): 53 Cal 199 (DB).

(3) Where it is alleged by the decree-holder applying for transfer that the properties within the jurisdiction of the Court are not sufficient to satisfy the decree, it is enough if the allegations are supported by an affidavit or some other evidence on which the Court can reasonably rely. AIR 1935 Cal 268 (270) (DB).

(4) When a decree is transmitted for execution to another Court, the presumption is that the decree was intended to be executed against properties within the jurisdiction of the latter Court. AIR 1924 Mad 144 (144) (DB).

(5) Where a decree is transferred for execution to another Court on the ground that one of the judgment-debtors has property within the local limits of the jurisdiction of the other Court, the decree cannot be executed against another judgment-debtor who does not fulfil that condition. AIR 1936 Cal 521 (523): 63 Cal 1210.

[But see AIR 1938 Mad 27 (29).]

**6. Decree for sale or possession of property outside jurisdiction — Clause (c). —** (1) Clause (c) includes cases where the Court passing the decree has subsequently lost territorial jurisdiction. AIR 1943 Mad 449 (453): ILR (1943) Mad 804 (DB) ° (1881) 6 Cal 513 (519, 520) (DB).

(2) This clause recognises the transferee Court as having inherent jurisdiction to sell or deliver properties situate within its territorial limits. AIR 1943 Mad 449 (453): ILR (1943) Mad 804 (DB).

(3) The transferee Court cannot execute the decree unless the Court which passed the decree has sent it to the former Court for execution. AIR 1943 Mad 449 (452, 453): ILR (1943) Mad 804 (DB) ° AIR 1964 Andh Pra 68: (1963) 2 Andh WR 324 (DB).

(4) Where subsequent to a decree, the immovable property which is the subject-matter of the decree is transferred to the jurisdiction of another Court, and if it proceeds to execute the decree against the property in the absence of a transfer of the decree to it for execution, the proceeding is not entirely without jurisdiction. AIR 1956 SC 87 (93): 1955-2 SCR 938: AIR 1969 Guj 141 (144, 145) * AIR 1968 Mad 99 (101, 102): (1967) 1 Mad LJ 281. (However, this principle does not apply to money decrees. In case of money decrees the decree must be transferred to executing Court by a proper transmission of the decreeing Court before it can be executed. AIR 1956 SC 87, AIR 1932 Mad 418 (SB), AIR 1959 Punj 350, AIR 1962 Punj 394 (FB), AIR 1964 Mys 34, AIR 1942 Cal 321, AIR 1943 Mad 449 Rel. on.; AIR 1920 Mad 427 (FB) (Overruling AIR 1914 Mad 162) Ref.) • AIR 1967 Ker 81 (82): 1964 Ker LT 690. (Execution of mortgage decree — Decree passed by Court A — Readjustment of territorial jurisdiction resulting in transfer of property under decree to Court B — Execution proceedings in Court B — Readjustment of jurisdiction resulting in retransfer of property to Court A — Sale in execution by Court B is valid.)

(5) Where properties mortgaged are within the jurisdiction of more than one Court

**40.**[a] **Transfer of decree to Court in another State.**—Where a decree is sent for execution in another [b][State], it shall be sent to such Court and executed in such manner as may be prescribed by rules in force in that [b][State].

[a] Sec. 40 is extended to the Amindivi Islands and the East Godavari, West Godavari and Visakhapatnam Agencies in the State of Andhra Pradesh: see Proviso to Section 1 (3). See note (a) under Section 36.

[b] Substituted for "province" by A. L. O., 1950 [26-1-1950].

**Section 39 — Note 6 (contd.)**

and one of such Courts has passed a decree for sale, the Court which has passed the decree is entitled to sell the properties outside its jurisdiction also. AIR 1939 Cal 403 (409) (DB).

**7. Court considering that execution should be in another Court — Clause (d).** — (1) In making an order of transfer under this clause, the Court must give its reasons in writing although when the parties do not object the mere failure to give reasons in writing will not affect the jurisdiction of the transferee Court to execute the decree. AIR 1955 All 96 (97).

**8. Transfer of small cause decree for execution.** — (1) A Court of Small Causes has no jurisdiction to execute a decree against immovable property or to sell movable propery outside its jurisdiction. It must transfer the decree under this section to a Court having jurisdiction. AIR 1951 Mad 491 (492) ° AIR 1941 Lah 109 (113): ILR (1941) Lah 670 (DB) ° (1884) 6 All 243 (248) (FB).

(2) For purposes of a transfer under this section, the small cause side and the original side of the same Court should be regarded as different Courts. AIR 1956 Trav-Co 213 (214): ILR (1956) Trav-Co 250 (DB) ° AIR 1951 Mad 491 (492) ° (1884) 8 Bom 230 (234) (DB).

(3) Small Cause Court decree — Execution by attachment and sale of immovable property — Prayer for transfer to original side — Court without passing formal order of transfer proceeding to execute it — Court must be deemed to have transferred decree to original civil side. AIR 1960 Pat 171 (172): 1959 BLJR 695.

**9. Transfer when takes effect.**— (1) A transfer of decree under this section to another Court takes effect from the date of order of transfer. AIR 1953 Mad 71 (73) (DB) * AIR 1957 Andh Pra 544 (546) (DB) ° AIR 1957 Mad 726 (727) (DB).

**10. Appeals from orders under this section.**—(1) An order rejecting an application for transfer falls under S. 47 of the Code and is appealable as a decree. (1904) 8 Cal WN 575 (577) (DB).

(2) An order of the transmitting Court refusing to decide objections to the executability of the decree, on the ground that they should be decided by the transferee Court is appealable. AIR 1928 Rang 40 (41): 5 Rang 775 (DB).

**11. Notice of transmission.**—(1) A Court is bound to issue notice to the judgment-debtor before transmission and hear his objections as to the executability of the decree. AIR 1929 Mad 199 (200) (DB) ° AIR 1917 Pat 70 (71) (DB) * AIR 1926 Mad 411 (412) (DB) ° AIR 1924 Mad 673 (674): 47 Mad 641 (DB) ° AIR 1930 Oudh 305 (308, 309) (DB).

[But see AIR 1956 Pat 269 (270) (DB) * 1956 Andh LT 997 (998) ° AIR 1951 All 362 (365): ILR (1953) 1 All 159 (DB) ° AIR 1936 Mad 99 (99) (DB).]

(2) Where, on the original side, the order of transmission is passed by the Master or Registrar of the High Court, such order is only a ministerial act and no notice is necessary. AIR 1916 Cal 488 (493): 43 Cal 903 (FB) ° AIR 1927 PC 73 (76): 54 Cal 500: 54 Ind App 129 * AIR 1937 Bom 365 (368): ILR (1937) Bom 691 ° AIR 1951 All 362 (365): ILR (1953) 1 All 159 (DB) ° AIR 1969 Bom 84 (86): 70 Bom LR 373. (Application is not a revival of decree.)

**12. Form of application under the section.** — (1) An application under this section for transmission of a decree for execution to another Court is not required to be in any particular form. AIR 1953 SC 65 (67): 1953 SCR 377 ° (1947) 52 Mys HCR 400 (402) (DB) * AIR 1935 Pat 485 (486) (DB).

(2) A mere clerical error in writing the application will not invalidate it. AIR 1937 All 397 (399).

**Section 40 — Note 1**

(1) The manner of execution is that of the Court which executes the decree, under the rules in force in its own province (now State) or district. AIR 1938 Lah 126 (128): ILR (1938) Lah 264 (DB) ° (1907) 31 Bom 5 (9) (DB).

(2) The question whether the execution of the transferred decree is barred by limitation is to be decided according to the law of the Court which passed the decree. AIR 1942 Pat 128 (129) (DB) ° (1897) 24 Cal 473 (491) (SB) * (1911) 11 Ind Cas 216 (216, 217) (DB) (Cal) ° (1913) 36 Mad 108 (111, 112) ° (1908) 31 Mad 24 (27) (DB) * AIR 1936 Pat 104 (105): 15 Pat 356 (DB).

[See however AIR 1947 Oudh 206 (207): 22 Luck 353 (DB).]

[But see AIR 1954 Sau 123 (127) (FB).]

(3) The section refers only to procedure; and in matters of the substantive rights of the parties, the law of the province where the decree was passed will be applicable. AIR 1953 Mys 37 (38): ILR (1952) Mys 312

**41.[a] Result of execution proceedings to be certified** — The Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or where the former Court fails to execute the same the circumstances attending such failure.

[1882, S. 223, para. 4; 1859, S. 294; 1877, S. 223 (4).]

[a] Sec. 41 is extended to the Amindivi Islands and the East Godavari, West Godavari and Visakhapatnam Agencies in the State of Andhra Pradesh: see Proviso to S. 1 (3). See note (a) under S. 36.

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**Section 40 — Note 1 (contd.)**

(DB) ° AIR 1948 Pat 245 (247); 26 Pat 307 (DB).

(4) The section applies only when the "transferor" and the "transferee" Courts are both regulated by the provisions of the Code of Civil Procedure. (1888) 12 Bom 230 (231) (DB) ° (1907) 34 Cal 576 (580, 582) (DB) * (1888) 15 Cal 365 (370) (DB) ° AIR 1936 Pat 150 (150) (DB).

(5) In the absence of any rules made by the High Court in exercise of its powers under S. 122 of the Code, rules in the First Schedule to the Code will govern the procedure as dealt with therein. AIR 1960 Madh Pra 387 (387): 1960 Jab LJ 612.

(6) Absence of rules under this section does not bar execution of decree sent for execution. AIR 1963 Madh Pra 153 (154): 1962 Jab LJ 511 (DB).

(7) The specific and the special provision contained in S. 31 of the Presidency Small Cause Courts Act does not engraft the general rule provided in O. 21, R. 5. Therefore, a transfer of a decree by the Small Cause Court of one State to Munsif's Court of another State is not illegal or without jurisdiction. AIR 1962 Pat 272 (273): 1962 BLJR 56.

## SECTION 41 — SYNOPSIS

1. Scope and object.
2. "Shall certify."
3. Jurisdiction of transferee court, how long continues. See S. 42.

**1. Scope and object.**—(1) The Court to which a decree is sent for execution must on the determination of the proceedings in that Court, certify to the Court which passed the decree the result of those proceedings. (1909) Cal L Jour 239 (243) (DB) ° (1960) 1 Andh WR 260: 1960 Andh LT 261. (Where, therefore, the order passed by the transferee Court does not indicate that it purported to intimate to the transferor Court of the fact of non-satisfaction of the decree, the execution proceedings started in the transferee Court are not closed.)

(2) The effect of certification under Section 41 is to determine the jurisdiction of the transferee Court. AIR 1955 Assam 12 (14, 15) (DB) * AIR 1955 Pat 456 (457): 34 Pat 599 (DB) ° AIR 1924 Bom 359 (359, 360) (DB).

(3) A certificate under this section can be issued only in the following circumstances: (1) if the transferee Court has succeeded in fully execuing the decree; (2) if the transferee Court has completely failed to execute the decree within the limits of its jurisdiction; or (3) if the transferee Court has executed the decree partly and has failed to execute the remaining part of the decree within its jurisdiction. The mere fact that one execution case has been dismissed on part satisfaction cannot prevent the transferee Court from entertaining a fresh application for execution: and, during the pendency of the latter, certificate cannot be issued under Section 41 AIR 1955 Pat 456 (457): 34 Pat 599 (DB).

(4) issue of non-satisfaction certificate though found not in accordance with law is yet a step-in-aid of execution. AIR 1969 Orissa 147 (148, 149): 35 Cut LT 181. (AIR 1932 Pat 286, Foll.)

**2. "Shall certify."**—(1) There must be a formal certification by the transferee Court to the transferor Court and the fact of certification should not be left open to inferences to be drawn from entries in the register of suits of the transferor Court. AIR 1924 Bom 359 (359) (DB) * AIR 1961 Pat 149 (150): 1961 BLJR 75 (DB). (The act of sending a certificate under S. 41 is something in the nature of a judicial act and a formal order of the transferee Court to that effect would be necessary to satisfy the requirements of section 41. AIR 1955 Pat 456, Rel. on.)

[But see AIR 1923 Bom 371 (371) (DB).]

(2) The mere sending of a certificate by the transferee Court does not oust its jurisdiction to further execute the decree. The jurisdiction continues until a copy of the decree together with the full satisfaction or non-satisfaction certificate is returned. AIR 1951 Hyd 65 (66, 67, 68): ILR (1951) Hyd 362 (DB) ° AIR 1950 Cal 287 (293) ° AIR 1969 Orissa 147 (148): 35 Cut LT 181. (Mere communication of information without a formal order is not non-satisfaction certificate. AIR 1961 Pat 149, Rel. on.)

[But see AIR 1937 All 474 (475).]

(3) An order that the result of part satisfaction of the decree may be communicated to the transferor Court does not amount to a certificate. AIR 1938 All 412 (413) (DB).

(4) A report of the facts relating to an arrangement come to between the decree-holder and the judgment-debtor is not such a certificate as is contemplated by the section. AIR 1937 All 766 (768) (DB).

**42.**[a] **Powers of Court in executing transferred decree —** The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.

[1882, 1887, S. 228; 1859 S. 294; See O. 21, R. 9 and Sch. III, C. P. C.]

[a] Section 42 is extended to the Amindivi Islands and the East Godavari, West Godavari and Visakhapatnam Agencies in the State of Andhra Pradesh : see Proviso to S. 1 (3). See note (a) under S. 36.

**Section 41 — Note 2 (contd.)**

(5) Where the transferee Court dismissed the execution case and directed that the transferor Court should be informed of it and a copy of this order was actually filed in the latter Court with the application of the decree-holder asking for a transfer to another Court, it was held that this section was complied with. AIR 1937 Cal 557 (559): ILR (1937) 2 Cal 734 (DB).

[See AIR 1969 Orissa 147 (148, 149): 35 Cut LT 181.]

(6) The section prescribes no particular form of the certificate. Intimation sent by the transferee Court that the execution case is dismissed as infructuous is a sufficient compliance with the section. AIR 1946 Pat 365 (366): 25 Pat 145 (DB) * AIR 1961 Raj 157 (161): 1961 Raj LW 93 (DB). (If information is sent to the Court concerned about the result of the execution case that in itself is sufficient to amount to a certificate within the meaning of Section 41 of the Code.)

(7) Where the transferee Court dismisses the execution case on the ground of limitation and sends back the case to the transferor Court with the requisite certificate, but the objection as to limitation is disallowed on appeal, the transferee Court can get back the records and proceed with the execution. AIR 1920 Pat 128 (129) (DB).

(8) Section 41 read with Order 21, R. 6 makes it clear that reporting in regard to the state of execution of the decree has to be made at both ends both by the transmitting Court and by the transferee Court. AIR 1957 All 336 (337).

(9) The transferee Court retains the power to execute the decree so long as it does not certify under Section 41. AIR 1957 Andh Pra 403 (405) * AIR 1963 Madh Pra 154 (155): 1961 Jab LJ 1270 (DB).

(10) Where a certificate under Sec. 41 is not received from the transferee Court, the transferor Court does not altogether lose seisin of decree and it has jurisdiction to execute decree in respect of property within its jurisdiction. AIR 1964 Orissa 170 (172): (1964) 6 OJD 21.

(11) Section 41 does not prescribe that certificate should precede the presentation of execution application to the transferor Court. AIR 1967 Mys 24 (25): (1965) 2 Mys LJ 85 (DB).

(12) An omission of the transferee Court to send a non-satisfaction certificate after deciding the execution case may be an irregularity but that would not affect the right of the decree-holder to file a second execution in Court which passed the decree. AIR 1960 All 558 (559).

**3. Jurisdiction of transferee Court how long continues.**—See S. 42.

## SECTION 42 — SYNOPSIS

1. **Powers of Court executing transferred decree.**
2. **Jurisdiction of transferee Court, how long continues.**
3. **"Shall be subject to the same rules in respect of appeal."**

## TOPIC INDICATOR

Pecuniary limits of the jurisdiction of the transferee court — See S. 39.
Territorial jurisdiction of the transferee Court — See S. 38.
Powers of transferor Court after transfer of decree — See Note 2.
Question of limitation relating to execution of decree — See Note 1.
Claims by or against banking Company which is being wound up — See Note 1.
Transfer of subject-matter of decree to jurisdiction of another court — See S. 37.

**1. Powers of Court executing transferred decree.**—(1) A decree transferred to a Court for execution is to be regarded as a decree of that Court for the purposes of execution and the transferee Court has the same powers as it would have, if the decree had been passed by itself. AIR 1956 SC 359 (363): 35 Pat 347: 1956 SCR 62 * AIR 1957 Andh Pra 403 (405) ° AIR 1954 Pat 497 (499) (DB) ° 1950 Trav-Co LR 437 (443) (DB) * AIR 1947 Mad 347 (349): ILR (1948) Mad 18 (FB) ° AIR 1944 Mad 446 (447): ILR (1945) Mad 257 (DB) ° AIR 1924 All 700 (700): 46 All 560 (DB) * AIR 1925 Cal 213 (216) (DB) ° AIR 1921 All 199 (201): 43 All 394 (DB) ° AIR 1925 Sind 293 (294): 19 Sind LR 1 ° AIR 1927 Oudh 112 (112): 1 Luck 46 (DB) * AIR 1967 Kerala 81 (83): 1964 Ker LT 690. (Execution of mortgage decree — Decree passed by Court A — Readjustment of territorial jurisdiction resulting in transfer of property under decree to Court B — Execution proceedings in Court B — Readjustment of jurisdiction resulting in

## STATE AMENDMENT

**Uttar Pradesh**

For the existing Section 42 the following shall be substituted:

"42. (1) The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of decree shall be punishable by such Court in the same manner as if it had passed the decree, and its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.

(2) Without prejudice to the generality of the provisions of sub-section (1), the powers of the Court under that sub-section shall include the following powers of the Court which passed the decree, namely :—

(a) power to send the decree for execution to another Court under Section 39;

(b) power to execute the decree against the legal representative of the deceased judgment-debtor under Section 50;

(c) power to order attachment of a decree.

(3) A Court passing an order in exercise of the powers specified in sub-section (2) shall send a copy thereof to the Court which passed the decree.

(4) Nothing in this section shall be deemed to confer on the Court to which the decree is sent for execution any of the following powers, namely :—

(a) power to order execution at the instance of the transferee of a decree;

(b) in the case of a decree passed against a firm, power to grant the leave to execute such decree against any person other than such a person as is referred to in Clause (b) or Cl. (c) of sub-rule (1) of Rule 50 of O. XXI".

—President's Act 35 of 1968, S. 2.

**Section 42 — Note 1 (contd.)**

retransfer of property to Court A — Sale in execution by Court B is valid.) ° AIR 1964 Madh Pra 226 (226, 227): 1963 Jab LJ 401. (The question whether the decree could be executed against certain properties can be determined by the transferee Court.)

[See also 1960 Andh LT 93 (DB). (Case under Section 42 (3), Hyderabad Jagirdars Debt Settlement Act 12 of 1952.)

(2) The powers of transferee Court as given in Section 42 are not restricted by the provisions of Order 21, Rule 26. AIR 1964 Madh Pra 226 (226, 227): 1963 Jab LJ 401 (DB).

(3) The power of attaching a decree under Order 21, Rule 53 (4) can be exercised by the Court to which the decree is sent for execution. AIR 1940 Pat 557 (558, 559): 19 Pat 832 (DB).

(4) The Court executing a transferred decree for specific performance of a contract to sell is competent to decide any question as to the identity of the property which was the subject of the contract. AIR 1956 SC 359 (363): 35 Pat 347: 1956 SCR 62.

(5) The Court to which a decree is sent for execution will not execute the decree until a regular application is made to it under Order 21, Rule 11. AIR 1924 Nag 413 (414) ° (1910) 35 Bom 103 (109) (DB).

(6) Where the decree-holder has already made an application for execution to the Court which has passed the decree he is not required to make a fresh application to the transferee Court. AIR 1924 Pat 120 (121): 2 Pat 909 (DB) ° AIR 1931 Cal 312 (316): 58 Cal 832 (DB).

(7) Where an application for execution and for transfer of a decree is filed in the Court which passed the decree within 12 years of the date thereof, and while this application is pending an application for execution is also filed in the transferee Court within that period the execution of the decree is not barred under Section 48, although order for transfer is passed and certificate of non-satisfaction is sent to transferee Court beyond 12 years. AIR 1947 Cal 424 (426).

[See AIR 1949 Mad 218 (219) ° AIR 1945 Mad 70 (71).]

(8) The expression "powers in executing such decree" means "powers in carrying out the purpose of executing the decree." AIR 1953 Cal 765 (766) ° AIR 1936 Rang 184 (187).

(8a) Questions such as limitation which relate to executability of the decree can be raised and decided in the Court which passed the decree when transfer is applied for. AIR 1954 Mys 1 (3): ILR (1954) Mys 193 (FB).

(9) As a result of the combined operation of Ss. 39 and 42 all objections whatever their nature may be bearing on the executability of the decree could be urged before the executing Court and Section 39 does not compel the transferor court to

Section 42 — Note 1 (contd.)
decide questions of limitation or of a like nature before transferring decree to another. AIR 1960 Andhra Pra 321 (323): (1959) 2 Andh WR 303 (FB).

(10) The failure to raise the objection as to executability of decree in the transferring Court will not preclude its being taken in the transferee Court. AIR 1956 SC 359 (363): 35 Pat 347: 1956 SCR 62.

(11) The transferee Court cannot question the legality or propriety of the order of the transferor Court directing execution. AIR 1930 Lah 143 (144) ° AIR 1934 Mad 266 (266) (DB) ° ('85) 7 All 330 (333) (DB) ° ('97) 21 Bom 456 (458) (DB) * (1880) 5 Cal 736 (737) (DB) ° AIR 1932 Pat 168 (169): 11 Pat 94 (97) (DB) * AIR 1937 Rang 477 (480): (1937) Rang LR 287 * (1890) 15 Bom 28 (29, 30) (DB) ° AIR 1929 Mad 199 (199, 200) (DB).

(12) A transferee Court cannot transfer the decree to another Court for execution. AIR 1956 Madh B 255 (255): ILR (1956) Madh B 293 (DB) * AIR 1958 Madh Pra 131 (132) ° AIR 1953 Mys 37 (38): ILR (1952) Mys 312 (DB) ° AIR 1938 Mad 113 (114): ILR (1938) Mad 326 (DB) ° ILR (1967) 1 Punj 564 (569).

(13) A transferee Court cannot stay execution of the decree except under the provisions of Order 21, Rule 26. AIR 1936 Rang 184 (187).

(14) The transferee Court also cannot go behind the decree or add to or vary its terms but must execute the decree as it stands. AIR 1943 Nag 340 (344): ILR (1944) Nag 1 (FB) ° AIR 1953 Mys 37 (38): ILR (1952) Mys 312 (DB) ° AIR 1931 Rang 252 (256): 9 Rang 480 * AIR 1934 Rang 165 (166): 12 Rang 320 (DB) ° AIR 1931 All 92 (94): 53 All 125 (DB). ° AIR 1961 All 1 (6): 1960 All LJ 967 (FB). (Compromise in execution proceedings — Agreement not to execute decree for specified time in return for judgment-debtor's agreement to pay interest at rate higher than decretal rate — Compromise cannot be engrafted on the decree and enforced in execution.)

(15) A transferee Court cannot rectify any mistake in the decree. Such mistake can be rectified only by the court which passed the decree. 1959 Raj LW 419 (420, 421). (Mistake in decree about identity of judgment-debtor. AIR 1940 Bom 10 and AIR 1925 Cal 203, Foll.)

(16) While an application for substitution of legal representatives should be made to the Court which passed the decree and not to the transferee Court, the non-compliance with the rule is only an irregularity in procedure which, if acquiesced in by a party cannot be challenged by him later on. AIR 1928 PC 162 (164): 55 Ind App 227: 3 Luck 314 ° AIR 1959 Punj 71 (75): ILR (1958) Punj 2430. (If objection is waived or if otherwise it is not possible to approach the Court which passed the decree or for other and sufficient and adequate reason the transferee Court so considers then it can proceed with the execution application.)

(17) The transferee Court can entertain an objection and investigate into the question whether the Court which passed the decree has made any order under O. 21, R. 16 for execution of the decree by the assignee. 1958 MPC 145 (147).

(18) The transferee Court cannot question the jurisdiction of the Court which passed the decree. AIR 1954 Tripura 5 (7) ° AIR 1940 Bom 277 (278): ILR (1940) Bom 633.

(19) The Court to which the decree is sent for execution can enter into the question of its own jurisdiction to execute the decree. AIR 1940 Bom 277 (278): ILR (1940) Bom 633.

(20) It is open to the transferee Court to take into account later happenings. AIR 1927 Rang 104 (105): 4 Rang 562 (DB) * AIR 1951 Nag 270 (275): ILR (1950) Nag 491 (DB).

(21) The transferee Court has jurisdiction to go into the question of limitation and decide that the decree was barred by limitation and not capable of execution. AIR 1955 Pat 187 (189).

(22) Where a transferee Court certifies its failure to execute the decree, it is only the Court passing the decree that is competent to grant a certificate of non-satisfaction to the decree-holder to enable him to execute the decree in another Court. AIR 1934 Lah 330 (331).

(23) Sections 45-A and 45-B of the Banking Companies Act, 1949, override Section 42, Civil Procedure Code, in respect of the claims by or against a banking company which is being wound up. AIR 1953 Cal 610 (612).

(24) Where a decree is sought to be executed against three judgment-debtors on the basis of a transfer certificate obtained against only two of them, the Court is not competent to proceed against the third judgment-debtor. AIR 1956 Ajmer 39 (39).

(25) As the result of the amendment of Section 42 by U. P. Act 24 of 1954 a decree of a Small Cause Court cannot be executed against immovable property at all; not by that Court because of the express prohibition in the C. P. C. and not by any other Court because of the restriction imposed by the amended Section 42. AIR 1960 All 512 (513): 1960 All LJ 352 ° 1966 All LJ 420 (420): 1966 All WR (HC) 139 ° AIR 1963 All 587 (588): 1963 All LJ 220 (DB). (AIR 1960 All 512, Approved.)

(26) The amendment of S. 42 by U. P. Act (24 of 1954) can only be prospective and not retrospective. It cannot be made applicable to the decrees that had already been passed or to the decrees passed in cases that had already been instituted before the Amending Act came into force. AIR 1968 All 312 (DB).

**Section 42 — Note 1 (contd.)**

[But see AIR 1967 All 263 (264): 1966 All L J 356 (Decree of the Court of Small Caus s — Transfer to District Munsiff's Court after amendment of Section 42 — Transferee Court has no power to execute the decree by sale of immovable property.)]

(27) Section 93 of the U. P. Panchayat Raj Act being a special law overrides the provision of Section 42, Civil P. C. (as amended by U. P. Act 24 of 1954). A Munsif to whom a decree passed by a Nyaya P nchayat is transferred under Section 93 (2) for execution can execute them as if it were passed by itself by attachment or sale of immovable property. AIR 1966 All 218 (220): 1965 All LJ 423.

(28) The powers of the transferee Courts given in Section 42 is not limited by any rules that can be framed under Section 40. The absence of rules does not staud in the way of execution of decree by transferee Courts. AIR 1963 Madh Pra 153 (154): 1962 MPLJ 540 (DB).

(29) Where decree of Special Judge under Section 14 U. P. Encumbered Estates Act (25 of 334) is transferred for execution to Court outside U. P. transferee Court has jurisdiction to execut such decree and no question of extra territorial application of Act arises. AIR 1959 SC 809 (812, 813): 1959 Supp (2) SCR 364. (AIR 1954 Pat 164, Reversed.)

(30) As to power of transferee Court to grant leave under O. 21, R. 50 (2), see Notes on O 21, R. 50.

**2. Jurisdiction of transferee Court, how long continues.**—(1) The transferee Court retains its jurisdiction over the execution proceedings until it certifies under S. 41. AIR 1952 Pat 213 (219): 31 Pat 56 (FB) * AIR 1955 Pat 456 (457): 34 Pat 599 (DB) * AIR 1951 Nag 270 (275): ILR (1950) Nag 491 (DB) ° AIR 1947 Mad 431 (433): ILR (1948) Mad 117 (DB) * AIR 1940 Cal 171 (173): ILR (1939) 2 Cal 173 * (1898) 20 All 129 (131, 132) (DB) ° (1909) 1 Ind Cas 57 (61) (DB) (Cal) * AIR 1963 Madh Pra 154 (155): 1961 Jab LJ 1270.

(2) Jurisdiction of the transferee Court ceases on the execution being withdrawn from it. AIR 1940 Cal 171 (173): ILR (1939) 2 Cal 173 ° AIR 1926 Bom 271 (272): 50 Bom 439 (DB).

(3) Decree partly executed by transferee Court — Application for further execution can be made to it — Certificate under Order 21, Rule 6 is not necessary. AIR 1955 Pat 456 (457). 34 Pat 599 (DB) ° Madh B LJ 1955 HCR 1150 (1152) (DB) * (1909) 1 Ind Cas 57 (61) (DB) (Cal) ° AIR 1931 Pat 27 (30): 9 Pat 829 (DB).

(4) Transferee Court is not bound to send certificate under Section 41 as soon as execution application fails. Failure should be complete. AIR 1923 Bom 396 (396) (DB).

(5) Execution petition struck off for some informality—Jurisdiction of Transferee Court is not determined thereby. (1909) 1 Ind Cas 57 (61) (DB) (Cal) ° (1898) 20 All 129 (132) (DB) ° AIR 1926 Pat 274 (275): 5 Pat 398.

(6) After the issue of the certificate under Section 41 the transferee Court ceases to have jurisdiction to receive execution petitions or to do anything further in the matter. AIR 1950 Cal 287 (293) (DB) ° (1939) 43 Cal WN 412 (415) (DB) ° AIR 1926 Pat 274 (275): 5 Pat 398 (DB) * AIR 1937 Rang 406 (407) (DB).

[But see AIR 1922 Nag 210 (212): 18 Nag LR 178 (DB).]

(7) After sending a certificate under Section 41 the transferee Court has jurisdiction to decide objections in respect of anything done in the course of the execution proceedings which were pending before it. AIR 1929 Oudh 76 (79): 4 Luck 209 (DB).

(8) The fact that execution has been transferred to another Court does not deprive the transferor Court of all control over the execution proceedings. AIR 1952 Pat 213 (218): 31 Pat 56 (FB) ° AIR 1958 Andh Pra 655 (657): ILR (1957) Andh Pra 615 (DB) ° AIR 1951 All 380 (381) (DB) * AIR 1946 Pat 365 (366, 367): 25 Pat 145 (DB) ° AIR 1940 Sind 11 (13): ILR (1940) Kar 46 (DB) ° (1885) 7 All 73 (76) (DB) * AIR 1929 Bom 418 (419): 53 Bom 844 (DB) ° AIR 1936 Cal 267 (269) (DB) ° AIR 1938 Mad 113 (114): ILR (1938) Mad 326 (DB) * AIR 1939 Pat 144 (145): 17 Pat 617 (DB) ° AIR 1964 Orissa 170 (172): (1964) 4 Orissa JD 21. (AIR 1947 Mad 431, Dissented from; 14 Moo Ind App 529 (PC) and AIR 1928 PC 162 and AIR 1952 Pat 213 (FB), Rel. on.) ° AIR 1962 Punj 293 (296): 64 Pun LR 203. (Transfer Certificate issued for wrong amount — Certificate can be recalled and amount corrected.) ° AIR 1969 Orissa 147 (148, 149): 35 Cut LT 181.

(9) After the execution has been transferred the transferor Court

(a) can determine objections as to the executability of the decree. AIR 1953 All 106 (109) * AIR 1929 Mad 199 (200) (DB) ° AIR 1927 Nag 31 (32) ° AIR 1962 Punj 293 (296): 64 Pun LR 203. (Satisfaction of decree by payment out of Court.)

(b) can determine a point of limitation. AIR 1953 All 106 (109) * AIR 1941 Rang 56 (58, 59): 1940 Rang LR 725 (DB) ° (1886) 13 Cal 257 (262) (DB) ° AIR 1939 Pat 144 (145): 17 Pat 617 (DB).

(c) can sanction an agreement for payment of the decree in instalments. AIR 1943 Nag 340 (344): ILR (1944) Nag 1 (FB) ° AIR 1953 All 106 (109).

(d) can decide who are the legal representatives of the judgment-debtor. AIR 1953 All 106 (109) ° AIR 1926 Mad 411 (412) (DB).

(e) can entertain an application for execution against the legal representatives of

**43.[a] Execution of decrees passed by civil Courts in place to which this Code does not extend.**—Any decree passed by any civil Court established in any part of India to which the provisions of this Code do not extend, or by any Court established or continued by the authority of the Central Government outside India, may, if it cannot be executed within the jurisdiction of the Court by which it was passed, be executed in the manner herein provided within the jurisdiction of any Court in the territories to which this Code extends.[b]

[1882, 1877, S. 229, 1859, S. 284.]

[a] Substituted by the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), S. 8 [1-4-1951].

[b] Section 43 is extended to the Amindivi Islands and the East Godavari, West Godavari and Visakhapatnam Agencies in the State of Andhra Pradesh: see Proviso to S. 1 (3). See note (a) below S. 36.

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Section 42 — Note 2 (contd.)

the judgment-debtor. (1909) 4 Ind Cas 46 (48) (DB) (Cal) ° (1905) 28 Mad 466 (471) (FB).

(f) can recognise an assignment of the decree AIR 1933 Mad 110 (111, 112) (DB) * (1879) 2 All 283 (283) (DB) ° AIR 1931 Lah 690 (690, 691).

(g) can stay the execution of the decree. (1905) 28 Mad 466 (471) (FB) ° AIR 1939 Pat 144 (145): 17 Pat 617 (DB).

(h) can entertain application for rateable distribution. (1905) 1 Cal L Jour 315 (318) (DB) ° AIR 1934 Lah 113 (113) * (1903) 25 All 443 (444) (DB).

(i) can pass an order transferring decree to another Court. AIR 1950 Mad 582 (585): ILR (1951) Mad 375 ° AIR 1947 Mad 431 (432): ILR (1948) Mad 117 (DB) * AIR 1927 Rang 258 (261): 5 Rang 297 (DB) ° AIR 1928 Mad 493 (494) (DB).

[But see AIR 1928 Rang 40 (42): 5 Rang 775 (DB).]

(j) can recall execution proceeding from the transferee Court. AIR 1953 Cal 765 (766) (DB) ° AIR 1939 Pat 144 (145): 17 Pat 617 (DB) * AIR 1962 Punj 293 (296): 64 Pun LR 203.

(k) can make an order for simultaneous execution. AIR 1950 Mad 582 (585): ILR (1951) Mad 375 ° AIR 1939 Pat 144 (145): 17 Pat 617 (DB).

(l) can entertain an application for revival of execution proceedings or accede to the request to suspend them. AIR 1958 Andh Pra 655 (657): ILR (1957) Andh Pra 615 (DB).

(10) Once an order recalling the decree has been made, the delay in complying with it is a mere want of formality which cannot affect the jurisdiction of the transferor Court to entertain an execution application. AIR 1949 Bom 379 (384): ILR (1949) Bom 634 (DB).

(11) Where, in accordance with O. 21, R. 6 (2) as added by the Allahabad High Court, a certificate of transfer and a copy of decree are handed over to the decree-holder and he returns them to the Court which issued them the Court which passed the decree becomes again seized of the matter and can start execution itself or grant a new certificate of transfer. AIR 1936 All 369 (369) (DB).

(12) Where after a decree has been transferred it is modified or affirmed by the appellate Court, it is not necessary to apply to the Court of first instance to transmit afresh the decree of the appellate Court. AIR 1957 Andh Pra 403 (406) ° AIR 1963 Madh Pra 154 (155): 1961 Jab LJ 1270. (The transferee Court has power to execute the decree of the appellate Court after getting the execution petition modified on the basis of the appellate decree.)

3. "Shall be subject to the same rules in respect of appeal."—(1) Where a small cause decree is transferred to the original side for execution and an appealable order is passed in execution such order would be appealable notwithstanding that the decree is itself not appealable. AIR 1941 Pat 624 (624) * (1940) 44 Cal WN 587 (589) ° (1909) 31 All 1 (2) (DB) ° AIR 1928 Bom 534 (537): 53 Bom 46 * AIR 1921 Cal 242 (243) (DB) ° AIR 1915 Cal 237 (237) (DB) ° AIR 1925 Mad 1179 (1180) (DB) * AIR 1919 Mad 264 (265) (DB).

[But see AIR 1957 Mad 761 (761).]

(2) The transfer of the decree cannot alter the nature of the suit. (1890) 12 All 579 (580) (DB).

(3) The provisions of S. 102 will control this section with the result that in the case of suits of a small cause nature, no second appeal will lie. AIR 1918 Mad 1368 (1368) ° (1911) 12 Ind Cas 959 (960) (DB) (Mad) * AIR 1927 All 740 (740) ° (1907) 11 Cal WN 861 (862) (DB) ° (1898) 25 Cal 872 (874) (DB).

(4) Where a High Court decree is transferred to a Subordinate Judge for execution, an appeal from the decision of the execution Court will lie to the District Judge and not to the High Court. AIR 1956 Mad 390 (392): ILR (1956) Mad 889 (DB) ° AIR 1940 Bom 277 (279): ILR (1940) Bom 633.

## SECTION 43 — SYNOPSIS

1. Scope.
2. Courts established or continued by authority of Central Government outside India.
3. Jammu and Kashmir.

**1. Scope.**—(1) This section cannot be availed of when execution of the decree is

**44.[a] Execution of decrees passed by revenue Courts in place to which this Code does not extend.**—The State Government may, by notification in the Official Gazette, declare that the decrees of any revenue Court in any part of India to which the provisions of this Code do not extend, or any class of such decrees, may be executed in the State as if they had been passed by Courts in that State.

[1882, S. 229-B.]

[a] Substituted by the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), S. 9 [1-4-1951].

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**Section 43 — Note 1 (contd.)**

sought outside the territory of the former Indian State after its merger with the rest of India. AIR 1956 Punj 193 (197, 198): ILR (1956) Punj 434 (FB) * AIR 1955 All 490 (493) ° AIR 1954 Cal 67 (70).

[But see AIR 1953 Punj 24 (26, 27).]

(2) A combined reading of Sections 43 to 45 would show that the Indian Courts have power (1) to execute the decrees of those Indian Courts to which the Civil P. C. does not apply, such as the scheduled districts; (2) to execute the decrees of the Civil Courts outside India which are established by the authority of the Central Government; (3) to execute the decrees of the revenue Courts in any part of India to which the provisions of the Civil P. C. do not apply, and (4) to execute decrees of the Indian Courts in the States in which the State Government has notified that Section 45 would apply. AIR 1958 Andh Pra 407 (411) (DB).

(3) Part B States came into existence after the coming into force of the Constitution on 26-1-1950. The section as it stood on 26-1-1950 could apply only to decrees which were passed after that date and not to earlier decrees of States like Gwalior or Madhya Bharat which could not in any manner be considered to be decrees of Part B States. AIR 1958 All 775 (787).° AIR 1962 SC 1737 (1749): (1963) 2 SCR 577.

[See also AIR 1963 SC 1180 (1181): (1963) 2 SCR 619. (Decree passed by Court in India before 26-1-1950 — Transfer of decree on 28-8-1950 to Court in Part B State of Madhya Bharat — Decree could not be executed under the then Section 43.) ° AIR 1964 Madh Pra 78 (81): 1963 Jab LJ 650 (DB) ° AIR 1962 Madh Pra 276 (278, 279): 1962 Jab LJ 201.]

(4) Ex parte decree passed by Gwalior Court before coming into force of Code of Civil Procedure (Amendment) Act (1951) i. e. 1-4-1951 — Decree is nullity outside Gwalior or Madhya Bharat — Decree transferred to Court at Allahabad after 1-4-1951 — Section 43 is inapplicable. AIR 1962 SC 1737 (1749): (1963) 2 SCR 577.

(5) The material date for determining whether a decree passed by a Court in a Native State can be executed in a Court which is outside the State is the date on which the decree was passed and not the date on which such decree was transferred for execution. AIR 1958 All 775 (788) (DB) * AIR 1962 Madh Pra 276 (278, 279): 1962 Jab LJ 201. (AIR 1951 Bom 125, Disting.; Minority view in AIR 1955 M. B. 1 (SB) and AIR 1955 Nag 103 and AIR 1956 Nag 273, Foll.)

**2. Courts established or continued by authority of the Central Government outside India.**—(1) The Court of the Political Agent at Sikkim was held to be a Court "established or continued by the authority of the Governor-General in Council." (1911) 38 Cal 859 (861) (DB).

(2) The Court of the Dewan Ahilkar of Cooch Behar was situated in a foreign territory but was not established or continued by the authority of the Governor-General in Council. (1870) 13 Suth WR 154 (155) (DB).

(3) The Okhamandal Court in the Baroda State before its merger in the Province of Bombay was not a Court established or continued by the authority of the Central Government. AIR 1954 Cal 67 (69, 70).

(4) This section did not apply to the execution of the decrees of the Court of the Native Commissioners of Kondh situated within the family domains of the Maharajah of Benares. (1907) 34 Cal 576 (582, 583) (DB).

(5) Karaikkal Court was a Court continued by the authority of Central Government outside India. (1965) 78 Mad LW 723 (725): ILR (1966) 2 Mad 522. (34 Cal 576, Disting.)

**3. Jammu and Kashmir.**—(1) On the coming into force of the Constitution the Courts of Jammu and Kashmir and those of India ceased to be "foreign Courts" with regard to each other, and hence, the decrees of Courts in Jammu and Kashmir were executable by Courts in other States of India and vice versa. AIR 1955 J and K 5 (6) (FB).

**Section 44 — Note 1**

(1) Section 44 like S. 43, only applies to cases where the decree to be executed was passed by a Court in a part of India to which the Code does not apply. AIR 1956 Bhopal 24 (26) * AIR 1958 Andh Pra 407 (411) (DB).

(2) Ex parte decree passed by Gwalior Court before coming into force of Code of Civil Procedure (Amendment) Act (1951) i. e. 1-4-1951 — Decree is nullity outside Gwalior or Madhya Bharat — Decree transferred to Court at Allahabad after 1-4-1951 — Section 43 is inapplicable. AIR 1962 SC 1737 (1749): (1963) 2 SCR 577.

[See however AIR 1959 Madh Pra 423 (424): 1959 Jab LJ 721.]

**44A.[a] Execution of decrees passed by Courts in [b][° ° °] reciprocating territory.**—(1) Where a certified copy of a decree of any of the superior Courts of [b][° ° °] any reciprocating territory has been filed in a District Court, the decree may be executed in [c][India] as if it had been passed by the District Court.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of Section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of Section 13.

[d][Explanation 1.— "Reciprocating territory" means any country or territory outside India which the Central Government may, by notification[e] in the official Gazette, declare to be a reciprocating territory for the purposes of this section; and "Superior Courts", with reference to any such territory, means such Courts as may be specified in the said notification.

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**Section 44 — Note 1 (contd.)**

(3) A compromise or sole decree is subject to all the infirmities of the contract or compromise, on which it is made. There can be no objection in law to an Indian Court, otherwise competent and having jurisdiction to grant a declaration in respect of a foreign contract that it is not binding on the parties before it, and to restrain its operation or enforcement within the territories of India. AIR 1959 Cal 663 (665, 666): 63 Cal WN 442 (DB).

**Section 44-A — Note 1**

**1. Scope.**—(1) The fact that at the time when Burma ceased to be a reciprocating territory, execution was pending in an Indian Court will not make the decree executable by such Court as the question of executability must be determined according to the position prevailing at the time when execution is sought and not at the time when the decree is passed. AIR 1957 Mad 25 (29, 31): ILR (1956) Mad 1200 (DB). (AIR 1952 Mys 69: ILR (1952) Mys 201 and AIR 1954 Trav-Co 358: ILR (1954) Trav-Co 694 (FB), Dissented from.)

[But see AIR 1964 All 548 (551): 1963 All LJ 969 (DB). (AIR 1952 Mys 69 and AIR 1953 SC 441 and AIR 1962 SC 1737, Rel. on; AIR 1951 Bom 190, Distinguished; AIR 1950 Cal 12 and AIR 1950 Mad 293 and AIR 1951 Punj 255 and AIR 1952 Assam 91, Not followed.) ]

(2) There is no reciprocity between India and Pakistan in the matter of their respective decrees as contemplated by this section. AIR 1957 Punj 214 (217): ILR (1957) Punj 1032 (DB) ° AIR 1960 Cal 779 (784): 64 Cal WN 161.

(3) A decree of a Court in Pakistan although it was passed before partition is a foreign judgment and there being no reciprocity between India and Pakistan the decree cannot be executed by a Court in India when it is transmitted for execution after the date of partition. AIR 1951 Simla (Punj) 255 (257): ILR (1951) Punj 111 ° AIR 1950 Cal 12 (14, 15) (DB) ° AIR 1950 Mad 293 (293, 294) ° AIR 1961 Punj 369 (372): ILR (1960) 2 Punj 241 (DB). (Execution could only be taken after obstacle was removed by passing of Displaced Persons (Legal Proceedings) Act (1949).)

(4) The holder of a foreign decree can file the decree in any Court and apply to that Court for transmission of the decree to the Court by which it is to be executed. AIR 1952 Cal 508 (514, 515).

(5) Decree passed by Court at Mathura — By order dated 26-7-1950 — That Court transferred the decree for execution to the District Judge Gwalior — Held transfer of decree for execution was within jurisdiction of the execution Court. AIR 1959 Madh Pra 423 (424): 1959 Jab LJ 721.

(6) Defendant company carried on business at Calcutta and had overdraft arrangements with plaintiff Bank. As security defendants' property in East Pakistan was hypothecated. Held Calcutta High Court could entertain suit on the overdraft account and a decree if passed, could be executed in Pakistan by employing machinery provided by S. 13 although Pakistan was not a reciprocating territory. AIR 1960 Cal 779 (783, 784): 64 Cal WN 161.

(7) The whole purpose of the words as if it had been passed by the District Court in this section, clearly appears to be to determine or fix the particular District Court in India to execute the foreign decree or judgment and attract to its execution by such Court the manner of procedure that governs execution of its own decrees. The purpose and ambit of the fiction go no further. AIR 1967 Mad 45 (50, 51): (1966) 2 Mad LJ 346 (FB). (AIR 1964 Mad 221, Overruled.) ° AIR 1961 Bom 156 (156, 157): 62 Bom LR 608.

(8) Section 44-A is an independent section not controlled by provisions of any other

Explanation 2.—"Decree" with reference to a Superior Court means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, but shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment.]

[a] This section was inserted by the Code of Civil Procedure (Amendment) Act, 1937 (8 of 1937), S. 2.

[b] The words "the United Kingdom or" were omitted by the Code of Civil Procedure (Amendment) Act, 1952 (71 of 1952), S. 2 [1-3-1953].

[c] Substituted for the words "the States," by the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), S. 3 [1-4-1951].

[d] Substituted for Explanations 1 to 3 by the Code of Civil Procedure (Amendment) Act, 1952 (71 of 1952), S. 2 [1-3-1953].

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**Section 44-A — Note 1 (contd.)**

section. Ss. 44-A and 39 provide alternative remedies to a decree-holder for execution in India of a decree passed by Court in reciprocating territory. AIR 1962 Punj 228 (229, 230): ILR (1961) 2 Punj 166.

(9) It is not possible to accept that, though a foreign decree may be barred or unenforceable in the country of its origin, it can nevertheless be enforced in the Indian Court where a larger period of limitation obtains in relation to a similar judgment passed by it. AIR 1967 Mad 45 (52): (1966) 2 Mad LJ 346 (FB).

(10) Judgment-debtor adjudged insolvent by High Court at Singapore after a Money decree was obtained from that Court — Execution application filed in Indian Court — Held adjudicative order of that Court had no effect on immovable property of the insolvent in India and this property could be proceeded against by the decree-holder. AIR 1962 Punj 228 (229, 231): ILR (1961) 2 Punj 166.

(11) Application for execution of a foreign decree in a Court in India — It is governed by Indian Law of Limitation. AIR 1962 Punj 228 (231): ILR (1961) 2 Punj 166.

(12) Section 44A has nothing to do with limitation and is merely confined to an extended application of the procedure provided for the manner of execution of a decree passed by any Civil Court in this country to execution by an Indian District Court of a foreign judgment of a superior Court in a reciprocating country. AIR 1967 Mad 45 (50): (1966) 2 Mad LJ 346 (FB). (AIR 1964 Mad 221, Overruled.)

(13) Article 181 of Indian Limitation Act of 1908 applies to execution of a foreign judgment under S. 44A. The three years' of limitation commences when the right to apply accrues. For execution of foreign judgments, the right to apply accrues on and from the date of filing under S. 44A(1) and for this purpose non-filing of a non-satisfaction certificate is not relevant. AIR 1967 Mad 45 (54): (1966) 2 Mad LJ 346 (FB). (AIR 1964 Mad 221, Overruled.)

(14) Defendant, a resident of Hyderabad appeared in obedience to the process of a foreign court viz., Bombay High Court and applied for leave to defend the suit without objecting to the jurisdiction of that Court, when he could not legally be compelled to do so. Ex parte decree was passed against him. Held he had voluntarily submitted to the jurisdiction of the Court, that it cannot be said that the decree suffered from the defect which a foreign ex parte decree without such submission would suffer from. The order for transfer of the decree to Hyderabad territory was made when C. P. C. was applicable to that territory — Hence order of transfer was valid and effective and decree could be executed. AIR 1967 SC 739 (740): (1963) 2 SCR 574.

(15) No question of limitation arises before or for filing certified copy of a foreign decree under S. 44-A (1) and filing of non-satisfaction certificate under S. 44-A (2) is not a condition precedent for the District Court to assume jurisdiction — Sub-section (2) does not pertain to jurisdiction but is procedural. It contains a rule of evidence as to the conclusiveness of the certificate in the specified respect. AIR 1967 Mad 45 (53): (1966) 2 Mad LJ 346 (FB). (AIR 1964 Mad 221, Overruled.)

(16) In application for execution of decree under S. 44A, issue of notice under O. 21, R. 22 is imperative. AIR 1969 Pat 228 (232) (DB).

**2. Decree falling within exceptions (a) to (f) of Section 13.** — (1) Under sub-s. (3) the burden is upon the judgment-debtor to establish that the decree falls within the exceptions to S. 13. AIR 1943 Cal 42 (44) (DB).

(2) Where a foreign decree is filed before a Court and an application is made to that Court for transmission of the decree to another Court, that Court must consider all the matters referred to in sub-section (3) including objections under S. 13 when such objections are taken before it. AIR 1952 Cal 508 (515).

(3) A decree of a foreign court which falls within exception (a) of S. 13, is a decree not of a Court of competent jurisdiction. A contention that the words 'as if' in S. 44-A (1) mean that the decree must be treated as passed by the executing Court and be held as passed by a Court of competent jurisdiction is contrary to and impossible having regard to provisions of S. 44-A(3). AIR 1961 Bom 156 (156): 62 Bom LR 608.

[e] Sikkim declared to be reciprocating territory for the purposes of the section for a period of 5 years with effect from 3-5-1967 and the High Court of Sikkim and any other Civil Courts in Sikkim whose jurisdiction is not subject to any pecuniary limit declared to be the Superior Courts, see G. S.R.704, G. I., 13-5-1967, Pt. II, S 3 (i), p. 803.

For similar notifications respecting Hong Kong and Republic of Singapore, see Gaz. of Ind., 23-11-1868, Pt. II, S. 3 (i), Ext., p. 611, and ibid 25-6-68, Pt. II, S. 3 (i), Ext., p. 355.

For notification relating to Trinidad and Tobago, w. e. f. 1-9-1968, see ibid, 7-8-1968, Pt. II, S. 3 (i), Ext., p. 464B.

For similar notification in regard to the United Kingdom of Great Britain and Northern Ireland, see G. I., 1-3-1953, Pt. II, S. 3, Ext. (S. R. O. 399).

For similar notification regarding New Zealand, the Cook Islands (including Niue) and the Trust Territory of Western Samoa, see Gaz. of Ind., 15-10-1937, Pt. II, S. 8, Ext., p. 2505.

[a]**45. Execution of decrees in foreign territory.** —So much of the foregoing sections of this Part as empowers a Court to send a decree for execution to another Court shall be construed as empowering a Court in any [b][State] to send a decree for execution to any Court established [c][° °] by the authority of the Central Government [d][outside India] to which the [e][State] Government has by notification in the Official Gazette declared this section to apply.

[S 45; 1882, S. 229A.]

[a] Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the original S. 45.

[b] Substituted for "Province" by A. L. O., 1950 [26-1-1950].

[c] The words "or continued" were omitted by A. C. A. O., 1948 [23-3-1948].

[d] Substituted by A. L. O. for "in any Indian State" which were substituted by A. C. A. O. for the words "or of the Crown Representative in the territories of any foreign Prince or State."

[e] Substituted for "Provincial" by A. L. O., 1950 [26-1-1950].

## STATE AMENDMENT

**Section 45A**

**Union Territory (Pondicherry)**

In its application to the Union Territory of Pondicherry after S. 45, insert the following :—

"45A. Execution of decrees, etc., passed or made before the commencement of the Code in Pondicherry.—Any judgment, decree or order passed or made before the commencement of this Code by any Civil Court in the Union Territory of Pondicherry, shall, for the purpose of execution, be deemed to have been passed or made under this Code :

Provided that nothing contained in this section shall be construed as extending the period of limitation to which any proceeding in respect of such judgment, decree or order may be subject."—see Act 26 of 1968, S. 3 (i) and Sch. Part II [5-9-68].

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**Section 45 — Note 1**

(1) A combined reading of Ss. 43 to 45 would show that the Indian Courts have power (a) to execute decrees of those Indian Courts to which the Civil Procedure Code does not apply such as the scheduled districts; (b) to execute the decrees of the Civil Courts outside India which are established by the authority of the Central Government; (c) to execute the decrees of the revenue Courts in any part of India to which the provisions of the Civil Procedure Code do not apply; and (d) to execute decrees of the Indian Courts in the States to which the State Government has notified that S. 45 would apply. AIR 1958 Andh Pra 407 (411) (DB).

(2) A judgment in personam pronounced in absentem by a foreign Court against a person who has not submitted himself to its jurisdiction and which is incapable of execution outside the territorial limits of that Court, is a nullity and if, at the time it is passed, it has no validity as a foreign judgment, it would not acquire new force but would continue to be inexecutable even after the advent of the Constitution. AIR 1969 Guj 23 (28): 10 Guj LR 93. (AIR 1951 Bom 125 (FB) and AIR 1951 Bom 190 held impliedly overruled in AIR 1962 SC 173.)

**46. Precepts.**—(1) Upon the application of the decree-holder the Court which passed the decree may, whenever it thinks fit, issue a precept to any other Court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept.

(2) The Court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree:

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the attachment has been made and the decree-holder has applied for an order for the sale of such property.

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**SECTION 46 — SYNOPSIS**

1. Attachment by precept.
2. Power of Court to which precept is sent.
3. Application under the section is not one for execution.

**TOPIC INDICATOR**

Object of the Section — See Note 1.
Precept can be issued even after decree is transferred — See Note 1.
"Unless the period of attachment is extended" — See Note 1.
Validity of precept, if can be challenged by Courts to which it is sent — See Note 2.

**1. Attachment of precept.**—(1) Object of this section is to enable the attachment of the property of the judgment-debtor in another Court in order to prevent the judgment-debtor from alienating or otherwise dealing with it to the detriment of the decree-holder till proper proceedings for the sale of the property in pursuance of an application can be taken. AIR 1952 Pat 213 (215): 31 Pat 56 (FB) ° AIR 1940 Cal 26 (28): ILR (1939) 2 Cal 370.

(2) No attachment can continue for more than two months unless the period is extended by order of the Court which passed the decree or unless the decree is transferred for execution to the attaching Court and the decree-holder has applied for the sale of the property. AIR 1936 Lah 486 (487) ° AIR 1957 Pat 209 (211) (DB).

(3) An order for a parmanent attachment is not one contemplated by this section. AIR 1936 Lah 486 (488).

(4) When an application for extending the period of the attachment is made before the expiry of the two months but the order extending the time is passed after the expiry of the period, the order will relate back to the date of the petition and will have a retrospective effect. AIR 1917 Mad 591 (592) (DB).

(5) The Court to which the precept is issued must attach the property and wait for an application for execution being made by the attaching creditor. AIR 1933 All 844 (845) (DB).

(6) The jurisdiction of the parent Court continues for certain purposes of which S. 46 is one and therefore it can issue a precept even after the decree is transferred for execution. AIR 1952 Pat 213 (215): 31 Pat 56 (FB) ° AIR 1927 Cal 581 (588) (DB).

(7) The Court to which the decree is transferred for execution is not competent to issue a precept. AIR 1926 Sind 157 (158).

(8) This section cannot be invoked in aid of an application for attachment before judgment under O. 38, R. 5. AIR 1941 All 212 (215).

(9) Section 46 governs only attachments in execution of a decree and does not come into play in the context of O. 38, R. 5 or O. 21, R. 46. AIR 1961 Andh Pra 417 (420): (1961) 1 Andh WR 295 (DB).

(10) No attachment can be effected under this section where the properties are situated outside India. AIR 1931 Lah 723 (724): 13 Lah 206 (DB).

**2. Powers of Court to which precept is sent.**— (1) When a precept sent by Court A for the attachment of property in the custody of Court B, is received by Court B, the attachment takes effect from the date when the precept is received by Court B. AIR 1935 Lah 914 (915).

(2) The Court to which the precept is sent cannot vest itself with jurisdiction to question the validity of the precept. AIR 1927 Cal 581 (588) (DB).

(3) The Court to which the precept is sent may stay execution if the judgment-debtor deposits the decree amount in Court or furnishes security for payment thereof AIR 1926 Lah 433 (433, 434).

**3. Application under the section is not one for execution.**— (1) An application for the issue of a precept under this section cannot be regarded as an application for execution. AIR 1926 Cal 249 (250) (DB).

(2) There must be an application for execution in the proper form after an attachment under a precept and it is only upon such application that execution can issue. AIR 1940 Cal 26 (28): ILR (1939) Cal 370

(3) An order of precept under this section does not fall under S. 47 and so is not appealable. AIR 1952 Mad 826 (827): ILR (1952) Mad 489 (DB).

[But see AIR 1956 Madh B 208 (208).]

## OBJECTS AND REASONS

"Clause 46 — Precept.—Though a system of execution based on precepts is in the opinion of the Committee open to grave objection, they think the idea may be utilised for the purpose of enabling a decree-holder to obtain an interim attachment where there is ground to apprehend that he may otherwise be deprived of the fruits of his decree. They have for this purpose introduced Clause 46 into the Bill. They think it expedient to fix a time limit for the continuance of this interim attachment, but at the same time they have empowered the Court to extend the period to meet the exigencies of particular cases.

After careful consideration they have come to the conclusion that notwithstanding attachment under a precept, re-attachment on the ordinary application for execution will still be necessary. Though at first sight it may appear a better course to provide that re-attachment shall not be necessary when the issue of a precept is followed by the ordinary application for execution, after careful consideration they have come to the conclusion that it will be safer to require re-attachment, having regard to the agency by which execution is carried into effect." — S. O. R.

"Clause 46.—We think that a decree-holder who has obtained an interim attachment should not be required to re-attach the property if before the determination of the attachment he applies for execution against the property, and we have altered this accordingly. There will now be only one attachment."—S. C. R.

## QUESTIONS TO BE DETERMINED BY COURT EXECUTING DECREE

**47. Questions to be determined by the Court executing decree.**—(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

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### SECTION 47 — SYNOPSIS

1. SCOPE, OBJECT AND APPLICABILITY OF THE SECTION.
2. Applicability to proceedings under other Acts.
3. QUESTION MUST BE ONE ARISING 'BETWEEN THE PARTIES' TO THE SUIT IN WHICH THE DECREE IS PASSED OR THEIR REPRESENTATIVES.
4. Parties arrayed on the same side.
5. "Arising", meaning of.
6. "Parties to the suit", meaning of.
7. Plaintiff whose suit is dismissed and defendant against whom suit is dismissed — Explanation.
8. Person against whom suit abates.
9. Surety under Section 145.
10. Government in proceedings under Order 33.
11. Intervenor.
12. Trespassers.
13. Party sued in a representative capacity.
14. Question as to who is a party can be decided by the executing Court.
15. "Representative", who is.
16. Auction-purchaser — Position of.
17. Transferee from auction-purchaser.
18. Transferee from a party.
19. Purchaser from party to suit in which injunction has been granted affecting such property.
20. Official Assignee or Official Receiver.
20-A. Custodian under Administration of Evacuee Property Act.
21. Liquidator of company.
22. Transferee of decree.
23. Judgment-debtor under attached decree.
24. Surety for the performance of a decree.
25. Question as to who is the representative must be determined by the Court — Sub-section (3).
26. Question must relate to execution, discharge or satisfaction of the decree.
27. Question as to validity of the decree.
28. Question as to the existence of the decree.

(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court-fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

[a][Explanation.—For the purposes of this section, a plaintiff whose suit has been dismissed, a defendant against whom a suit has been dismissed and a purchaser at a sale in execution of the decree are parties to the suit.]

[1882, 1877, S. 244; 1861, S. 11; 1859, S. 283. See S. 2, Cl. (2); Ss. 50, 52, 144, 145.]

[a] Substituted for the old Explanation, by the Code of Civil Procedure (Amendment) Act, 1956 (66 of 1956), S. 5 [2-12-1956]

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**Section 47 — Synopsis (contd.)**

**20. Pre-decree matters.**

**30. Decree incapable of execution.** See also C. P. C., S. 38.

**31. Questions arising between the preliminary and final decrees.**

**32. Question as to excess or deficient execution.**

**33. Question of mesne profits.**

**34. Agreement against execution of decree.** See also Note 29.

**35. Stay of execution.**

**36. Question of liability of certain property to attachment and sale.**

**37. Question, if property attached belongs to judgment-debtor.**

**38. Setting aside sales in execution.**

**39.** Fraud in execution proceedings.

**40.** Fraud in publishing and conducting the sale.

**41.** Want of notice under O. 21, Rules 16 and 22.

**42.** Purchase by decree-holder without permission.

**43.** Sale in contravention of stay order.

**44.** Sale not warranted by decree.

**45.** Sale without jurisdiction.

**46.** Other grounds for setting aside sale.

**47.** Miscellaneous.

**48. "SHALL BE DETERMINED BY THE COURT EXECUTING THE DECREE AND NOT BY A SEPARATE SUIT".**

**49. "Determined", meaning of.**

**50. "Court executing the decree", meaning of.**

**51. Power to grant relief against forfeiture and penalty.**

**52. COURT MAY TREAT A PROCEEDING AS A SUIT OR VICE VERSA — SUB-SECTION (2).**

**53. APPEAL.**

**54. Interlocutory orders in execution proceedings.**

**55. REVISION.**

**TOPIC INDICATOR**


Accession to hypotheca to be decided in execution — See Note 47.

Amendment of decree after sale — See Section 144.

Application under O. 21, Rule 2 — See Note 1.

Assignment of decree, question of validity — See Note 22.

Attached property — See Note 18.

Change in law before decree — See Note 29.

Claim by auction-purchaser for refund of purchase money — See Note 47.

Conditional decree for possession in a pre-emption suit — Conditions satisfied — Possession claimable in execution — Separate suit barred — See Note 47.

Decree for injunction, execution of — See Note 30.

Decree-holder becoming auction-purchaser — See Note 16.

Defaulting purchaser at execution sale — See Notes 6, 50 and 46, also O. 21, Rule 71.

Dispossession subsequent to private possession under a previous decree — See Note 32, See also Sec. 11.

Executability of decree — See Notes 27, 30 and S. 38.

Execution barred by Limitation — Fresh Suit — See Note 1.

Execution of award of Labour Tribunal — See Note 1.

Execution of rent decree — See Note 2.

Execution of scheme decree — See S. 92.

Exonerated parties — See Note 7.

Explanation to section — See Notes 7 and 16.

First decree for redemption barred — Second suit lies — See Note 31.

Fraud anterior to sale — See Note 39.

Head of a mutt appointed under a decree — See Note 30.

Karnavan of a Malabar tarwad — See Note 6.

Legality of execution proceedings — See Note 47.

Legatees — See Note 15.

Matters subsequent to decree — Notes 30 to 46.

## OBJECTS AND REASONS

"Clause 47.—The Committee have omitted sub-clauses (a) and (b) of S. 244 of the existing Code because they are strongly of the opinion that questions regarding the amount of any mesne profits or interest should be determined by the decree and not in execution. If this view is accepted it will be possible to exercise an effective control over the action taken by the Subordinate Courts in dealing with such matters.

The Committee have re-drafted sub-clause (3) and made it compulsory on the Court to determine questions arising as to representatives of parties. In their opinion, it is inexpedient that separate suit should be instituted for the decision of such questions. The delay and expense involved are often very great and result in the needless protraction of litigation.

The Explanation is intended to put an end to a conflict of judicial decisions."— S. C. R.

## STATE AMENDMENT

**Uttar Pradesh**

The existing Explanation of Section 47 shall be renumbered as "Explanation I" and a second Explanation as follows shall be added thereafter:

"Explanation II. — For the purpose of this section a purchaser at an auction sale in execution of the decree shall be deemed to be a party to the suit in respect of the property purchased by him." — U. P. Act 24 of 1954, Section 2 and Schedule, item 5, entry 3 [30-11-1954].

NOTE. — The above amendment is superseded by the amendment of the Explanation by the Central Act 66 of 1956.

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**Section 47 — Topic Indicator (contd.)**

Objections by judgment-debtor in respect of delivery of possession to the purchaser — See Note 16.

Objections by legal representative of deceased person — See Note 37.

"Parties" — Minors — Not properly represented — See Note 6.

Parties in several capacities — See Notes 6, 13, 37.

Powers of executing Court — See Section 38.

Power to go behind decree — See Note 27 and Section 38.

Power to enlarge time for payment of Court-fee — See Section 148.

Power to fix order of sale of properties — See Section 38.

Power to go behind decree — See Note 27 and Section 38.

Power to look into executability of decree — See Note 30 and S. 38.

Power to recall order passed against statutory provision, but with consent of parties — See Note 1.

Power to refuse execution of decree passed without jurisdiction — See Note 28.

Power to review — See Note 1 and Order 47, Rule 1.

Property not saleable — See Note 36.

Question as to waste committed by judgment-debtor subsequent to decree or possession — See Note 47.

Questions not covered by the section — See Note 47.

Questions that do not relate to execution, discharge or satisfaction under this section — See Note 47.

Question of restitution taken in execution when decree is amended, varied or reversed — See Notes 2 to 5 and Section 144 and Note 47 of this section.

Question of adjustment of decree — See Order 21, R. 2.

Question, if debts were contracted without legal necessity or tainted with immorality — See Sec. 53.

Receivers in representative capacities — See Note 6; also see Section 52.

Representative — Lessee — See Note 18.

Res judicata in execution proceedings — See Section 11.

Sales in contravention of Bengal Tenancy Act — See Note 18.

Suit by attaching creditor for illegal disposal of attached property — See Note 12.

Suits by non-impleaded subsequent mortgagee for payment of surplus sale proceeds — See Note 4.

Suits for damages for removal of materials by the parties to a suit after sale and before delivery of possession — See Note 36; also Note 47.

Suits for enforcing mere declaratory decrees — See Note 20; also N. 47.

Suit for redemption after a decree for the same could not be executed — See Note 20.

Theory of substitution of securities applicable to execution — See Note 47.

Transferees of occupancy holdings — See Note 18.

Transferee pendente lite — See Notes 15, 18.

Unregistered transferees of an occupancy holding — See Note 15.

**Section 47 — Topic Indicator (contd.)**

Valuation of appeal for jurisdiction — See Note 86; also Note 18 on Section 96.

**1. Scope, object and applicability of the section.** — (1) Where there is an executable judgment, no suit lies for the enforcement thereof, or for the determination of the questions specified in the section. AIR 1942 Mad 588 (590) * AIR 1941 Pat 95 (96): 20 Pat 86 (DB) * AIR 1925 PC 34 (35): 52 Cal 314: 52 Ind App 79 * AIR 1934 Cal 327 (327): 60 Cal 1467 * (1890) 13 All 98 (100) (DB) * (1886) 10 Bom 461 (467): 13 Ind App 66 (PC) * AIR 1930 Cal 586 (587) * (1878) 3 Cal 30 (35, 37, 38) (FB) * (1894) 17 Mad 343 (355): 21 Ind App 71 (PC) * AIR 1930 Nag 17 (18) * AIR 1965 Pat 427 (433, 434, 435): 1965 BLJR 635 (FB).

(2) Section pre-supposes valid execution proceeding. AIR 1959 Pat 89 (100): ILR 36 Pat 1027 (DB) * AIR 1960 Punj 437 (438 439): ILR (1959) Punj 2296. (No execution pending — J. D.'s application under Section 47 for recording compromise — Proceedings emanating from that application can be treated as proceeding under Order 21, Rule 2.)

(3) No suit lies even if the execution is barred by limitation. AIR 1921 All 369 (372): 43 All 170 * AIR 1919 Bom 34 (35): 43 Bom 703 * AIR 1927 Cal 411 (412): 54 Cal 524 * AIR 1925 Mad 279 (280): 48 Mad 482 * 1960 All LJ 254 (258). (Suit would be barred under Section 11 also — AIR 1959 Pat 331 and 1950 All WR (HC) 272 (LB), Dissented from.)

(4) Where the decree is appealed from and the appeal is compromised and a compromise decree is passed on appeal the original decree becomes unexecutable and the bar under this section cannot arise in respect of the original decree. AIR 1953 SC 33 (40): 1953 SCR 154.

(5) The questions may arise before or after the decree has been executed. AIR 1956 SC 87 (91): 1955-2 SCR 938 * (1895) 17 All 478 (480) (DB) * AIR 1933 All 429 (431) (DB) * AIR 1938 Nag 363 (364).

(6) Section has no application unless execution has been levied. (1951) 1 Orissa JD 331: ILR (1959) Cut 358. (Adjustment of decree — Application made by judgment-debtor in suit to Court to certify satisfaction — Neither Order 21, Rule 2 nor Section 47 apply.)

(7) An order must be one by an executing Court as such if the order is to come under this section. AIR 1941 Cal 530 (532): ILR (1941) 2 Cal 402 (DB) * AIR 1940 Bom 10 (11): ILR (1939) Bom 708.

(8) Execution proceedings and an application under Section 47 are a continuation of the suit. ILR (1967) Guj 408 (413).

(9) Order directing payment of solatium to auction purchaser consequent on setting aside a sale is a 'decree' and falls under Section 47 and is executable. AIR 1964 Mys 54 (55): (1963) 2 Mys LJ 147. (Order falls under Order 21, Rule 93 and not Order 21, Rule 92 — Appeal against the order does not lie under O. 48, R. 1 (j).)

(10) The mere fact that an application is made in the execution proceedings is not sufficient to attract the operation of this section when the question for determination does not fall within its purview. AIR 1941 Cal 530 (532): ILR (1941) 2 Cal 402 (DB).

(11) Where an auction purchaser in an execution sale pays balance of 75 per cent. of purchase price in treasury, but fails to deposit receipt in Court and consequently Court orders resale, such order of resale is open to review in application by auction purchaser under Order 47, Rule 1 and Section 47. AIR 1961 Mad 409 (410): (1961) 2 Mad LJ 37.

(12) Execution proceedings and proceedings under Section 33-C (2), Industrial Disputes Act, 1947, are of analogous nature. AIR 1964 SC 752 (755): (1964) 3 SCR 140. (Labour Court would be competent to interpret the award on which the claim is founded.)

(13) There is no antithesis between Section 47 and Order 21, Rule 2; the former deals with the power of the Court and the latter with the procedure to be followed in respect of a limited class of cases relating to discharge or satisfaction of decrees. O. 21, R. 2 prescribes special procedure for recording adjustment of a decree or for recording payment of money paid out of Court under any decree. However the plenary power conferred by Section 47 upon the Court executing the decree is not thereby affected. AIR 1967 SC 1193 (1195): (1967) 1 SCR 147. (AIR 1966 Punj 506, Affirmed; AIR 1960 Punj 437 (438), Overruled.) * AIR 1967 Mani 33 (37). (Declaratory decree and not money decree — Question relating to satisfaction, and discharge of decree — Section 47 and not Order 21, Rule 2, Applies.) * AIR 1959 Mys 155 (155, 156): 36 Mys LJ 539. (Application under Order 21, Rule 2 is one under Section 47.)

(14) Section 47 is very wide in its terms and in one sense all questions relating to execution, discharge or satisfaction of the decree that arise between the decree-holder and the judgment-debtor come within its purview yet that section ought to be so interpreted as not to render redundant, the other provisions of the Code. When there is a specific provision like Order 21, Rule 2 applicable to the facts of this case, the provision under Section 47 is excluded. AIR 1963 Mys 79 (81): 1962 Mys LJ (Sup) 299.

(15) In execution proceedings, once the decree is satisfied former rights of the judgment-debtor cannot be revived. Once the landlord in execution of his decree obtains delivery of possession, the tenants' rights are extinguished. The landlord cannot be dispossessed by means of an objection under S. 47. 1961 All WR (HC) 597 (598). (J. D. wanting to take advantage

**Section 47 — Note 1 (contd.)**
of Explanation to Section 20 of the U. P. Z. A. and L. R. Act — His remedy is not by an objection under Section 47, but by application under Section 232, U. P. Z. A. and L. R. Act.)

[See also AIR 1963 Orissa 160 (161): ILR (1963) Cut 321 (DB). (An application purporting to be one under Order 21, Rule 2 is an application in execution proceedings).]

(16) Though Section 47 is widely worded, it does not mean that the executing Court can recall its previous orders, passed with consent of parties, merely because on further argument they are considered to be bad in law and against specific statutory prohibition. ILR (1965) 2 Punj 590 (600, 602) (DB). (Pre-emption decree executed by consent of parties, against prohibition under Section 17-A, Punjab Security of Land Tenures Act, 1953 — Executing Court cannot recall execution — 66 Punj LR 24: ILR (1964) 1 Punj 299, Reversed.)

(17) Section is not inapplicable to Provincial Small Cause Courts. ILR (1960) 1 Cal 895.

**2. Applicability to proceedings under other Acts.**— (1) Where an order passed in proceedings under the provisions of other Acts is enforceable under the provisions of those Acts as if it were a decree, Section 47 will apply. AIR 1947 Mad 112 (113) * AIR 1957 Madh B 56 (57) (DB) * AIR 1938 All 124 (125) * AIR 1935 Cal 89 (89) * AIR 1927 Mad 440 (440, 441) * AIR 1935 Pat 227 (228).

(2) Section 47, Civil P. C. contemplates existence of a decree and not of an order which by a legal fiction may be treated as a decree for certain purposes Section 47 is therefore inapplicable to an order passed by a Special Judge under U. P. Encumbered Estates Act, which order is not a decree in the sense the word is used in the Civil P. C. ILR (1966) 2 All 351 (361, 362) (DB) * AIR 1969 Bom 74 (76): 70 Bom LR 438 (DB). (Orders under Bombay Agricultural Debtors' Relief Act (1947) not covered by Section 43 of the Act are orders under Section 47 of the Code and are appealable as decrees — (1957) 59 Bom LR 610, Overruled.)

(3) Suit against minor to recover legacy dismissed for non-compliance of Sections 53 and 54 of Orissa Court of Wards Act — Order is not one under Section 47, Civil P. C. AIR 1968 Andh Pra 239 (266, 267): (1968) 2 Andh WR 301 (FB). (Order does not come within ambit of Article 3 (iii) of Schedule II, Andhra Court-fees and Suits Valuation Act (7 of 1956).)

(4) Proceedings for delivery under Section 87, Madras Hindu Religious and Charitable Endowments Act 1951, are in the nature of execution proceedings by reason of the proviso contained in the section itself. 1961 Ker LT 708.

(5) Section 47 has no application in the matter of considering a deposit made under Sec. 73 of Kerala Land Reforms Act 1963 (1 of 1964). 1966 Ker LJ 1156.

(6) Order of eviction under Section 9, Madras Buildings (Lease and Rent) Control Act (1949) — Execution of — Section 47 and Section 21 applies. (1956) 2 Mad LJ 475. (Order can be executed against legal representatives as Order 21 allows it.)

**3. Question must be one arising between the parties to the suit in which the decree is passed or their representatives.**—

(1) Where a question for decision does not arise between the parties to the suit or their representatives, it cannot be decided under this section. AIR 1954 All 452 (453) * AIR 1957 J and K 23 (24) * AIR 1948 Nag 150 (153): ILR (1947) Nag 985 * AIR 1923 All 292 (292) * AIR 1923 Bom 450 (450, 451) * AIR 1936 Mad 733 (739) * AIR 1919 Pat 454 (464) * (1967) 1 Andh WR 151: (1967) 2 Andh LT 241 (244).

(2) All questions that arise between parties to the suit or their representatives and relating to the execution, discharge or satisfaction of the decree must be decided under this section and not by a separate suit. (1948) 27 Pat 332 (342) * AIR 1958 Pat 506 (508) * AIR 1944 Mad 62 (63) * AIR 1924 All 752 (752) * AIR 1928 Bom 534 (536): 53 Bom 46 * AIR 1916 Cal 471 (472) * AIR 1922 Nag 189 (191) * 1968 All WR (HC) 95.

[See however AIR 1950 Bom 346 (347, 348).]

**4. Parties arrayed on the same side.**—

(1) The words 'between the parties' do not necessarily mean parties ranged on opposite sides as plaintiff and defendant but mean parties opposed to each other in the suit. AIR 1949 Nag 398 (400): ILR (1949) Nag 708 * AIR 1946 Mad 90 (92): ILR (1946) Mad 640 (DB) * AIR 1934 Pat 627 (628) (DB) * AIR 1932 Cal 126 (128, 129): 59 Cal 117 (DB) * AIR 1924 Mad 365 (365) (DB).

(2) A dispute between joint decree-holders will be a dispute 'between parties' if the judgment-debtor is interested in such dispute but not otherwise AIR 1956 Orissa 53 (54): ILR (1955) Cut 454 (DB) * AIR 1948 Pat 362 (366) (DB) * AIR 1943 Mad 407 (408) (DB) * AIR 1937 Cal 177 (178) * AIR 1927 Pat 288 (289): 6 Pat 836 (DB) * AIR 1967 Madh Pra 3 (4): 1966 Jab LJ 284. (Decree for possession jointly passed in favour of co-widows, A and B—B saying that she had already obtained possession from judgment-debtor outside Court and subsequently A preventing her from entering — A's case that she obtained possession through Court under warrant of possession and yet Court directing fresh warrant of possession — Appeal by A — Appeal held was not competent, there being no conflict of interest and, as such, there was no right of appeal under Section 47.)

[But see AIR 1937 Cal 730 (731): ILR (1938) 1 Cal 175.)]

**Section 47 — Note 4 (contd.)**

(3) A dispute between co-judgment-debtors will be a dispute between parties if the judgment-creditor is interested in such dispute but not otherwise. AIR 1925 Mad 353 (354)*AIR 1957 Punj 307 (309) * AIR 1917 Mad 218 (219) (DB) * AIR 1929 All 291 (292): 51 All 752 (DB) * AIR 1935 Mad 714 (715).

[But see AIR 1925 Nag 186 (187): 21 Nag LR 34.]

(4) If the question raised between the rival decree-holders affects the judgment-debtor, the question will be one between the parties to the suit. AIR 1918 Mad 1322 (1324) (DB) * AIR 1939 Bom 112 (114): ILR (1939) Bom 133 (DB).

(5) A dispute as between the representatives of the same party will not fall within this section. AIR 1945 Mad 25 (26) * AIR 1941 Mad 161 (170): ILR (1941) Mad 438 (FB) * AIR 1934 All 730 (730) (DB) * (1898) 25 Cal 49 (52) (DB) * AIR 1936 Lah 116 (120) (DB) * AIR 1934 Pat 627 (628) (DB) * AIR 1965 Mys 268 (268, 269): (1965) 1 Mys LJ 728. (AIR 1924 Mad 365, Dissented from.) * AIR 1962 Pat 55 (57): 1961 BLJR 664. (Question as to right to execute decree between alleged heirs of sole plaintiff in original suit — Person not party to decree claiming interest in decree and seeking to be added as party decree-holder in execution — Question cannot be decided in proceeding under Section 47.)

[See however AIR 1948 Pat 362 (366) (DB).]

[But see AIR 1957 Punj 64 (65) * AIR 1937 Oudh 365 (366): 13 Luck 237 (DB).]

(6) Where the custody Court has determined the question of priority under O. 21, Rule 52, proviso, between the decree-holder and a third person, the decision is not one under Section 47. AIR 1958 All 636 (638) (DB).

**5. "Arising," meaning of.**— (1) The words "all questions arising" mean that the questions must be such as would relate to or affect the rights of parties to the suit. AIR 1952 Bom 438 (441): ILR (1952) Bom 1056 (DB) * AIR 1927 Cal 106 (109): 53 Cal 837 (DB) * (1968) 70 Pun LR (Delhi) 282 (DB).

(2) The words "all questions arising" mean all questions which could properly arise or could properly have been raised in the execution proceedings between the parties to the suit or their representatives. AIR 1952 Bom 438 (441): ILR (1952) Bom 1056 (DB).

(3) A plaintiff cannot, by improperly including in a suit a person who is really unnecessary and by not being able to have any issue decided between him and such other person in the suit itself, be allowed to pursue remedies against him in the execution proceedings. AIR 1953 Mad 916 (917).

**6. "Parties to the suit," meaning of.**— (1) The expression 'parties to the suit" refers to de facto parties admitted rightly or wrongly as parties on the record. AIR 1949 All 260 (261) * AIR 1934 All 699 (700).

(2) Party means proper party and not person who was improperly impleaded in suit and against whom suit was withdrawn before final decree was passed. AIR 1959 Andh Pra 106 (108): (1958) 2 Andh WR 415 (DB).

(3) A person against whom no relief is claimed and no decree is passed but who has been impleaded as a party to the suit must be deemed to be a party to the suit. AIR 1955 Pat 350 (351, 352): 34 Pat 336 (DB) * AIR 1940 Mad 881 (881, 882) * AIR 1960 Madh Pra 76 (78): 1960 Jab LJ 461 (DB).

[See however AIR 1956 Cal 208 (210) (DB).]

(4) Pro forma defendant in a partition suit, held, a judgment-debtor — Dispute between him and decree-holder falls to be decided under Section 47 and not under Rule 100 of Order 21. AIR 1968 Cal 547 (548): 73 Cal WN 4.

(5) A person, whose name is not on the record as a party at the time the decree is passed, does not become a party by acquiring, subsequent to the decree, an interest in the disputed property, or by applying for execution, or by objecting to attachment or sale in execution or by applying to set aside sale under Order 21 Rule 89 or by being added as a party to the execution. (1868) 3 Agra 193 (193) (DB). (Interest acquired subsequently by gift.) * (1877) 2 Cal 327 (335): 4 Ind App 66 (PC). (Application for execution.) * AIR 1948 All 307 (308): ILR (1948) All 207 (DB). (Objection to attachment and sale in execution.) * AIR 1930 Mad 538 (539): 53 Mad 581 (DB). (Do.) * AIR 1940 Sind 251 (253): ILR (1940) Kar 447 (DB). (Application under Order 21, Rule 89.) * AIR 1945 Cal 387 (391): ILR (1946) 1 Cal 45. (Addition of party to the execution.)

[See also (1965) 69 Cal WN 117. (Grantees from decree-holder after the decree which has been reversed in appeal are parties within Sec. 144, Civil P. C.)]

(6) A party on the record does not cease to be a party because he is not impleaded as a party in the appeal in which the final decree is passed. (1893) 17 Bom 49 (53) (DB).

(7) A party whose name is struck off from the record, ceases to be a party to the suit. AIR 1943 Nag 273 (275): ILR (1943) Nag 462 * AIR 1919 All 377 (378) (DB) * AIR 1928 Mad 276 (276) (DB) * AIR 1918 Mad 123 (125): 41 Mad 418 (FB).

(8) Where a person sues or is sued in a representative capacity, all persons represented by the party on record must be deemed to be parties also. AIR 1945 Bom 435 (437) * AIR 1942 Mad 62 (65, 66) * (1907) 4 All L Jour 117 (120, 121) (DB) * (1896) 23 Cal 454 (459) (DB) * AIR 1937 Mad 610 (614, 618): ILR (1937) Mad 880

**Section 47 — Note 6 (contd.)**

(FB) * AIR 1936 Pat 319 (320) * AIR 1969 SC 316 (318, 319): (1969) 1 SCJ 373. (Benamidar can represent real owner.) * AIR 1960 Cal 623 (625, 626): 64 Cal WN 780. (AIR 1955 Mad 281 (FB), Not foll.)

[See however AIR 1954 Mad 675 (677): ILR (1954) Mad 690 (DB) * AIR 1945 All 392 (392).]

(9) Decree against firm — Fact that all partners were not made parties or that a minor, not a partner, was impleaded as major, will not affect executability of decree, when the partner who was in the control of management of the firm was made a party. AIR 1963 Mani 45 (46).

(10) A decree obtained in a suit instituted in accordance with the provisions of Order 1, R. 8 will be binding on all the members that belong to the class who are sought to be represented, by operation of the principle of res judicata as enacted in Section 11, Expln. VI. But such a decree obtained against defendants in a representative capacity cannot be executed personally against persons who are not eo nomine parties. AIR 1955 Mad 281 (283): ILR (1955) Mad 339 (FB).

(11) Where a person is impleaded as a party to a suit in one capacity and he raises in execution proceedings an objection in a different capacity, such objection will not fall within this section. AIR 1953 Mys 153 (155): ILR (1953) Mys 267 (DB) * AIR 1936 Mad 733 (744, 745) (DB) * AIR 1961 Punj 229 (232): ILR (1960) 1 Punj 731 (DB).

(12) Decree in administration suit is composite decree — Any one of defendants can execute it on behalf of all parties. 1959 Ker LT 1094.

(13) Where lands acquired by Bihar State has been transferred to State of West Bengal by the Bihar and W. B. (Transfer of Territories) Act and an appeal against compensation claim pending in Patna High Court on the appointed date under the Act, has been decided after such date, refusal to execute the decree by a Court in Bihar is correct. AIR 1969 Pat 165 (169) (DB). (On construction of decree held, State of West Bengal must be read in decree under execution in place of Bihar State by a legal fiction.)

(14) Person against whom, contract not relating to suit but embodied in consent decree is sought to be enforced by process of execution can object to execution and try to stop such abuse of process of Court. AIR 1967 Cal 541 (545) (DB). (AIR 1919 PC 79, Rel. on. AIR 1960 Andh Pra 56, Dissented from.)

**7. Plaintiff whose suit is dismissed and defendant against whom suit is dismissed — Explanation.** — (1) A plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are nevertheless parties to the suit for the purpose of this section. AIR 1955 Pat 350 (351, 352): 34 Pat 336 (DB) * AIR 1933 All 57 (58): 54 All 1031 * AIR 1923 Bom 381 (381) * AIR 1938 Cal 113 (114): ILR (1938) 1 Cal 280 * AIR 1930 Mad 12 (14, 15) * AIR 1918 Mad 123 (125): 41 Mad 418 (FB) * AIR 1929 Nag 179 (179, 180) * AIR 1936 Pat 552 (553) * 1968 BLJR 413 * AIR 1959 Pat 13 (14, 15): 1957 Pat LR 9 (DB). (Ex parte decree set aside against minor sons — Execution against father — Objection by minor sons to sale and possession falls under Section 47.)

(2) A party who has been exonerated from the suit on the ground of misjoinder of parties, but whose name has not been actually struck off from the record is not a party to the suit for the purposes of the section. AIR 1954 Mad 864 (870): ILR (1954) Mad 834 (FB) * AIR 1959 Andh Pra 106 (108): ILR (1958) Andh Pra 759 (DB) * AIR 1957 Pat 437 (439, 440): 36 Pat 424 (DB) * AIR 1930 Mad 817 (820): 54 Mad 81 (FB). (AIR 1926 Mad 484: 49 Mad 494, Overruled and AIR 1918 Mad 911: 40 Mad 964, Approved.) * AIR 1954 Cal 367 (369): 1954 Cri L Jour 132 * (1950) 55 Mys HCR 1 (6) (DB) * AIR 1962 J & K 43 (45, 46). (Defendant must be necessary or proper party.)

[See (1965) 78 Mad LW 600. (Lessee whose name is struck off as wrongly impleaded in mortgage suit is not party to that within Section 47.)]

[See also AIR 1959 Andh Pra 106 (108): (1958) 2 Andh WR 415 (DB). (Suit by endorsee of promissory note executed by father alone—Son impleaded—Suit against him dismissed, on ground of his not being proper party or plaintiff himself withdrawing suit against him — Section 47 cannot be invoked by son. AIR 1954 Mad 864 (FB), Foll.)]

(3) Previous execution petition against plaintiff and his mother dismissed as barred by limitation — Order does not amount to exoneration of plaintiff as a party from the suit — Mere fact that no further execution petition could lie against them, cannot in law make them cease to be parties. So long as one was party to the suit, it does not matter if he was not a party to the execution proceedings wherein he puts forth his objection. ILR (1967) 3 Mad 408.

(4) An order exonerating a party from a suit may be made on several grounds and whether or not such a person could still be deemed to be a party for certain other purposes will depend on the circumstances of each case having regard to the pleadings and the scope of the order of exoneration. A person exonerated as improperly impleaded and struck off, has ceased to be a party to the suit and a subsequent suit by him is not barred by Section 47 of the Civil P. C. (1961) 2 Mad LJ 119.

(5) A party defendant whose name is directed to be removed from the record and who is exonerated from the suit may

**Section 47 — Note 7 (contd.)**
nevertheless be a party to the suit within the meaning of Section 47, Civil P. C., and any order passed on an objection raised by such party in execution would be open to appeal. AIR 1959 Mad 80 (81): (1958) 2 Mad LJ 580 (DB).

(6) Striking of execution case for non-filing of succession certificate amounts to dismissal within Section 47. ILR (1965) Cut 823: 32 Cut LT 628.

(7) Where a person has been properly impleaded as a party, but the plaintiff does not wish to proceed against him or is unable to prove his claim against him, his name is wrongly "struck off" he nevertheless does not cease to be a party to the suit. AIR 1926 Mad 687 (689) (DB) * AIR 1957 Pat 437 (439): 36 Pat 424 (DB).

(8) It is proper for the executing Court to consider not only the decree itself but the judgment and the pleading also and see whether, upon the circumstances of the case the parties, though the suit was dismissed against them remained parties to the suit. AIR 1930 Mad 817 (820): 54 Mad 81 (FB).

**8. Person against whom suit abates.** — (1) Where a person is added as a defendant to the suit, but on his death, his legal representatives are not brought on the record such legal representatives cannot be impleaded as joint judgment-debtors in the execution proceedings. AIR 1936 Pat 110 (110) (DB).

(2) Party to suit dying before decree — Legal representatives not substituted — Representative of that person is competent to raise questions about execution, discharge and satisfaction of the decree. AIR 1965 Pat 427 (433): 1965 BLJR 635 (FB). (AIR 1931 All 490 (FB), Dissented from.)

**9. Surety under Section 145.** — (1) Under Section 145, a surety against whom execution has been taken out is a party within the meaning of Section 47 only for the purposes of appeal and not for other purposes. AIR 1953 Hyd 111 (112): ILR (1953) Hyd 51 (DB) * AIR 1942 Nag 107 (108): ILR (1942) Nag 779 * AIR 1925 All 344 (345) (DB) * (1880) 2 All 604 (612) (FB) * AIR 1932 Bom 77 (77, 78) * AIR 1915 Cal 237 (237) (DB) * AIR 1938 Mad 215 (216) * AIR 1919 PC 55 (58): 42 All 158: 22 Oudh Cas 212: 46 Ind App 228 * AIR 1935 All 373 (374) * ILR (1957) 2 All 252 (256, 257). (Surety making claim for remuneration or expenses cannot be considered party under Section 47 for purpose of appeal — AIR 1932 Lah 324, Dissented from.)

(2) If a surety under Section 145 seeks to get his bond cancelled on the ground of fraud, or applies for discharge on the fulfilment of the condition imposed, or on account of an adjustment between the creditor and the debtor without the consent of the surety, he can proceed only by way of suit and not under Section 47. AIR 1920 Mad 75 (77): 43 Mad 325 (DB). (Fraud.) * (1893) 15 All 183 (184, 185). (Application for discharge.) * AIR 1943 Bom 246 (248): ILR (1943) Bom 382. (Adjustment.)

(3) Where a security bond for due performance of a decree is executed by the judgment-debtor himself at a time when the decree was being executed against his person it directly comes under Section 47. AIR 1953 Trav-Co 364 (366) (DB).

(4) Security bond to Court by judgment-debtor — Bond cannot be enforced under Section 145 — Bond can be enforced under Section 151 in execution proceedings. AIR 1966 Andh Pra 151 (152): (1965) 1 Andh LT 245 (DB).

(5) Court below holding that Section 145 (c), clearly applicable — Order is covered by Section 47. AIR 1962 Assam 23 (24): (1960) 1 Assam LR 243 (DB). (Appeal lies — In proper case High Court would exercise powers under Section 115.)

**10. Government in proceedings under Order 33.** — (1) A Collector applying under Order 33 for payment of court-fee in pauper suits is a party within Section 47 and an order on his application is one under the section AIR 1919 Pat 99 (101): 4 Pat L Jour 166 (DB) * (1911) 35 Bom 448 (450) (DB).

**11. Intervenor.** — (1) An intervener who is impleaded as a party will be a party to the suit within the meaning of Section 47. AIR 1955 Pat 350 (351, 352): 34 Pat 336 (DB).

(2) A person who pays down money to avoid an attachment of his properties wrongly identified as judgment-debtor's is not a party and cannot claim his money back in execution under this section. AIR 1916 Sind 22 (22): 9 Sind LR 213 (DB).

**12. Trespassers.** —(1) A third party who, at the instigation of the judgment-debtor, obstructs the decree-holder in getting possession of the property, or who violates the rights of the attaching decree-holder by cutting and carrying away the crops on the attached land, is not a party to the suit. (1898) 2 Cal WN 311 (314) (DB) * AIR 1957 J & K 23 (24) (DB) * (1907) 30 Mad 413 (417) (DB).

**13. Party sued in a representative capacity.** — (1) Person actually made a party to a suit cannot be said to be not a party thereto merely because he is sued in a representative capacity. AIR 1940 Rang 27 (28) * (1872) 18 Suth WR 185 (188) (PC) * AIR 1919 Cal 623 (624) (DB) * (1909) 3 Ind Cas 764 (764) (DB) (Bom) * AIR 1917 Mad 168 (169) (DB).

(2) Rights of a person actually made a party to the suit whether representative or individual, must be deemed to be the rights of a party to the suit within the meaning of Section 47. AIR 1946 Mad 209 (214): ILR (1946) Mad 707 (DB) * AIR 1940 Rang 27 (29) * AIR 1927 Mad 1043 (1050): 51 Mad 46 (FB).

**Section 47 — Note 13 (contd.)**

[See also AIR 1966 Ker 18 (19): 1965 Ker LT 835 (FB). (Hypothecation of tarwad property — Subsequent partition — Property allotted to sub-tarwad — Suit to enforce mortgage — Sub-tarwad not impleaded — Objection by Karnavarthi impleaded in suit in her individual capacity to execution of decree — Applicability of section to objection.)]

[But see AIR 1933 Mad 152 (153): 56 Mad 453 (DB).]

(3) Decree obtained against father bound the sons as well and ancestral property in their hands was liable to be proceeded against in execution of the decree. (1968) 2 Mys LJ 269.

**14. Questions as to who is a party can be decided by the executing Court.** — (1) Where an objection is taken that a certain person was not a party to the suit at the time of decree and therefore, it is not open to the executing Court to issue process against his legal representative, the executing Court can and must determine the question under the section. AIR 1917 Pat 623 (623): 2 Pat L Jour 192 (DB).

(2) Where a decree has been obtained by a benamidar and execution is sought to be obtained by the true owner and the judgment-debtor challenges the ownership of the latter, the question as to who is the party to the suit, ought to be decided under this section by the executing Court. AIR 1928 Cal 835 (836) (DB).

[But see AIR 1931 Rang 24 (24) (DB).]

**15. "Representative", who is.** — (1) The word 'representative' includes not only a legal representative but any representative in interest. AIR 1943 Oudh 354 (358): 19 Luck 1 (FB) * AIR 1920 Mad 324 (332): 43 Mad 107 (FB) * AIR 1939 Nag 183 (184): ILR (1939) Nag 548 (DB) * AIR 1936 Pat 126 (128) * AIR 1935 Sind 214 (215): 29 Sind LR 251 (DB) * AIR 1956 All 555 (557) * AIR 1956 Assam 9 (10) (DB) * 1955-2 Mad L Jour 357 (358) (DB) * AIR 1953 Nag 236 (236): ILR (1952) Nag 150 * AIR 1950 Pat 211 (211) (DB) * AIR 1948 Cal 172 (173): ILR (1948) 1 Cal 146 (DB) * (1940) 42 Bom LR 1123 (1132) * AIR 1926 Cal 798 (808): 53 Cal 781 (FB) * (1904) 26 All 447 (460, 461, 463) (FB) * AIR 1952 Trav-Co 467 (471): ILR (1952) Trav-Co 201 (DB) * AIR 1948 Cal 172 (173): ILR (1948) 1 Cal 146 * AIR 1945 All 22 (23): ILR (1944) All 496 (DB) * AIR 1943 Oudh 354 (358): 19 Luck 1 (FB) * AIR 1942 Pat 369 (370) * AIR 1941 Mad 161 (174): ILR (1941) Mad 438 (FB) * (1897) 24 Cal 62 (73) (FB) * AIR 1939 Nag 183 (184): ILR (1939) Nag 548 (DB) * AIR 1934 Pat 413 (419): 13 Pat 735 * 1963 Mys LJ (Supp) 421 * (1963) 65 Pun LR 606: ILR (1963) 2 Punj 245. (Decree for ejectment against deceased tenant — Can be executed against his heirs who are in possession of the building.)

(2) Any one who intermeddles with property of another is the latter's representative (1963) 65 Pun LR 606: ILR (1963) 2 Punj 245 * AIR 1962 Pat 55 (57): 1961 BLJR 664. (Question as to right to execute decree between alleged heirs of sole plaintiff in original suit.)

(3) A question which arises only between the representatives of one of the parties is not a question between the parties or their representatives within the meaning of the expression occurring in Section 47. AIR 1965 Mys 268 (268, 269): (1965) 1 Mys LJ 728. (AIR 1924 Mad 365, Dissented from.)

(4) It is not necessary that the transfer of the interest should be after decree; it may be before the decree, in which case the circumstances must be such that the transferee is bound by the decree. (1897) 24 Cal 62 (75) (FB) * (1890) 12 All 313 (317) (FB) * AIR 1939 Nag 183 (184): ILR (1939) Nag 548 (DB).

(5) A transferee of property during the pendency of suit concerning that property, will be a representative of the party whose interest has been transferred. AIR 1956 Orissa 165 (171) (DB) * AIR 1939 Mad 944 (945) * AIR 1959 Ker 133 (135): 1958 Ker LT 925 (DB).

(6) Where during pendency of execution proceedings the judgment-debtor places his brother in possession of the machinery, that was pledged to the decree-holder, with the result that part of it was no longer available for sale in execution of the final decree owing to its being misappropriated or converted to his own use by the said brother, it is unjust and unfair to drive the decree-holder to separate proceedings to pursue the missing pledged property. The brother is liable to account for the missing property as the representatives of the judgment-debtor. The executing Court can make an order against the brother for restitution of the value of the missing portion so far as it can be ascertained. AIR 1959 Punj 464 (465, 466). (A. I. R. Commentary on C. P. Code, Section 47, Note 17, Cited.)

(7) A universal legatee or universal donee is a representative but not a legatee of a part of an estate. ILR (1954) Mad 1003 (1009) (DB) * AIR 1930 Oudh 268 (270).

(8) A receiver appointed during the pendency of a suit is not a representative. AIR 1945 Cal 387 (392): ILR (1946) 1 Cal 45 * ILR (1956) 1 Cal 171 (177).

(9) A party to a partition suit is not a representative of another party. AIR 1938 Pat 90 (91).

(10) Benamidar can represent real owner — Proceedings between benamidar and third party — Death of Benamidar — His heirs brought on record — Application by real owner for being brought on record dismissed — Decree against heirs of benamidar — Held, on facts that benamidar and his heirs represented real owner

**Section 47 — Note 15 (contd.)**
and decree was binding on him. AIR 1969 SC 316 (318, 319): (1969) 1 SCJ 373.

(11) On request by first plaintiff decree passed in favour of second plaintiff — Second plaintiff is decree-holder and executes decree — No question of determination of legal representative of deceased first plaintiff can arise. AIR 1964 Ker 149 (149, 150): ILR (1963) 1 Ker 663. (The grounds on which the decree had been so passed, the reasons for the same and the motives which prompted the first plaintiff to so request were matters, entirely foreign to the scope of the enquiry falling under Section 47.)

(12) Mortgage decree — Death of mortgagor — Execution started bona fide against sole legal representative in possession of deceased mortgagor without any knowledge of alleged will executed by mortgagor — Decree-holder purchasing property in execution — Obstruction to delivery by person claiming title under alleged will of mortgagor — No question of substantial representation in execution arises — Execution proceedings held valid as claimant and failed to intervene in execution. AIR 1963 Ker 5 (7): (1963) 1 Ker LR 29 (FB).

(13) Death of party during pendency of suit — Some persons but not his widow substituted as legal representatives — Decree against them — Widow is not legal representative of judgment-debtors and her application under Section 47 that decree was not binding on her is not maintainable. AIR 1963 Pat 127 (127, 128).

**16. Auction-purchaser, position of.** — (1) Under the Explanation to the section a purchaser at a sale in execution of the decree is a party to the suit. AIR 1959 Pat 13 (14, 15, 16): 59 Pat LR 9 (DB). (Execution against father — Sale of property including minor sons' share — Objection by minors to delivery of possession to auction purchaser falls under Section 47.)

(2) The Explanation to Section 47 of C P. Code in its present form was substituted for the old Explanation by the Amendment Act (LXVI of 1956) which came into force with effect from 2-12-1956. The earlier decisions, therefore, dealing with the question whether an auction purchaser is or is not a party to the suit, have lost much of their importance. AIR 1968 Delhi 104 (107). (Auction purchasers in prior litigation between common judgment-debtor and third parties would not be parties to suit.)

(3) When an execution sale is required to be set aside on an application made by the judgment-debtors, the auction-purchaser is a necessary party. 1963 Jab LJ 608: 1962 MPC 68.

(4) A question relating to delivery of possession is one relating to the execution, discharge or satisfaction of the decree. AIR 1943 Mad 318 (321) * AIR 1958 Ker 309 (310) (DB) * AIR 1957 Madh B 99 (100) (DB) * AIR 1957 Punj 307 (309) * (1905) 28 Mad 87 (89, 90) (DB) * AIR 1927 Mad 288 (290, 291): 50 Mad 403 (DB) * AIR 1939 Mad 369 (370): ILR (1939) Mad 456 (SB). (Reversing AIR 1936 Mad 571 on another point.) * AIR 1936 Mad 571 (572) * AIR 1933 Mad 569 (570) * AIR 1925 Mad 1198 (1199) * AIR 1920 Mad 979 (980) (DB) * AIR 1916 Mad 1008 (1010) (DB) * (1908) 28 Mad 119 (121) (DB) * (1903) 26 Mad 740 (741) (DB) * (1902) 25 Mad 529 (532) (DB) * (1901) 24 Mad 185 (188) (DB) * AIR 1944 Cal 328 (328) * AIR 1926 Cal 798 (803, 807): 53 Cal 781 (FB) * AIR 1930 Cal 586 (588) * AIR 1934 Cal 541 (542) (DB) * AIR 1933 Cal 680 (680): 60 Cal 832 (DB) * AIR 1933 Cal 311 (311, 312) (DB) * AIR 1932 Cal 126 (128): 59 Cal 117 (DB) * (1913) 20 Ind Cas 874 (875, 876) (DB) (Cal) * (1904) 31 Cal 737 (742) (DB) * (1900) 27 Cal 34 (38) (DB) * AIR 1956 Nag 93 (94, 95): ILR (1955) Nag 72 (DB) * AIR 1953 Nag 236 (237): ILR (1952) Nag 150 * AIR 1927 Nag 294 (295) * AIR 1917 Nag 24 (25) * AIR 1938 Nag 212 (215): ILR (1938) Nag 583 (DB) * AIR 1933 Nag 369 (370) * 1949 Trav-Co LR 90 (93) (DB) * AIR 1956 Nag 81 (84): ILR (1956) Nag 371 (DB) * AIR 1925 Pat 478 (479): 4 Pat 726 (DB) * ILR (1967) 3 Mad 408 * AIR 1965 Andh Pra 8 (9): (1964) 2 Andh WR 337. (Delivery of possession to stranger auction-purchaser.) * AIR 1963 Mad 144 (146): (1962) 2 Mad LJ 348. (Charge decree for maintenance — Execution — Third party auction purchaser is representative of judgment-debtor — Subsequent execution for future arrears — Court auction purchase by decree-holder — Question as to delivery of possession as between them — Relates to execution, discharge or satisfaction — Application for removal of obstruction by decree-holder auction purchaser dismissed — Suit for declaration of title and possession barred.) * AIR 1959 Madh Pra 348 (349): 1959 Jab LJ 294. (AIR 1932 Nag 140 and AIR 1937 All 742 (FB) and AIR 1931 Pat 241 (FB), Not followed.)

(5) A question relating to delivery of possession is not one relating to execution, discharge or satisfaction of decree AIR 1955 All 49 (51): ILR (1955) 1 All 687 (FB). (31 All 82 (FB) and AIR 1937 All 742: ILR (1937) All 921 (FB), Rel. on.; 19 All 477 and AIR 1919 All 390: 41 All 479 (DB), Overruled.) * ('57) AIR 1957 All 251 (252) * (1909) 31 All 82 (92, 93, 94) (FB) * (1907) 29 All 463 (466) * AIR 1937 All 742 (750): ILR (1937) All 921 (FB) * AIR 1918 All 405 (405): 40 All 216 (DB) * (1908) 30 All 231 (234, 235) (DB) * (1906) 28 All 722 (723) (DB) * (1902) 24 All 519 (520) (DB) * AIR 1945 Bom 386 (387) (DB) * AIR 1924 Bom 429 (431): 48 Bom 550 (FB). (Overruling 35 Bom 452.) *

**Section 47 — Note 16 (contd.)**

AIR 1924 Bom 527 (528) (DB) * AIR 1930 Bom 375 (377): 54 Bom 479 (DB) * AIR 1923 Bom 62 (62): 46 Bom 914 (DB) * (1898) 22 Bom 939 (944) (DB) * AIR 1916 Pat 216 (216): 1 Pat L Jour 232 (FB) * (1954) 33 Pat 894 (898) (DB) * AIR 1930 Pat 311 (312, 313): 9 Pat 775 (DB) * (1938) 177 Ind Cas 692 (693) (DB) (Pat) * AIR 1931 Pat 241 (243 to 247, 252, 255, 261 to 263): 10 Pat 670 (FB) * AIR 1930 Pat 308 (310): 9 Pat 332 (DB) * AIR 1929 Pat 559 (560) (DB) * AIR 1919 Pat 297 (304): 4 Pat L Jour 716 * AIR 1918 Pat 546 (547) * AIR 1918 Pat 395 (396): 3 Pat L Jour 571 (DB) * AIR 1933 Mad 482 (484): 57 Mad 844 * (1896) 6 Mad L Jour 256 (258) * (1892) 15 Mad 226 (228) (DB) * (1884) 7 Mad 592 (594) (DB) * AIR 1932 Nag 140 (141): 28 Nag LR 250 * AIR 1965 Orissa 2 (4). (Whether auction-purchaser is decree-holder or stranger is immaterial — AIR 1955 All 49 (FB) and AIR 1924 Bom 429 (FB), Foll.) * AIR 1962 Him Pra 8 (10). (Question between stranger auction purchaser and judgment-debtor — AIR 1957 All 251, Foll.; AIR 1948 Nag 94 and AIR 1956 Nag 81, Dissented from.) * AIR 1960 Pat 294 (295). (Sale confirmed — J. D.'s application resisting delivery of possession — Order rejecting application is not appealable. AIR 1931 Patna 24, Foll.)

(6) The amendment of Explanation to Section 47, by Act LXVI of 1956, operates retrospectively and applies to a suit filed before amendment and the auction-purchaser in execution of a decree obtained in such a suit would be treated as a party to the suit for purposes of Section 47. AIR 1965 Orissa 2 (4).

(7) Where the decree-holder purchaser obtains possession under the sale and is thereafter dispossessed again by the judgment-debtor, a suit for possession by the decree-holder is not barred under this section. ('36) AIR 1936 Rang 298 (299) * ('57) AIR 1957 Assam 131 (133).

(8) The explanation which makes an auction-purchaser a party to the suit takes away distinction between decree-holder purchaser and stranger-purchaser. AIR 1966 Punj 315 (319, 321): ILR (1966) 2 Punj 593 (DB). (Sale in execution of decree — Sale confirmed — Decree set aside — Sale must be treated as cancelled even if auction purchaser is stranger.)

(9) Confirmation of sale — Suit by third party — Judgment-debtor found to have no saleable interest in property — Dispossession of auction purchaser — Auction-purchaser can recover purchase money from decree-holder not by application under Section 144 or Section 151 but by separate suit. AIR 1964 Raj 140 (144, 145): 1964 Raj LW 178 (DB). (AIR 1961 Raj 193, Reversed.)

(10) A dispute between the decree-holder purchaser and a third party in possession will not come within this section. AIR 1936 Mad 733 (740) (DB) * AIR 1958 Ker 309 (310) (DB).

(11) Third party purchasing mortgaged property in execution during pendency of mortgage suit — Purchaser is representative in interest of judgment-debtor and bound by mortgage decree. (1962) 2 Mad LJ 336: 75 Mad LW 632.

[See AIR 1959 Ker 133 (135, 136): 1958 Ker LT 925 (DB). (Sale in execution of money decree pending mortgage suit — Execution of mortgage decree — Purchaser given symbolical possession — Symbolical possession is as good as actual possession — Suit for recovery of property from purchaser pendente lite, in execution of money decree, is maintainable.)]

(12) Dispute between purchaser in execution of money decree and purchaser in execution of mortgage decree against same debtor — Former represents the J. D. and the latter his own interest as well as mortgagee decree-holder — Section applicable. AIR 1963 Mad 450 (451). (AIR 1940 PC 11, Rel. on; Observations to the contrary in AIR 1944 Mad 11, Doubted.)

[But see AIR 1968 Pat 181 (183, 184). (AIR 1961 Andhra Pra 298, Dissented from.]

(13) Attachment before judgment — Property can be sold in execution of another decree — Person purchasing property in execution of another decree, can bring this fact to notice of Court and stop further proceeding in regard to that property at instance of decree-holder who attached it earlier — This cannot be done by objection on basis of Order 21, Rules 58 to 61 — Purchaser, however, can object under Section 47 on ground that he had already purchased the property. Such a purchaser is representative in interest of judgment-debtor and can claim benefit of Section 47. AIR 1961 Andh Pra 298 (300, 301): (1961) 1 Andh WR 218 (DB). (The aggrieved respondent filed the suit to set aside the order on the claim petition under Order 21, Rule 63. The auction-purchaser's petition to treat the suit as a petition under Section 47 and to dispose of the second appeal on that basis was allowed.)

(14) Attachment and sale of lessor's interest in building in execution of decree against lessor — Auction purchaser gets only lessor's interest and cannot claim to take lessee's interest also. AIR 1965 Andh Pra 8 (10, 11, 12): (1964) 2 Andh WR 337 (Lessee is not a representative of his lessor.)

(15) Contract of sale of property — Transferee in possession of property as part performance of such contract — Transferee cannot maintain suit under Order 21, Rule 103 against auction purchaser of same property, since the suit is concerned not with question of title but

**Section 47 — Note 16 (contd.)**
only with the right to maintain possession and the auction purchaser does not claim under the transferor within the meaning of Section 53-A, Transfer of Property Act. AIR 1967 Bom 34 (36, 37): 67 Bom LR 767. (AIR 1952 Orissa 143 and AIR 1943 Mad 706, Dissented from.)

(16) Final mortgage decree for sale — Subsequent Court auction-purchaser of mortgaged property in execution of money decree is representative of judgment-debtor mortgagor. AIR 1960 Assam 57 (58): ILR (1957) 9 Assam 302.

(17) Vendee purchasing property subject to attachment in execution of decree against vendor impugning attachment, of which he had no knowledge as being void — Question can only be raised by application under Section 47 in execution against vendor. (1963) 67 Cal WN 916 (920). (When it was so raised but without success a suit by the vendee for declaration that attachment of property purchased by him is void is barred under Section 47.)

(18) Auction-purchasers in prior litigation between common judgment-debtor and third parties would not be parties to suit and no second appeal would lie from controversy raised by them. AIR 1968 Delhi 104 (107). (Case law before the amendment of Explanation in the present form by Act 66 of 1956 has lost much of its force.)

(19) Third party auction-purchaser in execution of simple money decree — Is representative of judgment-debtor. 1961 All LJ 669 (671): 1961 All WR (HC) 497 (DB). (Refusal to implead him in execution of mortgage decree in respect of same property, is appealable.)

**17. Transferee from auction-purchaser.**— (1) Under the amendment by Act 66 of 1956, a purchaser in execution of the decree is a 'party to the suit' for the purposes of this section. Hence, a transferee from such execution purchaser, whether he is the decree-holder or a stranger, would now be a representative of a 'party' for the purpose of this section.

(2) No objection also raised against attachment or sale at the stage of execution — Suit by alienee from purchaser at auction-sale for declaration of title — Sale cannot be assailed in that suit as invalid or not binding on the judgment-debtor. (1965) 1 Mad LJ 358.

**18. Transferee from a party.**— (1) Where the suit is one in which any right to immovable property is directly and specifically in question and the transferee gets a transfer of such property pendente lite, the transferee is a representative of the party. AIR 1956 Orissa 165 (171) (DB) * AIR 1953 Nag 236 (236): ILR (1952) Nag 150 * AIR 1951 Trav-Co 187 (188) (DB) * AIR 1949 Mad 207 (208) * AIR 1945 Nag 86 (89): ILR (1944) Nag 852 (DB) * AIR 1938 Bom 367 (369): ILR (1938) Bom 649 (DB) * AIR 1937 PC 260 (261): 31 Sind LR 652. (Affirming AIR 1933 All 201: 55 All 235.) * AIR 1937 Mad 580 (581) * AIR 1936 All 479 (480) (DB) * AIR 1934 Cal 145 (146) (DB) * (1900) 22 All 243 (246, 247) (DB) * AIR 1920 Pat 710 (711) (DB) * AIR 1921 Mad 559 (560) (DB) * AIR 1966 Madh Pra 318 (323): 1966 Jab LJ 1133. (Decree directing sale of property charged — Property can be sold in execution in hands of transferee — Want of knowledge of decree cannot be pleaded by him.) * 1963 Mys LJ (Supp) 421 * AIR 1960 Madh Pra 198 (200): 1960 Jab LJ 404. (Mortgagor, during pendency of mortgage suit exchanging mortgaged property with property of A — Death of mortgagor after mortgagee's obtaining mortgage decree — Execution can be taken out against A.)

(2) Where properties have been attached in execution of a money-decree and the transfer is of an interest in such properties pending attachment, the transferee is the representative of the party. AIR 1946 Lah 134 (137, 140, 141): ILR (1946) Lah 672 (FB) * ILR (1954) Madh-B 378 (382) * (1897) 19 All 332 (333) (DB) * (1901) 28 Cal 492 (498) (DB) * AIR 1926 Lah 134 (135): 6 Lah 544 (DB) * AIR 1932 Mad 86 (89): 55 Mad 495 (DB). (Reversing AIR 1927 Mad 450) * (1897) 20 Mad 378 (383) (DB).

[See however AIR 1952 Trav-Co 467 (471): ILR (1952) Trav-Co 201 (DB).]

(3) Where the transfer is made by the judgment-debtor of an occupancy holding which is not transferable by custom the transferee is representative. AIR 1940 Pat 670 (671) * AIR 1926 Cal 956 (956) * AIR 1918 Pat 483 (484): 3 Pat L Jour 579 (DB) * AIR 1915 Cal 242 (248): 42 Cal 172 (FB).

[But see AIR 1927 Cal 156 (157): 53 Cal 913 (DB) * (1909) 3 Ind Cas 461 (462) (DB) (Cal).]

(4) Where the suit does not relate to any property and the transfer is made by the judgment-debtor of properties, which have not been attached in execution of the decree in such suit or the attachment of which has been set aside, the transferee is not a representative. AIR 1941 Pat 394 (394) (DB) * AIR 1939 Bom 496 (498) * AIR 1939 All 264 (267, 268): ILR (1939) All 354 (DB) * AIR 1918 Mad 142 (142) (DB) * (1894) 16 All 286 (291) * (1911) 9 Ind Cas 307 (308) (DB) (Cal) * AIR 1920 Nag 205 (205).

(5) Private purchase after an invalid attachment in execution of a decree is not affected by Section 64 of the Code — Title of the private purchaser in such a case would be paramount and he would not be bound by the subsequent execution proceedings leading to the sale of the property in favour of the Court auction-purchaser. Section 47 has no application to such a case. (1966) 1 Mad LJ 413: ILR (1966) 1 Mad 600.

(6) A sub-lessee would be bound by a decree for possession obtained by the les-

**Section 47 — Note 18 (contd.)**
sor against the lessee on a ground which determined the sub-lease also, no matter whether the sub-lease was created before or after the suit and would be representative. AIR 1953 SC 514 (515, 516): 1954 SCR 235.

(7) Lessee is not a representative of the landlord of the premises but has a distinct and separate estate. AIR 1965 Andh Pra 8 (10, 11, 12): (1964) 2 Andh WR 337. (Decree against lessor — Attachment and sale of interest in building — Auction-purchaser gets only lessor's interest and cannot claim to take lessee's interest also.)

(8) Tenant of premises objecting to mode of partition of premises in execution of partition decree — Objection allowed by order made under Order 21, Rule 36 — Tenancy commenced prior to institution of partition suit and tenant not made party to such suit--Tenant is not representative of one of parties to the partition decree — His objection is not a dispute between parties or their legal representatives. AIR 1966 All 528 (529): 1966 All LJ 393. (Order is not appealable as decree.)

[But see AIR 1964 Punj 525 (526, 527): 66 Pun LR 832. (Execution of partition decree — Land leased by one of co-sharers — Decree can be executed — Separate suit to evict lessee not necessary.)]

(9) Decrees containing covenants running with the land passed by consent and/or even in invitum the same cannot be held executable against third parties and/or purchasers of the property after the decrees. Case law discussed. (1967) 69 Bom LR 749 (751): 1967 Mah LJ 985.

(10) Suit for specific performance by subsequent contractees — Earlier contractees not impleaded — Sale pendente lite in favour of earlier contractees, is not affected by decree in favour of subsequent contractees — Suit for possession by earlier contractees is maintainable. 1962 MPLJ 142.

(11) During pendency of execution petition property sold in execution of prior mortgagee's decree — Surplus sale proceeds in Court deposit — Subsequent mortgagee can apply to withdraw it under doctrine of substituted security. (1966) 78 Mad LW 44: ILR (1964) 2 Mad 101. (Court can take notice of subsequent events and grant relief in execution.)

**19. Purchaser from party to suit in which injunction has been granted affecting such property.**— (1) A purchaser of property from a party to suit in which an injunction has been granted alienating such property is not the representative of that party. (1908) 32 Bom 181 (184) (DB).

**20. Official Assignee or Official Receiver.**— (1) The Official Assignee or Official Receiver, claiming property on behalf of the creditors of an insolvent judgment-debtor, is not a "representative" of the judgment-debtor. AIR 1956 Cal 656 (658) * AIR 1941 Mad 262 (264) (DB) * AIR 1932 Cal 203 (204) (DB) * (1885) 7 All 752 (755) (DB) * (1897) 21 Bom 205 (219) * (1902) 29 Cal 428 (432) (FB). (Overruling 28 Cal 419.) * AIR 1966 Punj 479 (481): ILR (1965) 2 Punj 212 (DB). (Receiver appointed under Section 20 of Provincial Insolvency Act cannot be termed as representative of party within meaning of Section 47.)

(2) The Official Receiver in whom the properties are vested under Section 37 of the Provincial Insolvency Act is a representative of the debtor. AIR 1949 Mad 91 (94) * AIR 1960 Andh Pra 131 (132).

(3) A receiver in insolvency may represent both the creditors and the insolvent according to the circumstances of the case. AIR 1945 Cal 387 (392): ILR (1946) 1 Cal 45 * AIR 1941 Mad 606 (607) (DB) * AIR 1935 Cal 503 (504): 62 Cal 457 (DB).

(4) Where property of insolvent vests in receiver in insolvency, objection about the propriety of any order relating to property of insolvent, can be raised only by receiver who is in eye of law the legal owner of the property and not by the insolvent himself. AIR 1959 Cal 160 (161): ILR (1959) 1 Cal 287 (DB). (But undischarged insolvent without claiming any proprietary right simply pointing out that property is no longer his and not liable to attachment by Civil Court — Objection is entertainable.)

**20-A. Custodian under Administration of Evacuee Property Act.**— (1) Sale of evacuee property in execution proceedings after Administration of Evacuee Property Act came into force but before amendment of Section 17 of Administration of Evacuee Property Act (1950) (as amended by Act 22 of 1951) — Application under Section 47 for setting aside by Custodian is competent, the Custodian being legal representative of the evacuee judgment-debtor. AIR 1960 Punj 341 (347): 62 Pun LR 475 (FB).

[But see 1962 All LJ 8 (11): 1962 All WR (HC) 44 (DB). (Custodian objecting under Section 17 of Administration of Evacuee Property Act — Not a representative of original evacuee judgment-debtor.)]

**21. Liquidator of company.**— (1) The liquidator of a co-operative society claiming priority over a mortgagee of the judgment-debtor who has obtained a decree on the mortgage and is seeking to execute the decree is not a representative of the judgment-debtor. AIR 1934 Nag 201 (203): 30 Nag LR 240.

**22. Transferee of decree.**— (1) The transferee of a decree including the transferee of a portion of the decree is a representative of the decree-holder. (1899) 26 Cal 250 (252) (DB) * AIR 1919 All 337 (337): 41 All 432 (DB) * (1894) 16 All 483 (492) (DB) * AIR 1935 Bom 298 (302): 59 Bom 417 (DB) * (1887) 11 Bom 506 (512) (DB) * AIR 1921 Cal 74 (75) (DB) * AIR

**Section 47 — Note 22 (contd.)**
1938 Mad 78 (79) * (1902) 15 CPLR 69 (72) * AIR 1925 Pat 449 (450): 4 Pat 120 (DB) * AIR 1966 Mys 115 (118): (1965) 3 Law Rep 202. (Decree obtained for and on behalf of joint family allotted in writing to one of its members, as asset of family, by final decree in partition suit empowering him to realise fruits of decree — Held allottee would be entitled to execute that decree.) * 1960 Ker LT 281: 1960 Ker LJ 183. (Execution by assignee of decree dismissed — Suit by assignee for declaration that he was entitled to execute is barred — Question held one between representative of decree-holder and judgment-debtor relating to discharge or satisfaction of decree.)

(2) A mere transfer of a portion of the property comprised in a decree for possession is not equivalent to the transfer of the decree and such a transferee is therefore not the representative of the decree-holder. AIR 1947 All 297 (299) * AIR 1924 Bom 426 (427) (DB).

(3) When a plaintiff, during the pendency of a suit for the recovery of a debt, transfers the whole debt to another and a decree is subsequently passed in favour of the plaintiff, the transferee becomes the representative of the plaintiff in the suit within the meaning of this section. AIR 1955 SC 376 (394, 395): (1955) 1 SCR 1369. (AIR 1924 Cal 661: 51 Cal 703 (DB). Overruled.)

(4) A question, whether the assignment of the decree is valid or not, arising between the assignee of the decree-holder and the judgment-debtor and relating to the discharge or satisfaction of the decree falls, within the purview of Section 47 and must be decided by the executing Court. 1960 Ker LT 281: 1960 Ker LJ 183. (Separate suit for declaration that assignment is valid is barred.)

**23. Judgment-debtor under attached decree.**— (1) Where in execution of a decree obtained by A against B, a decree obtained by B against C is attached, C cannot be considered a representative of B. (1904) 26 All 136 (138) (DB).

**24. Surety for the performance of a decree.**— (1) A person who has not rendered himself personally liable for the performance of a decree is neither a party nor the representative of a party. AIR 1919 PC 55 (58): 42 All 158: 46 Ind App 228: 22 Oudh Cas 212.

**25. Question as to who is the representative must be determined by the Court — Sub-section (3).**— (1) Where a question arises as to whether a person is, or is not, the representative of a party, the section makes it obligatory upon the executing Court to determine the question for itself. AIR 1952 Orissa 64 (66): ILR (1952) Cut 277 (DB) * AIR 1958 Pat 228 (229) * AIR 1952 Pat 333 (335): 27 Pat 848 (DB) * AIR 1945 Nag 86 (88): ILR (1944) Nag 852 (DB) * AIR 1936 All 479 (480) (DB) * AIR 1935 Bom 298 (302): 59 Bom 417 (DB) * AIR 1938 Cal 818 (820) (DB) * AIR 1926 Mad 411 (412) (DB) * (1968) 2 Mad LJ 610: 81 Mad LW 583. (Legatee under will of decree-holder — Executing Court has to try question whether legatee is legal representative of deceased decree-holder — It can determine question whether will is genuine and whether property in question was bequeathed.) * 1961 All LJ 669 (671): 1961 All WR (HC) 497 (DB) * AIR 1969 Mad 271 (272): 1968-2 Mad LJ 610.

(2) Sub-section (3) does not apply to a case in which the question is between rival representatives of one party, the other party not having any interest in the question. AIR 1942 Bom 309 (309): ILR (1942) Bom 822 * AIR 1957 Trav-Co 5 (6): ILR (1956) Trav-Co 474 (DB) * AIR 1934 All 730 (730) (DB) * AIR 1936 Lah 116 (119) (DB).

[But see 51 Cal WN 186 (188) * AIR 1957 Punj 64 (65).]

(3) Once the executing Court has decided who is the legal representative of a party, the question will not be allowed to be litigated again. AIR 1954 Bom 139 (143, 144): ILR (1953) Bom 991 (DB) * AIR 1960 Cal 623 (625, 626): 64 Cal WN 780. (Representative suit — Execution against parties not on record — Decision by executing Court as to whether person is party to suit falls under Section 47 (3) — AIR 1955 Mad 281 (FB), Not foll.).

**26. Question must relate to execution, discharge or satisfaction of the decree.**— (1) The expression 'relating to the execution' would apply as well to a dispute arising in relation to the execution of a decree after it had been executed, as it would to a dispute relating to the execution of a decree before it had been executed. AIR 1956 SC 87 (91): 1955-2 SCR 938.

(2) The executing Court can take notice of altered circumstances. AIR 1954 Madh B 181 (183): ILR (1954) Madh B 426 (FB) * AIR 1952 Mad 125 (126).

(3) The executing Court must execute the decree as it is or not at all and it has no power to substitute another relief for the one granted by the decree merely because it is impossible, in the circumstances that have happened, to give effect to the latter relief. The proper remedy is to get the decree modified. AIR 1956 SC 359 (363): 1956 SCR 62: 35 Pat 347 * AIR 1969 Orissa 144 (145): 35 Cut LT 287. (Execution of mortgage decree — Property sold — Sale confirmed — Objection to delivery of possession to auction purchaser, held, not within the purview of Section 47 — Order of executing Court was one under Section 151.) * AIR 1966 Punj 336 (336). (Decree passed in award — Decree though purported to be simple money decree, judgment-debtor contending that it was executable only as mortgage decree and ob-

**Section 47— Note 26 (contd.)**

jecting to attachment of land not secured by mortgage — Held attachment of land belonging to judgment-debtor could not be objected as award which was sheet-anchor of decree-holder's proceedings for execution did not mention security against which loan was originally advanced and therefore, decree had to be executed as simply money decree — Further held that even if decree was to be executed as mortgage decree, remedy of sale of land belonging to judgment-debtor was concurrent with sale of mortgaged property and could not have been objected to.) * AIR 1964 Andh Pra 236 (244): (1963) 2 Andh WR 147.

[See also 1968 BLJR 45.]

[See however AIR 1922 PC 54 (55): 1 Pat 378: 49 Ind App 139.]

(4) Where a decree imposes on both the parties reciprocal obligations which are conditional and dependent on each other, and one of the parties applies for execution against the other the executing Court can and must determine whether the applicant is in a position to carry out his part of the decree. AIR 1956 SC 359 (363): 1956 SCR 62: 35 Pat 347.

(5) The executing Court has to see that the judgment-debtor gives the decree-holder the very thing that the decree directs and not something else. So that if there is any dispute about its identity or substance, nobody but the Court executing the decree can determine it. AIR 1956 SC 359 (363): 1956 SCR 62: 35 Pat 347.

(6) When a sale in execution of a decree is impugned on the ground that it is not warranted by the terms thereof, that question could be agitated when it arises between parties to the decree only by an application under Section 47 and not in a separate suit. AIR 1956 SC 87 (91): (1955) 2 SCR 938. (AIR 1930 PC 86, Rel. on; 13 Ind Cas 133 (Mad); 22 Cal 483; AIR 1916 All 104: 38 All 339 (DB) and AIR 1932 Bom 96, Approved.)

(7) Where an execution application is dismissed without going into its merits, and then the Court restores the application under its inherent power, the order of restoration is of a collateral character and does not relate to the execution, discharge or satisfaction of the decree. AIR 1953 SC 23 (27): 1953 SCR 136.

(8) An application under Section 19, Hyderabad Agricultural Debtors Relief Act, 1956, is a matter in the execution of decree. But having regard to the use of the word 'execution' in Section 47 it cannot be strictly construed to a matter relating to the executability of a decree. The plea of limitation is a matter directly relating to the execution of a decree. The plea that execution is barred by limitation, can be gone into under Section 47. But when it is urged that on account of certain statutory provisions the judgment-debtor is entitled to certain relief the matter does not directly relate to execution of a decree though ultimately it may have a bearing on its executability. AIR 1965 Andh Pra 346 (348): (1965) 1 Andh WR 435.

(9) The Court executing the decree also can take into account the subsequent changes in law which either puts an end to the rights of the decree-holder or modifies them. AIR 1962 Madh Pra 318 (319): 1961 Jab LJ 1443. (AIR 1933 Nag 261 (FB), Rel. on.)

(10) Decree for declaration that respondent was entitled to retain possession of house till realisation of its costs — Adjustment of amounts by way of rents involved — Petition for a declaration that the decree was fully discharged and satisfied — Matter relates to discharge or satisfaction of decree . AIR 1967 Manipur 33 (37). (Since the decree was a declaratory and not a money decree, Section 47 and not Order 21, Rule 2 would apply.)

(11) An order under Section 24 of the Bombay Money-lenders Act (31 of 1947) granting or refusing to grant instalments cannot be regarded as a determination of a question relating to the execution, discharge or satisfaction of a decree under Section 47. AIR 1960 Bom 334 (335 to 337): 61 Bom LR 1591 (DB) * (1968) 34 Cut LT 1347.

(12) Where in execution of money decree against insolvent and his sons the joint family property attached before judgment is sought to be sold in execution by decree-holder, on application by Receiver for delivery of property to him for administration the question whether property, is self-acquired or joint family property is one relating to execution of decree within S. 47. AIR 1965 Andh Pra 451 (455): (1965) 2 Andh WR 256 (DB).

(13) Question relating to mesne profits is to be determined by the decree itself and not in execution proceeding in view of Order 20, Rule 12. ILR (1963) Andh Pra 560 (DB) * 1968 All LJ 17 (DB).

**27. Question as to validity of the decree.—** (1)The question as to validity of the decree can be gone into only by way of a separate suit and not in execution. AIR 1954 Hyd 190 (192): ILR (1954) Hyd 353 (FB) * AIR 1958 Andh Pra 1 (8): ILR (1957) Andh Pra 326 (FB) * AIR 1956 Pat 280 (283): 35 Pat 610 (DB) * 1956 Madh BLJ 992 (996) * ILR (1955) 5 Raj 736 (741) * AIR 1954 Cal 492 (495) (DB) * AIR 1952 All 27 (28) * AIR 1952 Mys 94 (97): ILR (1952) Mys 234 (DB) * AIR 1950 Mad 47 (48) (DB) * AIR 1943 Nag 165 (165): ILR (1943) Nag 293 (DB) * AIR 1921 Bom 229 (229): 45 Bom 946 (DB) * AIR 1920 Cal 883 (884) (DB) * AIR 1965 Madh Pra 75 (76, 77): 1965 MPLJ 89 (FB). (AIR 1943 Nag 165, Approved and AIR 1946 Nag 311, Overruled.) * AIR 1962 Pat 434 (435): ILR 41 Pat 347 (DB). (Death of judgment-debtor pending execution of decree for evic-

**Section 47 — Note 27 (contd.)**

tion — Objection that decree is not binding not open to legal representative brought on record — Remedy is by separate suit.) * 1961 Ker LT 541: 1961 Ker LJ 793. (Ex parte decree.) * AIR 1961 Punj 229 (232): ILR (1960) 1 Punj 731 (DB). (Objection by legal representative of party, impleaded in execution proceeding.) * AIR 1959 Ker 194 (195, 196): 1959 Ker LT 1 (DB) * (1956) 9 Sau LR 80. (Decree on basis of unregistered award which is compulsorily registrable — Decree not nullity — Decree is binding until set aside in appropriate proceedings.)

[See 1962 All WR 643 (644). (Court cannot sit in judgment on the validity of a decree passed by another Court of competent jurisdiction unless the case comes before it in appeal or revision or the decree is assailed on the ground of fraud of the decree-holder or any other similar reason.)]

[See also AIR 1956 SC 339 (362): 1956 SCR 62: 35 Pat 347. (Decree to be executed as it is or not at all.)]

(2) Parties to compromise — Compromise between some parties to suit — Decree passed against other parties also — Such other party challenging decree but not successful — Execution — Such other party cannot question its validity in execution. 1967 Ker LJ 287: 1967 Ker LT 1077.

(3) Question of validity of decree due to subsequent change in law — Executing Court can consider. AIR 1962 Madh Pra 318 (319, 320): 1961 Jab LJ 1443.

(4) A third party against whom an order is served that the latter should withhold a certain amount from the salary of the judgment-debtor every month till the decree is satisfied and remit the same to the Court can move the executing Court and challenge the validity of the order. AIR 1950 Bom 155 (157): ILR (1950) Bom 185.

(5) Validity of decree cannot be challenged on ground of want of territorial jurisdiction in execution proceedings — Judgment-debtor held estopped from taking that objection in execution. AIR 1962 SC 199 (201): (1962) 2 SCR 747. (Objection does not go to the root of jurisdiction — Judgment-debtor is estopped from taking objection.) * AIR 1965 Ker 16 (18): 1964 Ker LT 1101. (Final decree unconditionally allowing personal execution before execution against property — Defect does not make decree void — Executing Court cannot take notice of defect.)

(6) Not having raised objection as to validity of decree in execution, a judgment-debtor is precluded from filing suit for declaration that decree is nullity by constructive res judicata. 1968 Ker LR 145: 1968 Ker LT 447: 1968 Ker LJ 360.

**28. Question as to the existence of the decree.**— (1) A question whether a decree is a nullity by reason of the fact that it was passed by a Court without jurisdiction or that it was passed against a dead person, can be entertained in execution. AIR 1957 Madh Pra 71 (72) (FB) * ILR (1955) Bom 386 (395) (DB). (Without jurisdiction.) * AIR 1953 Mys 153 (156): ILR (1953) Mys 267 (DB). (Do.) * AIR 1953 Punj 51 (52). (Do.) * AIR 1949 Nag 106 (108): ILR (1948) Nag 376. (Do.) * (1895) 17 All 478 (482) (DB). (Do.) * AIR 1927 Cal 578 (578) (DB). (Do.) * AIR 1929 Lah 449 (451) (DB). (Do.) * AIR 1950 Pat 211 (211) (DB). (Decree against dead person.) * 1942 Nag L Jour 338 (339). (Do.) * AIR 1935 Cal 130 (131) (DB). (Do.) * AIR 1968 Delhi 167 (168) (FB). (Court can consider validity of decree passed by it as Tribunal under Displaced Persons (Debts Adjustment) Act (1951).) * AIR 1965 Pat 427 (433, 434, 435): 1965 BLJR 635 (FB) * (1966) 32 Cut LT 794 (797) * AIR 1965 Bom 129 (130): 1964 Mah LJ 528. (Permission by authority under Rent Control order to file ejectment suit — Ejectment decree — Authority's order set aside in writ petition — Decree is without jurisdiction and cannot be executed.) * 34 Cut LT 1175: AIR 1969 Orissa 21 (22, 23). (But the position is different where the question of lack of inherent jurisdiction was specifically raised and negatived.) * (1965) 67 Punj LR 558: ILR (1965) 1 Punj 717. (AIR 1954 SC 340, Foll.) * (1964) 66 Pun LR 347. (Ejectment decree contrary to provisions of Rent Control Act — Court can refuse execution.) * (1962) 40 Mys LJ 904 * (1962) 28 Cut LT 60. (Exercise of and existence of jurisdiction — Distinction pointed out.) * AIR 1960 Punj 610 (611): ILR (1959) Punj 1588 (DB). (Decree passed by Court having no pecuniary jurisdiction is nullity and executing Court can refuse to execute it.) * AIR 1959 Bom 221 (223): 60 Bom LR 715 (DB). (Court deciding objection and holding decree executable — Question cannot be raised again by independant suit.) * (1958) 24 Cut LT 395. (Karta member of co-operative society — Award against coparceners is a nullity.)

[See AIR 1964 SC 752 (755): (1964) 3 SCR 140. (Proceedings under Section 33-C (2) Industrial Disputes Act are analogus to execution proceedings — Labour Court can refuse to implement award which is made without jurisdiction.) * AIR 1966 Him Pra 77 (79). (Question of lack of jurisdiction can only be entertained when lack of jurisdiction is apparent on face of record and does not involve investigation.)]

[See also ILR (1968) 1 Punj 201. (Sale in pursuance of decree which is nullity is not a good sale — There is no decree in law — Sale can be ignored.)]

[See however 1961 BLJR 212. (Objection as to jurisdictional fact not taken before the Special Tribunal under Section 17, Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, cannot be raised for first time before executing Court.)]

**Section 47 — Note 28 (contd.)**

[But see AIR 1957 Pat 87 (91): 35 Pat 1175 (DB). (Decree nullity.)]

(2) While a decree passed without jurisdiction is a nullity and can be questioned in execution proceedings or in collateral proceedings, if the question of want or absence of jurisdiction in the Court passing the decree cannot be determined without an amount of research, investigation or elaborate inquiry, the executing Court is not competent to permit that inquiry or investigation to be made which would require that Court to take evidence pro and contra and to give a finding as if it was a trial Court. AIR 1959 Andh Pra 159 (163): (1959) 1 Andh WR 275 (DB) * 1961 MPLJ 959: 1961 Jab LJ 1476.

(3) The executing Court can see whether the decree to be executed is a subsisting and operative decree capable of execution. AIR 1956 SC 359 (363):1956 SCR 62: 35 Pat 347 * AIR 1956 Trav-Co 171 (173): ILR (1956) Trav-Co 129 (FB) * (1913) 19 Ind Cas 630 (632) (DB) (Cal) * AIR 1931 Rang 252 (256): 9 Rang 480 (FB).

[See AIR 1961 Cal 643 (647, 648) (DB). (Decree requiring plaintiff to deposit money within particular time — Decree reversed by first appellate Court though latter affirmed by same Court on remand from High Court — Execution — Defendant must accept position that there was subsisting decree.)]

(4) Objection under Bombay Agricultural Debtors Relief Act that decree has been extinguished under Section 15 of that Act is maintainable in execution. AIR 1954 Kutch 19 (19). (Objection does not require Court to question the decree or to go behind it.)

(5) Preliminary and final decrees in mortgage suits and effect thereon of appellate decree — In appeal preliminary decree reversed — Final decree must fall to the ground — No application to set aside final decree within three years — Decree-holder cannot get a right to execute final decree which has no preliminary decree to support it — In such a case it is the duty of executing Court, to take note of the fact that the preliminary decree has been set aside and refuse to execute the final decree, even though the fact is brought to its notice more than three years after decree in appeal reversing preliminary decree. AIR 1967 SC 1236 (1241): (1967) 3 SCR 101. ( (1913) 18 Cal LJ 223 and AIR 1933 Lah 859 (2), Overruled, AIR 1946 Mad 383, Approved but slightly modified.)

(6) Decree in second appeal — Contention that second appeal had abated and the decree was nullity and that therefore decree of appellate Court revived — Question is not one for executing Court — It is only for second appellate Court to decide the question. AIR 1960 Madh Pra 232 (233): 1960 Jab LJ 961.

(7) Execution of decree stayed pending appeal — Dismissal of appeal — Decree-holder applying to executing Court to proceed with stayed petition — Execution petition does not cease to be pending after passing of appellate decree, though petition becomes technically defective after appellate decree — Executing Court can proceed with execution after allowing amendment of execution petition. AIR 1965 Ker 29 (30, 31): 1964 Ker LT 532. (Amendment can be allowed even after appellate decree has become time-barred. 1949 Ker LT 191, Dissented from.)

(8) Satisfaction entered in execution on the alleged adjustment of decree by decree-holder — Adjustment however not recorded — Decree does not subsist after entry of satisfaction — Failure of judgment-debtor to pay in accordance with adjustment — Decree-holder's application for recovery of amount under Section 47 is barred by virtue of Order 21, Rule 3. MBLJ 1955 HCR 2072.

(9) Pauper suit decreed — Order to pay Court-fee to Government — Decree set aside in appeal and de novo trial ordered — Order as to payment of Court-fee also stands set aside — Government cannot execute the order. (1963) 1 Mys LJ 219. (Order executed and property sold — Sale is void ab initio — Fact that judgment-debtor in decree which was set aside was party to sale, does not make it binding on him.)

(10) Where a suit for ejectment under Delhi and Agra Rent Control Act, 1952, on the grounds of the landlord's requirements, is compromised on terms that the defendant would vacate the premises by a certain date and that upon failure to do so the decree would be executed and that the standard rent would be reduced to a lesser amount from a particular date, and the Court passes a decree in terms of the compromise, without being satisfied of the grounds for ejectment as required by the Act the decree is a nullity and cannot be executed. (1969) 1 SCWR 56. ((1969) 1 SCWR 51, Foll., 64 Punj LR 1091, Affirmed.)

**29. Pre-decree matters.**— (1) A Court executing a decree cannot entertain an objection to the execution of the decree, based on an arrangement between the parties prior to the date of the decree. AIR 1928 Cal 527 (530) (DB) * AIR 1935 Cal 177 (178): 62 Cal 421 (DB) * (1902) 29 Cal 810 (812) (DB) * AIR 1938 Nag 265 (266) * AIR 1929 Nag 339 (340) * AIR 1951 Trav-Co 216 (216) (DB) * AIR 1955 Bhopal 3 (5) * AIR 1964 Mys 41 (42): (1963) 2 Mys LJ 373 * AIR 1962 All 374 (377): 1962 All LJ 442 (DB). (Agreement not embodied in decree.)

[But see (1909) 2 Ind Cas 608 (609) (DB) (All) * (1896) 22 Bom 463 (468) (FB)

**Section 47 — Note 29 (contd.)**
* AIR 1934 Bom 370 (372): 58 Bom 610 (DB).]

(2) An agreement postponing the execution of a decree for a time is a matter that can be gone into in execution, notwithstanding the fact that the effect of postponing execution will be virtually to vary the terms of the decree. AIR 1918 Mad 1174 (1178): 40 Mad 233 (FB) * AIR 1926 Mad 582 (583): 49 Mad 513 (DB) * AIR 1925 Mad 591 (592).

(3) An oral pre-decretal agreement between the decree-holder and the judgment-debtors to execute a compromise decree against some of the judgment-debtors would not have the effect of adding to or varying the terms thereof, when there is nothing in the decree which says that the decree will be executed simultaneously against all the judgment-debtors. Such an agreement can be pleaded in bar of execution and the executing Court can enquire into it. AIR 1960 Andh Pra 324 (326): (1960) 1 Andh WR 53 (DB).

(4) Except in cases of agreements relating to execution, a pre-decree arrangement which attacks the decree itself cannot be gone into in execution. AIR 1955 Mad 339 (340) (DB) * AIR 1957 Andh Pra 75 (76). (Agreement not to execute decree.) * AIR 1935 Mad 860 (862, 863): 58 Mad 994 (FB) * AIR 1931 Mad 399 (403): 54 Mad 184 (DB) * AIR 1930 Mad 673 (674) * AIR 1923 Mad 619 (620) (DB) * 54 Mad LW 157 (158) (DB) * AIR 1961 Ker 179 (180): 1960 Ker LT 863 (DB).

[But see AIR 1938 Mad 456 (457): ILR (1938) Mad 451 (DB).]

(5) Appeal against decree — Change in law in favour of appellant during pendency of appeal — Appeal not pressed and allowed to be dismissed — Execution — Change in law cannot be relied on by judgment-debtor to defeat execution. AIR 1962 All 124 (125).

(6) If the decree is for a certain sum of money, to say, that that is not the amount that is due but according to the pre-decretal arrangement when executing the decree, deduction should be given to certain amount, amounts to attacking the decree itself, which is not contemplated in law and is outside the provisions of Section 47. AIR 1964 Mys 41 (42, 43): (1963) 2 Mys LJ 373.

**30. Decree incapable of execution.** See also C. P. C. S. 38.— (1) The question whether a decree is capable or incapable of execution is pre-eminently one coming under this section. AIR 1956 SC 359 (363): 1956 SCR 62: 35 Pat 347 * AIR 1942 Mad 748 (750) * AIR 1965 Pat 427 (433, 434, 435): 1965 BLJR 635 (FB) * (1966) 32 Cut LT 794 (797) * (1968) 70 Punj LR (Delhi) 282 (DB) * AIR 1965 Bom 129 (130): 1964 Mah LJ 528.

(2) The proper stage for raising the plea that a decree obtained against a tarwad is not executable as a member of the tarwad has obtained assignment of the same is in execution as the contention really is that the decree has been discharged by the assignment. 1958 Ker LT 97: 1958 Ker LJ 190.

(3) The principle that an executing Court cannot go behind the decree will not hold good where the decree ex facie cannot be executed by the Court and is opposed to law or so defective as to be incapable of implementation. AIR 1967 Mad 141 (142): 1967 Cri LJ 501: (1966) 2 Mad LJ 371. (Madras Hindu Religious and Charitable Endowments Act (1959), Section 101 — Certificate by Commissioner — Absence of finding that person from whom delivery is sought comes within terms of section — Implementing Magistrate can question legality, propriety or correctness of certificate.)

(4) An objection that the decree is incapable of execution according to its terms can be raised in execution although it could have been but was not raised before the decree was passed. Such an objection can be taken for the first time before the Court to which the decree has been transferred for execution. AIR 1956 SC 359 (363): 1956 SCR 62: 35 Pat 347.

(5) A decree which merely declares the rights of parties is incapable of being executed and only a separate suit will lie to enforce the rights so declared by the decree. AIR 1951 Punj 132 (133) * AIR 1958 Pat 546 (547) * 1958-2 Mad L Jour 512 (513) (DB) * AIR 1957 All 575 (582) (DB) * (1950) 55 Mys HCR 121 (127) (DB) * AIR 1915 All 61 (61): 37 All 97 (DB) * AIR 1933 All 269 (272): 55 All 346 (FB) * AIR 1923 Cal 252 (255) (DB) * (1894) 21 Cal 784 (789): 21 Ind App 89 (PC) * 1968 Cri LJ 704 (706) (Punj)*AIR 1967 Andh Pra 206 (207): (1966) 2 Andh WR 142. (Decree merely declaring charge on property —Property cannot be sold in execution — AIR 1957 All 575, Foll.) * AIR 1966 J and K 13 (21): 1965 Kash LJ 369 (DB) * AIR 1963 Punj 387 (389, 390). (Decree on award declaring contingent rights and liabilities.)

[See (1965) 2 Mys LJ 103 (DB). (Award decree directing that certain properties should go to party No. 1 is not merely declaratory decree.)]

(6) Decree declaring charge for maintenance allowance fixed by agreement between parties — Held the simple declaratory decree is incapable of execution — It simply created a charge. 1961 All LJ 812 (813): 1961 All WR (HC) 648. (Observations of Agarwala, J. in AIR 1951 All 141, held to be obiter.)

[See also AIR 1969 Orissa 114 (116): 34 Cut LT 1296. (Maintenance decree creating charge on property — Auction purchaser purchasing such property for consideration and without notice of charge — Decree not satisfied—Property put to sale — Auction purchaser objecting under Section 47, C. P. C. — Objection cannot be upheld.)]

**Section 47 — Note 30 (contd.)**

(7) Maintenance decree directing judgment-debtor to pay amount specified — Decree making him personally liable and also providing charge on immovable properties — Decree is executable. AIR 1963 Mad 215 (216): (1962) 1 Mad LJ 309 * ILR (1963) Cut 85 (DB).

(8) Compromise decree in suit on condition of future payment — In case of non-payment, amount to be charge on property to be recoverable by recourse to Court of law — Amount can be recovered by separate money suit and not by executing compromise decree — Decree in separate money suit for recovery of amount not barred. AIR 1964 Pat 24 (25) * AIR 1969 All 296 (302, 304): 1968 All LJ 225 (FB). (Compromise instalment decree — Obligation on decree-holder to get certain pending appeal dismissed within definite period — Default— Suit must be deemed to have been dismissed — Decree held unexecutable.)

(9) A partition decree without actually allotting shares or a decree for joint possession is incapable of being executed. AIR 1942 Bom 44 (46): ILR (1942) Bom 14 (DB) * 1899 All WN 124 (125) (DB) * (1904) 6 Bom LR 35 (37) (DB) * AIR 1920 Lah 159 (160): 1 Lah 134 (DB) * AIR 1927 Mad 952 (953) (DB) * AIR 1926 Pat 154 (155) (DB).

[But see AIR 1927 Cal 411 (412): 54 Cal 524 (DB).]

(10) Decree for possession specifying shares of all the three decree-holders — Transfer of interest of shares by two decree-holders to judgment-debtors—Decree is not joint—Decree is executable to the extent of the shares of the third decree-holder by delivery of symbolic possession. AIR 1965 J and K 2 (8): 1964 Kash LJ 238.

(11) Where the decree is vague and indefinite, or where the decree becomes incapable of execution by events subsequent to the decree or where the decree is fully executed, the decree is incapable of execution. ('58) 1958-2 Mad LJ 82 (85). (Subsequent event.) * AIR 1953 Orissa 74 (75) (DB). (Vague or indefinite.) * AIR 1916 All 62 (62) (DB). (Do.) * AIR 1946 Oudh 1 (5): 20 Luck 517. (Subsequent events.) * ('20) AIR 1920 All 129 (131): 42 All 544 (DB). (Do.) * (1905) 28 All 1 (18): 32 Ind App 229 (PC). (Do.) * AIR 1930 Bom 132 (134): 54 Bom 162. (Do.) * AIR 1954 Nag 245 (248): ILR (1954) Nag 332 (DB). (Fully executed.) * AIR 1936 Pat 416 (417). (Do.).

(12) Decree for specific performance — Decree directing execution of sale-deed within specified time not mentioning when sale price was to be paid or whether its payment must precede execution of sale-deed — Decree construed and held was capable of execution notwithstanding non-payment of sale price. AIR 1963 All 49 (50, 51, 52): 1962 All LJ 1082.

(13) (a) If a charge is created by act of the parties or by operation of law prior to the decree itself, a suit has got to be instituted. (b) A charge created by operation of law is not the same thing as a charge created under the decree. Section 100 of the T. P. Act does not extend to a charge created by decree. (c) If on a construction of the decree it appears that it is a money decree and there is collateral declaration that a charge is created or will be created in certain contingencies, the plaintiff's relief lies only in instituting a suit. (d) But, where, the the decree itself creates the charge and the words used in the decree are not inconsistent with the intention of the Court to have the judgment-debtor's dues satisfied by sale of the charged properties in execution proceedings, a fresh suit to achieve the same purpose is not maintainable. A charge created by an arbitrator in his award is not an act of the parties. Until registration takes place or the award merges in a decree, there is no lawful charge. In such a case the charge is created for the first time in the decree itself and, accordingly, enforcement of the charge takes place in execution and not by another suit. AIR 1968 Cal 336 (338, 339): 72 Cal WN 86. (AIR 1951 All 141 (144) (FB) held obiter.)

(14) Decree directing defendants by mandatory injunction to remove earthen bunds put up by them—Bunds not in existence at time of decree—Clause for removal in decree is otiose and cannot be given effect to — It would not entitle decree-holders to execute it against a bund which was not in existence at time of decree but came into existence subsequently — Similarly, it cannot be executed if the bund which was in existence at time of decree, is voluntarily removed by the judgment-debtors. AIR 1969 Andh Pra 92 (96) (DB).

(15) Decree providing that the decree-holder should pay the deficit Court-fee on the decretal amount before its execution is capable of execution from the date of decree. AIR 1951 SC 16 (18): 1950 SCR 852.

(16) Where the executing Court ignores the provisions of the Rent Control Order prohibiting eviction of tenants, and passes an order of delivery of possession in execution of a decree, the order can be set aside and an order of redelivery to the tenant can be passed on an application under Section 47 read with Section 151, C. P. C. AIR 1961 SC 272 (275): (1961) 1 SCR 591.

(17) Consent decree — Condition in decree that decree-holder shall first exhaust his remedies against properties charged under decree — Execution application against other properties of judgment-debtors not specifying what steps were taken to exhaust remedies against charged properties — Execution held not maintainable. AIR 1969 Bom 84 (88): 70 Bom LR 373.

(18) Landlord requiring land for erecting new residential building — Decree under

**Section 47 — Note 30 (contd.)**

Section 13 (1) (i) — Decree is not a personal decree. It is not a decree of defeasance and would not become unexecutable on the disappearance of the condition on the basis of which the decree was passed. (1963) 4 Guj LR 721.

(19) Execution of decree for permanent injunction — Alteration of circumstances due to act of judgment-debtor — Execution Court may direct aggrieved party to institute a suit — Question whether execution should be disallowed on that ground in a particular case, is a matter depending on discretion of executing Court. AIR 1961 Mys 268 (272): 1962 Mys LJ (Sup) 6. (Injunction restraining J. D. from impeding free flow of water in watercourse on to decree-holders land—J. D. by deepening his own land diverting free flow of water in watercourse — J. D's. act amounted to disobedience to injunction — Decree-holder held entitled to ask executing Court to direct J. D. to obey injunction and in default to commit to civil prison.) * AIR 1964 Mad 233 (234): (1963) 2 Mad LJ 552 (DB).

(20) Bihar Land Reforms Act (30 of 1950), Section 4 (d) — Decree for mokarari rent — Execution not barred under Section 4 (d). 1963 BLJR 779.

(21) It is a question to be decided in each case whether or not an order of eviction based on compromise is in accordance with the provisions of the Punjab Urban Rent Restriction Act. Such an order cannot, as a matter of law, be held to be inexecutable, merely because it is based upon a compromise. (1966) 68 Punj LR 293 * (1966) 68 Pun LR 288: 1966 Cur LJ 110 * AIR 1964 Punj 311 (313): 65 Pun LR 1077.

(22) Consent award decree providing for sale of mortgaged property on default in payment of decretal amount — Decree is final decree and can be executed. (1956) 9 Sau LR 80.

(23) Compromise decree — Only portion falling within the suit is executable. AIR 1966 Raj 178 (181): 1966 Raj LW 62 (DB). (Compromise decree in eviction suit — Clause permitting tenant to pay a certain amount of rent from certain date creates a fresh tenancy which being outside the suit for eviction cannot be enforced in execution.)

**31. Questions arising between the preliminary and final decrees.**— (1) An order directing accounts to be taken in an administration suit, or an order appointing or refusing to appoint a commissioner for effecting a partition in a partition suit, or an order on an application for final decree, or for making absolute a decree nisi for sale, foreclosure or redemption of a mortgage, is an order pased in the suit itself and does not come under this section. (1883) 9 Cal 773 (776, 777) (DB). (Accounts in administration suit.) * (1897) 24 Cal 725 (735, 738, 739) (FB) . (Commissioner in partition suit.) * AIR 1916 Mad 809 (810) (DB). (Do.) * AIR 1925 Nag 132 (133): 22 Nag LR 110. (Application for final decree.) * AIR 1919 Mad 709 (709): 42 Mad 52 (DB) * (1909) 33 Bom 273 (277). (Application for decree absolute.)

(2) Where a Commissioner is appointed to work out a preliminary decree passed on the basis of a compromise the suit remains pending till the decree is worked out by the Commisstoner and a final decree passed. AIR 1953 Pat 178 (187): 31 Pat 851 (DB).

**32. Question as to excess or deficient execution.**— (1) Where in execution of a decree, land not included in or covered by the decree or which is in excess of the decree, is sold to or taken possession of by the decree-holder, the proper remedy for the judgment-debtor to recover the whole or the excess land is by an application under this section. AIR 1956 SC 87 (91): 1955-2 SCR 938. (Land not included sold.) * AIR 1916 All 104 (105, 106): 38 All 339 (DB). (Do.) * (1903) 25All 343 (346) (DB). (Do.) * (1888) 12 Bom 449 (453) (DB). (Do.) * AIR 1928 Cal 865 (867) (DB). (Do.) * AIR 1933 Mad 569 (570) * AIR 1957 Cal 335 (336) (DB) * AIR 1957 Pat 700 (701) (DB). (Land not included sold.) * AIR 1938 Nag 193 (194): ILR (1939) Nag 521. (Do.) * (1954) 33 Pat 894 (898) (DB). (Excess.) * AIR 1940 All 78 (78). (Do.) * AIR 1922 PC 252 (253): 48 Ind App 155: 44 Mad 483. (Do.) * AIR 1925 All 551 (552). (Do.) * AIR 1919 Mad 269 (271): 42 Mad 753 (FB). (Do.) * AIR 1938 Nag 276 (281). (Do.) * AIR 1968 Mad 433 (435): (1968) 2 Mad LJ 472. (Identity of property is a question relating to execution. AIR 1950 All 186, Dissented from.)

[But see (1902) 24 All 519 (520): 1902 All WN 144 (145) (DB). (Excess.) * AIR 1930 All 865 (866) (DB). (Do.) * AIR 1929 Pat 391 (392) (DB). (Do.) * AIR 1923 All 470 (471): 45 All 96 (DB). (Land not included sold.)]

(2) Parts not relating to suit included in compromise decree — No objection by judgment-debtor even in appeal — Judgment-debtor cannot object to execution of decree before executing Court. 1963 Raj LW 484. (Exceptions stated.)

(3) In case of delivery of property to the decree-holder in excess of that to which he was entitled under the decree, a stranger to the suit cannot invoke the provisions of Section 47. AIR 1947 Mad 458 (460): ILR (1948) Mad 415.

(4) Moneys unduly or wrongly realised by the 'decree-holder as due under a decree or surplus sale proceeds or jewels wrongly seized, or moveables misappropriated are recoverable only under this section. AIR 1930 PC 86 (90). (Money wrongly realised.) * 1950 Trav-Co LR 437 (440) (DB). (Do.) * (1878) 2 All 61 (62, 63) (FB). (Do.) * AIR 1920 Bom 208 (209): 44 Bom 97. (Do.) * AIR 1928 Cal 776

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(777). (Do.) * AIR 1922 Pat 166 (167): 1 Pat 336. (Do.) * (1897) 2 Cal WN 429 (431). (Surplus wrongly seized.) * (1900) 23 Mad 55 (58). (Do.) * AIR 1916 Pat 308 (309). (Moveables.) * AIR 1961 Raj 227 (229, 230): 1961 Raj LW 588.

[See also (1965) 1 Ker LR 458. (Excess execution on account of wrong calculation by decree-holder.)]

[See however AIR 1949 Nag 375 (376). (Moveables.)]

(5) Application under Section maintainable in case of excessive execution but not where decree-holder's action constitutes tort outside scope of execution proceedings — Judgment-debtor's remedy is to file regular suit. AIR 1965 All 527 (530, 531): 1965 All LJ 432 (DB).

(6) Decree for recovery of undivided share — Executing Court directing delivery of specific share — Petition for declaration that execution proceedings were without jurisdiction is maintainable under Section 47. AIR 1959 Ker 401 (401, 402): 1958 Ker LT 331.

(7) The extraneous material introduced into a decree, by the Court hearing the suit, will become part of it, unless challenged at that stage. The judgment-debtor cannot at a later stage challenge it when the party seeks to execute it. But, if the extraneous consideration is given during execution, it cannot be added on to the decree and realised as part of it. 1961 Jab LJ 1498.

**33. Question of mesne profits.** — (1) Where the decree awards mesne profits, the amount must be ascertained under Order 20, Rule 12 by the decree itself and not in execution. AIR 1931 Pat 1 (4) (DB) * AIR 1958 Mad 414 (415) * AIR 1938 Bom 320 (321) * AIR 1937 Mad 879 (881).

(2) An enquiry as to mesne profits is not a proceeding in execution but a proceeding in continuation of the original suit. AIR 1925 All 588 (589): 47 All 543 (DB) * AIR 1958 Mad 414 (415) * 1958-1 Mad L Jour 99 (101) * 1957-2 Andh WR 152 (154) * AIR 1929 Mad 785 (786).

(3) A decree-holder auction-purchaser seeking to recover mesne profits of the property purchased by him must proceed by way of a separate suit. AIR 1944 Cal 328 (328) (DB).

**34. Agreement against execution of decree. (See also Note 29).**— (1) Where, after the passing of the decree, the parties enter into an agreement against execution of the decree, if it is clearly the intention of the parties to abandon the decree and to enter into a new and different contract in supersession of the decree the section is no bar to a subsequent suit based on contract. AIR 1944 Cal 53 (55) * (1881) 3 All 781 (786) (DB) * AIR 1937 PC 256 (259): 64 Ind App 302: ILR (1938) 1 Cal 66: 31 Sind LR 637. (AIR 1935 Cal 596: 62 Cal 28, Reversed.) * (1895) 19 Bom 546 (549) (DB) * AIR 1969 Orissa 32 (33, 34): 34 Cut LT 1121 * AIR 1961 Punj 439 (440, 441): ILR (1962) 1 Punj 8 (DB) * AIR 1960 Punj 459 (460, 462).

[See also AIR 1953 SC 33 (40): 1953 SCR 154.]

(2) Post-decree arrangement — Appealable decree — Promise not to execute decree if judgment-debtor did not appeal — It is a valid compromise which can be set up as bar to execution — Executing Court has power to investigate and decide the question. AIR 1960 All 562 (563).

(3) Where the agreement does not supersede the decree but is merely pleaded as a bar to execution, the executing Court can inquire into and decide the matter under the section. AIR 1946 Nag 313 (313): ILR (1946) Nag 752 * AIR 1958 All 387 (389, 390) * AIR 1944 Cal 53 (55) * AIR 1940 All 270 (271): ILR (1940) All 377 (FB) * AIR 1969 Orissa 32 (33, 34): 34 Cut LT 1121. (The decree as modified by agreement is executable.)

[See also AIR 1960 All 747 (748): 1960 All LJ 522.]

(4) An agreement not to execute a decree against a particular judgment-debtor does not vary the terms of the decree and could be pleaded in execution and the Executing Court could determine whether the agreement was true. (1966) 1 Andh WR 121 (122): (1965) 2 Andh LT 400. (AIR 1963 Assam 24. Not foll.) * AIR 1960 Madh Pra 257 (258): 1960 Jab LJ 639.

(5) If the true effect of the agreement was to discharge the decree forthwith in consideration of certain promises by the debtor, then the Court will not have occasion to enforce the agreement in execution proceedings. If, on the other hand, the agreement is intended to have effect upon the time or manner of enforcement of the decree it is a matter to be dealt with under Section 47. AIR 1939 PC 80 (86): 14 Luck 192: ILR (1939) Kar 136. (AIR 1932 All 273: 54 All 573 (FB), Approved.) * AIR 1961 Punj 439 (440, 441): ILR (1962) 1 Punj 8 (DB).

(6) Compromise in execution where minor is party, without sanction of Court — Execution dismissed as having been completely satisfied — Minor can avoid compromise — Separate suit is barred — Execution application governed by Section 47. AIR 1964 Raj 92 (98): 1964 Raj LW 457 (DB).

(7) A Court executing the decree will be competent to enforce an agreement entered into between the judgment-debtor and the auction-purchaser, if the agreement is lawful one, not extraneous to the decree but on the other hand governs the liability under the decree and relates to the manner of its enforcement, namely manner of delivery of possession. It may

**Section 47 — Note 34 (contd.)**
be that the manner agreed upon adopted a procedure not prescribed by the Code but available in different circumstances. But this cannot make it illegal or outside the jurisdiction of the Court. Court will be entitled to enforce the agreement in execution. AIR 1964 Mad 53 (58): (1963) 2 Mad LJ 162 (FB) * AIR 1961 Punj 439 (440, 441): ILR (1962) 1 Punj 8 (DB), (AIR 1961 All 1 (FB), Dissent. from.) * AIR 1960 Punj 459 (460, 462).

(8) The executing Court can determine all questions relating to the agreement postponing the execution of the decree and the incidental term as to payment of the higher rate of interest. The jurisdiction of the executing Court to enforce such a compromise is not taken away by O. 23, Rule 4. The effect of Order 23, Rule 4 is that Order 23, Rule 3 does not apply to execution proceedings. Independently of Order 23, Rule 3 the provisions of Order 21 Rule 2 and Section 47 enable the executing Court to record and enforce such a compromise in execution proceedings. AIR 1968 SC 1087 (1088, 1089): (1968) 2 SCJ 824.

(9) Money decree — Parties agreeing to adjustment of decree — Adjustment brought to notice of Court by decree-holder — Dispute as to performance of terms of agreement — Court is competent to enquire into fact of adjustment. AIR 1963 Mad 261 (262, 263): 76 Mad LW 119 (DB).

(10) Compromise decree — Provision for revival of original liability in default of payment of smaller sum is not in the nature of a penalty and execution can be legally levied upon default. 1962 Ker LT 808 (DB).

**35. Stay of execution.** — (1) The question of stay of execution is a matter relating to the execution of the decree and the decision on such a question is a decree. AIR 1951 Mad 56 (63): ILR (1951) Mad 393 (FB) * ILR (1951) 2 Cal 70 (74) (DB) * AIR 1949 Mad 196 (197) * AIR 1949 Mad 157 (158) * AIR 1948 Mad 524 (525) * ('45) 49 Cal WN 532 (533) (DB) * AIR 1964 Pat 295 (296, 297): 1963 BLJR 299 (DB).

(2) Question of stay of execution is one relating to execution but the decision thereon cannot be said to be one "on the rights of the parties" and consequently cannot amount to a decree. AIR 1931 All 129 (130, 131) (DB) * AIR 1929 All 85 (85) (DB) * AIR 1924 All 808 (808, 809, 811): 46 All 733 (DB) * AIR 1915 Cal 122 (124) * AIR 1914 Cal 149 (149): 41 Cal 160 (DB) * (1911) 12 Ind Cas 745 (748, 750) (DB) (Cal) * AIR 1918 Mad 1174 (1177): 40 Mad 233 (FB). (Per Abdul Rahim Offg. C. J. Phillips J. Contra.) * AIR 1917 Mad 310 (311): 39 Mad 541 (DB).

(3) The question of the stay of execution relates to execution; but whether an order of stay will amount to a decree depends on the question whether it conclusively determines the rights and liabilities of the parties in regard to the execution of the decree. AIR 1954 Cal 339 (340) * AIR 1940 All 326 (328): ILR (1940) All 517 (FB) * AIR 1940 Cal 257 (258, 259): ILR (1940) 1 Cal 393 (DB) * (1940) 44 Cal WN 587 (588) * AIR 1963 Raj 4 (5): 1962 Raj LW 353.

(4) The question of the stay of execution does not relate to execution at all. AIR 1956 Madh B 229 (230) * AIR 1952 Assam 30 (31): ILR (1952) 4 Assam 106 (DB) * 1951 All L Jour 442 (442) * AIR 1924 All 794 (795) * AIR 1933 Nag 84 (85): 29 Nag LR 121 * AIR 1921 Bom 208 (208): 45 Bom 241 (DB) * AIR 1920 Cal 71 (72) (DB).

(5) An order for stay of execution by the Appellate Court in an appeal from the decree is not one within Section 47. AIR 1954 Mad 1053 (1056): ILR (1954) Mad 1104 (FB) * AIR 1915 Mad 41 (41) (DB).

(6) An order of executing Court refusing to stay execution under Order 21, Rule 29 is not a decree and is not appealable. AIR 1963 Raj 4 (5): 1962 Raj LW 353.

(7) An order refusing stay of execution by the Appellate Court is not one under Section 47. 1956 Madh BLJ (Bhopal) 114 (115, 117).

**36. Question of liability of certain property to attachment and sale.** — (1) All objections to attachment and sale in execution of a decree raised between parties to the suit or their representatives on the ground that the properties are not liable to be attached, or are not saleable in execution of that decree, are matters coming within the section. AIR 1952 SC 170 (178): 1952 SCR 544: ILR (1952) Punj 254. (AIR 1949 East Punj 9: ILR (1948) East Punj 312, Affirmed.) * AIR 1955 Pat 350 (351, 352): 34 Pat 336 (DB) * 1955-2 Mad L Jour 357 (358) (DB) * AIR 1951 Trav-Co 237 (238): ILR (1951) Trav-Co 294 and 788 (DB) * AIR 1950 Cal 174 (176) (DB) * AIR 1952 All 361 (365) * AIR 1951 Pat 515 (519): 27 Pat 399 (DB) * AIR 1943 Pat 75 (76): 21 Pat 774 (DB) * AIR 1941 Cal 251 (252): ILR (1940) 2 Cal 226 * AIR 1938 Cal 113 (114): ILR (1938) 1 Cal 280 (DB) * AIR 1927 Cal 106 (108): 53 Cal 837 (DB) * AIR 1939 Nag 183 (184, 186): ILR (1939) Nag 548 (DB) * AIR 1942 Lah 153 (155): ILR (1942) Lah 559 (FB) * AIR 1941 Pat 240 (241) (DB) * AIR 1962 Punj 379 (381): 64 Pun LR 383 (Decision thereon amounts to decree and operates as res judicata.) * AIR 1962 Orissa 69 (70): ILR (1961) Cut 617 (DB). (Money decree against A personally and against assets of A in hands of A's wife B — Attachment in execution — Objection by B that attached property was her stridhan — Allegation of benami by decree-holder — Objection falls under Section 47

**Section 47 — Note 36 (contd.)**
and not under Order 21, Rule 58.) * AIR 1960 Madh Pra 76 (77) (DB). (Money decree against widow of deceased debtor — Objection by widow that attached property does not form part of assets of deceased — Remedy does not lie under Order 21, Rule 58 or by way of suit under Order 21, Rule 63 — Objection falls under Section 47.) * 1959 Andh LT 214 (216) (DB). (Setting aside sale held in execution of decree against a judgment-debtor in personal capacity for being illegal on ground that property being trust property is not saleable — Separate suit is barred.) * 1966 All LJ 344 (344): 1966 All WR (HC) 133. (Objection under Section 47, claiming exemption of land and house from attachment and sale considered in this case.)

[But see AIR 1932 Mad 169 (169).]

(2) Objection to attachment may be made any time before sale is held — Objection to sale may be made before sale is confirmed — Objection to attachment dismissed — Objection to sale on same grounds cannot be made, as long as decision stands. AIR 1961 All 436 (437): 1962 All WR (HC) 94. (See also under Section 11, Civil P. C.)

(3) An objection raised by a judgment-debtor in a representative capacity as shebait of an idol on the ground of the property belonging to the idol, will not be covered by this section. (1947) 13 Cut L Tim 57 (60) (DB) * AIR 1936 Pat 256 (257).

[But see AIR 1942 Sind 14 (15): ILR (1941) Kar 474 (DB) * AIR 1939 Sind 22 (23).]

(4) Applicant under Order 21, Rule 58 and Section 47 asking that the execution be dismissed — Court cannot order release of the amount attached, which relief had not been prayed for. AIR 1962 All 9 (11, 12). (Court granting relief not prayed for — It is a case for revision.)

(5) A person who omits to prefer a claim under Order 38, Rule 8, C. P. C., does not run the risk of being prevented from raising an objection to attachment under Section 47, C. P. C., after the execution of the decree is levied. AIR 1964 Andh Pra 99 (100, 101): (1963) 2 Andh WR 348 (DB).

(6) Mortgage decree — Death of mortgagor — Execution started bona fide against sole legal representative in possession of deceased mortgagor without any knowledge of alleged will executed by mortgagor — Decree-holder purchasing property in execution — Obstruction to delivery by person claiming title under alleged will of mortgagor — No question of substantial representation in execution arises — Execution proceedings held valid as claimant had failed to intervene in execution. AIR 1963 Ker 5 (7): (1963) 1 Ker LR 29 (FB).

**37. Question, if property attached belongs to judgment-debtor.** — (1) Where in execution of a money decree, properties in the hands of the legal representative of the debtor are attached, and the representative objects to the attachment on the ground that the property is his own the question is within the section. AIR 1956 Pat 194 (196) * AIR 1947 Cal 364 (365) (DB) * AIR 1934 Mad 621 (622) (DB) * AIR 1935 All 183 (184) (DB) * (1890) 12 All 313 (321, 324, 327) (FB) * AIR 1934 Bom 296 (297): 58 Bom 513 (DB) * AIR 1939 Nag 147 (149): ILR (1939) Nag 165 (DB) * AIR 1934 Pat 188 (190) (DB) * AIR 1960 Madh Pra 76 (77): 1960 Jab LJ 461 (DB). (Sale of property in execution of money decree — Judgment-debtor filing application under Section 47 on ground that property was not liable to sale.)

(2) Section overrides Order 21, Rule 58 — Objection under Order 21, Rule 58 by parties to the suit should be preferred under this section — Such objections, however, held might be treated as having been preferred under the section. AIR 1967 Punj 350 (351, 352): 68 Punj LR 216.

(3) Where the legal representative objects, not on his own behalf but as representing third parties, or as trustee, the objection falls under Order 21, Rule 58, and not under this section. AIR 1916 Mad 789 (789) (DB) * (1888) 15 Cal 437 (445) (DB) * AIR 1924 All 183 (184) * (1898) 23 Bom 237 (242, 243) (DB) * AIR 1915 Cal 327 (331): 42 Cal 440 (DB) * (1912) 39 Cal 298 (302) (DB) * (1902) 6 Cal WN 663 (667) (SB) * (1900) 23 Mad 195 (202) (FB) * AIR 1939 Nag 183 (185): ILR (1939) Nag 548 (DB).

[But see 1889 Pun Re No. 9 p. 17 (18) (DB) * AIR 1927 Oudh 120 (120, 122): 2 Luck 145 (DB).]

(4) Where, in execution of a mortgage decree, the mortgaged properties are brought to sale, and the legal representative of the judgment-debtor objects on the ground that the property is not that of the judgment-debtor or that it could not have been validly mortgaged by him, the objection cannot be gone into by the executing Court. AIR 1954 Trav-Co 118 (118, 119): ILR (1952) Trav-Co 275 (DB). (3 Trav LJ 164, Dissented from.) * AIR 1953 All 281 (282, 283): ILR (1951) 1 All 545 * AIR 1947 Bom 307 (309): ILR (1947) Bom 178 * AIR 1946 Pat 214 (215): 24 Pat 741 (DB) * AIR 1941 Mad 898 (902, 903): ILR (1942) Mad 271 (FB) * AIR 1932 All 49 (50) (DB) * (1909) 32 Mad 429 (440, 441): 2 IC 18 (23) (DB).

[See however AIR 1939 Sind 142 (144): ILR (1939) Kar 398 (DB).]

[But see AIR 1936 Mad 675 (677) (DB) * 1963 Ker LJ 633. (Decree in suit relating to property passed against

**Section 47 — Note 37 (contd.)**
legal representatives — Legal representatives claiming independent rights — Executing Court — It is not going behind the decree — AIR 1939 Lah 178, AIR 1947 Bom 307, Dissented from.)]

(5) When the decree gives no indication as to what property should be sold in execution, the executing Court can look into the judgment to find out whether the property brought to sale has been held to belong to the judgment-debtor. AIR 1949 PC 8 (9): 75 Ind App 300: 28 Pat 15.

(6) Bank in liquidation — Decree in favour of Bank transferred by High Court to another Court for execution — Claim under Order 21, Rule 58, Civil P. C. made before executing Court — Notwithstanding Section 45-B, Banking Companies Act executing Court has jurisdiction to decide it. AIR 1969 Cal 158 (160): 39 Com Cas 309 (DB). (AIR 1962 Cal 86, Overruled.)

(7) While the Court can decide a question under O. 21, R. 100 only on the basis of possession, it can under Section 47, go deeper, even into the question of title. AIR 1968 Cal 547 (548): 73 Cal WN 4.

(8) Execution of personal decree against share of judgment-debtor in partnership assets — Other partner impleaded in execution proceedings under Order 21, R. 49 — It is not necessary to file a separate suit for a declaration that the judgment-debtor whose assets in partnership are sought to be attached is a partner — It is the duty of the executing Court to go into the question whether the judgment-debtor is a partner in the said business and if it is found to be so, follow the procedure laid down in Order 21, R. 49 (2). AIR 1958 Mad 290 (290): (1957) 2 Mad LJ 412.

(9) Property of judgment-debtor alleged to have vested in the State under Bihar Land Reforms Act — Question whether judgment-debtor had any saleable interest on date of vesting falls under Section 47 and not under Order 21, Rule 89 or 90. AIR 1962 Pat 410 (413): 1962 BLJR 16.

(10) Identity of property is a question relating to execution. AIR 1968 Mad 433 (435): (1968) 2 Mad LJ 472. (AIR 1950 All 186, Dissent. from.)

**38. Setting aside sales in execution.** — (1) If a judgment-debtor seeks to set aside a sale on the ground of an irregularity, his application is covered by Order 21, Rule 90, but if he seeks a declaration that sale was null and void, he could get relief under Section 47. A sale attended with an irregularity has to be set aside; whereas in a null and void sale only a declaration to that effect may be necessary, if at all. Absence of the attachment as a condition precedent to the sale of the property is only an irregularity may be a material irregularity, which does not vitiate the sale unless substantial injury is caused to the judgment-debtor. Where the objection of the judgment-debtor under Section 47 that the sale without attachment is illegal, unaccompanied by an application for stay of the sale could not be disposed of before the property is put to sale, there is no option left to the Court than to direct that the judgment-debtor should file an objection under Rule 90 of Order 21 and challenge the legality of the sale in accordance with the provisions of that rule. AIR 1963 All 320 (328, 329): 1963 All LJ 204 (DB) * AIR 1965 Andh Pra 215 (217): (1964) 2 Andh LT 190 * 1959 Andh LT 436 (438). (Total absence of proclamation—Case comes within Section 47 — If there is only defect in proclamation, it is only an irregularity falling within ambit of Order 21, Rule 90.)

(2) As between the judgment-debtor and a decree-holder an objection to the sale in execution of the decree or an application to set it aside is one in execution and must be determined in execution. AIR 1956 SC 87 (91): 1955-2 SCR 938 * AIR 1945 Bom 386 (388) (DB) * AIR 1944 Cal 381 (381) * (1911) 34 Mad 417 (418) * AIR 1934 Nag 21 (27): 31 Nag LR 67 * AIR 1931 Pat 97 (98) * AIR 1959 Ker 382 (384): 1959 Ker LT 147 (DB).

[See however AIR 1939 Lah 405 (406): ILR (1939) Lah 116 (DB).]

(3) The power to set aside the sale, in cases where the grounds for so setting it aside fall within Order 21, Rules 89, 90 or 91, is circumscribed by those provisions AIR 1952 All 361 (364) * AIR 1957 Andh Pra 38 (40) * AIR 1952 Mad 377 (380) (DB) * AIR 1948 Cal 203 (204): ILR (1948) 2 Cal 278 (DB) * AIR 1939 Nag 241 (242) (DB).

(4) An application to set aside a sale on grounds not within the purview of O. 21 Rule 89, 90 or 91 must be dealt with under this section independently of those provisions. AIR 1950 Cal 582 (583): ILR (1951) 1 Cal 216 * AIR 1941 Pat 566 (570) (DB) * AIR 1965 Pat 427 (436): 1965 BLJR 635 (FB) * AIR 1961 Pat 508 (511, 512) (DB). (Execution of decree in contravention of Section 48 — Sale is not nullity — Sale can be set aside under Section 47, within period prescribed.) * AIR 1959 Pat 13 (14, 15, 16): 1957 Pat LR 9 (DB).

(5-6) Application by person claiming to be successor-in-interest of judgment-debtor on ground that the judgment-debtor had no saleable interest in the property lies under Section 47 — Separate suit does not lie. AIR 1968 Pat 32 (34) (DB).

(7) Where the Court has jurisdiction to sell, a sale held in contravention of some provision of law can be avoided before its confirmation by an application under Section 47 on that ground. But after its confirmation the sale can only be avoided on the applicant's showing that owing to fraud or other reason he was in ignorance

**Section 47 — Note 38 (contd.)**
of the sale proceedings preliminary to sale. AIR 1953 Raj 51 (53): ILR (1952) 2 Raj 768 (FB) * AIR 1947 Pat 461 (462): 26 Pat 201 (FB).

(8) Where the sale is ab initio void, no effect can be given to it and the fact that objection is raised and the illegality is brought to the notice of the Court after the sale is confirmed does not make any difference. The matter can be gone into and decided by the executing Court. AIR 1956 Pepsu 77 (77) * AIR 1958 Bom 278 (278): ILR (1958) Bom 633 * AIR 1963 Mad 201 (201, 202): (1963) 1 Mad LJ 65. (Security cannot be demanded for that part of petition falling under Section 47.) * AIR 1960 Madh Pra 76 (78): 1960 Jab LJ 461 (DB).

[See also AIR 1964 Orissa 91 (92, 93). (Sale voidable — Application filed after expiry of 30 days is barred.)]

(9) Wherever there is a defect in the service of a sale notice under Order 21, Rule 66, C. P. Code, and the judgment-debtor in his petition for setting aside the sale relies on it and also puts in Section 47, C. P. Code, a second appeal will lie. (1959) 2 Mad LJ 212: 72 Mad LW 138.

(10) Executing Court ordering sale of plaintiff's property and transferring the proceedings to Collector under Section 68 to effect the sale — Sale proceeding in respect of same property already pending before Collector in some other execution proceeding — Property sold in pending execution proceeding — Suit by plaintiff to set aside sale held not barred — Question raised in suit related to validity of sale held by collector and executing Court has no jurisdiction to determine the validity. ILR (1958) Mys 432.

(11) Judgment-debtor preferring objections against sale of property in execution of ex parte decree and also stating that he has applied for setting aside ex parte decree — Executing Court staying confirmation of sale — Ex parte decree set aside — Objection in execution that decree having been set aside execution sale was nullity — Executing Court confirming sale holding that objections filed under Order 21, Rule 90 were time barred — Held, Section 47 was appropriate provision of law and executing Court was not bound to confirm sale under Rule 92 as the judgment-debtor had challenged validity and not merely conduct of sale. AIR 1965 Punj 380 (382, 383): 1965 Cur LJ 158.

**39. Fraud in execution proceedings.** — (1) Where a judgment-debtor impeaches the validity of an execution sale, not on the ground of fraud in the publishing and conducting of the sale, but on the ground of fraud in execution proceedings which preceded and led up to the sale, the question as between the parties is one falling within this section and not under Order 21, Rule 90. AIR 1947 Cal 132 (133): ILR (1946) 1 Cal 87 * AIR 1941 Pat 566 (570) (DB) * (1906) 28 All 681 (682, 683) * (1909) 33 Bom 698 (702) * (1892) 19 Cal 683 (689): 19 Ind App 166 (PC) * (1890) 17 Cal 769 (772, 777) (FB) * AIR 1930 Mad 489 (489) * AIR 1961 Punj 495 (496, 497): ILR (1960) 1 Punj 83. (Application under Section 47 to set aside sale after its confirmation on ground that sale was held without notice under Order 21, Rule 66 (2) or that fraud was practiced on executing Court is maintainable — Such a sale is a nullity.)

(2) This section does not apply to a party to the suit who had no notice of the execution proceedings and against whom an adverse order had been passed in the execution proceedings. AIR 1956 Bhopal 62 (63).

**40. Fraud in publishing and conducting the sale.** — (1) When the order decides a question arising between the parties to suit in which the decree was passed and there was a judicial decision binding on the parties, order falls under Section 47. AIR 1965 Assam 21 (23, 26, 27): ILR (1965) 17 Assam 140 (DB).

(2) An application to set aside a sale for fraud in publishing and conducting the sale as between the parties falls under this section. AIR 1931 Pat 97 (98) * (1963) 1 Mys LJ 448. (Allegation of fraud by decree-holder in conduct of sale by suppression of notices and processes — Application falls under Order 21, Rule 90 and not under Section 47.)

(3) If the question is one covered by Order 21, Rule 90. it is only an appealable order though it may fall under Section 47 also. AIR 1942 All 257 (258): ILR (1942) All 237.

[See however AIR 1955 Cal 63 (64).]

(3) Application to set aside sale on the ground of fraud comes under Order 21, Rule 90. AIR 1953 Punj 118 (120): ILR (1953) Punj 609 (DB) * AIR 1929 Nag 130 (131): 25 Nag LR 58 * AIR 1928 All 354 (354).

(4) Service of notice under Order 21, Rule 66 (2) served on person who was a stranger to judgment-debtor, due to mistake not of Court but of bailiff of Court — There is no question of illegality but only an irregularity — Irregularity is material irregularity, if it has led to non-appearance of judgment-debtor — It is an irregularity in publication of sale — Proper remedy to get the sale set aside is not under Section 47 or by a separate suit but by an application under Order 21, R. 90. AIR 1959 Bom 178 (179, 180): 60 Bom LR 482.

(5) Order passed on application under Order 21, Rule 66 may in some cases be one under Section 47 — Omission of time and place in sale proclamation — Order on judgment-debtor's application to set aside sale on ground that it is null and void,

**Section 47 — Note 40 (contd.)**
falls under Section 47. AIR 1965 Assam 21 (23): ILR (1965) 17 Assam 140 (DB).

(6) An application to set aside a sale on grounds not within Order 21, Rules 90 and 91 falls under Section 47 only. Madh BLJ 1955 HCR 1137 (1138) * AIR 1919 Pat 396 (398) (DB) * AIR 1937 All 407 (410) (DB) * AIR 1967 Kerala 163 (169): 1967 Ker LT 238 (DB). (Setting aside Court sale which is voidable on ground of material irregularity or fraud committed otherwise than in publishing or conducting the sale.) * AI R1965 Ker 99 (100): 1964 Ker LT 209. (Failure to affix proclamation on the property is illegality and not a mere irregularity.)

**41. Want of notice under O. 21, Rr. 16 and 22.**— (1) An objection against a sale in execution of a decree on the ground that no notice was served on the judgment-debtor under Order 21, Rule 22, falls under this section. AIR 1947 Pat 454 (459): 26 Pat 340 (FB) * AIR 1954 Pat 429 (431) (DB) * AIR 1931 Cal 555 (556): 58 Cal 825 (DB) * (1910) 5 Ind Cas 390 (393, 394) (DB) (Cal) * AIR 1924 Mad 431 (436, 437): 47 Mad 288 (FB).

[See AIR 1969 Pat 251 (253) (DB). (Objection to execution which could be taken under Order 21, Rule 22, if not taken cannot be agitated under Section 47, Civil P. C.)]

(2) Where notice under Order 21, R. 22 Is not necessary the question of setting aside sale on that ground is not one under this section. AIR 1924 Pat 111 (112): 2 Pat 916 (DB) * AIR 1965 Raj 155 (160): 1964 Raj LW 59.

(3) The question of the irregularity or illegality of a notice under Order 21, Rule 16, and its effect upon execution proceedings and sale is, as between the parties, one that must be determined under this section. AIR 1920 Lah 251 (253) * 1958 MPC 146 (147).

**42. Purchase by decree-holder without permission.**— (1) A judgment-debtor, seeking to set aside a sale of his land on the ground that the decree-holder has purchased it without permission to bid must proceed only under this section. AIR 1922 PC 336 (338): 49 Ind App 312: 1 Pat 733 * ILR (1956) Trav-Co 1130 (1137) (DB) * AIR 1953 Mad 822 (823) (DB) * AIR 1932 Cal 672 (674): 59 Cal 956 (DB).

**43. Sale in contravention of stay order.**— (1) An application to set aside a sale held in contravention of a stay order is, as between the parties to the suit, one under this section. AIR 1946 Cal 45 (46, 47) * AIR 1942 Pat 146 (147) * AIR 1926 All 457 (459) (DB).

[See AIR 1963 All 319 (320): 1961 All LJ 951 (DB). (Execution sale in contravention of stay order — Objection regarding existence of sale as well as its legality — Can be dealt with partly under Section 47 and partly under Order 21, Rule 90.)]

(2) Where the original application for stay as well as the order for stay is without jurisdiction, an application to set aside the sale on the ground of its being one in contravention of the stay order is not one under Section 47. AIR 1928 Bom 189 (190): 52 Bom 290 (DB).

[See however AIR 1942 Pat 146 (148) (DB).]

(3) Court has inherent power to set aside proceedings taken after stay order but before order is brought to its notice. (1968) 1 Andh LT 321 (325).

**44. Sale not warranted by decree.**— (1) The proper procedure to set aside a sale on the ground that it is not warranted by the terms of the decree or that it was held in contravention of the directions contained therein is, as between the parties to the suit, by an application under this section. AIR 1956 SC 87 (91): 1955 2 SCR 938 * AIR 1958 Ker 78 (79) (DB) * 1957 BLJR 414 (416) (DB) * AIR 1952 Bom 438 (440, 443): ILR (1952) Bom 1056 (DB) * (1912) 13 Ind Cas 133 (134) (DB) (Mad) * AIR 1961 Cal 422 (430).

[But see AIR 1925 All 236 (237): 47 All 304 (DB) * AIR 1957 Orissa 14 (17): ILR (1956) Cut 630 (DB).]

**45. Sale without jurisdiction.**— (1) Even where the sale is held without jurisdiction a party seeking to set aside the sale on that ground must do so under this section. Madh BLJ 1955 HCR 503 (504) (DB) * AIR 1950 Cal 287 (294) (DB) * AIR 1941 Pat 566 (568) (DB) * AIR 1915 Cal 268 (271) (DB) * (1890) 12 All 440 (446) (FB). (Judgment-debtor dead at time of sale.) * AIR 1924 All 261 (262, 263): 46 All 153 * (1890) 17 Cal 699 (704) (FB). (Property outside territorial jurisdiction.)

[But see AIR 1957 Orissa 14 (17): ILR (1956) Cut 630 (DB).]

(2) Deposit of decretal amount and costs by decree-holder before confirmation of auction sale — Decree stands satisfied — Subsequent confirmation is without jurisdiction and sale is not in execution, discharge or satisfaction of decree — Sale is void and objection to it falls under Section 47 and is not barred by Order 21, Rule 92. AIR 1967 All 258 (259).

**46. Other grounds for setting aside sale.**— (1) A judgment-debtor may seek to set aside an execution sale by an application under this section on the following grounds :

(a) Where the receiver of an insolvent's estate seeks to set aside an execution sale on the ground of a prior adjudication of the debtor. AIR 1935 Cal 503 (504): 62 Cal 457 (DB).

(b) Where the Official Receiver of an Insolvent's estate seeks to set aside an execution sale of insolvent's property on the ground of want of notice to him under Order 21, Rule 22. AIR 1941 Mad 606 (607) (DB).

(c) An objection that the sale in execution was void because the previous sanc-

**Section 47 — Note 46 (contd.)**

tion for such sale of a particular authority necessary in the case was not obtained. AIR 1942 Mad 509 (510) (DB).

[See AIR 1960 Ker 69 (73, 74): 1959 Ker LT 642. (AIR 1925 Mad 318 and AIR 1951 Mad 986, Rel. on.)]

(d) Where the sale is sought to be set aside on the ground of failure of the purchaser to make the deposit of 25 per cent. required under Order 21, Rule 84. AIR 1951 Cal 319 (319) * AIR 1964 Ker 68 (74, 75): 1963 Ker LT 635. (Per majority.)

(e) Where the sale is to be set aside on the ground of want of 75 per cent under Order 21, Rule 85. AIR 1957 All 558 (560).

**47. Miscellaneous.—** (1) The following questions come within the section :

(a) An order deciding whether a decree is time-barred or not. AIR 1955 Kutch 9 (9) * AIR 1924 Pat 683 (685, 686) (DB) * AIR 1929 All 287 (287): 51 All 640 (DB) * AIR 1936 Mad 801 (801) (DB) * AIR 1964 Orissa 170 (173): (1964) 6 OJD 21.

(b) An order directing execution to issue or refusing to execute a decree. ILR (1954) Madh B 454 (459). (Order directing the execution to proceed.) * AIR 1915 PC 88 (89) * AIR 1927 All 574 (575) (DB) * AIR 1937 Cal 425 (426) (DB) * AIR 1935 Mad 647 (648) * AIR 1926 Pat 202 (203): 4 Pat 696 (DB) * AIR 1963 Guj 1 (2): (1962) 3 Guj LR 1032. (Order under O. 21, Rule 23 for execution of decree.)

(c) The determination of a question in execution as to who is the legal representative of a party to the suit. AIR 1952 Pat 333 (335): 27 Pat 848 (852) (DB) * AIR 1925 All 578 (579): 47 All 365 (DB).

(d) A question relating to restitution of property or refund of money. AIR 1950 Mad 317 (318) * AIR 1957 Punj 307 (309) * AIR 1933 All 429 (430, 431) (DB) * AIR 1923 All 394 (396): 45 All 369 (FB) * AIR 1931 Cal 779 (781) (DB) * AIR 1931 Mad 588 (589, 590) * AIR 1939 Nag 101 (102): ILR (1939) Nag 492 * AIR 1965 SC 1477 (1486): (1965) 2 SCR 436. (Application for restitution is an application for execution of decree. AIR 1934 All 626 (FB) and AIR 1932 Cal 308 and AIR 1928 Cal 646 and AIR 1947 Nag 239 and AIR 1958 Punj 132 (FB), Overruled.) * 1955 Raj LW 5: ILR (1965) 15 Raj 170. (Party deprived of fruits of decree by order of Court — Executing Court has power under Section 151 read with Section 47 to make restitution and separate suit is not necessary.)

[Following cases are deemed not to be good law in view of AIR 1965 SC 1477 — AIR 1930 Bom 132 (134): 54 Bom 162 * AIR 1917 Mad 217 (217) (DB).]

(dd) Question relating to satisfaction of decree for restitution of conjugal rights. AIR 1966 Punj 506 (507): 1965 Punj LR (Supp) 135 (DB).

(e) An application by the decree-holder for restoration of property, in a case where a mortgage decree is re-opened and a new decree is passed under Section 36 of the Bengal Money-lenders Act. AIR 1954 SC 409 (411): 1955 SCR 150.

(ee) Question whether decree against tarwad is not executable as member of tarwad has obtained assignment of decree, contention being that decree has been discharged. 1958 Ker LT 97: 1958 Ker LJ 190.

(f) An order determining a question relating to the satisfaction of a decree. AIR 1948 PC 12 (14): 74 Ind App 264: ILR (1948) Mad 505: ILR (1947) Kar (PC) 410 * AIR 1958 Madh Pra 333 (336) (DB) * AIR 1954 Cal 105 (107, 108) (DB) * AIR 1943 Nag 335 (339): ILR (1944) Nag 370 (DB) * AIR 1942 Mad 260 (265): ILR (1942) Mad 360 * AIR 1930 PC 86 (90) * AIR 1918 All 339 (341) (DB) * AIR 1919 Mad 840 (841) (DB) * AIR 1938 Nag 363 (364) * AIR 1961 SC 272 (275): (1961) 1 SCR 591 * AIR 1961 All 91 (92).

[But see (1882) 4 All 420 (422) (DB) * AIR 1914 Oudh 147 (148): 17 Oudh Cas 14 * (1908) 11 Oudh Cas 144 (146, 147) * AIR 1915 Oudh 171 (172).]

(g) Question of compensation payable by a judgment-debtor in possession or a decree-holder in possession of the mortgaged property in respect of waste committed by him. AIR 1953 Trav-Co 77 (85, 87): ILR (1952) Trav-Co 784 (FB). (1950 Trav-Co LR 260, Overruled.) * AIR 1955 All 223 (224) (DB) * AIR 1933 Mad 825 (832): 57 Mad 49 (DB) * AIR 1935 Lah 170 (171) * AIR 1924 Pat 362 (364) (DB) * AIR 1945 Mad 179 (180) (DB). (Decree-holder in possession.)

[But see AIR 1933 Lah 168 (168) * AIR 1937 Mad 879 (881).]

(gg) The question, of any change, or alteration in the property, or deterioration caused by any act of the judgment-debtor after the passing of the pre-emption decree is clearly one relating to the execution, discharge or satisfaction of the decree and has to be enquired into by the Court executing the decree. 1959 Jab LJ 125: 1959 MPLJ 164.

(h) Enquiry regarding substituted share of judgment-debtor's property or accretions to his property. AIR 1922 PC 54 (55): 1 Pat 378: 49 Ind App 139 * AIR 1917 Pat 253 (257): 2 Pat L Jour 496 (DB) * AIR 1925 PC 86 (88): 52 Ind App 137: 49 Bom 233.

(i) Questions relating to the enforcement of security or relating to orders requiring security under Order 41, Rule 5, but not an order refusing to extend time for furnishing security for stay of execution and directing the sale of the property in default of furnishing security. AIR 1953 Trav-Co 364 (366) (DB) * AIR 1918 Mad 442 (442): 41 Mad 327 (DB) * AIR 1930 Pat 108 (109, 110): 8 Pat 801 (DB) * AIR 1951 Assam 147 (147, 148): ILR (1951) Assam 383 (DB). (Order refusing to extend time.)

(j) Order under Order 20, Rule 11 (2) (as amended by Nagpur High Court) grant-

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ing instalments. 1957 MP LJ 191 (191, 192) (Nag) (DB).

(k) Execution of mortgage-decree — Direction as regards order of properties to be put to sale — Question relates to execution. (1957) 2 Andhra WR 385 (387).

(l) Suit by A, reversioner of X, challenging alienation of X's property made by his widow during her lifetime — Subsequent suit by B claiming to be adopted son of X — A's suit decreed — B's suit dismissed — Appeal by B against dismissal — Sale of certain property by A to G pending appeal — Compromise decree in B's appeal providing that appeal shall stand dismissed against G and rights of G shall not be affected by compromise — G dispossessed in execution of decree by B — Application by G under Order 21, Rules 99 and 101 for restoration of possession — Held, that effect of compromise decree was that plea of lis pendens was not available to B — Held, further that Section 47 applied and B was bound to restore possession to G: AIR 1967 Andh Pra 277 (279) (DB). (A. A. O. Nos. 25 and 26 of 1964, dated 29th January, 1966 (A. P.), Affirmed.)

(m) Claim of Income-tax department for determination of its interest — Department entitled to agitate question of priority — Custody Court bound to determine. (1963) 67 Cal WN 266 (268): (1963) 48 ITR 653.

(n) Order by the executing Court refusing to amend decree in accordance with provisions of Himachal Pradesh Debt Reduction Act, 1953. AIR 1962 Him Pra 32 (35).

(o) Court ordering a warrant for possession to be issued even though it was not proper for it to do so. (1963) 4 Guj LR 710: ILR (1963) Guj 827. (Decree amended in execution — Execution of amended decree — Decree cannot be executed since under guise of adjustment decree could not be amended.)

(p) Question as to validity of assignment of decree arising between assignee and judgment-debtor. 1960 Ker LT 281: 1960 Ker LJ 183. (Separate suit is barred.)

(q) Objection that decree has been extinguished under Section 15 of the Bombay Agricultural Debtors Relief Act. AIR 1954 Kutch 19 (19).

(r) Order on objection under Order 21, Rule 5 — Order is appealable under Cl. 10 Letters Patent (MP). AIR 1959 Madh Pra 188 (189): 1958 Jab LJ 749.

(s) Application under Order 21, Rule 2 (2) is one under Section 47. AIR 1959 Mys 155 (155, 156): 36 Mys LJ 539. (Application cannot be treated as suit — Order converting it into suit is not appealable.)

(t) Where the decree was executable before the expiry of 15 days granted in the decree. (1963) 29 Cut LT 594.

(u) Decree for pre-emption of certain land — Allotment of another piece of land in consolidation proceedings — Decree-holder applying for possession of allotted land in execution — Execution Court can decide and grant such possession. ILR (1963) 1 Punj 872.

(2) The following are questions not relating to execution, discharge or satisfaction of the decree:

(a) An order made by a Court exercising a power given to it by a provision in a scheme framed in a scheme suit. AIR 1947 Bom 462 (463, 464): ILR (1947) Bom 461 (DB) * AIR 1941 Cal 618 (621) (DB) * AIR 1925 PC 155 (156).

[But see AIR 1914 Low Bur 226 (228) (DB).]

(b) An order restoring execution which was dismissed as partly satisfied. AIR 1953 SC 23 (27): 1953 SCR 136.

(c) A proceeding to recover back possession of property in the possession of the decree-holder purchaser, which sale in his favour was set aside under Section 23, Madras Agriculturists' Relief Act, is not a proceeding relating to execution, discharge or satisfaction of the decree. AIR 1958 Ker 84 (85).

[See also AIR 1967 Kerala 97 (102): 1967 Ker LT 629 (DB). (Proceedings subsequent to confirmation of sale and relating to redelivery of property in execution of a decree — May or may not be a matter relating to execution, discharge or satisfaction of a decree within the section.)]

(d) Question of compensation claimed by the decree-holder lessor for the removal of temporary construction which was not included in the decree for ejectment does not relate to execution, satisfaction or discharge of a decree and is not covered by Section 47, Civil P. C. AIR 1961 All 84 (85).

(e) Execution 'consigned for default' in payment of process-fee — No question relating to execution, discharge or satisfaction of decree, held determined. AIR 1965 All 589 (590): 1965 All LJ 849. (Order does not amount to decree and is not appealable.)

(f) The dispute as to possession of the property which the auction-purchaser purchased can in no sense be regarded as a matter connected with the execution, discharge or satisfaction of the decree. Obtaining of possession by the purchaser is wholly independent of the execution of the decree. AIR 1968 Bom 98 (99, 100) 69 Bom LR 502. (AIR 1963 Mad 450, Dissented from.)

(g) Order allowing application of decree-holder under Order 21, Rule 66 for reduction of upset price in sale proclamation — Order does not relate to execution, discharge or satisfaction of decree and does not fall under Section 47. AIR 1966 Andh Pra 152 (153): (1965) 2 Andh WR 481 (DB). (Order is not appealable — Appeal filed against order treated as revision as it involved a point of law.)

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(h) Dispute between decree-holder auction-purchaser and his assigns, regarding money deposited by judgment-debtor to set aside sale — Dispute does not relate to execution, discharge or satisfaction of decree. AIR 1967 Ker 86 (86): 1966 Ker LT 160. (Executing Court allowing assignee to withdraw amount — No appeal lies.) * AIR 1967 Kerala 83 (84): 1966 Ker LT 291.

(i) Kerala Tenants and Kudikkidappukars Protection Act (VII of 1963), Section 6 (2) — Application to receive deposit and record satisfaction of payment required by Section 6 (2) — Payment or deposit under Section 6 (2) is not payment towards arrears of rent or towards decree for such arrears — Application therefore, does not fall within Section 47 of C. P. Code. 1966 Ker LJ 975.

(j) No direction in decree as to disposal of money deposited into Court — Some amount attached in execution of decree — Except as to such attached amount executing Court cannot, even in exercise of its inherent powers, order disposal since that is not a matter relating to execution, discharge or satisfaction of decree. AIR 1967 Ker 193 (194): 1967 Ker LT 1148.

(k) Order of executing Court under Order 21, Rule 95 directing delivery of possession to decree-holder auction-purchaser. 1965 Raj LW 474: ILR (1966) 16 Raj 77. (AIR 1926 Cal 798 (FB), Dissent. from; Dissenting view of Stanley C. J., in ILR 31 All 82, Held, impliedly overruled by ILR 16 Cal 682.)

(l) Question whether there is mistake in the decree which is alleged to be not in accordance with judgment. AIR 1963 Tripura 55 (56).

**48. "Shall be determined by the Court executing the decree and not by a separate suit".** — (1) All objections that can be raised in execution under this section shall be determined by the Court executing the decree and not by a separate suit. AIR 1953 SC 514 (515): 1954 SCR 235 * AIR 1955 Trav-Co 51 (54) (FB) * ILR (1955) Hyd 437 (439) * AIR 1915 PC 88 (89) * AIR 1931 Bom 114 (118) * AIR 1933 Mad 166 (167): 56 Mad 447 (DB) * AIR 1931 Rang 117 (121): 9 Rang 305 (FB) * AIR 1965 Pat 427 (433, 434, 435): 1965 BLJR 635 (FB) * 1962 All WR (HC) 643 (644) * AIR 1962 Madh Pra 62 (63): 1961 Jab LJ 751. (Dispute relating to delivery of possession — Proceedings between decree-holder auction-purchaser and transferee from judgment-debtor after attachment before judgment — Separate suit does not lie.) * AIR 1961 Madh Pra 107 (107, 108): 1961 MPLJ 156. (Compromise decree — Defendant to build wall according to certain specification — Wall built but not according to specification — Plaintiff completing wall and filing suit for recovery of expenses — Section 70 of Contract Act held attracted and suit is not barred under Section 47, C. P. C.) * 1960 Ker LT 281: 1960 Ker LJ 183. (Suit by assignee of decree whose execution petition is dismissed, for declaration that he is entitled to execute decree is barred.) * 1959 Andh LT 214 (216) (DB). (Setting aside sale on ground of illegality — Suit is barred.) * AIR 1959 Patna 13 (14, 15, 16): 1957 Pat LR 9 (DB). (Ex parte decree set aside against minor sons — Decree against father — Execution and sale — Objection by minors that property included their shares falls under Section 47 — Separate suit is barred.) * 1968 All WR (HC) 95.

[See 1967 All WR (HC) 511 (512). (Failure to raise objection to validity of execution sale — Subsequent suit by judgment-debtor for declaration that sale was null and void is barred by constructive res judicata.)]

[See also AIR 1967 Cal 541 (545) (DB) (Terms of compromise in consent decree not relating to suit cannot be incorporated in operative part of decree and cannot be enforced in execution. AIR 1919 PC 79, Rel. on.)]

(2) The bar of suit applies not only where the questions are raised by a party as plaintiff in a suit, but also to such questions raised in defence to a suit. AIR 1929 Cal 374 (379): 57 Cal 403 (FB). (Overruling 24 Cal 355; 26 Cal 946; 7 Cal WN 67; 4 Ind Cas 168 (Cal); AIR 1922 Cal 311 — The decision in AIR 1929 Cal 247, 56 Cal 467 to the contrary must also be considered to be no longer law.) * AIR 1927 Cal 106 (108): 53 Cal 837 (DB) * (1910) 7 Ind Cas 457 (458) (Bom) * AIR 1931 Nag 27 (28, 29) * 1939 All WR (CC) 94 (95).

[See AIR 1963 Ker 217 (218). (Two decrees on same cause of action against same person — Later decree cannot be challenged in another action on ground of mistake in its adjudication — Matter decided is decided once for all.)]

(3) Judgment-debtor filing application under Section 47 on ground that property was not liable to sale — Application treated as one under Order 21, Rule 90 and dismissed as barred by time — Question whether suit was proper remedy neither raised nor adjudicated upon — Suit by judgment-debtor against decree-holder for declaration that property was not liable to sale — Defendant held was not estopped from pleading that the suit was barred under Section 47. AIR 1960 Madh Pra 76 (77): 1960 Jab LJ 461 (DB).

(4) Where the defendant has been kept out of knowledge of the execution proceedings, until after the suit has been brought, by the fraud of the decree-holder, he could raise such objections by way of defence to the suit. AIR 1932 Cal 825 (827): 59 Cal 1242 (DB) * 1957 BLJR 414 (416) (DB) * AIR 1929 Cal 247 (249): 56 Cal 467 (DB).

**Section 47 — Note 48 (contd.)**

[But see AIR 1921 Mad 279 (280) (DB) * (1909) 32 Mad 242 (252) (FB) * (1909) 1 Ind Cas 193 (194) (DB) (Mad).]

(5) Defendant successfully contesting execution proceeding on ground that decree contemplated enforcement of claim by separate suit — Such suit by plaintiff cannot be objected to as barred by Section 47, C. P. Code. AIR 1964 Madh Pra 124 (125): 1963 Jab LJ 181 (DB).

(6) Compromise in execution where minor is a party without sanction of Court — Minor can avoid compromise by an application under Section 47 — Separate suit for the purpose is barred. AIR 1964 Raj 92 (98): 1964 Raj LW 457 (DB).

(7) Where a person has moved the Court on an application under Section 47 and invited a decision he cannot subsequently turn round and say, because the decision went against him, that the Court was not competent to deal with the matter under Section 47. AIR 1944 Cal 53 (54) * AIR 1959 Pat 13 (14, 15, 16): 1957 Pat LR 9.

(8) Where it was found that the petitions impeaching the decree and Court sale were not maintainable, the orders dismissing the petitions cannot operate as bar to the suit. 1966 Ker LJ 485 (DB).

(9) The executing Court can take note of altered circumstances after the passing of the decree. AIR 1952 Mad 125 (126).

[See AIR 1964 Mad 53 (58): (1963) 2 Mad LJ 162 (FB). (Parties have right to enter into compromise during execution proceedings. Held, impliedly overruled by AIR 1966 SC 470 as interpreted AIR 1962 Mad 817.)]

(10) A decree passed in a suit negativing the bar under this section is not a nullity or one passed without jurisdiction. AIR 1951 Trav-Co 171 (1) (171) (DB).

[But see AIR 1956 Cal 317 (319) (DB).]

(11) Dispute by garnishee — Issue has to be determined in execution proceedings themselves — Decree-holder cannot be directed under Order 21, Rule 133 (All) to file separate suit to get the point raised by garnishee decided. AIR 1960 All 547 (547): 1960 All LJ 123.

(12) Action of decree-holder constituting tort outside scope of execution proceedings — Application under section does not lie — Remedy of judgment-debtor is a regular suit. AIR 1965 All 527 (530, 531): 1965 All LJ 432 (DB).

(13) Claim by vendee from judgment-debtor that attachment of the property is void — Question can be raised only by application under Section 47 against vendor — Objection so raised rejected — His suit to declare the attachment void is barred by section. (1963) 67 Cal WN 916 (920).

(14) Question as to validity of assignment of decree arising between assignee and the judgment-debtor and relating to execution, satisfaction and discharge of decree must be decided by executing Court. Separate suit by assignee for declaration of validity of assignment is barred. 1960 Ker LT 281: (1960) Ker LJ 183.

(15) Sale void for non-compliance with Order 21, Rules 84, 85 — Suit for declaration that sale void and for recovery of properties is barred. AIR 1964 Ker 68 (75, 77, 78): 1963 Ker LT 635 (FB). (Per majority.)

(16) A suit for redemption of a mortgage on the basis that the execution sale of the mortgaged property is void, is barred under Section 47, C. P. Code as it raises a question relating to execution, discharge or satisfaction of the decree. AIR 1963 Ker 258 (259, 260, 261): 1962 Ker LT 848 (DB). (Fact that prayer is only for declaration of nullity and not for setting aside voidable sale is no ground for holding that it is not a matter relating to execution, discharge or satisfaction.)

(17) A suit to recover possession against the defendants who have trespassed upon the plaintiff's property is not hit by Section 47 (1) by reason of the decree granting a prohibitory injunction to the plaintiff in a previous suit filed by him for a declaration of his title and for a permanent injunction against the same defendants when they had previously attempted to trespass upon the said property. AIR 1960 Ker 127 (129): 1959 Ker LT 1110 (DB).

(18) Decree for redemption of mortgage and for possession against mortgagee K — Execution — Portion of land mortgaged found encroached upon by owner F of adjoining land — Denial of encroachment by F and K — Suit against F and K for recovery of portion is not barred by Section 47. AIR 1962 Pat 341 (342, 343): 1962 BLJR 450 (DB).

(19) Suit relating to property — Legal representative of deceased defendant setting up their own independent title to property — Court should implead them in their personal capacity as well — Decree — Execution — Separate suit by legal representatives for asserting independent title is not necessary — This can be done in execution of the decree — Decision of the question would not be going behind the decree. 1963 Ker LT 500.

(20) Delivery of symbolical possession to decree-holder in execution — Suit for recovery of possession of property on the basis of execution sale maintainable. AIR 1969 Ker 121 (122) (DB). (AIR 1959 Ker 133, AIR 1958 Ker 309, Relied on.)

(21) Suit for specific performance by subsequent contractees — Earlier contractees not impleaded — Sale pendente lite in favour of earlier contractees — Not affected by decree in favour of subsequent contractees — Suit for possession by earlier contractees held maintainable. 1962 MPLJ 142.

**Section 47 — Note 48 (contd.)**

(22) Suit for setting aside decree by major defendants on ground that minors were not represented by guardians is barred. AIR 1961 Madh Pra 36 (37): 1961 MPLJ 48.

(23) Claim by auction-purchaser for mesne profit — Claim for continued occupation of lands by judgment-debtor after extinction of his title to it at auction sale — Claim can be agitated only by separate suit. AIR 1966 Madh Pra 67 (79): 1965 MPLJ 627 (DB).

(24) Preliminary and final decree for sale of mortgage property — Property acquired in land acquisition proceedings — Mortgagee has right to claim mortgage money out of compensation which is substituted security — Remedy of mortgagee is to execute his mortgage-decree and not fresh suit. AIR 1963 Mad 73 (74). (Where fresh suit is filed, Court can convert it into execution petition.)

(25) Compromise decree for specified amount with charge on property and liberty to execute — Fresh suit to enforce the charge without executing the prior decree is barred. AIR 1959 Mad 105 (107): (1958) 2 Mad LJ 612 (DB).

(26) Award decree relating to division of properties of Aliyasanthana family — Award giving directions as to manner in which division should take place — Execution dismissed as time-barred — Suit to enforce directions in award decree held not barred, since it did not relate to execution, discharge or satisfaction of decree. AIR 1960 Mys 193 (196, 197): 38 Mys LJ 27 (DB). (Dismissal of execution as time-barred held did not operate as res judicata.)

(27) Where a suit for declaration of title and recovery of possession has already been decreed, a fresh suit between the same parties for recovery of possession of the property, filed on the ground that subsequent to the delivery of possession in pursuance of the previous decree, the defendants have again trespassed, is barred under Section 47. The question of giving delivery of possession is an integral part of the decree itself and that must be determined by the executing Court. (1963) 29 Cut LT 236 :ILR (1963) Cut 393.

(28) Execution sale against 5 annas interest of judgment-debtor in property — Property long ago partitioned and specific property allotted to judgment-debtor — Specific property never put up for sale and never purchased — Judgment-debtor not having any right, title or interest in the property actually sold — Suit by decree-holder for possession of specific property allotted to judgment-debtor, is barred, since the matter fell within terms of Section 47. (1960) 26 Cut LT 521.

(29) Compromise decree — Money payable under, charged on property and made recoverable by recourse to Court of law — Money can be recovered by separate money suit and not by executing compromise decree. AIR 1964 Pat 24 (25).

(30) Execution proceeding against judgment-debtor and his surety — Surety bond executed by surety, under Section 145 — Surety raising objection as to his liability under bond — His objection dismissed summarily — Surety filing suit to establish claim — His suit is not barred under Section 47. AIR 1964 Raj 1 (3): 1963 Raj LW 473. (Summary dismissal of objection does not operate as res judicata — 28 Mad 117, AIR 1929 All 266 (2) and AIR 1930 Lah 399, Dissented from.)

**49. "Determined", meaning of.**— (1) The effect of the word 'determined' is to give the Court executing the decree jurisdiction to dispose of finally questions contemplated by the section by granting appropriate relief. AIR 1940 Pat 420 (422): 19 Pat 524 (DB) * AIR 1914 Mad 91 (93).

(2) Even questions involving investigation of complicated facts or difficult questions of law can be decided by the Court under this section. AIR 1955 SC 376 (399): 1955-1 SCR 1369 * AIR 1955 All 686 (687) (DB).

[See AIR 1969 SC 575 (577, 578): (1968) 2 SCWR 489. (Determination of any question within Section 47 is a decree. AIR 1940 Pat 176, Overruled.)]

[See however AIR 1952 Mad 125 (126).]

(3) It is open to the Court to consider the application under this section on merits at the time of its presentation and dismiss it summarily. AIR 1951 Pat 372 (376) (DB).

**50. "Court executing the decree," meaning of.**— (1) There is no warrant for the argument that the expression 'Court executing the decree' as used in Section 47 of the Civil Procedure Code means a 'Court which is seized of an application for execution of a decree at the instance of the decree-holder.' Section 47 enacts the salutary rule that all questions relating to execution, discharge or satisfaction of the decree shall be determined not by a separate suit, but in execution of the decree. The power so conferred may not be limited by any strained or artificial construction of the words 'Court executing the decree.' It follows that a question relating to execution, discharge or satisfaction of a decree may be raised by the decree-holder or by the judgment-debtor in the execution department and that pendency of an application for execution by the decree-holder is not a condition of its exercise. An application made by the judgment-debtor which raises a question relating to execution, discharge or satisfaction of a decree in a suit to which he or the person of whom he is a representative was a party, is an application before the Court executing the decree and must be tried in that Court. AIR 1967 SC 1193 (1195, 1196): (1967) 1 SCR 147. ((1900) ILR 23 Mad

**Section 47 — Note 50 (contd.)**
377: 10 MLJ 91, Approved, AIR 1966 Punj 506 Affirmed, AIR 1960 Punj 437, Overruled.)

(2) "The Court executing the decree" does not include the Court which has executed the decree and has thereby become functus officio, or an Appellate Court. (1884) 10 Cal 538 (540) (DB) * (1900) 23 Mad 377 (380) (DB) * 1956 Madh BLJ (Bhopal) 114 (116, 117). (Appellate Court.) * AIR 1915 Mad 41 (41) (DB). (Do.)

(3) An application for executing the decree made by an assignee or an application for executing the decree against the legal representatives of the deceased judgment-debtor can only be made before the Court which passed the decree. ILR (1949) 2 Cal 424 (427, 428) (DB). (AIR 1945 Cal 452: ILR (1944) 2 Cal 70, Overruled.)

(4) A Collector executing a decree transferred to him is not a "Court executing a decree." AIR 1955 Hyd 221 (222): ILR (1955) Hyd 456 (DB) * AIR 1925 All 146 (149): 47 All 217 (DB).

(5) Transferee Court executing decree — Transferor Court subsequently holding that certificate was wrongly granted, execution being barred — It cannot order restitution. AIR 1961 All 636 (637). (It is only the transferee Court which can order restitution.)

(6) Case transferred to Collector under Section 68, (Prior to its deletion in 1956) — Application for dismissal of execution in respect of decrees transferred to Collector — Execution Court is forum and not the Collector.) * AIR 1968 All 125 (126). (Collector (prior to deletion in 1956) is delegatee of powers of the Civil Court and as a delegate he has no power to make decision taking away the jurisdiction of the delegating authority.)

**51. Power to grant relief against forfeiture and penalty.**— (1) A compromise decree is subject to the exercise of the powers of a Court of equity to relieve against forfeiture and penalties. Madh BLR 1954 (Civ) 52 (54) * AIR 1951 Orissa 46 (47): ILR (1950) Cut 69 (DB) * AIR 1914 Mad 18 (18) (DB) * (1860) 8 Moo Ind App 239 (258) (PC) * 1966 Cur LJ 665 (Punj) (DB). (Clause granting more than that is really due to the decree-holder in the event of default, is a penal clause and the Court can grant relief against the rigour of such clause.) * (1963) 65 Pun LR 78.

(2) The executing Court can relieve against the forfeiture and penalty imposed by the decree. AIR 1925 Mad 264 (264) * AIR 1933 All 252 (254): 55 All 334 (FB) * AIR 1931 Lah 696 (699) (DB) * AIR 1962 Cal 272 (275): ILR (1962) 2 Cal 254 (DB). (AIR 1926 Pat 122, 10 Bom 435, 10 Bom 437n Held not good law.)

(3) Where the decree is not based on any compromise, relieving against the penal clauses cannot be done by the Court executing the decree. (1910) 4 Sind LR 1 (2).

(4) The executing Court can give relief to a party to the decree against the consequences of his default in not observing the obligations imposed upon him by the decree. AIR 1925 Bom 404 (405) (DB) * AIR 1922 Bom 170 (171): 46 Bom 463 (DB).

(5) An executing Court cannot modify an award on the ground of giving relief against a penalty imposed by it. AIR 1925 Lah 180 (181).

(6) Compromise decree — Provision for revival of original liability in default of payment of smaller sum is not in the nature of a penalty and execution can be legally levied upon default. 1962 Ker LT 808 (DB).

(7) Compromise decree — Draft sale deed to be filed within 15 days of decree — Time being essence of contract, cannot be extended. AIR 1962 Mad 489 (489).

(8) The principle applicable to the question whether a compromise contains a provision in the nature of penatly is that if a creditor agrees to reduce the amount of his claim on certain conditions but the agreement provides that on the failure of the debtor to fulfill any of those conditions, the original claim shall revive, the revival of the original claim is not in the nature of a penalty. But if on the other hand a debtor agrees to pay a sum of money over and above his original liability, he is entitled to be relieved against what undoubtedly has to be regarded as a penalty. The same principle applies to a consent decree made by a Court. AIR 1962 Mys 9 (9): 39 Mys LJ 539.

**52. Court may treat a proceeding as a suit or vice versa — Sub-section (2).**— (1) A Court can, under sub-section (2), treat a proceeding under the section as a suit, or a suit as a proceedings. AIR 1956 SC 87 (91): 1955-2 SCR 938 * AIR 1953 SC 514 (515): 1954 SCR 235 * AIR 1954 Madh B 181 (183): ILR (1954) Madh B 426 (FB) * AIR 1954 All 641 (641) * (1954) 93 Cal L Jour 175 (178, 179) (DB) * AIR 1952 Trav-Co 136 (139): ILR (1951) Trav-Co 728 (DB) * AIR 1951 Mad 736 (737) (DB) * AIR 1951 Pat 333 (337) (DB) * AIR 1940 Nag 92 (94) (DB) * AIR 1963 Mad 73 (73, 74) * AIR 1961 Andh Pra 298 (300): (1961) 1 Andh WR 218 (DB). (Suit under O. 21, Rule 63 by aggrieved creditor to set aside order on claim petition was treated as application under Section 47 on auction-purchaser's petition and second appeal allowed.)

(2) Petitioners neither parties to suit nor representatives of parties — Question involved not relating to execution, discharge or satisfaction of decree — Petition under Order 34, Rule 13 cannot be converted into a suit under Section 47 (2). (1967) 1 Andh WR 151: (1967) 2 Andh LT 241.

(3) The discretion cannot be exercised to convert an execution petition into a

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plaint when no suit lies. AIR 1955 All 686 (687) (DB).

(4) Before the Court can treat a suit as an application the Court in which the suit is brought must have jurisdiction to execute the decree. AIR 1956 SC 87 (91): 1955-2 SCR 938 * AIR 1953 SC 514 (515): 1954 SCR 235 * AIR 1956 All 555 (557).

(5) Before the Court can treat a suit as an application the application should not have been barred by limitation at the date of the institution of the suit. AIR 1956 SC 87 (91): 1955-2 SCR 938 * AIR 1953 SC 514 (515): 1954 SCR 235 * AIR 1956 All 555 (557) * AIR 1955 Pat 350 (352): 34 Pat 336 (DB) * AIR 1954 All 641 (641) * AIR 1953 Punj 118 (120): ILR (1953) Punj 609 (DB) * AIR 1952 Trav-Co 136 (139): ILR (1951) Trav-Co 728 (DB) * AIR 1948 Nag 147 (149): ILR (1948) Nag 68 * AIR 1964 Ker 68 (74, 75): 1963 Ker LT 635 (FB) * AIR 1963 Ker 258 (259, 260): 1962 Ker LT 848 (DB) * AIR 1961 Bom 56 (57, 59): 62 Bom LR 410 (DB). (Execution pending — Suit for declaration of nullity of decree — If may be treated as application.) * AIR 1961 Pat 508 (511, 512) (DB) * (1960) 26 Cut LT 521 * AIR 1959 Ker 382 (384): 1959 Ker LT 147 (DB).

[But see AIR 1940 Nag 92 (94) (DB) * AIR 1921 Bom 285 (289): 45 Bom 174 (DB).]

(5) Suit cannot be treated as application under Section 47, if application would have been barred by res judicata. ILR (1967) 3 Mad 408.

(6) Before an application under Section 47 can be treated as a suit the application must have been made within the period of limitation prescribed for the suit. AIR 1964 Andh Pra 99 (100): (1963) 2 Andh WR 348 (DB). (Application under Section 47 made within six years can be treated as suit under Order 38, Rule 8 on payment of deficit Court-fee and costs.)

(7) The application under this section cannot be treated as a suit if the Court is not competent to try the particular suit. AIR 1955 Cal 295 (296) (DB) * AIR 1954 Mad 239 (240): ILR (1954) Mad 338 (DB).

(8) Execution initiated in Court which would have cognizance of suit when execution was converted into suit — If execution was not permitted to be treated as suit then fresh suit would be barred—Execution application should be permitted to be treated as suit. 1962 All LJ 646 (648, 649) (DB).

(9) The power exercisable under this sub-section may not only be exercised by the original Court, but also by the appellate Court. AIR 1946 Lah 134 (141): ILR (1946) Lah 672 (FB) * (1895) 22 Cal 483 (485, 486) (DB) * AIR 1927 Cal 411 (411, 412): 54 Cal 524 (DB) * AIR 1927 Cal 106 (108): 53 Cal 837 (DB).

(10) The power given to a Court under sub-section (2) of Section 47 is discretionary, and no interference with lower appellate Court's decision should be made by the High Court when the appellant has not made a prayer that his petition should be treated as a plaint. AIR 1958 Pat 546 (547).

(11) It is open to the appellate Court to excrise the power of converting an execution application into a suit even at the appellate stage provided there is no objection on ground of limitation and jurisdiction. 1962 All LJ 649 (649): 1962 All WR (HC) 693.

(12) Where the case has been tried by the two Courts below and has been completely argued in the High Court, Court would not permit conversion of the application at the stage of second appeal. (1967) 69 Bom LR 749 (752): 1967 Mah LJ 985.

(13) Where an application under Section 47 on the ground that the property was not liable to sale in execution is dismissed, a suit for a declaration that the property was not liable to sale in execution cannot be treated as continuation of the previous application. AIR 1960 Madh Pra 76 (78): 1960 Jab LJ 461 (DB).

(14) Where the matters in dispute between the parties are not so very complicated that the petition should be treated as a suit, it is a proper exercise of discretion not to convert petition into a suit. AIR 1967 Manipur 33 (37).

(15) Where the interests of any person, who was not a party to the suit or his representative, get involved in the question that comes before a Court under Section 47, the proceeding can be converted into a suit as provided in sub-section (2) and all relevant matters will be decided in that suit. These are clear indications of the wide scope of the section. AIR 1965 Pat 427 (433): 1965 BLJR 635 (FB). (AIR 1931 All 490 (FB), held no longer good law in view of AIR 1962 SC 199.) * AIR 1968 Orissa 140 (142, 143, 144): 34 Cut LT 560.

**52. Appeal.**— (1) Where an order amounts to a determination of a question between the parties and relates to the execution discharge or satisfaction of the decree it is appealable under Section 96. AIR 1948 PC 12 (14): 74 Ind App 264: ILR (1948) Mad 505: ILR (1947) Kar (PC) 410 * AIR 1951 Mad 56 (57, 63): ILR (1951) Mad 393 (FB) * AIR 1958 Ker 78 (79) (DB) * 1958 MPC 145 (147) * AIR 1957 All 558 (559) * AIR 1954 Cal 492 (494): All 361 (365) * AIR 1942 Cal 342 (342) * AIR 1935 All 183 (184) (DB) * AIR 1933 All 201 (202): 55 All 235 (DB) * ILR (1967) 3 Mad 408. (Question between stranger auction-purchaser in execution of money decree and another party to suit.) * AIR 1965 Tripura 10 (12). (Order reviving execution on review — Objection by judgment-debtor that execution cannot pro-

**Section 47 — Note 53 (contd.)**

ceed as being barred by limitation — Order passed on such objection being one under Section 47 is appealable.) * AIR 1963 Cal 515 (518) (DB). (Definition of decree in Section 2 (2) has to be considered — Order in execution appointing Receiver for sale of property is not 'final order' within meaning of Art. 133 (1) (c) of the Constitution.) * AIR 1963 Orissa 160 (161): ILR (1963) Cut 321 (DB). (Application under Order 21, Rule 2.) * (1963) 29 Cut LT 594. (Question whether the decree was executable before the expiry of 15 days granted in the decree is one relating to execution, discharge and satisfaction of decree.) * 1963 BLJR 89. (Order under Section 15 of Bihar Money-Lenders Act (3 of 1938).) * AIR 1962 Madh Pra 62: 1961 Jab LJ 757. (Order in proceedings between decree-holder auction purchaser and transferee from judgment-debtor after attachment before judgment — Dispute relating to delivery of possession — Order passed amounts to decree and is appealable.) * AIR 1962 Mad 489 (490). (Second appeal.) * (1962) 64 Pun LR 392. (Execution of eviction order under East Punjab Urban Rent Restriction Act, 1949, Section 17 — Objection under Section 47 — First and second appeal lie under C. P. Code.) * AIR 1959 Mad 191 (194): 1959-1 Mad LJ 181.

[See also AIR 1969 Pat 79 (81). (Decree passed ex parte — Judgment-debtor pleading complete adjustment of decree and as such disposal of execution case — Whether case would be one covered by Section 47 and as such appealable or would it be covered only by Order 21, Rule 2 as regards other payments of partial nature and as such not appealable (Quaere).) * AIR 1967 Ker 86 (86): 1966 Ker LT 160. (Judgment-debtor depositing money for setting aside sale — Dispute between decree-holder and his assignee — No appeal lies against order allowing assignee to withdraw money.) * (1963) 1 Mys LJ 997. (Dispute about satisfaction of award decree — Appeal before District Judge competent under Bombay Agricultural Debtors Relief Act (28 of 1947), Section 46.)]

[But see (1877) 2 Bom 553 (556, 557) (DB).]

(2) Notice to judgment-debtor issued under Order 21, Rule 22 — On his remaining absent, decree ordered under O. 21, Rule 23 to be executed — Order being a determination of a question within Section 47 amounts to decree and is open to appeal. AIR 1963 Guj 1 (2, 5): (1962) 3 Guj LR 1032. (No appeal preferred — Any contention against execution of decree is barred by res judicata — Contention which ought to have been raised but not raised is also barred by constructive res judicata. AIR 1943 Bom 252, Not foll.)

(3) An order restoring, in the exercise of the inherent power of the Court, an execution case which was erroneously dismissed without going into merits does not relate to the execution, discharge or satisfaction of the decree. AIR 1953 SC 23 (27): 1953 SCR 136 * (1967) ILR 46 Pat 1171 (DB). (Order recalling dismissal of execution case for default.) * AIR 1963 Pat 59 (59): 1963 BLJR 85.

(4) Order striking off execution terminating execution proceedings — Order is one under Section 47 and is appealable. 1965 All LJ 370 (372).

(5) Order of executing Court dismissing application filed by judgment-debtor for restoration of his application under O. 21, R. 90 (Dismissed earlier for default of appearance) — Appeal not competent — Order, in effect, amounts to confirmation of sale — There is no refusal to set aside sale — Such order is not appealable under Order 43, Rule 1 (j). AIR 1968 Madh Pra 196 (197, 198): 1968 Jab LJ 663 (DB). (AIR 1925 Cal 510 and AIR 1917 Cal 815 and AIR 1929 Cal 407 and AIR 1957 Pat 465, Dissent. from.)

(6) Where a decree of a Small Cause Court is sent for execution to a Court exercising original jurisdiction and an order is passed under this section, such an order is appealable. (1907) 11 Cal WN 861 (862) * AIR 1917 All 304 (304): 39 All 357.

(7) Where a small cause decree is transferred for execution to the Court of original jurisdiction and the latter Court passes an order for arrest of the judgment-debtor under Section 51 (c) the order is not appealable. AIR 1957 Mad 761 (762).

[See ILR (1960) 1 Cal 895. (Order in execution passed Small Cause Court in its Small Cause side — Order is not appealable, but revisable.)]

(8) Where a decree is obtained in a suit brought under Section 9 of the Specific Relief Act and an order is passed in proceedings in execution of that decree, no appeal lies against that order. AIR 1954 All 19 (20) * AIR 1947 Nag 53 (54): ILR (1946) Nag 640 * AIR 1918 Cal 925 (926): 45 Cal 519 (DB) * (1903) 26 Mad 438 (439).

(9) Where a judgment-debtor or a party to the suit prefers a claim, an order deciding such a claim is appealable as a decree. AIR 1950 Cal 174 (176) * AIR 1950 Pat 90 (91) * AIR 1932 Lah 376 (376) * AIR 1935 Mad 923 (924) * (1958) 60 Pun LR 686. (Execution by transferee of decree — Dismissal of objection by judgment-debtor — Appeal by judgment-debtor is competent.)

[But see AIR 1920 Mad 206 (207) (DB).]

(10) Execution sale confirmed — Application by judgment-debtor resisting delivery of possession — Order rejecting application — No appeal lies from such order — Appeal wrongly entertained and order set aside — Second appeal to High Court is competent. AIR 1960 Pat 294 (295).

**Section 47 — Note 53 (contd.)**

(11) Where a decree-holder in execution of his decree for possession claims compensation for the loss caused to the property by the judgment-debtor after the decree and the executing Court orders the application to be converted into a plaint, its order in substance amounts to a refusal to execute the decree and is appealable. AIR 1955 All 686 (687) (DB).

(12) Where a person obtaining a decree against the judgment-debtor personally takes out execution against his share in a partnership business, the other partner is impleaded in the execution because of the provisions of Order 21, Rule 49 (4), but is not a party to the decree and no second appeal is competent so far as he is concerned. AIR 1958 Mad 290 (291).

(13) Execution of mortgage decree — Refusal to implead third party auction-purchaser of the same property in execution under a simple money-decree — Order falls under Clause (3) and is appealable. 1961 All LJ 669 (671, 672) (DB).

(14) Order setting aside an auction sale as nullity on ground that deposit was not paid on the date of sale — Order is a final order and not an interlocutory one and hence falls under definition of a decree under Section 2 (2) read with Section 47 — Appeal is maintainable. AIR 1967 SC 1344 (1348): (1967) 2 SCR 301. (AIR 1939 Lah 210, Disapproved.)

(15) Order under U. P. Tenancy Act (XVII of 1939), Section 168 — Not a proceeding under Section 47, C. P. Code — Order passed is not appealable. 1965 All LJ 645 (649): 1965 All WR (HC) 381.

(16) Application for restitution — Proceedings under Section 47 — Order in an appeal held decree. AIR 1965 All 527 (533): 1965 All LJ 432 (DB).

[See however 1963 Ker LT 531. (Restitution ordered under Section 151 and not under Section 47 — Appeal does not lie.)]

(17) Execution consigned for default in payment of process fee — Order does not amount to a decree and is not appealable. AIR 1965 All 589 (590): 1965 All LJ 849.

(18) It is clear from Section 46, Bombay Agricultural Debtor's Relief Act that an order which is not covered by Section 43 of the Act is appealable, if an appeal from that order is provided by the Civil P. C. In view of Section 36 of the Code the abovementioned orders are orders under Section 47 of the Code and are, therefore, decrees. AIR 1969 Bom 74 (76): 70 Bom LR 438 (DB). (Execution of award — Order that satisfaction alleged by debtor was not proved or that execution application is not maintainable — Order is appealable — (1957) 59 Bom LR 610, Overruled.)

(19) Joint application for execution of a joint decree in favour of a number of decree-holders — Order of executing Court on an application for substitution of heirs of a deceased decree-holder — Order falls within Section 47 and hence amounts to a decree against which a first appeal would lie under Section 100 — AIR 1967 Assam and Nagaland 27 (28): ILR (1966) 18 Assam 482.

(20) Compensation for injury awarded to employee — Insurer though served with notice not made party to proceeding — Appeal by insurer against order is competent. AIR 1967 Bom 416 (420): 69 Bom LR 162. (Decision under Section 47 is appealable either by decree-holder or judgment-debtor—Section 90 (2), Motor Vehicles Act puts the insurer on the same footing as judgment-debtor.)

(21) Order under Section 145 (c) — Appeal lies and in proper cases also revision. AIR 1962 Assam 23 (24): (1960) 1 Assam LR 243.

(22) Court hearing partition suit ordering sale of suit property where it cannot be conveniently partitioned — No decree however, drawn — Order, ordering sale is not appealable — Order cannot be regarded as one under Section 47 and it is not therefore, appealable as such — Order is also not one appealable under Order 43, Rule 1. (1966) 7 Guj LR 121: ILR (1966) Guj 143 (156) * AIR 1962 Him Pra 8 (10).

(23) Preliminary decree for partition — Commissioner disposing of property at private sale for division of proceeds on the direction of Court — Order of Court falls under Order 20, Rule 18 and is not appealable either as decree or as an order passed in execution proceeding or as a preliminary decree. 1963 Jab LJ 52: 1962 MPLJ 872. (In absence of any rules framed by M. P. High Court order is appealable under Order 43, Rule 1 (j) by virtue of Section 7 of the Partition Act.)

(24) Order of eviction under Section 13 of Punjab Urban Rent Restriction Act — Order under Section 47, Civil P. C., relating to execution of such eviction order — Second appeal does not lie. AIR 1966 Him Pra 77 (78). (Section 100, C. P. C. does not apply in Himachal Pradesh but Para 32 of Himachal Pradesh (Courts) Order, 1948, under which second appeal lies from decrees passed in suits only — Proceedings under Section 13, Punjab Rent Restriction Act is not a suit — Order under Section 47 relating to execution of ejectment order under Section 13, Punjab Rent Restriction Act cannot be regarded as one passed in suit — No second appeal from this order lies under Para. 32.) * AIR 1962 Him Pra 8 (10). (AIR 1950 All 713 (FB), Not foll.)

(25) Scheme for management of a mosque framed by Court in a suit providing for representation of the family of the defendant in the celebration of annual festival in the mosque — Dispute regarding such representation — Court passing an order that certain person was entitled to represent family of the defendant —

**Section 47 — Note 53 (Contd.)**
Order of the Court held could not be treated as a decree under Section 47 read with Section 2 and was not appealable. 1960 Ker LT 729.

(26) Scheme for management of mosque framed by Court in a suit — Scheme providing for representation of the family of the defendant in the celebration of annual festival in the mosque — Dispute arising regarding such representation — Court passing an order that certain person was entitled to represent family of the defendant — Order of the Court held could not be treated as a decree under Section 47 read with Section 2 and was not appealable. 1960 Ker LJ 639.

(27) Order dismissing application under Order 21, Rule 10 — Consequential order of confirmation of sale follows — Appeal against such order incompetent. 1964 Ker LT 720: ILR (1964) 2 Ker 522. (Unless an order in itself determines some right of the parties in controversy it cannot be a 'decree' even if it relates to execution, discharge or satisfaction of the decree in a case.)

(28) Order refusing stay of sale not appealable. 1963 Jab LJ 608: 1962 MPC 68.

(29) Order of executing Court refusing to stay execution under Order 21, Rule 29 is not appealable. AIR 1963 Raj 4 (5): 1962 Raj LW 353.

(30) Decision on objection as to non-compliance with Order 21, Rule 5 is appealable as of right under Clause 10 Letters Patent (M. P.). AIR 1959 Madh Pra 188 (189): 1958 Jab LJ 749.

(31) Suit on mortgage — Third parties claiming certain right in mortgage property impleaded as defendants — Their claim which was opposed to auction purchaser's interest supported by mortgagee decree-holder also — Order rejecting claim is appealable under section. (1956) 2 Mad LJ 534.

(32) Application by judgment-debtor alleging excessive execution without notice to him — Dismissal of application — Appeal against dismissal competent. AIR 1966 Madh Pra 67 (72, 78, 79): 1965 Jab LJ 1133 (DB).

(33) The order dispensing with the furnishing of the security by the applicant to set aside sale in execution affects the rights of the parties, and the matter, being in relation to the execution and satisfaction of the decree, falls within the scope of Section 47. Therefore, an appeal is competent under Section 47, C. P. Code. (1968) 2 Mad LJ 377: 82 Mad LW 30.

(34) Order converting an application into suit is not a decree and is not appealable. AIR 1959 Mys 155 (155, 156): 36 Mys LJ 539.

(35) Order under Section 47 (2) converting application into a suit — Order is decree within meaning of Section 2 (2) and is appealable. AIR 1966 Mad 308 (309): (1965) 2 Mad LJ 548.

(36) Order of executing Court under Order 21, Rule 95 directing delivery of possession to decree-holder auction-purchaser is not appealable. 1965 Raj LW 474: ILR (1966) 16 Raj 77. (AIR 1926 Cal 798 (FB), Dissented from; Dissenting view of Stanley C. J. in 31 All 82, Held, impliedly overruled by 16 Cal 682 (PC).)

(37) Pre-emption decree fully satisfied — Application by judgment-debtor under Section 47 — Preliminary issue — Decision on — Issues of fact framed — Order does not amount to decree — Not appealable as such. AIR 1962 Punj 44 (45).

(38) Order dismissing objection to sale held under Partition Act (1893) — Final decree passed — No appeal lies against order dismissing objection under Section 47. AIR 1959 Punj 129 (130): 60 Pun LR 702. (Appeal lies against final decree — AIR 1929 Lah 245, Dissented from.)

**54. Interlocutory orders in execution proceedings.** — (1) The phrase "determination of any question within Section 47" in Section 2, Clause (2) does not make every decision of any question within this section a decree. In order to be appealable as a decree, the decision must also be the formal expression of an adjudication conclusively determining the rights of the parties. AIR 1954 Mad 1070 (1073, 1074) (DB) * AIR 1957 Punj 92 (94): ILR (1957) Punj 938 * AIR 1952 Pat 333 (335): 27 Pat 448 (452) (DB) * AIR 1944 Nag 25 (26): ILR (1944) Nag 230 (DB) * AIR 1942 Lah 153 (160): ILR (1942) Lah 559 (FB) * AIR 1940 Cal 257 (258, 259): ILR (1940) 1 Cal 393 (DB).

(2) If the decision does not conclusively determine the rights of the parties the order is merely an interlocutory one and is not appealable as a decree. AIR 1954 Nag 31 (32) * AIR 1957 Punj 92 (94): ILR (1957) Punj 938 * ILR (1953) 3 Raj 803 (804) * AIR 1947 Pat 255 (256) (DB) * AIR 1943 Lah 140 (143, 144, 146) (FB). (AIR 1939 Lah 177, Overruled.) * AIR 1940 Mad 54 (55) * AIR 1924 All 808 (811): 46 All 733 (DB) * AIR 1931 Bom 388 (390) (DB) * AIR 1964 Orissa 83 (85). (Order of remand by appellate Court to executing Court for deciding question of maintainability of execution application after taking evidence.)

[But see AIR 1932 All 85 (89): 53 All 391 (DB) * AIR 1916 Cal 471 (472) (DB).]

(3) Though an order may be interlocutory, if it is one which in substance deter-

## LIMIT OF TIME FOR EXECUTION

**48. Execution barred in certain cases.**—[Repealed by the Limitation Act, 1963 (36 of 1963), S. 28 (w. e. f. 1-1-1964).]

The Repealed section ran as follows :—

"48. **Execution barred in certain cases.**—(1) Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from—

(a) the date of the decree sought to be executed, or,

(b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.

(2) Nothing in this section shall be deemed—

(a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application; or

(b) to limit or otherwise affect the operation of Article 183 of the First Schedule to the Indian Limitation Act, 1908."

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**Section 47 — Note 54 (contd.)**

mines a question relating to execution between the decree-holder and the judgment-debtor as, for instance, where it has the effect of reviving an application for execution which was dismissed for default of the decree-holder, especially when a fresh application would be barred by limitation, it will be appealable as a decree. AIR 1955 Kutch 9 (9) * AIR 1953 Kutch 39 (39, 40) * AIR 1920 Cal 534 (535) (DB) * AIR 1965 Assam 21 (23): ILR (1965) 17 Assam 140 (DB). (Application by judgment-debtor to set aside sale as null and void — Ground alleged that sale proclamation did not mention time and place of sale — Order falls under Section 47 and is appealable.)

[See however AIR 1953 SC 23 (27): 1953 SCR 136 * (1968) ILR 47 Pat 178 (FB).]

(4) An order under Section 24, Hindu Marriage Act for maintenance pendente lite, is executable under Civil P. C. and therefore, applications arising therefrom under Section 47 are entertainable and appeals consequently would be maintainable. It is difficult to conceive of a position that an appeal would not lie from the original order but would be maintainable as soon as the same is executed, resulting in an order under Section 47. (1966) 70 Cal WN 633 (637). (AIR 1962 Cal 455, Held, overruled by 68 Cal WN 316.)

**55. Revision.**— (1) An order which is appealable under this section is not open to revision. AIR 1952 Kutch 20 (21) * AIR 1941 Cal 264 (265) (DB) * AIR 1941 Pat 408 (409) (DB) * AIR 1959 Madh Pra 188 (189): 1958 Jab LJ 749. (Revision treated as appeal.)

(2) An order in which there is no question of jurisdiction involved is not open to revision. AIR 1953 SC 23 (27): 1953 SCR 136 * AIR 1933 Bom 185 (186) (DB) * AIR 1936 All 479 (480) (DB).

(3) In the case of an order not open to appeal, a revision may lie if the conditions of Section 115 are satisfied. AIR 1950 Mad 402 (404) * AIR 1944 Nag 298 (300): ILR (1944) Nag 885 (DB) * AIR 1941 Cal 156 (158): ILR (1940) 2 Cal 277 * AIR 1969 Orissa 144 (145): 35 Cut LT 287.

(4) Court granting relief not prayed for — It is a case for revision. AIR 1962 All 9 (11, 12). (Applicant asking that execution be dismissed — Court cannot order release of amount attached.)

(5) Order in execution passed by Small Cause Court in its small cause side is not appealable, but revisable. ILR (1960) 1 Cal 895.

## SECTION 48 — SYNOPSIS

(Note :— The case law given under the different headings in the synopsis is under the repealed section — Ed.)

1. Object, applicability and scope.
2. Retrospective operation.
3. "Application to execute".
4. Decree granting injunction.
5. Fresh application after twelve years.
6. "Fresh application" and "continuation of previous application".
7. Successive applications — See Note 1.
8. "Date of the decree".
9. Subsequent order.
10. "At a certain date or at recurring periods".

**Section 48 — Synopsis (contd.)**

**11. Deduction of time.**

**12. Fraud or force.**

**13. Plea under section.**

**1. Object, applicability and scope.—** (1) A decree-holder is entitled, as of right, to execute his decree and for that purpose may make any number of applications in succession. AIR 1943 PC 98 (100): ILR (1943) Nag 669: 70 Ind App 83: ILR (1943) Kar (PC) 109 * (1895) 17 All 106 (111, 112): 22 Ind App 44 (PC).

(2) Besides the principles of res judicata and Article 182 of the Limitation Act, 1908, this section imposes a further restriction on the rights of the decree-holders to execute their decrees by fixing a maximum limit of time for execution and by enacting that no order for execution shall be made upon an application presented after the expiry of twelve years from certain specified dates. AIR 1954 Hyd 190 (192): ILR (1954) Hyd 353 (FB) * AIR 1924 All 263 (265): 46 All 73 * AIR 1922 Mad 268 (268): 45 Mad 785 (DB) * AIR 1924 Mad 163 (167): 47 Mad 120 (DB) * (1883) 7 Bom 214 (216) (DB).

[See (1884) 6 All 189 (192).]

[See also (1882) 1882 All WN 111 (111) * AIR 1964 Andh Pra 50 (54): (1963) 2 Andh WR 304 (DB) * AIR 1969 Andh Pra 250 (256): 1969-1 Andh WR 455 (FB). (Order of attachment of the decree by another Court under Order 21, Rule 53 in execution — Period during which attachment subsisted cannot be excluded for purpose of limitation under Section 15, Limitation Act.)]

(3) The effect of the section is not to supersede the law of limitation but only to fix the outside period after which, execution of a decree, though not barred by the Limitation Act, may not be granted. AIR 1951 SC 16 (21): 1950 SCR 852 * AIR 1952 Trav-Co 269 (273) * AIR 1942 Cal 255 (256): ILR (1942) 1 Cal 245 (DB) * AIR 1941 Bom 158 (159): ILR (1941) Bom 147 (DB) * AIR 1941 Pat 45 (46): 20 Pat 1 (DB) * AIR 1963 Andh Pra 1 (4): (1962) 2 Andh WR 160.

(3-A) Section 48, though incorporated in the general law relating to procedure, prescribes a period of limitation and to that extent is a special law within Section 29 of Limitation Act. That being so Section 19 of Limitation Act will not apply to it. AIR 1969 Andh Pra 250 (261, 262 and 263): (1969) 1 Andh WR 455 (FB). (Section is not controlled by Section 19 of Limitation Act.) * 1968 All LJ 364: 1968 All WR (HC) 215 (FB). (Limitation under Section 48 cannot be extended under Section 20, Limitation Act.)

(3-B) Non-satisfaction certificate issued under Section 41 though not in accordance with law, is yet step-in aid of execution and saves limitation. AIR 1969 Orissa 147 (148, 149): 35 Cut LT 181. (AIR 1932 Pat 286, Foll.)

(4) Section applies to all decrees of any kind except a decree granting injunction. AIR 1915 Mad 407 (410) (DB) * AIR 1915 Bom 40 (41): 39 Bom 256 (DB).

(5) Section does not come into play until there has been at least one prior application for execution of a decree. What it prohibits is a fresh application after the twelve years prescribed. AIR 1956 Hyd 7 (9, 10): ILR (1955) Hyd 797 (FB) * AIR 1952 Trav-Co 269 (273) (DB) * AIR 1939 Nag 245 (246): ILR (1939) Nag 559 (DB).

(6) Before the execution can be held to be barred under the section it must be shown that the decree was, in all parts, ripe for execution on the date from which the twelve years' period is to be computed. AIR 1920 Nag 40 (41).

(7) Where a decree-holder applies for execution and a fresh application therefor in the future is likely to be barred under this section, the Court should allow the decree-holder to exhaust all lawful means of realising his decree in the pending application, before finally dismissing it. AIR 1956 Madh B 158 (159) * AIR 1926 Lah 544 (544).

(8) The salutary rule in this section should not be permitted to be evaded as by striking off an execution petition and continuing the attachment so as to enable the decree-holder to apply for execution after the twelve years' period under the pretext of continuing a pending application. (1910) 8 Ind Cas 727 (728) (Oudh).

[See also AIR 1928 Mad 1154 (1155).]

(9) The section only requires that the application should be presented within twelve years. The order on such application may be made even after the expiry of the specified period. See Note 5.

(10) A sale in execution of a decree executed in contravention of the provisions of this section is not a nullity. The purchaser in such a sale gets a good title and can lose it only if the sale is avoided in a proper proceeding by getting it set aside. AIR 1961 Pat 508 (511, 512) (DB).

(11) Application prima facie barred under section — Decree-holder must explain how he can escape the bar under this section. Madh BLJ 1955 HCR 858 (858).

(12) Section does not apply to decrees of Presidency Small Cause Courts even though transferred for execution to Court other than Court of Small Causes. AIR 1950 Mad 504 (506): ILR (1951) Mad 1 (FB). (36 Mad 108, Approved; AIR 1941 Mad 477, Overruled.) * AIR 1942 Pat 128 (128, 129) (DB).

(13) The proceedings for the passing of the final decree pursuant to the preliminary decree are not proceedings in execution and hence not governed by Section 48. (1966) 2 Andh WR 204.

**Section 48 — Note 1 (contd.)**

(14) Section does not apply to the execution of decrees passed by Village Courts under the Madras Village Courts Act (1 of 1889) even though they are transferred to the District Munsif's Court for execution. AIR 1955 Mad 718 (720): ILR (1956) Mad 381 (DB).

(15) The section bars only the execution of the decree after the specified period. The rights of the decree-holder in other respects are not in any way affected. AIR 1924 Mad 163 (165, 167): 47 Mad 120 (DB). (1964) 1 Mad LJ 340: 77 Mad LW 143. (Holder of mortgage decree against estate — Right to get payment out of compensation under Madras Estates (Abolition and Conversion into Ryotwari) Act — Does not amount to enforcement of his decree — Bar of limitation under Section 48 does not apply.)

(16) A warrant issued to the Collector under Section 386 of the Criminal Procedure Code for the recovery of fine has the force of a decree. But Section 70 of the Penal Code sets a limit of six years for the recovery of fines imposed on an offender. The twelve years' rule under this section will not apply to such cases. AIR 1941 Bom 158 (159): ILR (1941) Bom 147 (DB).

(17) Under Rule 18 (h) of the Rules framed under Section 43 of the Co-operative Societies Act, 1912, for the purposes of execution, an award under that Act has the same status as a decree and the twelve years' rule under this section will apply in such cases. AIR 1947 Lah 269 (271, 272) (DB).

[See also AIR 1960 Madh Pra 213 (214): 1960 Jab LJ 199.]

(18) An award under the Mysore-Co-operative Societies Act (7 of 1913) does not become a decree unless and until a certificate is granted by the Registrar under Section 43-C of that Act. The twelve years under this section will run only from the grant of such certificate. AIR 1954 Mys 54 (56): ILR (1954) Mys 288 (DB).

[See also (1962) 3 Guj LR 512.]

(19) Where the execution of a decree had become barred under the provisions of a special statute long before the Constitution of India came into force, the fact that the special statute is declared void under Art. 13 (1) of the Constitution will not have the effect of reviving the right to execute the decree within the extended period of limitation under this Section. AIR 1952 Punj 417 (418).

**2. Retrospective operation.**— (1) The right to execute a decree is only a right of procedure and not a vested right. AIR 1955 Raj 33 (34): ILR (1954) 4 Raj 994 (DB) * AIR 1917 Pat 485 (486) (DB).

[But see (1910) 32 All 499 (502) (DB).]

(2) Law governing an application to execute a decree will be the law of procedure in force at the time of the application and not the law in force when the decree was passed. AIR 1955 Kutch 20 (21) * AIR 1926 All 93 (94): 48 All 121 (DB) * (1881) 3 Mad 98 (101) * AIR 1917 Pat 493 (494) (DB).

[See also 1959 Raj LW 250.]

(3) A decree passed on 8-8-1934 by a Court in the former Jaipur State was sought to be executed in 1952, but the Court by its order dated 24-4-1952 dismissed the execution application to be barred under Section 48. The Jaipur Code of Civil Procedure did not contain any provision corresponding to Section 48 of the Indian Code. The Rajasthan Code of Civil Procedure (Adaptation) Ordinance (5 of 1950) came into force on 24-1-1950 and according to Section 8 thereof the period for execution of such decree was 12 years from 24-1-1950 as the decree was to be deemed to have been passed on 24-1-1950 for purposes of Section 48. The Rajasthan Ordinance was, however, superseded by the Code of Civil Procedure (Amendment) Act, 1951, by which the entire Code was made applicable to the whole of India. The Code was, however, amended by the Code of Civil Procedure (Rajasthan Amendment) Act (20 of 1952) on 14-6-1952 and a new Section 48-A was inserted in the Code with retrospective effect which provided that for purposes of application of Section 48 to the State of Rajasthan, a decree passed prior to 25-1-1950 could not be ordered to be executed after 12 years from 25-1-1950 or after the period originally fixed by law whichever expired first. It was held that the order of the trial Court dismissing the execution as barred under Section 48 was wrong and must be set aside. 1956 Raj LW 48 (49) * 1961 Raj LW 307 (309) (DB).

(4) Decree passed in 1922 by Court in former Mewar State — Execution filed in 1951 is barred under Section 48 as applied by United State of Rajasthan Code of Civil Procedure Ordinance (61 of 1948) which repealed Mewar Civil P. C. — Section 48-A as inserted by Code of Civil Procedure (Rajasthan Amendment) Act (20 of 1952) cannot have effect of keeping alive such decree which had already become inexecutable before Rajasthan Code of Civil Procedure (Adaptation) Ordinance (5 of 1950) had come into force on 24-1-50. AIR 1955 Raj 33 (34, 35): 1954 Raj LW 493 (DB).

**3. "Application to execute."**— (1) An application to execute a decree means an application under Order 21, Rule 11 or otherwise by "which proceedings in execution are commenced and not merely an incidental application." (1877) 3 Cal 235 (242) (FB).

(2) Execution application should be an application in accordance with law, asking for a relief granted by the decree and for obtaining it in the mode admitted by law. (1889) 13 Bom 237 (239) (DB).

(3) An application to the Court passing a decree to transfer it for execution to another Court or for re-transferring it

**Section 48 — Note 3 (contd.)**

where it has already been transferred to another Court for execution is not an application to execute the decree within this section. AIR 1953 All 74 (75, 76) (DB) * AIR 1957 Andh Pra 544 (544) (DB) * AIR 1948 Nag 189 (192): ILR (1947) Nag 497 * AIR 1929 Mad 745 (745) * AIR 1947 Mad 431 (453): ILR (1948) Mad 117 (DB). (Application for re-transfer.) * AIR 1960 Madh Pra 215 (215): 1960 MPLJ 1027.

(4) Where a decree gives reliefs of different characters, there is nothing in the Code preventing separate and successive applications for execution as regards each of such reliefs. (1891) 18 Cal 515 (518) (DB).

(5) The section applies to applications contemplated by Article 182, Limitation Act, and not to applications contemplated by Article 180. Hence an application for delivery of possession under Order 21, Rule 95 of the Code is not an application for execution within the meaning of this section. AIR 1955 Kutch 9 (11).

(6) Filing of an execution petition in the transferee Court within twelve years of the decree and before the order of transmission which is passed after the expiry of twelve years would not save the decree-holder from the bar of the section. AIR 1957 Mad 726 (727) (DB).

(7) An application for sale of properties attached before judgment is an application for execution within the meaning of this section. AIR 1952 Trav-Co 228 (229): ILR (1952) Trav-Co 227 (DB).

(8) Where a security bond is given under Order 32, Rule 6 (2) on behalf of a guardian of a minor for withdrawing the latter's money under a decree, an application by the minor to enforce the bond cannot be said to be an application for the execution of the decree under which the money was withdrawn and this section has no application to the case. Section 145 has no application to such a case. AIR 1949 Mad 152 (153) (DB).

(9) The expression "in the manner herein provided for execution of decree' in Section 145 attracts the provisions of this section. For enforcement of liability of surety under Section 145, twelve years period mentioned in this section applies and the period should be calculated from the time such liability accrues. AIR 1949 Mad 285 (287): ILR (1948) Mad 504 (DB).

**4. Decree granting injunction.**— (1, Where a decree prohibits the defendant from obstructing a village path, it is a decree granting a permanent injunction. It is not capable of execution on the date it is passed. Such a decree is beyond the reach of the bar provided in this section. AIR 1946 Pat 392 (397): 25 Pat 397 (DB).

**5. Fresh application after twelve years.**— (1) The section does not prohibit the Court from making an order for execution after the expiration of twelve years, if the fresh application had been presented within the period of twelve years. AIR 1946 Cal 51 (52, 53): ILR (1945) 2 Cal 637 (DB) * AIR 1926 All 331 (331, 332): 24 All LJ 347 (DB).

**6. "Fresh application" and "continuation of previous application."**— (1) Under the present section the expression "fresh application" means a substantive application for execution and not merely an ancillary one made with the object of moving the Court to proceed in the matter of a substantive application already on file. AIR 1956 Hyd 7 (9): ILR (1955) Hyd 797 (FB) * AIR 1956 Madh B 158 (159) * ILR (1955) Hyd 471 (472) * AIR 1946 Cal 51 (52, 53): ILR (1945) 2 Cal 637 (DB) * AIR 1943 Bom 164 (166) (DB) * (1911) 33 All 517 (520) (FB) * AIR 1959 All 179 (185, 186): 1959 All LJ 229 (SB). [Reversed on another point in AIR 1961 SC 1790 * AIR 1963 Pat 209 (210).]

[But see (1905) 28 Mad 224 (227) (DB) * (1897) 24 Cal 473 (480, 487, 491) (SB).]

(2) The question whether an application is only ancillary to a previous application or is a "fresh application" depends upon the circumstances of each case. AIR 1956 Hyd 7 (9): ILR (1955) Hyd 797 (FB) * AIR 1958 All 387 (390) * AIR 1957 Cal 142 (142) (DB) * ILR (1955) Hyd 471 (472) * AIR 1954 Cal 73 (75): ILR (1954) 2 Cal 139 * 1950 Trav-Co LR 279 (284) (DB) * AIR 1943 Pat 127 (130): 21 Pat 838 (DB) * AIR 1940 All 270 (272): ILR (1940) All 377 (FB) * AIR 1939 PC 80 (84): 14 Luck 192: ILR (1939) Kar 136 (PC) * 78 Mad LW 44: ILR (1964) Mad 101 (DB). (During pendency of execution petition property sold in execution of prior mortgagee's decree — Surplus sale proceeds in Court deposit — Subsequently mortgagee applying to withdraw it under doctrine of substituted security — Subsequent application is only auxiliary.) * AIR 1960 Madh Pra 187 (188): 1960 MPLJ 174.

(3) Whether the application is a "fresh application" is to be decided with reference to the antecedent proceedings and the orders passed thereon. AIR 1956 Hyd 7 (10): ILR (1955) Hyd 797 (FB) * AIR 1958 All 387 (390) * AIR 1954 Madh B 61 (63): ILR (1953) Madh B 143 * AIR 1953 All 74 (75, 76) (DB) * AIR 1964 SC 1451 (1457): (1964) 6 SCR 251. (The execution petition would not terminate merely because expression like "closed", "closed for statistical purposes," "struck off," "recorded" etc., are used; ILR 10 Cal 416 and AIR 1946 Mad 170 and AIR 1952 Mad 51, Approved.) * 1966 All LJ 376 * AIR 1965 Assam 96 (98, 99): ILR (1964) 16 Assam 410 (DB).

[See also AIR 1968 Punj 509 (511, 512): 70 Punj LR 667 (DB) * AIR 1954 Trav-Co 369 (369): ILR (1954) Trav-Co 479 (DB) * AIR 1954 Trav-Co 1 (3): ILR (1953) Trav-Co 858 (FB).]

(4) The test to be applied for the principle of revival is that the interruption to

**Section 48 — Note 6 (contd.)**

the execution proceedings is due to an intermediate order which was afterwards set aside or the execution proceedings must have been rendered infructuous by some such obstacle and the interruption to the execution should not have been occasioned by any fault or laches of the applicant. AIR 1954 Madh B 61 (63): ILR (1953) Madh B 143.

(5) As a general rule, where the previous application has been suspended or stayed or dismissed for no fault of the decree-holder and the second application is similar in scope and character to the previous one, the second application will be deemed to be an ancillary one in continuation of the previous one. ILR (1955) Hyd 471 (472) * AIR 1958 Andh Pra 493 (493) * AIR 1957 Cal 142 (142) (DB) * AIR 1957 Orissa 5 (6) (DB). (Previous application closed for statistical reasons — Fresh application is one in continuation.) * Madh BLJ 1955 HCR 2235 (2236) * AIR 1954 Cal 73 (75): ILR (1954) 2 Cal 139 * AIR 1954 Madh B 61 (63): ILR (1953) Madh B 143 * AIR 1953 Trav-Co 359 (359) (DB) * AIR 1952 Mad 51 (51): ILR (1952) Mad 622 (DB) * AIR 1952 Mys 67 (68): ILR (1952) Mys 167 (DB) * AIR 1952 Nag 322 (323) * AIR 1952 Punj 118 (119) * AIR 1946 Cal 51 (52, 53): ILR (1945) 2 Cal 637 (DB) * AIR 1934 Pat 532 (533) (DB) * AIR 1934 All 481 (487, 489, 493): 56 All 791 (FB) * AIR 1964 SC 1454 (1456, 1457): (1964) 6 SCR 251*(1964) 1 Andh WR 115: (1964) 1 Andh LT 117 * AIR 1964 Assam 64 (66): ILR (1963) 15 Assam 520 * AIR 1969 Andh Pra 250 (254): (1969) 1 Andh WR 455 (FB).

(6) Where the character of the second application is different from that of the former, as for instance, where the relief claimed in the second application is against properties or persons different from those in the previous application, the second application will be deemed to be a "fresh application" within the meaning of this section. AIR 1952 Nag 126 (127): ILR (1952) Nag 1 (FB) * AIR 1957 Trav-Co 109 (115): ILR (1956) Trav-Co 1244 (FB) * AIR 1950 Mys 64 (70): ILR (1951) Mys 30 (FB) * AIR 1957 Orissa 5 (6) (DB) * AIR 1956 Sau 1 (3) * AIR 1952 Raj 66 (68) * AIR 1947 Mad 216 (222): ILR (1947) Mad 525 (DB) * AIR 1946 Cal 51 (52, 53): ILR (1945) 2 Cal 637 (DB) * AIR 1941 Pat 635 (635, 636) (DB) * AIR 1929 PC 209 (212) * AIR 1964 SC 1454 (1458): (1964) 6 SCR 251 * AIR 1968 Pat 458 (460) * 1966 Ker LT 78 * AIR 1964 Bom 157 (159, 160): 65 Bom LR 452 * AIR 1964 Pat 480 (482): 1964 BLJR 359 (DB) * AIR 1963 All 398 (404, 406): 1963 All LJ 116 * 1963 Ker LT 357: 1963 Ker LJ 169 * AIR 1959 Madh Pra 396 (397): 1960 MPLJ 78. (AIR 1942 Nag 126 (FB) and AIR 1945 Nag 239 and AIR 1948 Nag 272, Foll. AIR 1956 Madh B 158, Held did not lay down good law.)

[See AIR 1951 Mad 429 (431).]

[But see AIR 1956 Madh B 158 (159). (AIR 1947 Mad 216: ILR (1947) Mad 525; AIR 1949 Mad 251 and AIR 1951 Pat 635: 29 Pat 400 (DB), Dissented from.)]

(7) Where the last application filed in the transferring Court within time does not contemplate the transmission of the decree to the transferee Court for being executed through that Court, the application filed in the transferee Court together with a list of properties to be attached, cannot be treated as ancillary to or as one to continue the application filed in time in the transferring Court but only as an independent application, that is a fresh application within the meaning of Section 48. And if the application made to the transferee Court happens to be made on a date beyond 12 years from the date of the decree, it will be treated as out of time. AIR 1957 Trav-Co 200 (202) (SB).

(8) Where the proceedings under the prior application have come to an end, the second application cannot be taken to be one in continuation of the prior application. AIR 1942 Bom 282 (284) (DB) * 1958 Ker LJ 156 (158) * AIR 1942 Cal 255 (257): ILR (1942) 1 Cal 245 (DB) * AIR 1940 Pat 432 (433) (DB) * (1912) 13 Ind Cas 160 (160) (DB) (Mad) * AIR 1964 SC 1454 (1458): (1964) 6 SCR 251 * AIR 1969 Andh Pra 250 (254): (1969) 1 Andh WR 455 (FB)*AIR 1963 Andh Pra 1 (3, 4): (1962) 2 Andh WR 160 (FB). (AIR 1943 Mad 118 (FB); AIR 1958 Andh Pra 402; AIR 1947 Mad 216, Rel. on.)

[See AIR 1947 Mad 216 (222): ILR (1947) Mad 525 (DB) * AIR 1940 Pat 54 (55): 18 Pat 649 (DB).]

[See also AIR 1956 Hyd 7 (10): ILR (1955) Hyd 797 (FB).]

(9) Even if the order of dismissal of the execution petition is a mistaken one, if it has the effect of judicial determination, the subsequent application cannot be considered as a continuation of the previous one. AIR 1957 Trav-Co 293 (294): ILR (1956) Trav-Co 980.

(10) Where there are more prayers than one to the previous application by ordering the detention of the judgment-debtor in civil prison, it cannot be said that the application has been really, effectively and validly disposed of. AIR 1957 Orissa 5 (6) (DB).

(11) Where the order for taking further steps is passed on a date on which the execution is properly posted the decree-holder must be presumed to have knowledge of such order. If the execution is dismissed for default of decree-holder to take further steps and the decree-holder allows it to become final, the order even if wrong must be treated as judicial order so that a subsequent application for execution cannot be treated as continuation of the previous application. AIR 1955 Trav-Co

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230 (231) * AIR 1953 Trav-Co 572 (573): ILR (1951) Trav-Co 540 (DB).

(12) A decree-holder is always entitled to give up a part of the attached property at any time and an application for that purpose does not amount to a making up of fresh application for execution. 1955 All L Jour 516 (517).

(13) The pendency of an application for execution of a partition decree is sufficient to keep alive the whole of the execution matter and the benefit thereof can be had even by a party other than the one who has made the application. The dismissal of another application made during such pendency, though after more than 12 years from the date of the decree, is erroneous. AIR 1954 Nag 264 (264): ILR (1955) Nag 611.

(14) If the execution petition is within time with reference to Section 48, the fact that judgment-debtor died during its pendency and the execution has to be continued against the legal representatives and for doing so certain further details are to be provided for will not have the effect of treating such further acts of decree-holder in aid of his execution as tantamount to fresh application for execution. AIR 1960 Madh Pra 187 (188): 1960 MPLJ 174.

Amendment of execution application beyond 12 years from decree :

(15) A Court has power apart from provisions of Order 21, Rule 17 to add fresh properties to the list of properties appended to the original execution petition provided the petition for amendment is filed before the expiry of twelve years period prescribed under this section. AIR 1955 Orissa 94 (96): ILR (1955) Cut 156 (DB) * AIR 1957 Trav-Co 109 (115): ILR (1956) Trav-Co 1244 (FB) * AIR 1957 Orissa 5 (6) (DB).

(16) Where an application made within twelve years of the specified date is found to be defective, an amendment thereof after twelve years is not necessarily ultra vires of the powers of the Court. Court has discretion in the matter. AIR 1952 Raj 66 (68) * AIR 1952 Trav-Co 23 (25): ILR (1951) Trav-Co 357 (DB) * AIR 1951 Mad 844 (847) (DB) * 1950 Trav-Co LR 279 (283) (DB) * AIR 1948 Bom 116 (117) (DB) * AIR 1942 Cal 306 (307): ILR (1941) 2 Cal 251 (DB) * AIR 1940 Mad 19 (20) (DB) * AIR 1959 Assam 25 (27, 28): ILR (1958) 10 Assam 14 (DB).

[See however AIR 1945 Oudh 84 (87) (DB).]

(17) Except in the case of a defective execution application admitted and registered by the Court without calling upon the decree-holder to cure the defects, the Court will have no jurisdiction to allow execution against properties mentioned for the first time in a list filed 12 years after the date of the passing of the decree, even though that list happened to be filed when an execution application filed within time was pending. AIR 1957 Trav-Co 109 (115): ILR (1956) Trav-Co 1244 (FB) * AIR 1957 Trav-Co 200 (201) (SB).

(18) An amendment should not be allowed if it has the effect of substantially altering the character of the execution proceedings. Madh BLJ 1954 HCR 1097 (1098) * AIR 1957 Trav-Co 109 (115): ILR (1956) Trav-Co 1244 (FB) * AIR 1957 Trav-Co 194 (197): ILR (1955) Trav-Co 520 (DB) * AIR 1951 Mad 417 (418) (DB) * AIR 1942 All 442 (443).

(19) Amendment sought to be made after twelve years from the date of the decree and introducing reliefs different and distinct from those contained in the last application filed within time, should be treated as fresh application. AIR 1957 Trav-Co 200 (201) (SB).

(20) A decree-holder who is not diligent should not, in the absence of special and sufficient grounds, be allowed to circumvent the provisions of this section by way of amendment. Where the decree-holder applied on the last day of limitation for arrest and attachment of moveable property and thereafter sought to amend it by adding a prayer for the attachment of immovable property, it was held that the result of allowing the amendment would be to circumvent the provisions of this section and that it should not therefore be allowed. AIR 1936 Mad 623 (624) * AIR 1959 Pat 199 (199, 200): 1958 BLJR 706 (DB).

[See also AIR 1943 Pat 127 (130): 21 Pat 838 (DB) * AIR 1941 Pat 635 (635, 636) (DB).]

(21) The amendment of an execution petition on the eve of twelve years by the inclusion of a prayer for the arrest of the legal representative judgment-debtor for the realisation of the sum of money indicated in the order of the executing Court cannot be said to be barred by Section 48 when the true position is that the order of the Court fixing the personal liability of the legal representative judgment-debtor is the order which gives the right to demand payment to the money personally against him. The amendment cannot be said to introduce a new fund from which the decree-holder expects to realise his money. Further, where the relief of the realisation of the decree amount from out of the debts due to the deceased debtor in the hands of the garnishees involves a personal decree against the judgment-debtor in case the decree-holder is able to satisfy the Court that those assets have been already realised by the judgment-debtor and have not been properly accounted for, the relief of arrest of the judgment-debtor really flows out of the relief prayed for in the execution petition and the amendment cannot, therefore, be said to introduce a new form of relief, namely, arrest which was not contemplated at the

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time when the execution petition was put into Court. AIR 1958 Mad 395 (396).

(22) Where an amendment is sought the question whether it ought to be allowed so as to make it operative from the date of the original application depends upon the circustances of each case. AIR 1928 Mad 1154 (1155, 1156) (DB).

(23) If the defect is not a fundamental one, the amendment may be allowed. AIR 1950 Mys 64 (69): ILR (1951) Mys 30 (FB) * AIR 1951 Mad 417 (419) (DB) * AIR 1949 Mad 348 (349) (DB) * AIR 1962 Andh Pra 423 (425): ILR (1963) Andh Pra 383 (DB).

(24) If the defect is a fundamental one the amendment ought not to be allowed. In such a case the so-called amendment is really a fresh application. AIR 1948 Nag 189 (192): ILR (1947) Nag 497 * AIR 1915 Mad 1042 (1043) (DB) * (1890) 17 Cal 631 (636, 637, 638, 641) (FB) * AIR 1955 Punj 247 (249): ILR (1955) Punj 1317 (DB) * AIR 1964 Orissa 182 (183, 184): ILR (1963) Cut 927 (DB).

(25) A mortgage decree did not award subsequent interest by inadvertence. An application for its execution including subsequent interest was filed within twelve years from the decree but was returned for representation after amendment of the decree. The decree-holder applied for amendment within time but the actual amendment of decree was made after expiry of twelve years. It was held that the decree-holder's application to continue the execution after the amendment was not barred by this section. AIR 1953 Mad 205 (205).

**7. Successive applications** — See Note 1.

**8. "Date of the decree".** — (1) In the absence of the circumstances specified in sub-section (1) (b) and in the absence of anything postponing the period of execution, the period of twelve years is to be computed from the date of the decree. (1900) 2 Bom LR 199 (200) (DB) * (1908) 11 Oudh Cas 57 (58, 59) (DB).

(2) The date of the decree is the date which it ought to bear under Order 20, Rule 7 and not the date when it is actually prepared and signed by the Judge. AIR 1946 Mad 348 (349) (DB) * (1897) 1 Cal WN 93 (94) (DB) * AIR 1918 Bom 217 (218): 42 Bom 309 (DB) * ILR (1967) 2 Punj 408 (DB). (A decree is revived if there is a determination by a Court that the decree is still enforceable — Neither Article 182 of Limitation Act (1908) nor Section 48, C. P. Code applies to a case governed by Article 183.) * (1967) 1 Mys LJ 366: 9 Law Rep 821.

(3) Where there is a preliminary and a final decree the date from which the time is computed is the date of the final decree. AIR 1916 Cal 482 (483) (DB) * AIR 1924 Cal 131 (132): 50 Cal 743 (DB) * (1907) 6 Cal L Jour 462 (465) (DB) * AIR 1918 All 254 (255): 40 All 211 (DB).

[See however AIR 1949 Mad 251 (252).]

[But see AIR 1922 Bom 95 (95): 46 Bom 761 (DB).]

(4) Where a decree is amended, the date of the amendment will not give a fresh starting point of limitation under this section. AIR 1950 Mad 504 (504): ILR (1951) Mad 1 (FB) * AIR 1957 Trav-Co 293 (294): ILR (1956) Trav-Co 980 * AIR 1954 Bom 104 (106): ILR (1954) Bom 92 (DB) * AIR 1951 Mad 844 (847) (DB) * AIR 1946 Pat 392 (395): 25 Pat 397 (DB) * AIR 1940 Mad 127 (128, 129): ILR (1940) Mad 349 (FB) * AIR 1939 Pat 607 (609, 610): 18 Pat 395 (DB). (60 Ind Cas 318 (Pat), Dissented from.) * AIR 1932 All 351 (352): 54 All 622 (DB). (60 Ind Cas 318 (Pat), Dissented from.)

[But see AIR 1956 Trav-Co 209 (209, 210): ILR (1956) Trav-Co 287 (DB) * AIR 1952 Sau 28 (30) * AIR 1943 Oudh 412 (413): 19 Luck 291 * 99 Ind Cas 204 (205) (Oudh) * AIR 1960 All 596 (599): 1960 All WR (HC) 284. (Amendment of decree under Section 8, U. P. Debt Redemption Act amounts to fresh adjudication — Limitation runs from date of amendment and not original decree. AIR 1946 All 89, Rel. on.)]

(5) In the case of a combined mortgage-decree which provides that if the net proceeds of the sale are not sufficient to satisfy the mortgagee's claim the balance be realised from the person and other properties of the mortgagor, the period will run from the date of the decree in respect of both remedies. AIR 1952 Nag 322 (323) * AIR 1917 PC 85 (85). (Affirming AIR 1915 Cal 8.) * AIR 1926 Mad 954 (955): 50 Mad 5 (DB).

[See also AIR 1926 Mad 20 (28): 48 Mad 846.]

(6) If, after the sale of the mortgaged properties a personal decree for the balance is passed under Order 34, Rule 6 time will run in respect of the personal decree from the date thereof. AIR 1955 Andh 251 (254): ILR (1955) Andhra 435 (DB) * AIR 1950 Pat 491 (493) (DB) * AIR 1926 Mad 954 (955): 50 Mad 5 (DB).

(7) Where there has been an appeal from the original decree, the period under the section is to be computed from the date of the appellate decree. ILR (1955) Mad 498 (502) (DB) * AIR 1952 Trav-Co 269 (273) * AIR 1951 Mad 844 (847) (DB) * AIR 1946 Mad 231 (232): ILR (1946) Mad 817 (DB). (AIR 1945 Mad 485, Affirmed; AIR 1941 Mad 477, Dissented from.) * (1966) 2 Mad LJ 575: (1966) 79 Mad LW 273 * AIR 1962 Mad 391 (393, 394): 74 Mad LW 752 (DB).

(8) In case of appeal, the period is to be computed from the date of the appellate decree even though the appeal was only from a portion of the original decree and even if the original decree is confirmed in appeal or the appeal is dismissed as not

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pressed. (1903) 26 Mad 91 (93, 95, 96) (FB) * AIR 1954 Mad 170 (171, 172) (DB) * (1877) 1 All 508 (509) (DB) * (1881) 6 Cal 194 (196) (DB) * (1882) 4 All 274 (276) (DB) * (1898) 22 Bom 500 (505, 508) (DB) * (1898) 25 Cal 594 (601, 602) (FB) * (1899) 23 Mad 60 (67, 69) (DB) * (1905) 27 All 501 (504, 505, 508, 509) (FB) * AIR 1948 Mad 485 (487). (Decree confirmed in appeal.) * (1894) 18 Bom 203 (205) (DB). (Do.) * (1910) 32 All 136 (137, 138) (DB). (Do.) * (1909) 31 All 379 (381) (DB). (Do.) * AIR 1938 Pat 401 (402) (DB). (Appeal dismissed as not pressed.) * (1908) 30 All 385 (386, 387) (DB). (Do.) * 1966 All LJ 544 (DB).

[See however (1878) 2 Cal L Rep 471 (473) (DB). (Time runs against non-appealing defendant from original decree, where appeal by some does not imperil whole decree.)]

(9) Even where the final decree is passed during the pendency of appeal from the preliminary decree, the period under this section would run from the date of the decree dismissing the appeal against the preliminary decree and not from the date of the final decree. AIR 1956 Nag 200 (202) (DB). (AIR 1939 Bom 454 and AIR 1948 Bom 337, Dissented from.)

(10) In order to count 12 years under this section from a date later than that of the first Court's decision it must be shown that a decree has been passed by the appellate or superior Court in supersession of the first Court's decree. The same principle applies to cases of appeals to the Privy Council. AIR 1943 Pat 371 (373) * (1880) 2 All 763 (764, 765) (DB) * (1881) 7 Cal 620 (622, 627) (DB).

(11) An application for leave to appeal to the Privy Council cannot be treated on the same footing as an appeal to the Privy Council so as to give a fresh starting point of limitation under this section from the date of order on such application. ILR (1955) Mad 498 (502, 503, 504) (DB).

(12) In the case of a revision twelve years have to be counted from the date of the decree of the revisional Court. AIR 1943 Pat 371 (373). (AIR 1941 Mad 477, Dissented from.) * AIR 1956 Madh B 34 (35). (Even if the lower Court's decision is confirmed on revision it gives a fresh start of limitation.)

[But see AIR 1941 Mad 477 (478) (DB). (AIR 1940 Mad 127: ILR (1940) Mad 349 (FB), Rel. on. Note.— For criticism of this view, see AIR 1946 Mad 231: ILR (1946) Mad 817 (DB), Overruled on another point in AIR 1950 Mad 504: ILR (1951) Mad 1 (FB).)]

(13) Where an appeal is preferred where no appeal lies or where an appeal is withdrawn or is dismissed for default, or is rejected for insufficiency of stamp, time will run only from the original decree. AIR 1926 All 440 (442, 443): 48 All 377 * (1908) 1908 Pun Re No. 54, p. 266. (Appeal withdrawn.) * AIR 1943 Pat 371 (373). (Appeal dismissed for default.) * AIR 1918 Oudh 446 (449). (Do.) * (1884) 6 All 438 (439) (DB). (Rejection for insufficient stamp.) * AIR 1963 All 398 (402, 403, 404): 1963 All LJ 116.

[But see AIR 1921 All 134 (134): 43 All 405 (DB).]

(14) Where a decree is passed severally against two or more defendants and one of the defendants appeals, the period of twelve years as against the other defendants runs from the date of the original decree. AIR 1926 Cal 664 (664) (DB) * (1891) 13 All 1 (15, 16) (FB) * AIR 1923 Bom 400 (400).

[Note:— This view requires reconsideration in the light of the P. C. decision in AIR 1932 PC 165 (167): 60 Cal 1: 59 Ind App 283.]

[See however AIR 1952 Trav-Co 269 (273) (DB). (AIR 1932 PC 165, Rel. on.) * AIR 1961 Andh Pra 326 (327): ILR (1961) 2 Andh Pra 300 (DB). (AIR 1923 Bom 400, Diss. from.)]

(15) Peremptory order by the appellate Court, on 22-9-1954 directing payment of deficient court-fee on memo of appeal by 22-10-1954 failing which appeal to stand rejected without further reference to Bench — Default in payment — Appeal standing rejected — Date of decree within meaning of Section 2 (2) read with Order 7, Rule 11, is 22-9-1954 and not 22-10-1954. AIR 1957 Pat 430 (431): 36 Pat 951 (FB).

(16) Whether a suit is dismissed under Order 1, R. 10 against one of the defendants and subsequently a consent decree is passed against the other defendants, the period of twelve years under this section would start against the latter defendants from the date of the consent decree and not from the date on which the plaintiff's appeal against the order dismissing the suit as against the former defendant was rejected. AIR 1955 Him Pra 35 (36).

(17) Where an application to set aside an ex parte decree has been rejected the period for the execution of the ex parte decree runs from the date of the decree notwithstanding the pendency of the application. (1892) 16 Bom 123 (125) (DB).

(18) Where the decree is in part executable immediately and in part not, limitation against both the parts would run from the date of the decree. AIR 1954 Bom 104 (107): ILR (1954) Bom 92 (DB) * ILR (1955) Mad 498 (506) (DB).

(19) Section refers to a decree which is capable of execution and in the case of a decree which is not capable of execution except on the happening of a particular contingency, time will not begin to run until that contingency occurs. ILR (1955) Mad 498 (506) (DB) * AIR 1939 Bom 75 (78): ILR (1939) Bom 87 (DB).

(20) A provision in a decree directing the plaintiff to pay the deficit court-fee

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before execution does not make it conditional. It is capable of execution from the moment it is passed provided the plaintiff pays the deficit court-fee. AIR 1951 SC 16 (18): 1950 SCR 852. (AIR 1949 Bom 379: ILR (1949) Bom 634, Affrmed.) * (1966) 68 Pun LR 20 (Delhi).

(21) A decree for payment of costs to be taxed is not a contingent decree and, the limitation for execution runs from the date of the decree and not from the date when the costs are ascertained. ILR (1955) Mad 498 (508, 507) (DB).

(22) Limitation for enforcement of a surety's liability under Section 145 runs from the time when the liability accrues. AIR 1949 Mad 285 (288): ILR (1948) Mad 504 (DB).

[See also AIR 1954 Mad 237 (238) (DB).]

(23) An award under the Mysore Co-operative Societies Act (7 of 1913) does not become a decree unless and until a certificate is granted by the Registrar under Section 43-C of that Act. The twelve years' period under this section will only commence from the grant of such certificate. AIR 1954 Mys 54 (56): ILR (1954) Mys 288 (DB).

**9. Subsequent order.** — (1) Where a subsequent order directs payment of money or delivery of property at a future date, the period of twelve years will run from such date. AIR 1955 Hyd 111 (112): ILR (1955) Hyd 265 (DB) * AIR 1953 Trav-Co 394 (397).

(2) An order under Order 20, Rule 11 (2) will be a subsequent order within the meaning of this section. AIR 1921 Pat 340 (340) (DB) * AIR 1917 Mad 188 (188) (DB) * AIR 1964 Punj 207 (208): 66 Pun LR 106 (DB) * AIR 1963 Punj 363 (365): 65 Punj LR 362 (DB).

[See AIR 1924 Lah 342 (344).]

[See also AIR 1956 Pat 209 (211): 35 Pat 254 (FB) * (1925) 21 Mad LW (Jour) (SRC) 29 (29).]

[But see (1908) 18 Mad L Jour 548 (549) (DB).]

(3) An order under Section 14, Hyderabad Regulation of 1342-F, directing payment of the decretal amount by instalments amounts to a subsequent order. AIR 1955 Hyd 111 (112): ILR (1955) Hyd 265 (DB) * 1968-2 Andh WR 292.

[See also AIR 1963 Mad 397 (398, 399): (1963) 2 Mad LJ 172. (Madras Indebted Agriculturists (Repayment of Debts) Act (1 of 1955), Sections 2 (b), 4 (7) — Effect — 12 years period commences from date of default in instalment. (1960) 2 MLJ 67, Rel. on.)]

(4) "Any subsequent order" in this section means an order in the suit in which the decree is made and an order which directs payment by the debtor or surety of money in respect of the judgment debt. AIR 1933 PC 52 (54): 12 Pat 195: 60 Ind App 43.

(5) Decree — Subsequent compromise for payment of decree amount in instalments — Compromise recorded below decree — Did not amount to subsequent direction by Court for payment in instalments — Section 48 (1) (b) inapplicable. AIR 1964 Guj 100 (101). (AIR 1925 Bom 503, Disting.)

(6) Where another suit is brought by a third party against the judgment-debtors in respect of certain of their properties and a receiver is appointed, an order made in that suit on the receiver for payment of money to the decree-holder on an application by the latter in the absence of the judgment debtor and the surety, is not a "subsequent order" and cannot be relied on as giving a fresh start to limitation. AIR 1933 PC 52 (54): 12 Pat 195: 60 Ind App 43.

(7) A subsequent order may be one passed by any competent Court including an executing Court. AIR 1925 Bom 503 (504): 49 Bom 695 (DB) * AIR 1958 All 387 (390) * AIR 1957 Ker 108 (109) * AIR 1945 Cal 154 (155): ILR (1945) 2 Cal 65 (DB) * AIR 1938 Cal 25 (30): ILR (1937) 2 Cal 373 (DB) * AIR 1929 Cal 687 (689): 57 Cal 789 (DB) * (1885) 11 Cal 143 (145) * AIR 1953 Madh B 63 (64): ILR (1953) Madh B 295 * ILR (1954) Madh B 42 (51) * AIR 1948 Nag 272 (274): ILR (1948) Nag 230 * AIR 1947 Nag 101 (106): ILR (1947) Nag 25 (DB) * AIR 1931 Nag 50 (51): 27 Nag LR 150 (DB) * AIR 1955 Raj 33 (35): ILR (1954) 4 Raj 994 (DB) * AIR 1954 Raj 222 (224): ILR (1954) 4 Raj 836 (DB). (AIR 1935 Pat 380: 14 Pat 816; AIR 1936 Oudh 266: 12 Luck 244 and AIR 1932 All 273: 54 All 573 (FB), Dissented from.) * AIR 1939 Sind 93 (96): ILR (1939) Kar 502 (DB) * AIR 1926 Lah 465 (466) * AIR 1939 PC 80 (85, 86): ILR (1939) Kar PC 136: 66 Ind App 84: 14 Luck 192 * ('40) AIR 1940 All 107 (108). (AIR 1932 All 273: 54 All 573 (FB), Held, overruled by AIR 1939 PC 80.) * AIR 1940 All 423 (424): ILR (1940) All 533 (DB) * AIR 1940 All 270 (272): ILR (1940) All 377 (FB) * (1968) 2 Andh WR 292 * AIR 1959 Ker 384 (385): 1958 Ker LT 1 * AIR 1959 Ker 83 (86): 1958 Ker LT 1036 (DB). (1953 Ker LT 20, Overruled.) * AIR 1959 Madh Pra 269 (271): 1959 MPLJ 505 * AIR 1959 Pat 158 (163): 1959 BLJR 84 (DB). (AIR 1939 PC 80, Foll; AIR 1918 Pat 216 and AIR 1921 Pat 340 and AIR 1935 Pat 380 and AIR 1932 All 273 (FB), Held, must be deemed to have been overruled in AIR 1939 PC 80 and AIR 1933 PC 52, Distinguished.) * AIR 1959 Punj 193 (195, 196). (AIR 1923 Lah 381 and AIR 1925 Bom 503, Foll. AIR 1944 Lah 106, Not foll.) * ILR (1957) Punj 98.

(7-a) The subsequent order must be one passed by Court which passed a decree as such Court and not an order of an executing Court: AIR 1935 Pat 380 (381): 14 Pat 816 (DB) * AIR 1921 Pat 340 (340) (DB) * AIR 1953 Trav-Co 394 (397) * AIR 1936 Oudh 266 (266): 12 Luck 244 * AIR

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1944 Lah 106 (109): ILR (1944) Lah 592 * AIR 1918 All 216 (218): 40 All 198 (DB).

(8) An entry in the suit register that the parties certify that an adjustment of the decree has been made by a compromise in a subsequent suit, providing for payment of the decretal amount in instalments and for execution in default has been held to be evidence of a "subsequent order directing payment" within the meaning of this section. (1948) 52 Cal WN 587 (590) (DB) (Dacca).

(9) Section does not require that the 'subsequent order' extending time must be one carried out by the judgment-debtor. Where the subsequent order only stated that the judgment-debtor would lose the benefit of being allowed to pay by instalments if he did not furnish security within the specified time, but did not say that on the failure to furnish security the order would stand abrogated, the judgment-debtor cannot be heard to say that as he did not furnish the security within the time the order itself should be deemed to have been not passed at all so as to deprive the decree-holder of the extended period of limitation. ILR (1954) Madh B 49 (52).

(10) An order amending the decree under Section 24 of the Cochin Agriculturists' Relief Act (18 of 1114) amounts to a 'subsequent order' within the meaning of this section. AIR 1956 Trav-Co 209 (209): ILR (1959) Trav-Co 287 (DB).

(11) Where a decree is scaled down under Section 11 of the Saurashtra Agriculturists' Relief Act, 1934, the amended decree amounts to a subsequent order. AIR 1952 Sau 28 (30).

**10. "At a certain date or at recurring periods."**— (1) Where a decree does not fix a definite date the question whether a sum is payble by a certain date should be ascertained on construction of the decree and if so ascertainable time runs from that date. (1891) 14 Mad 396 (398) (DB) * ('89) 1889 Pun Re No. 159, p. 559 (561).

(2) An order merely directing a compromise petition for payment by instalments to be filed, is not an order directing payments to be made at a particular date. AIR 1944 Lah 106 (109): ILR (1944) Lah 592 (DB) * AIR 1932 All 273 (282): 54 All 573 (FB).

[See however AIR 1959 Ker 384 (385): 1958 Ker LT 1. (An order recording a compromise between parties in execution falls under sub-section (1) (b) of Section 48.) * AIR 1959 Ker 83 (86): (1958) Ker LT 1036. (AIR 1953 Trav-Co 394, Overruled.)]

(3) Decrees for payment, in instalments, annual or monthly, and decrees for future maintenance are decrees for payment "at recurring periods". 1892 Pun Re No. 13, p. 64 (69) (FB). (Instalment decree.) * (1885) 9 Bom 328 (332) (DB). (Do.) * (1887) 9 All 33 (34) (DB). (Future maintenance.) * AIR 1931 Bom 492 (494) (DB). (Do.) * (1892) 19 Cal 139 (144, 145, 146) (FB). (Do.)

(4) Where a decree directed mesne profits to be ascertained in execution, the order for mesne profits is not an order for the payment of money at a certain date under this section. Time in the case of such decrees and of decrees for the payment of money at a particular date, runs from the date of default or the expiry of the period, as the case may be. AIR 1927 Mad 842 (843) (DB) * AIR 1943 Pat 33 (34) (DB) * AIR 1940 All 423 (424): ILR (1940) All 536 (DB) * (1888) 12 Bom 65 (67) (DB).

(5) Where an instalment decree provides for the payment of the whole sum in default of any one instalment and either no option is given to the decree-holder or an option is given and exercised by him, time for the execution of the whole decree runs from the date of the first default. AIR 1953 Madh Bha 63 (64): ILR (1953) Madh B 295 * AIR 1957 Kerala 108 (109) * AIR 1945 Cal 154 (155): ILR (1945) 2 Cal 65 (DB) * AIR 1931 Bom 263 (264) * (1962) 1 Mad LJ 10 (12): 74 Mad LW 654. (Effect of Section 4 (7) of Madras Act (1 of 1955) — Decree deemed to be instalment decree — Limitation extended to 12 years from date of default in paying particular instalment.)

(6) Where the decree-holder has exercised his option to enforce the default clause in an instalment decree by applying for execution to recover the entire decretal amount, he is not debarred from having the benefit of executing his decree as an instalment decree unless there is prejudice to the judgment-debtor. AIR 1953 All 283 (286): ILR (1951) 2 All 148 (DB) * AIR 1961 All 107 (108, 109): ILR (1960) 2 All 908 (DB) * AIR 1960 Madh Pra 70: 1959 MPLJ 1146. (AIR 1953 All 283 and AIR 1943 Nag 170, Rel. on; AIR 1931 Bom 263, Dissent. from.)

(7) Where an instalment decree provided that in default of payment of any instalment, the decree-holder was entitled to realise the whole amount of the decree at once, it was held that such a decree could not be considered to be a decree payable "at a certain date" within the meaning of this section, and that therefore, after twelve years from the date of the default, only that instalment will be barred in respect of which the default was made. AIR 1936 Lah 159 (160) (DB) * (1968) 2 Andh WR 292.

(8) Where a decree is for delivery of possession of immovable property contingent on the non-payment of annuity, the decree-holder is not bound to execute for possession on the occurrence of the first default but might execute it on the occurring of any subsequent default. (1894) 16 All 237 (238, 239) (DB).

(9) Where a decree directs that money be recoverable from a party only on failure

**Section 48 — Note 10 (contd.)**
to recover the same from another, the period of twelve years runs from the date of decree and not from the time of the failure of the other to make the payment. AIR 1926 Mad 20 (23): 46 Mad 846 (DB).

(10) Where the decree directs that the plaintiff is entitled to receive every year from the defendant half the share of the Iskel of Patwari Giri, an execution application for recovery of arrears for three years prior to the date of application would be within time under Article 163, Cl. (6), Hyderabad Limitation Act, even if the application is filed more than 12 years from the date of the decree. AIR 1950 Hyd 48 (49, 50): ILR (1951) Hyd 100 (DB).

**11. Deduction of time.** — (1) Where the period of twelve years expires on a day when the Court is closed, the application can be presented on the next re-opening day. AIR 1955 Cal 269 (272) (DB) * AIR 1949 Mad 275 (276).

(2) In cases of intervening insolvency of the judgment-debtor the period during which the adjudication lasts will be excluded in computing the period of twelve years. AIR 1954 Trav-Co 1 (4): ILR (1953) Trav-Co 858 (FB) * AIR 1939 Mad 270 (272): ILR (1939) Mad 611 (DB) * AIR 1921 Cal 456 (457) (DB).

[See however (1950) 55 Mys HCR 152 (155) (DB). (Creditor not proving debt under decree in insolvency proceedings — Admission of decree debt in debtor's application for adjudication would not save limitation.)]

(3) The pendency of an appeal by the judgment-debtor is not a ground of suspension of the period prescribed by this section in the absence of fraud or force. AIR 1917 Cal 460 (461) (DB).

(4) The pendency of a claim petition under Order 21, Rule 58 operates as a stay of execution and therefore, the period taken by such proceedings can be excluded in computing the period prescribed under this section. AIR 1955 Mad 67 (67) (DB).

[See also 1961 MPC 858 (860). (The same principle governs the duration of the suit under Order 21, Rule 63. AIR 1952 Mad 186 (FB); AIR 1955 Mad 67; AIR 1934 Pat 532; AIR 1939 All 403 (FB); AIR 1944 Nag 155; AIR 1948 Nag 272; AIR 1951 SC 16, Foll.)]

(5) In computing the period of limitation for an execution application under Section 48, the periods limited by special enactments have to be excluded. 1967 Ker LT 319: 1967 Ker LJ 629 * 1968 Ker LT 580: 1968 Ker LR 284 * ILR (1966) 2 Ker 508: 1966 Ker LT 1031 * (1962) 40 Mys LJ 847. (Joint decree against A and B — Execution pending against both — Application by A alone under Section 26, Mysore Debt Conciliation Act (6 of 1937) — Effect — Execution proceedings suspended against B also — Entire period during which execution proceeding was suspended, liable to be excluded in computing limitation under Section 48. 222 IC 138, Disting.) * (1961) 1 Mad LJ 30: 70 Mad LW 475 *AIR 1961 Mys 259 (261): 38 Mys LJ 928 * (1960) Ker LJ 1435 * 1957 All LJ 487 (489): 1957 All WR (HC) 460.

[See however AIR 1959 Madh Pra 396 (397): 1959 Jab LJ 653 * AIR 1959 Punj 613 (614): 60 Pun LR 172. (Where, however, the special statute does not deprive the decree-holder from proceeding against the other properties of judgment-debtor, such period cannot be excluded.)]

**12. Fraud or force.** — (1) In order to get the benefit of sub-section (2) (a) it must be proved that there was fraud or force on the part of the judgment-debtor, and the decree-holder was thereby prevented from executing the decree. (1910) 8 Ind Cas 805 (805) (DB) (Mad) * AIR 1935 Mad 8 (11): 58 Mad 311 (DB) * AIR 1935 Pat 380 (382): 14 Pat 816 (DB) * AIR 1929 Pat 597 (599) (DB) * (1912) 13 Ind Cas 88 (89) (Cal) * AIR 1919 Mad 197 (198) (DB).

[See also AIR 1932 All 273 (277, 284): 54 All 573 (FB).]

(2) The fraud, however, need not be such as to have continued to prevent execution up to the expiry of the twelve years. (1911) 14 Oudh Cas 238 (242, 243) * AIR 1919 Mad 197 (198) (DB).

(3) The Court has no discretion to refuse execution when fraud or force on the part of the judgment-debtor preventing execution is established within twelve years of the application. (1911) 35 Mad 670 (672, 673) (DB).

[But see (1906) 11 Cal WN 440 (441) (DB) * (1911) 14 Oudh Cas 238 (241, 242).]

(4) Where the alleged misrepresentation by the judgment-debtor came long after twelve years from the date fixed in the decree for payment, the case does not fall under Clause (a) of sub-section (2). AIR 1957 Trav-Co 109 (116): ILR (1956) Trav-Co 1244 (FB).

(5) The term "fraud" in the section should be interpreted in a very liberal sense. AIR 1949 Bom 379 (381): ILR (1949) Bom 634 (DB) * ILR (1957) Madh Pra 3 (5) * AIR 1948 Nag 272 (274): ILR (1948) Nag 230 * AIR 1946 Mad 172 (173) * AIR 1931 All 31 (33) (DB).

(6) Any improper means resorted to by the judgment-debtor to prevent execution of the decree would amount to fraud. AIR 1949 Bom 379 (382): ILR (1949) Bom 634 (DB) * ILR (1957) Madh Pra 3 (5) * AIR 1936 Lah 843 (845) * AIR 1961 Raj 271 (272): 1962 Raj LW 170.

(7) The term 'fraud' includes not merely deceit but also circumvention. AIR 1936 Lah 843 (845) * AIR 1927 All 668 (669) * AIR 1961 Raj 271 (272): 1962 Raj LW 170. (AIR 1936 Lah 843 and AIR 1949 Bom 379, Foll.)

**Section 48 — Note 12 (contd.)**

(8) Fraudulent motive or design is not capable of direct proof; it can only be inferred. Each circumstance by itself may not mean much, but taking all of them together, they may reveal a fraudulent or dishonest plan. AIR 1951 SC 16 (19): 1950 SCR 852.

(9) Mere objections by the judgment-debtor cannot be taken advantage of as "fraud" within the meaning of this section. AIR 1955 Trav-Co 208 (208) (DB) * ILR (1955) Patiala 176 (181, 182) * AIR 1947 Mad 216 (218): ILR (1947) Mad 525 (DB) * AIR 1935 Pat 380 (382): 14 Pat 816 (DB) * AIR 1959 Ker 81 (83): 1958 Ker LT 657 (FB). (A plea of discharge by the judgment-debtor which is later found to be false, will not amount to preventing the execution of a decree by fraud or force. AIR 1931 All 134 and AIR 1935 Pat 380 and AIR 1936 Lah 843 and 30 Trav LJ 445 and AIR 1947 Mad 216 and AIR 1948 Nag 189 and AIR 1955 Trav-Co 208, Rel. on; AIR 1950 Trav-Co 80, Overruled.) * AIR 1959 Madh Pra 269 (270): 1959 MPLJ 505.

(10) Resistance of execution on legal grounds available to the judgment-debtor even if ultimately found to be untenable cannot amount to preventing execution by fraud. ILR (1955) Patiala 176 (181, 182). (AIR 1922 All 145: 44 All 319 (DB), Not foll.)

(11) Objection raised to the jurisdiction of the Court was held not to amount to fraud. ILR (1955) Patiala 176 (185).

(12) Judicial constraint imposed by the passing of the stay order under the provisions of the Madras Agriculturists' Relief Act is not to be covered by the words "fraud or force" in this section. AIR 1945 Mad 70 (72).

(13) Raising a plea based on a false statement would be fraudulent. AIR 1936 Lah 843 (845).

(14) Frequent, futile and false objections raised by the judgment-debtor accompanied by his keeping out of the way when warrants of arrest are issued, may be taken to amount to fraud. (1912) 13 Ind Cas 929 (929) (All) * (1883) 6 Mad 365 (367) (DB).

(15) In the following instances the conduct of the judgment-debtor has been held to amount to fraud within the meaning of the section.—

(a) Where he raised frivolous objections in order to delay execution of the decree against him. AIR 1952 Mys 67 (68): ILR (1952) Mys 167 (DB) * ILR (1957) Madh Pra 3 (5) * AIR 1950 Trav-Co 80 (80) (DB) * AIR 1934 Pat 532 (533) (DB) * AIR 1922 All 145 (146): 44 All 319 (DB).

[But see (1912) 13 Ind Cas 88 (89) (DB) (Cal).]

(b) Where he wilfully evaded the arrest warrant, or escaped from lawful custody after his arrest in execution of decree. AIR 1924 Mad 836 (837) (DB) * (1912) 13 Ind Cas 929 (929) (DB) (All) * 1950 Ker L Tim 684 (688) (DB). (Escape from lawful custody.) * AIR 1967 Ker 87 (88): 1966 Ker LT 685.

[See also 1956 MBLJ 102: Madh BLR 1955 Civ 687. (Shifting of judgment-debtor from Gwalior State to Indore State is not 'fraud' within meaning of Section 48 (2) (a).]

(c) Where knowing that a warrant of attachment was issued against his moveable property, he locked up his house and so prevented the moveable property therein being attached. (1885) 9 Bom 318 (319) * (1899) 22 Mad 320 (323) (DB).

[See however AIR 1917 Oudh 159 (160).]

(d) Where he or his heirs made fictitious and fraudulent alienation of property which was subsequently set aside in a regular suit. AIR 1940 Lah 178 (179) * (1882) 4 Mad 292 (294) (DB).

(e) Where he kept out of British India so that the decree-holder was not in a position to take out execution against his person. AIR 1925 Nag 82 (90): 22 Nag LR 67.

(f) Where a judgment-debtor actively suppresses the fact of his owning a certain big property, as part of his fraudulent scheme to prevent the judgment-creditor from realizing the fruits of his decree. AIR 1951 SC 16 (19): 1950 SCR 852 * AIR 1952 Mys 67 (68): ILR (1952) Mys 167 (DB).

(16) Where the Court merely refused to permit execution against properties of the judgment-debtor in the hands of a receiver but the decree-holder did not proceed against the person and other properties of the judgment-debtor or of the surety within the twelve years, it was held that Section 48 (2) was of no help to the decree-holder. AIR 1929 Pat 597 (599) (DB).

(17) Fraud or force of one judgment-debtor will not extend the time against a co-judgment-debtor who did not resort to it. AIR 1916 Mad 1 (2): 38 Mad 419 (DB) * AIR 1931 Mad 381 (383) (DB) * AIR 1930 Sind 218 (219) (DB).

(18) A plea of fraud under Section 48 (2) may be allowed to be taken even at a late stage if the circumstances justify such a course. AIR 1948 Nag 272 (274): ILR (1948) Nag 230 * AIR 1946 Mad 172 (173).

(19) A decree-holder who claims the benefit of this sub-section should be vigilant in the matter of execution. AIR 1955 Trav-Co 208 (208) (DB).

(20) Under sub-section (2) fraud must have prevented the judgment-creditor from

## TRANSFEREES AND LEGAL REPRESENTATIVES

**49. Transferee.**—Every transferee of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder.

[1882, 1877, S. 233. See O. 21, R. 16.]

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**Section 48 — Note 12 (contd.)**

applying for execution. Under Section 18 of the Limitation Act, the fraud must have kept the judgment-creditor from knowing that he had a right to apply for execution. For the purpose of Articles 181 and 182 of the Limitation Act, it is Section 18 of the Limitation Act that will apply. Fraud that is sufficient for the purpose of Section 48, Civil Procedure Code, will not necessarily be sufficient. AIR 1951 SC 16 (21, 22, 23): 1950 SCR 852.

**13. Plea under Section.**— (1) Where notice of petition for attachment in execution is duly served on the judgment-debtor who allows orders to be passed ex parte, he cannot ask for a review of the order, nor can he in appeal raise the plea that the execution application is barred by expiry of twelve years under the section. AIR 1956 Hyd 7 (10): ILR (1955) Hyd 797 (FB) * AIR 1929 Mad 826 (826, 827).

[See also AIR 1945 Cal 387 (393): ILR (1946) 1 Cal 45.]

[But see AIR 1938 All 89 (90) (DB).]

(2) Where executing Court decides wrongly that the execution of a decree is not barred, it is merely an erroneous decision and not an illegal exercise of jurisdiction. So long as the order is not set aside in appeal or revision, it cannot be attacked in any collateral proceeding. AIR 1934 Cal 282 (283): 61 Cal 234 (DB).

### SECTION 49 — SYNOPSIS

1. Scope and object.
2. Equity to set off cross-decree.
3. Transfer during pendency of suit by judgment-debtor.
4. Assignee's want of knowledge of equity.

**1. Scope and object.**— (1) Section 49, refers to a transferee of decree and does not cover a case of transferee of property. AIR 1943 Oudh 354 (358): 19 Luck 1 (FB).

(2) The equity, to which a transfer of a decree is subject, must be one available against the original decree-holder. AIR 1952 Punj 183 (184): ILR (1951) Punj 475 (DB) * AIR 1925 Pat 449 (450): 4 Pat 120 (DB) * AIR 1962 Raj 223 (223, 224): 1962 Raj LW 542 (DB). (Assignment of decree — Assignee holds decree subject to equities in existence on date of assignment.)

(3) A mere claim for restitution made by the judgment-debtor against the decree-holder is not an equity which can be availed of against an assignee from the decree-holder. AIR 1933 Cal 865 (868) (DB).

(4) The principle of this section applies to a case where a transferee of decree is permitted to continue the execution started by the transferor. AIR 1947 Nag 116 (121): ILR (1946) Nag 895.

(5) The transferee of the decree, permitted to continue the execution, cannot put forward contentions inconsistent with the prayers in execution of the original decree-holder. AIR 1952 Trav-Co 504 (506) (DB).

(6) It is the executing Court that should consider whether the assigned decree is subject to any equities. AIR 1937 Cal 570 (571) (DB) * AIR 1919 Mad 424 (426): 42 Mad 338 (SB).

**2. Equity to set off cross-decree.**— (1) A right to set off a cross-decree or cross-claim is an equity which can be enforced against the transferee of the decree. AIR 1945 Mad 381 (383): ILR (1946) Mad 30 * AIR 1937 All 351 (352): ILR (1937) All 553 (DB) * (1936) 163 Ind Cas 618 (619) (DB) (Cal) * (1868) 10 Suth WR 32 (33) (FB) * AIR 1924 Nag 46 (47): 19 Nag LR 164.

(2) The decree against which the set off is asked for must be before the Court for execution. (1887) 13 Ind App 106 (110): 14 Cal 18 (PC) * (1902) 24 All 481 (482).

**3. Transfer during pendency of suit by judgment-debtor.**— (1) Where the decree is assigned during the pendency of a suit by the judgment-debtor against the decree-holder and a decree is passed subsequently in the latter suit in favour of the judgment-debtor, the latter will be entitled to a set off in respect of such decree against the transferee of the decree in the prior suit. AIR 1938 Bom 253 (256): ILR (1938) Bom 263 (DB) * AIR 1937 Rang 316 (317) (DB).

(2) An application for stay of execution under Order 21, Rule 29 is maintainable even though the decree-holder has assigned his decree in favour of a stranger pending the suit by the judgment-debtor and the assignee is not on the party array. AIR 1959 Ker 402 (402): 1958 Ker LT 1012.

**4. Assignee's want of knowledge of equity.**— (1) It is not necessary that the assignee should have any notice of the equity. AIR 1945 Mad 381 (383): ILR (1946) Mad 30 (DB) * AIR 1938 Bom 253 (256): ILR (1938) Bom 263 (DB) * (1910) 7 Ind Cas 55 (60) (DB) (Cal) * AIR 1959 Ker 402 (402): 1958 Ker LT 1012.

(2) The case would be very much stronger against the assignee if he had notice of the equity. (1889) 16 Cal 619 (622) (DB).

**50. Legal representative.**—(1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

[1882, 1877, S. 234; 1859, S. 210. See Order 21, Rule 22.]

## SECTION 50 — SYNOPSIS

**1. Scope.**
**2. "Holder of the decree".**
**2-A. Extent of liability of legal representative** — See also Section 52.
**3. Legal representative bound by what the deceased judgment-debtor himself would have been bound by.**
**4. "Where a judgment-debtor dies".**
**5. "Before the decree has been fully satisfied".**
**6. Application to execute against the legal representative.**
**7. Execution against wrong legal representative or without the legal representative.**
**8. Decree-holder, if can proceed against property in the possession of third party.**
**9. Limitation for substitution of legal representative.**
**10. Successive deaths of judgment-debtor and legal representative.**
**11. Decree for injunction.**
**11-A. Decree for specific performance.**
**12. Orders executable as decrees.**
**13. Appeals.**

**1. Scope.** — (1) The section is wide enough to include the case where the judgment-debtor dies before decree, provided the decree is valid in spite of his death. AIR 1937 Pat 321 (322): 16 Pat 316 (DB).

(2) Section 53 extends the scope of Sections 50 and 52 to ancestral property in the hands of a descendant which is liable under the Hindu law for payment of debts of the ancestor. AIR 1948 PC 1 (3): ILR (1947) Nag 830: 74 Ind App 247.

(3) Where an assessee liable to pay tax under the Hyderabad Agricultural Income-tax Act (13 of 1950) dies while the recovery proceedings are pending but after receipt of demand notice, such proceedings cannot be continued against the legal representative unless a demand notice is served on him. The machinery provided by the Civil P. C. for execution of decree against legal representative cannot be imported by virtue of proviso to Section 34 (4) of the Act in such a case. AIR 1968 Mys 326 (328, 329): (1968) 1 Mys LJ 1 (FB).

**2. "Holder of the decree".** — (1) A person who appears upon the face of the decree as the person in whose favour the decree is passed is entitled to execute it, unless it is shown that some other person has taken his place. (1891) 18 Cal 639 (641) (DB).

(2) Where a decree is due to an estate of a deceased person, an application for execution by any person who, for the time being, is recognised as the proprietor of the estate is good. AIR 1918 Pat 216 (216, 217) (DB).

**2-A. Extent of liability of legal representative** — See also Section 52. — (1) Personal properties of legal representatives — Recovery from cannot be effected in absence of any direction in decree in this behalf. (1966) 1 Andh LT 92 (93) (DB).

(2) Universal donee is a 'legal representative' of the deceased testator — Decree against the donor prior to his death — Decree-holder can proceed against property in the hands of donee in execution of his decree. AIR 1964 Mad 78 (80): 76 Mad LW 692.

**3. Legal representative bound by what the deceased judgment-debtor himself would have been bound by.** — (1) The legal representative will be bound by the decree passed or the previous proceedings taken against the judgment-debtor himself. Madh BLJ 1954 HCR 1501 (1503) * AIR 1918 Pat 41 (46): 4 Pat LJ 213 (DB) * (1886) 10 Bom 74 (77) (DB) * (1889) 21 All 277 (279) (DB) * 1968-2 Mys LJ 124: 15 Law Rep 388. (Legatee under will made by surety.)

(2) Where the judgment-debtor was impleaded in the suit as a subsequent mortgagee but did not plead his rights of marshalling, it is not open to his legal representatives to raise the question again. AIR 1916 Oudh 288 (288, 289) (DB).

(3) A Hindu son or a descendant of a Hindu cannot question the validity of the decree against the ancestor except where the decree debt is of an illegal or immoral nature. (1893) 16 Mad 99 (103) (DB) * (1911) 9 Ind Cas 648 (649) (DB) (Mad) * AIR 1963 Madh Pra 49 (51). (Liability for torts — Does not amount to avyawaharik debt — On death of judgment-debtor after passing of decree in respect of wrong his son will be bound to pay if he received assets — Son's liability will be governed by Sections 50 and 53, Civil P. C.)

(4) A legal representative cannot be permitted to urge grounds to invalidate the

**Section 50 — Note 3 (contd.)**
decree which his predecessor-in-interest could not have urged. 1957 Ker LJ 640 (641) (DB).

**4. "Where a judgment-debtor dies".**— (1) The word "dies" is used in its natural meaning and does not include a civil death. AIR 1935 Cal 713 (714) * AIR 1931 All 306 (307): 53 All 529 (DB).

(2) Where in the course of execution proceedings against the property of the insolvent in the hands of the Official Assignee the insolvent dies and his legal representatives do not claim any interest in the property, the execution can be continued without joining them as parties. AIR 1944 Cal 432 (432) (DB).

**5. "Before the decree has been fully satisfied".**— (1) It is necessary to implead the legal representatives of a judgment-debtor who dies after attachment. AIR 1956 Trav-Co 147 (153): ILR (1955) Trav-Co 823 (FB) * AIR 1955 Cal 573 (575) (DB) * (1910) 5 Ind Cas 339 (340) (DB) (Mad).

(2) The failure to implead the legal representatives of a judgment-debtor dying after attachment renders the sale void. AIR 1936 Mad 205 (216): 59 Mad 461 (FB). (AIR 1924 Mad 130: 47 Mad 63, Overruled.) * AIR 1955 Trav-Co 92 (96) (DB).

[But see AIR 1927 Cal 315 (318) (DB) * (1929) 115 Ind Cas 520 (521) (DB) (Cal) * AIR 1920 Oudh 178 (179): 23 Oudh Cas 218 * AIR 1925 Pat 384 (387) (DB).]

(3) Where an order for possession has been made and the judgment-debtor dies thereafter, it is not necessary to implead the legal representatives. (1889) 12 Mad 211 (213) (DB).

(4) The principle of Section 50 applies where the judgment-debtor becomes insolvent after the attachment, so that, a sale thereafter without impleading the Official Receiver and without due notice to him is inoperative and irregular. AIR 1914 PC 129 (131): 42 Cal 72: 41 Ind App 251.

**6. Application to execute against the legal representative.**— (1) In this section the words "may apply" are equivalent to "shall apply". AIR 1955 Cal 573 (575) (DB) * AIR 1957 Raj 154 (156): ILR (1957) 7 Raj 520 (DB) * AIR 1955 Trav-Co 92 (95) (DB) * AIR 1954 Pepsu 115 (117): ILR (1953) Patiala 615 * AIR 1936 Mad 205 (206): 59 Mad 461 (FB).

(2) The amendments to Rules 22 and 90 of Order 21 by the Calcutta High Court do not do away with the necessity of making an application under this section to execute the decree against the legal representative. AIR 1949 Cal 299 (300).

(3) The provisions of Order 21, Rule 22 do not control the provisions of this section. AIR 1955 Trav-Co 92 (96) (DB).

(4) The application to execute the decree against the legal representative must be made to the Court which passed the decree. AIR 1952 Pat 333 (335): 27 Pat 848 (DB) * AIR 1951 Ajmer 31 (32) * AIR 1934 Bom 215 (216) (DB) * (1905) 28 Mad 466 (471, 472) (FB) * AIR 1926 Mad 411 (412) (DB).

[But see AIR 1959 Punj 71 (75): ILR (1958) Punj 2430 (DB). (Transferee Court can also deal with application for substitution of legal representative as jurisdiction of Court passing decree is not exclusive.)]

(5) Application to execute decree against legal representative — Court passing decree has to decide whether decree is executable against him. (1905) 28 Mad 466 (470) (FB) * (1895) 17 All 431 (432) * AIR 1926 Mad 411 (412).

(6) Transferee Court ordering execution against legal representatives — This amounts to irregularity in procedure which may be waived. AIR 1952 Pat 333 (335): 27 Pat 848 (DB) * AIR 1959 Mys 99 (99, 100): 36 Mys LJ 865 (DB). (AIR 1941 Pat 139 and ILR 22 Cal 558, Rel. on.)

(7) An application under this section is necessary only when further execution is needed or asked for. A separate application merely for substituting a legal representative is not necessary. AIR 1936 Oudh 152 (153): 11 Luck 500 (DB) * AIR 1921 Mad 693 (693).

(8) A legal representative of the deceased defendant need not be first brought on record under Section 50, before filing an application to set aside the ex parte decree. AIR 1925 Oudh 370 (371): 27 Oudh Cas 299.

(9) Application for execution made by mistake against judgment-debtor who is dead can be regarded as a step-in-aid of execution. AIR 1964 Ker 90 (92): 1963 Ker LT 466.

(10) Under Section 50 it is open to the decree-holder either to ask the executing Court to bring the legal representative of a deceased judgment-debtor on record or to present another execution petition. AIR 1964 Mys 211 (212): (1963) 2 Mad LJ 359. (On death of judgment-debtor, the execution continues to be pending.)

(11) There are two requirements of an execution application as required under Section 50 read with Order 21, Rule 22, one is that the execution application must be made to the Court which passed the decree and second is that the notice of execution must be issued to the legal representatives. AIR 1969 Bom 84 (90): 70 Bom LR 373.

**7. Execution against wrong legal representative or without the legal representative.**— (1) A proceeding taken against one of several representatives who prima facie is entitled to represent the estate of the deceased is binding on all the representatives. AIR 1956 Trav-Co 147 (154): ILR (1955) Trav-Co 823 (FB) * AIR 1955 Pat 408 (413): 34 Pat 298 (DB) * AIR 1953 Mad 622 (623) * AIR 1940 Oudh 55 (58): 14 Luck 751 (DB) * (1909) 33 Mad 6 (8, 9) (DB).

[But see (1879) 4 Cal 142 (156) (FB) * (1882) 11 Cal L Rep 268 (272) (DB).]

**Section 50 — Note 7 (contd.)**

(2) An execution proceeding taken against a wrong person as legal representative will as a general rule, not bind the actual or real legal representatives. (1905) 32 Cal 296 (315): 32 Ind App 23 (PC) * AIR 1952 Pat 53 (54): 30 Pat 779 * (1910) 32 All 404 (409) (DB) * AIR 1919 Cal 831 (833) (DB) * AIR 1960 Mad 726 (727) (DB) * AIR 1917 Mad 979 (980, 981) (DB) * AIR 1921 Bom 385 (388, 389): 45 Bom 1186 (DB) * AIR 1962 Ker 144 (146): 1961 Ker LT 1013.

(3) Where the legal representative stands by and allows the proceedings to be taken or continued against a wrong person, he will not be allowed to challenge the proceedings subsequently. AIR 1944 Cal 42 (43) (DB) * (1879) 4 Cal 342 (345, 346) (DB).

(4) Where a wrong person is impleaded as a legal representative but the Court decides that he is the true heir and orders execution to proceed, such proceedings cannot be said to be void for want of jurisdiction. AIR 1956 Trav-Co 147 (153): ILR (1955) Trav-Co 823 (FB) * AIR 1947 Bom 164 (166) * (1901) 25 Bom 337 (347): 27 Ind App 216 (PC) * AIR 1926 Oudh 613 (614) (DB).

(5) Proceedings taken against persons in their representative capacity are binding on all persons who are represented by the person against whom such proceedings are taken. AIR 1956 Trav-Co 147 (154): ILR (1955) Trav-Co 823 (FB) * AIR 1954 Trav-Co 26 (27) * AIR 1945 Bom 435 (437) (DB) * (1897) 21 Bom 539 (542, 543) (DB) * (1887) 15 Cal 70 (81): 14 Ind App 187: 1888 Pun Re No. 1 (PC) * AIR 1924 Mad 571 (573, 574) (DB) * (1910) 33 All 15 (16, 17) (DB) * (1889) 16 Cal 40 (56): 15 Ind App 195 (PC) * AIR 1962 All 125 (127).

(6) Where there are heirs who are co-owners, as in the case of Muslims or Christians, one of them cannot represent the others as the interest of each heir is distinct and separate. The bona fides of the claimant prosecuting the proceeding cannot and will not clothe the co-owners on record with competency to represent the others who are not on record. AIR 1956 Trav-Co 147 (154): ILR (1955) Trav-Co 823 (FB). (AIR 1950 Trav-Co 1: 1950 Trav-Co LR 546, Overruled.)

(7) The mere fact that the name of the legal representative is wrongly given does not invalidate the execution petition. AIR 1926 Lah 34 (35) (DB).

(8) The rule that the proceeding taken against a person prima facie entitled to represent the estate is binding on the other persons entitled to the estate has no application where the judgment-debtor becomes an insolvent and his estate vests in the Official Receiver or Official Assignee. AIR 1929 Mad 609 (611).

(9) Where a decree-holder acting bona fide describes the legal representatives of the deceased judgment-debtor by wrong names, the error is one of description only and a sale held after notice to such persons is not a nullity. AIR 1957 Bom 170 (175): ILR (1957) Bom 623 (DB).

(10) The omission to substitute some of the legal representatives does not render an execution sale void even to the extent of their interest. AIR 1957 Bom 170 (175): ILR (1957) Bom 623 (DB).

**8. Decree-holder, if can proceed against property in the possession of third party.**— (1) The right of a creditor of the donor to follow the properties in the hands of the universal donee is a right which cannot be exercised by levying execution against the properties in his hands under a decree obtained against the donor only. AIR 1952 Trav-Co 23 (28, 29): ILR (1951) Trav-Co 357 (DB).

(2) Money given to a rival claimant to the estate of the deceased in settlement of his claim cannot be proceeded against by creditors of the estate as assets of the deceased. AIR 1924 Oudh 364 (365, 366): 27 Oudh Cas 262 (DB).

(3) This section has no application where the interest of the judgment-debtor devolves on another by purchase or otherwise subsequent to institution of suit. (1908) 31 Mad 464 (466, 467) (DB).

(4) A legatee of a part of an estate is not the legal representative of the deceased testator and a decree against the latter cannot be executed against the assets in the hands of the legatee. ILR (1954) Mad 1008 (1009, 1010).

(5) If the legatee has helped himself to the legacy by unauthorisedly taking possession, he would become executor de son tort and as such is liable to be proceeded against as the legal representative of the deceased testator. AIR 1953 Mad 622 (624).

(6) Transfer of property pending suit — Decree — Execution — Death of mortgagor — Execution can be taken out against transferee. AIR 1960 Madh Pra 198 (200). 1960 MPLJ 287.

(7) Compromise decree with regard to easements of light and air between owners of adjacent houses — It is not judgment in rem — Such decree cannot be executed against third party purchasing house after decree, although decree provided that it shall bind assigns of parties — Such provision not valid under law of execution. 1967 Mah LJ 985 (988): 69 Bom LR 749.

**9. Limitation for substitution of legal representative.**— (1) There is no provision in the Code as to abatement of execution by the death of parties. AIR 1920 All 171 (172): 42 All 570 (DB) * AIR 1942 Cal 436 (437): ILR (1942) 2 Cal 262 (DB) * 1960 MPLJ 202 (204, 205): 1960 Jab LJ 283.

(2) No separate application for substitution of legal representatives is necessary.

## PROCEDURE IN EXECUTION

**51. Powers of Court to enforce execution.**—Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree—

(a) by delivery of any property specifically decreed;

(b) by attachment and sale or by sale without attachment of any property;

(c) by arrest and detention in prison;

(d) by appointing a receiver; or

(e) in such other manner as the nature of the relief granted may require:

[a][Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor

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**Section 50 — Note 9 (contd.)**

(1879) 24 Cal 778 (780, 783) (DB)*AIR 1931 Bom 425 (427) (DB).

(3) There is no special period of limitation for substitution in execution. (1878) 3 Bom 221 (222) (DB) * AIR 1921 Mad 693 (693) * (1910) 13 Oudh Cas 90 (93).

(4) In view of Order 22, Rule 12, a decree-holder is not bound to bring the legal representatives of the judgment-debtor on record within thirty days prescribed by Article 166 of the Limitation Act. AIR 1957 Raj 154 (157): ILR (1957) 7 Raj 520 (DB).

**10. Successive deaths of judgment-debtor and legal representative.**— (1) If legal representative in possession of assets himself dies, the assets continue as such even in the hands of the legal representatives of the legal representative who died subsequent to his substitution. (1900) 22 All 367 (368, 369, 370, 371) (DB) * AIR 1914 Mad 668 (668, 669) (DB).

**11. Decree for injunction.**— (1) Under this section, a decree for injunction against the judgment-debtor can be executed against his legal representatives. (1902) 26 Bom 283 (287, 288) (DB) * AIR 1931 Bom 484 (488, 489): 55 Bom 709 (DB).

(2) Where the properties are purchased during the pendency of proceedings in execution of a decree for injunction, the purchaser will be bound by the doctrine of lis pendens. AIR 1927 Bom 93 (95): 51 Bom 37 (DB).

**11-a. Decree for specific performance.**— (1) A decree for specific performance by execution of sale deed can be executed against the legal representative under Section 50. AIR 1962 Andh Pra 308 (311): ILR (1960) 2 Andh Pra 449 (DB).

**12. Orders executable as decrees.**— (1) An order executable as a decree under the provisions of other Acts can be executed against the legal representative of the person against whom the order was passed. 1956-2 Mad L Jour 475 (476).

(2) Order for eviction under Section 7 of Madras Buildings (Lease and Rent Control) Act (15 of 1946) is executable by City Civil Court as if it was a decree passed by itself—Application to bring legal representative on record — Civil Court is competent to order. AIR 1951 Mad 822 (823): 64 Mad LW 26.

**13. Appeals.**— (1) Orders under this section are appealable if the conditions of Section 47 are satisfied. (1890) 12 All 313 (327) (SB) * (1890) 17 Cal 711 (720, 721) (FB) * (1887) 10 Mad 117 (120) (DB) * (1903) 26 Cad 501 (501, 502).

(2) The appellate Court can permit the appellant to amend the memo of appeal so as to bring on record the legal representatives of the respondent when he was dead at the time of filing the appeal. AIR 1962 Mys 44 (45): 39 Mys LJ 607. (AIR 1925 Mad 1210 (FB) Foll., AIR 1956 Madh B 76, Dissented from.)

(3) Decree transferred for execution — Transferee Court allowing, without objection, substitution of representatives of deceased judgment-debtor at instance of decree-holder — No objections raised against substitution — No prejudice caused —Merits of case not affected — Section 99 applies — Appellate Court cannot interfere. AIR 1965 Pat 52 (53): 1964 BLJR 212 (DB). (AIR 1928 PC 162, AIR 1941 Pat 139, Relon.)

### SECTION 51 — SYNOPSIS

1. Scope.
2. Powers of the Court in execution.
   3. "By delivery of any property specifically decreed.
   4. "By attachment and sale or by sale without attachment of any property" — Clause (b).
   5. "By arrest and detention" — Clause (c).
   6. Proviso to the section.
   7. Explanation.
   8. "By appointing a receiver" — Clause (d).
   8-A. "In such other manner" — Clause (e).
9. "On the application of the decree-holder."
10. Appeal.

### TOPIC INDICATOR

Decision of questions relating to execution — See Section 47.
Executing Court, if can go behind decree — See Section 38.
Simultaneous execution — See Note 2.
Appointment of receiver to collect future maintenance — See Note 8.

an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied,—

(a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree,—

(i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or

(ii) has, after the institution of the suit in which the decree was passed, dishonestly, transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property; or

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

Explanation.—In the calculation of the means of the judgment-debtor for the purposes of clause (b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree.]

[See O. 21, Rr. 30 to 34, 35, 53, 56 and 64; O. 40, R. 1; also Ss. 54 and 68 to 72.]

[a] Proviso was inserted by the Code of Civil Procedure (Amendment) Act, 1936 (XXI of 1936), Section 2.

## OBJECTS AND REASONS

"Clause 51.—This clause states generally the powers of the Court in regard to execution leaving the details to be determined by rules. It will be observed that the power to direct immediate execution is no longer restricted to one class of suits but that it is now general in terms. Any limitation that may be found necessary will be imposed by rules."—S. O. R.

"Clause 51.—We have added a power to execute a decree by appointing a receiver on the suggestion of the Advocate-General of Madras."—S. C. R.

## STATE AMENDMENT

**Uttar Pradesh**

In S. 51, after Cl. (b), the following shall be added as a new Cl. (bb):

"(bb) by transfer other than sale, by attachment or without attachment of any property."

—U. P. Act 24 of 1954, S. 2 and Schedule, Item 5, Entry 4 [30-11-1954.]

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**Section 51 — Topic Indicator (contd.)**

Power to sell whether includes power to order temporary alienation — See Note 4.

Power to appoint decree-holder himself as receiver — See O. 40, R. 1.

Receiver in respect of inalienable property — See Note 8.

Receiver in respect of inalienable property where there are other hypotheca which can be sold — See O. 40, R. 1.

Power of receiver to sue in a Court outside the jurisdiction of the Court appointing him — See Note 8; See also O. 40, R. 1.

Adjustments or agreements or parties relating to execution — See Note 8A; see also O. 21, R. 2.

Temporary alienation of property in execution — See Note 4.

**1. Scope.** — (1) Section 51 enumerates in general terms the various modes in which the Court may order the execution of a decree. AIR 1942 Cal 587 (592) (DB) ° AIR 1940 Pat 557 (558): 19 Pat 832 (DB).

(2) Section 168A of the Bengal Tenancy Act, 1885 (as amended by Bengal Act XVIII of 1940) is not repugnant to S. 51 (1946) 50 Cal WN 181 (183) (DB) ° AIR 1942 Cal 587 (592) (DB).

(3) By virtue of S. 45-H, Banking Companies Act, 1949, an order under that Act can be enforced as provided in this section. AIR 1953 Cal 610 (612).

(4) By virtue of S. 17 of the Administration of Evacuee Property Act as amended in 1951 the decree-holder is debarred from

**Section 51 — Note 1 (contd.)**

proceeding in any manner against any property declared as evacuee property or deemed to be such, in execution of a decree. ILR (1954) Hyd 674 (676).

(5) There is no wide and unrestricted jurisdiction to order execution in every case in all the ways indicated in the section. The jurisdiction has to be exercised subject to such conditions and limitations as may be prescribed by the rules in the following schedule. AIR 1936 All 495 (502): 58 All 949 (FB).

(6) When there is a partial stay of execution of a decree the stay is complete when there is a single decree. In case of a composite decree, if the partial stay is with respect to a part of it and in respect to a specific mode of execution, then only that part and that mode is stayed while other parts of the decree with other modes of execution would be open. AIR 1965 Ker 236 (237):1964 Ker LT 607.

(7) A Civil Court has undoubted power to order execution of a decree by arrest and detention but that power is subject to such conditions and limitations as may be prescribed in the Code. Further by virtue of S. 4 the power is controlled by the provisions of Special and local laws. Under Ss. 58A and 59 of Madras Act 26 of 1948 land-holders are immune from arrest in execution proceedings at all stages, so they cannot be arrested and detained under S. 51. Further, a judgment-debtor cannot be detained in Civil prison when there is no proof that despite means the judgment-debtor had refused or neglected to pay. AIR 1961 Andh Pra 399 (400): (1961) 1 Andh WR 328 (DB).

**2. Powers of the Court in execution.** — (1) It is for the judgment-creditor to decide the mode in which he will execute his decree. AIR 1953 Cal 717 (718) (DB).

(2) The Court has no authority, except under the circumstances mentioned in the proviso, to refuse to order execution in the mode asked for. AIR 1951 Simla (Punj) 277 (279) * AIR 1957 Mad 777 (779) ° AIR 1942 Nag 58 (59): ILR (1942) Nag 159 ° AIR 1926 Lah 110 (110): 6 Lah 548 (DB).

[See however 1951 All WR (HC) 71 (72).]

(3) A Court passing a decree should not ordinarily place any limitation as to the mode in which it is to be executed. AIR 1918 Cal 186 (186) (DB).

(4) A decree may be executed simultaneously against both the persons and the property of the judgment-debtor. AIR 1956 Hyd 7 (9): ILR (1955) Hyd 797 (FB) ° AIR 1957 Mad 777 (779) * AIR 1943 Lah 166 (168).

(5) Court has, under O. 21, R. 21 a judicial discretion to refuse to order simultaneous execution in proper cases. AIR 1953 Cal 717 (718) (DB) ° AIR 1957 Mad 777 (779).

(6) Court should offer the decree-holder all possible and reasonable facilities for realising the decretal amount in as short a time as possible. AIR 1936 Cal 238 (239) ° AIR 1936 Pat 76 (77) (DB).

(7) Ordinarily there can be only one complete execution. (1912) 16 Ind Cas 708 (709) (DB) (Cal) * (1910) 8 Ind Cas 410 (411) (Oudh).

(8) Where one complete execution is ineffectual and invalid, another execution, valid in law, can be ordered. AIR 1931 Pat 241 (247), 253): 10 Pat 670 (FB).

(9) A decree-holder has no rights in all the modes of execution prescribed by S. 51, at the time when he obtains the decree. He merely has a right to execute the decree and such execution can proceed according to the procedure prescribed at that time when the execution is taken out. The modes prescribed by S. 51 are subject to other provisions such as S. 42 and O. 21, R. 82. AIR 1967 All 263 (264): 1966 All LJ 356.

(10) Under Ss. 51, 27, 141 and O. 21 the Courts have to issue summons and notices, attachment warrants and delivery warrants in matters before them. The Courts have the discretion in fixing dates for their return after service. Any order interfering with this discretion cannot be classed as an administrative order, and would be set aside. AIR 1962 Manipur 24 (26).

(11) Normally the representatives of an association sued in their own names can be proceeded against in execution even in their personal capacity. However, if the decree-holder has already agreed to proceed only in a particular manner, he cannot without the consent of the judgment-debtor, proceed in new and substantially more onerous manner. 1961 MPLJ 154 (156): 1961 Jab LJ 156.

(12) In proper cases a Court has jurisdiction to combine the reliefs under S. 51 (b) and S. 51 (d). AIR 1963 Cal 515 (520) (DB).

**3. "By delivery of any property specifically decreed."**— (1) Where the decree holder prays for execution by delivery of the movable property and also by attachment of other property the executing Court has power to order conditional attachment of the other property. AIR 1953 Cal 717 (719) (DB).

**4. "By attachment and sale or by sale without attachment of any property."— Clause (b).** — (1) Where the decree itself directs the sale of properties no attachment is necessary for bringing the properties to sale in execution of that decree. AIR 1929 Lah 90 (91): 10 Lah 543 (DB) ° ('06) 33 Cal 676 (678) (DB) ° AIR 1921 Pat 320 (321) (DB).

(2) A sale without attachment is not without jurisdiction. AIR 1953 Trav-Co 494 (509): ILR (1953) Trav-Co 405 (FB) * AIR 1947 Mad 213 (215): ILR (1947) Mad 471 (DB) ° AIR 1940 Lah 78 (79, 80): ILR (1940) Lah 516 ° AIR 1939 Bom 277 (278): ILR (1939) Bom 420 (DB) * AIR 1937 Nag

**Section 51 — Note 4 (contd.)**
149 (149): ILR (1939) Nag 450 ° AIR 1934 All 430 (432) (DB) ° AIR 1967 Andh Pra 148 (151) (FB). (Overruling AIR 1964 Andh Pra 514.) ° AIR 1963 All 320 (326): 1963 All LJ 204 (DB).

[But see AIR 1918 Cal 39 (40): 45 Cal 780 (DB) * AIR 1918 Cal 1036 (1037) (DB).]

(3) Section 51, clause (b), must be interpreted to mean that the Court has jurisdiction to attach and sell any property which the decree-holder puts forward as the property of his judgment-debtor. AIR 1927 Mad 394 (394, 395): 50 Mad 639 (DB) ° AIR 1969 Mad 268 (269): (1968) 2 Mad LJ 634. (Attachment of shares — Fact that place of business of company is outside the jurisdiction is immaterial.)

(4) If the property sold does not belong to the judgment-debtor but to a stranger, the latter will not be bound by the sale in any way. AIR 1926 Oudh 501 (502).

(5) A sale of a property belonging to a stranger is not void as between the decree-holder, judgment-debtor and the auction purchaser. AIR 1927 Mad 394 (394, 395): 50 Mad 639 (DB) ° AIR 1967 Kerala 145 (146): 1966 Ker LT 798.

(6) The property to be sold must be saleable property under S. 60 of the Code. AIR 1942 Cal 429 (434) (DB) * AIR 1942 Cal 470 (471): ILR (1942) 2 Cal 325 (DB).

(7) Lands inalienable according to the provisions of special enactments cannot be sold in execution. AIR 1929 Pat 700 (701): 9 Pat 368 (FB) ° AIR 1920 Lah 456 (459): 1 Lah 192 (FB) ° AIR 1942 Cal 470 (471): ILR (1942) 2 Cal 325 (DB).

(8) Section 72 implies that the Court has authority to order a temporary alienation of the judgment-debtor's property. AIR 1920 Lah 456 (459): 1 Lah 192 (FB) ° AIR 1936 Lah 696 (698) ° AIR 1937 Nag 41 (42): ILR (1937) Nag 261.

[But see AIR 1938 All 290 (291, 292): ILR (1938) All 528 (FB). (AIR 1932 All 571, Overruled.) ]

(9) The Court has power, apart from the provisions of S. 72, to order a temporary alienation of the judgment-debtor's property. AIR 1936 Pesh 90 (91) (DB).

(10) The prohibition of sale does not prevent the Court from mortgaging or leasing the property under this clause. AIR 1920 Lah 456 (459): 1 Lah 192 (FB) ° AIR 1935 Pesh 113 (114).

[But see AIR 1938 All 290 (291, 292): ILR (1938) All 528 (FB) * AIR 1937 All 699 (700, 701) (DB) ° AIR 1936 Pesh 90 (90, 91) (DB).]

(11) The Court cannot order attachment of property for the purpose of temporary alienation when such property is not liable to be sold in execution. AIR 1937 Nag 41 (43): ILR (1937) Nag 261.

(12) Where not only a sale but also a temporary alienation is prohibited, the Court cannot, by way of execution, make an order for temporary alienation. AIR 1929 Pat 700 (701): 9 Pat 368 (FB).

(13) The word "sale" in the section includes also a sale by a nominee of the parties under a consent decree. AIR 1917 Cal 740 (742): 44 Cal 789 (DB).

(14) Attachment of immovable property before judgment and continued after the decree will not disable the decree-holder from applying for the attachment and sale of the moveable property. AIR 1936 Bom 268 (272) (DB) ° AIR 1962 Mad 383 (384): (1962) 2 Mad LJ 132. (Fresh attachment necessary if second application is filed after the period.)

(15) A decree of Small Cause Court passed before amendment of S. 42 by U. P. Act 24 of 1954 was transferred to the Court of District Munsiff for execution after the amendment. The transferee Court, held, in view of amendment could not execute the decree by sale of immoveable property. AIR 1967 All 263 (264): 1966 All LJ 356.

(16) A decree is liable to attachment and sale under clause (b) of S. 51, Civil P. C. and there is no reason why a decree for specific performance cannot be attached or sold in execution of a money decree under Cl. (b) of S. 51. 1965 All LJ 1109 (1110).

(17) The power of an execution Court to execute a decree is given in S. 51, where the Court is authorized to execute a decree by various means. It is the situs of the debt that will decide the jurisdiction of the execution Court and not the situs of the debtor from whom the debt is payable to the judgment-debtor. O. 21, R. 46 neither defines jurisdiction nor does it lay down the act doing of which amounts to exercise of jurisdiction. AIR 1963 All 313 (315, 317, 318): 1963 All LJ 443 (DB).

(18) The principle underlying S. 51 (b), is that, if the property sought to be attached is within the limits of the jurisdiction of the Court, the Court can attach and sell the property. Where, the properties sought to be attached and sold are the shares of the judgment-debtor which are with him within the limits of the jurisdiction of the Court, it would follow without further more that that Court had the jurisdiction to attach and sell. It is the situs of the shares that gives jurisdiction. AIR 1969 Mad 268: (1968) 2 Mad LJ 634 (637).

(19) Where a charge is created by compromise decree, fresh suit to enforce it is not necessary. Charged property can be brought to sale in execution of decree. No fresh attachment is also necessary. AIR 1963 Tripura 46 (47).

**5. "By arrest and detention" — Clause (c).** — (1) Where a decree-holder prays for the arrest of the judgment-debtor the Court cannot (except as provided for by the proviso) compel the decree-holder to proceed against his property. AIR 1939 Pat 380 (381): 18 Pat 366 (DB) * AIR 1935 Cal 127 (129) (DB).

**Section 51 — Note 5** (contd.)

(2) Where the stay of execution of decree is in respect of execution against attached properties, the decree-holder can proceed against the person of the judgment-debtor after claiming benefit under S. 15 of Limitation Act. AIR 1964 Ker 134 (135): 1963 Ker LT 442. (AIR 1958 Cal 1 and AIR 1940 Lah 75, Dissented from; 14 Trav LJ 501, Foll.)

(3) In suitable cases the Court should not make an order of committal to prison on the first application of the decree-holder but should order payment by instalments after ascertaining the means of the judgment-debtor. AIR 1955 Mad 409 (411) (DB) ° AIR 1961 Raj 243 (244): 1960 Raj LW 530 (DB).

[But see AIR 1964 Ker 264 (265): 1962 Ker LJ 1397.]

(4) The mere fact that he is sixty years of age does not entitle him to any consideration on that account. AIR 1942 Sind 19 (21): ILR (1941) Kar 479 (DB).

(5) Where an arrest before judgment is made under O. 38, R. 1, further procedure with regard to security after the passing of decree will still be governed by O. 38. AIR 1943 Mad 366 (367).

(6) It is only when an order under sub-rule (3) of R. 40 has to be made, it will have to be made subject to the provisions of S. 51. There is no need to comply with the requirements of S. 51 while acting under either R. 37 or under sub-rules (1) and (2) of Rule 40 which provide for the arrest and custody of the judgment-debtor. AIR 1959 Mys 94 (95): 36 Mys LJ 814.

(7) Where a court issues a warrant either under sub-rule (1) or under sub-rule (2) of R. 37 it does not do so with the intention of committing the person against whom the warrant is issued to prison. It only issues such a warrant to secure the presence of such a person in Court. In such a case the provisions of S. 51 or O. 21, R. 40 are not applicable. AIR 1961 Bom 23 (24): 62 Bom LR 599.

(8) A mortgage decree against A and a personal decree against B the surety, when interpreted, should that B was to be proceeded against after exhausting remedies against A. Application by decree-holder to arrest and detain B without proceeding against 'A' held, was premature and not maintainable. AIR 1964 Mad 233 (234): (1963) 2 Mad LJ 352 (DB).

(9) There can be no arrest in execution where no detention is possible any more than there can be attachment in execution where no sale is possible. Arrest under S. 51 is a preliminary process for detention and arrest by itself is no execution. AIR 1966 Ker 65 (65): 1965 Ker LT 261.

**6. Proviso to the section.**— (1) The proviso is mandatory and restricts the power of the Court to arrest the judgment-debtor in execution of a money decree. AIR 1956 Mad 580 (582) ° AIR 1957 Mad 761 (762) * AIR 1955 All 402 (403) (DB) ° 1951 Raj LW 123 (125).

[But see AIR 1964 Ker 158 (159, 160): 1964 (1) Cri LJ 668: 1964 Ker LJ 97 (DB).]

(2) A record of reasons contemplated by the proviso is not necessary if the order eventually passed is not one of detention. ('48) AIR 1948 Mad 9 (9).

(3) Unless such a circumstance as is mentioned in the proviso is alleged, the Court cannot take action under O. 21, R. 37 or issue notice to the judgment-debtor why he should not be arrested. AIR 1955 All 402 (403) (DB).

(4) The burden of proving that the circumstances specified in the section exist lies on the decree-holder. AIR 1956 Mad 580 (582) ° AIR 1955 All 402 (404) (DB) * AIR 1955 Mad 409 (410, 411) (DB) ° AIR 1951 Pat 355 (356) (DB) * AIR 1950 Trav-Co 8 (9) (DB) ° AIR 1968 Pat 218 (219): ILR 46 Pat 1142 ° AIR 1964 All 378 (379) * AIR 1964 Ker 264 (265): 1962 Ker LJ 1397 (DB) ° AIR 1961 Andh Pra 399 (400): (1961) 1 Andh WR 328 (DB) * ILR (1960) Cut 33 (39, 40) * 1960 Raj LW 619 (619): ILR (1960) 10 Raj 1467.

(5) It is not essential that the decree-holder should be required to give strict proof of the allegations made by him. It is perfectly open to the executing Court, on all the materials placed before it, to come to an inference as regards the statutory findings required by cls. (a) (ii) and (b) of the proviso. AIR 1955 Mad 409 (410, 411) (DB).

(6) For the proper way of understanding the import of the words in cl. (b) of the proviso, see the undermentioned case. AIR 1954 Mad 81 (82): ILR (1954) Mad 281 (DB).

(7) If the judgment-debtor had other claims to satisfy or other more urgent necessities to meet, it cannot be said that he neglected to pay the decree-holder. AIR 1955 All 402 (404) (DB).

(8) When other persons, who apparently have a right to the property obstruct the attachment, it cannot be said that the judgment-debtor is responsible for their action. AIR 1954 Mad 81 (82, 83): ILR (1954) Mad 281 (DB).

(9) A director of a company being in a fiduciary position with regard to the members of the company can be arrested in execution of an order for payment of money passed against him in misfeasance proceedings, even though he is pauper. AIR 1950 Mad 208 (209) (DB).

(10) Where the terms of a security bond provided for an unconditional undertaking in the matter of safe return of attached articles by the defendant whether a relationship of bailor or bailee is there or not may be open to doubt. But it does create a position of quasi trust or of a fiduciary nature. The defendant therefore falls within the classification of cl. (c) of the proviso to

**Section 51 — Note 6 (contd.)**

S. 55. AIR 1959 Ker 273 (274): 1958 Ker LT 801.

(11) The procedure prescribed under O. 21, R. 40 should be strictly followed before ordering detention. AIR 1953 Ajmer 16 (1) (16) ° AIR 1955 All 402 (404) (DB).

(12) Before a member of an undivided Hindu family which has been assessed to income-tax may be held to be liable to arrest for the recovery of the Income-tax arrears, it must be shown that he was in charge of some property of the joint family. AIR 1958 Cal 524 (529) (DB).

(13) Even when an order under S. 51 is passed ex parte, the provisions of the section must be complied with. AIR 1957 Mad 761 (762).

(14) Where the lower Court does not say that in its opinion the judgment-debtor has had, since the date of the decree, the means to pay the amount of the decree or some substantial part thereof, and has refused or neglected to pay the same, the order of arrest is illegal and has to be set aside. AIR 1957 Mad 761 (762).

(15) Where the first order for arrest and detention in prison was not given effect to, and subsequent application is made after long interval for passing fresh order, Court must give opportunity to judgment-debtor to show cause and must be satisfied that conditions mentioned in proviso are fulfilled at time when it is called upon to make subsequent order. AIR 1949 Mad 470, Foll. — Such opportunity need not, however be given nor is it necessary for Court to record reasons in writing as to its satisfaction about fulfilment of conditions contained in proviso where interval between first order and subsequent order is short. AIR 1968 Delhi 101: (1967) 69 Pun LR (D.) 328. (AIR 1949 Mad 470, Diss. from.)

(16) Where there is a prior order of Court holding that judgment-debtor had means to pay, a subsequent objection by the judgment-debtor to his arrest on grounds of inability to pay without any allegations that he had lost some assets needs no fresh enquiry into the means of the judgment-debtor. 1959 Ker LJ 1036 (1037): 1959 Ker LR 909 (DB) ° AIR 1965 Ker 16 (17): 1964 Ker LT 1101. (Order operates as res judicata in subsequent execution proceedings regarding objections which he might and ought to have raised in earlier proceedings regarding means to pay.)

(17) Where a Court issues a warrant either under sub-rule (1) or under sub-rule (2) of R. 37 it does not do so with the intention of committing the person against whom the warrant is issued to prison. It issues such a warrant only to secure the presence of such a person in Court. After the judgment-debtor appears in Court in pursuance either of a notice or a warrant then the Court will make an enquiry contemplated under S. 51 and O. 21, R. 40. AIR 1961 Bom 23, Followed. (1964) 2 Andh WR 38 (38).

(18) When a judgment-debtor is managing the properties of his sons and deriving benefit therefrom it is not enough to justify personal execution by arrest of the judgment-debtor. (1965) 2 Ker LR 39 (40).

(19) In a suit for dissolution of partnership and for accounts a decree was passed against the managing partner. As no fraud, clandestine dealing or other special circumstance was proved the partnership did not create any fiduciary relationship, conditions of S. 51 cl. (c) were not satisfied and as such execution by way of arrest and detention could not be done. AIR 1967 SC 1342 (1344): (1967) 2 SCR 298 ° AIR 1961 All 19 (24).

(20) The provisions of Cl. (b) of the proviso to S. 51 require a finding that the judgment-debtor has or has had since the date of the decree the means to pay the amount of the decree. Where the fact whether the judgment-debtor has or had sufficient means to pay is not decided with reference to the date of the decree, the finding of the Court, that the judgment-debtor was liable to be arrested and detained in execution of the decree against him, is vitiated in law. AIR 1964 All 378 (379). (AIR 1955 All 402, Rel. on.)

(21) It is not correct to say that the word 'means' occurring in Cl. (b) to Proviso to S. 51 should be taken as equivalent to cash. 'Means' there only mean realisable assets, and where the judgment-debtor has got sufficient assets from out of which the necessary moneys can be realised to pay up the decree amount, he will not be exempted by the provisions of S. 51 from being proceeded against personally by detention in prison for the realisation of the amount due under the decree. AIR 1964 Mad 233 (234): (1963) 2 Mad LJ 552 (DB).

(22) Arrest and detention in civil prison represent two different and distinct stages in the process of execution of a decree. Section 51 proviso (c) indicates that arrest and detention in prison is one mode of executing a decree. The proviso to that section refers only to execution by detention in prison and not to execution by arrest and detention in prison. This makes it clear that the need for the Court to be satisfied that the conditions mentioned therein exist and to record such reasons applies only to an order for detention in prison and not to arrest. The inhibition contained in S. 51 is not made applicable while ordering the arrest of the judgment-debtor. AIR 1959 Mys 94 (95, 96): 36 Mys LJ 814 (DB). ((1957) 2 Mad LJ 28, Dissent from.)

(23) The proviso to S. 51 enjoins on the Court itself not to order arrest and detention of the judgment-debtor in prison unless the Court, for reasons recorded in writing, is satisfied that the materials on the record of the case come within any of the clauses

**Section 51 — Note 6 (contd.)**

of the proviso. In other words it is a mandate to the Court by the Legislature as a matter of public policy with a view to implement its object by protecting debtors who cannot pay their debts for reasons beyond their control. Irrespective of the fact whether the judgment-debtor appears or not, the Court has to satisfy itself, before issuing any warrant of arrest against the judgment-debtor, whether the materials on the record bring the case within any of the clauses of the proviso to S. 51. The judgment-debtor cannot waive the privilege conferred on him by that section. AIR 1968 Pat 218 (219): ILR 46 Pat 1142 (DB).

**7. Explanation.** — (1) The Explanation applies only to cl. (b) of the proviso. AIR 1940 Pesh 33 (33, 34).

(2) The income of the judgment-debtor from his land, the land alone being exempt from sale, should not be left out of account when such income is attachable in execution of the decree against him. AIR 1943 Lab 166 (167).

(3) In calculating the means of the judgment-debtor the necessary expenses of maintenance of himself and his dependants must be taken into account. AIR 1942 Pat 242 (242) (DB) * (1939) 43 Cal WN 427 (429).

(4) The words 'exempt from attachment in execution of the decree' mean exemption from all forms of execution involving attachment of property. AIR 1951 Cal 48 (52): ILR (1952) 2 Cal 1 (FB). ((1946) 50 Cal WN 181, Overruled.)

(5) In calculating the means of the judgment-debtor who is a pensioner, the amount of his monthly pension cannot be left out of account. AIR 1944 Mad 263 (264).

(6) What Cl. (i) of the proviso to S. 60 (1) prohibits is that the salary qua salary cannot be attached or be brought to sale. The amount of the salary which the judgment-debtor has already received can be taken into account in judging his means under S. 51 because it was no longer salary after receipt by him and therefore no longer subject to the bar against attachment or sale. AIR 1961 Bom 142 (144): 1960 Nag LJ 463 (DB).

(7) The question as to whether the decree-holder's remedy primarily lies against the property charged under the decree cannot affect the question which arises under S. 51, Proviso (b) read with the explanation, as to what is the means of the judgment-debtor. Both the property charged as also other property can be taken into account in judging his means although the remedy of the decree-holder may primarily be against the charged property. AIR 1961 Bom 142 (143): 1960 Nag LJ 463 (DB).

(8) Where judgment-debtor gets Rs. 80 per month (i.e. less than Rs. 100 p. m.) by way of total monthly emolument as salary and allowance he is not liable to arrest in execution of decree — Order issuing warrant of arrest against him is wrong. 1963 Ker LT 392 (393): (1963) 1 Ker LR 406.

(9) In view of the explanation to S. 51, the decree-holder, while proceeding to prove that the judgment-debtor had means to pay the decretal amount under Cl. (b), must give some indication or details of the properties of the judgment-debtor because otherwise it is difficult to see how, in computing the means to pay the same, the properties which are exempt from attachment in execution of the decree would be left out. It would not be a sufficient compliance if the decree-holder merely says vaguely that the judgment-debtor has moveable and immovable properties from which he can pay the decretal amount. 1964 BLJR 617 (622).

**8. "By appointing a receiver" — Clause (d).** — (1) Execution under cl. (d) is entirely within the discretion of the Court. Madh B LR 1954 Civ 249 (252) ° AIR 1949 Cal 63 (65) ° AIR 1929 Pat 700 (701): 9 Pat 368 (FB) ° AIR 1942 Pat 455 (456) (DB) * AIR 1939 Oudh 116 (118): 14 Luck 538 (DB) ° AIR 1936 Bom 399 (400) (DB) * AIR 1932 Mad 193 (195) (DB).

(2) The conditions and limitations under which such appointment is to be made are prescribed by O. 40, R. 1. AIR 1956 Mad 163 (164) ° ILR (1955) 1 Cal 122 (124) (DB) * AIR 1942 Pat 455 (456) (DB) ° AIR 1937 All 389 (392, 393): ILR (1937) All 542 (DB) ° AIR 1937 Lah 738 (739) ° AIR 1937 Oudh 232 (233) (DB).

(3) Equitable execution by appointment of a receiver being an exceptional remedy, a strong case must be made out in support of it. AIR 1955 Ajmer 58 (59) * AIR 1955 Ajmer 61 (61) ° AIR 1965 Pat 238 (239): ILR 44 Pat 735 (DB).

(4) Where there is ample property of the judgment-debtor available for satisfaction of the decree the appointment of receiver would not be justified. AIR 1955 Ajmer 58 (59).

(5) A receiver can be appointed even before the property is attached. AIR 1942 Mad 396 (396, 397).

(6) A receiver may be appointed in respect of properties which cannot be attached and sold. AIR 1934 All 605 (606) (DB) ° (1912) 39 Cal 1010 (1015) (DB) * AIR 1930 Cal 159 (160) ° AIR 1942 Lah 126 (128): ILR (1943) Lah 179 (DB) * AIR 1936 Nag 288 (289): ILR (1937) Nag 534 ° AIR 1950 Orissa 220 (223) (DB) ° AIR 1942 Oudh 410 (412): 18 Luck 147 (DB) * AIR 1942 Pat 240 (241, 242) ° AIR 1924 Pat 269 (270): 3 Pat 339 (DB).

[But see AIR 1929 Pat 700 (701): 9 Pat 368 (FB) ° AIR 1937 All 389 (392, 393) (DB) ° AIR 1955 Bom 450 (450, 451): ILR (1955) Bom 589.]

(7) An order appointing a receiver to collect future maintenance is illegal. AIR 1936 Bom 399 (400) (DB) * ('33) AIR 1933 Bom 350 (352): 57 Bom 507 (DB).

**Section 51 — Note 8 (contd.)**

[But see AIR 1942 Oudh 410 (412): 18 Luck 147 (DB).]

(8) Where the maintenance is charged on property or is to come out of specified properties, a receiver may be appointed for realising the rents and profits of the properties. AIR 1925 PC 176 (176): 47 All 385: 52 Ind App 262 ° AIR 1954 Pat 364 (365) ° AIR 1950 Orissa 220 (224) (DB) * AIR 1931 PC 160 (161): 51 Ind App 215: 59 Cal 1 ° AIR 1943 All 1 (2) (FB).

(9) No receiver can be appointed in execution in respect of the Provident Fund amount standing to the credit of the judgment-debtor who is a retired Government servant. AIR 1952 SC 227 (229, 230): 1952 SCR 765.

(10) Where in a pauper suit for maintenance a decree for future maintenance is passed, a receiver can be appointed at the instance of the Government in regard to the maintenance recoverable under the decree for the purpose of realising the court-fee payable by the decree-holder under the decree. AIR 1950 Orissa 220 (224, 225) (DB).

(11) A receiver may be appointed to realise a decree or debt which has been attached in execution proceedings. (1887) 11 Bom 448 (455) (DB) * AIR 1929 Bom 279 (280) (DB).

(12) A receiver may be appointed to collect the future rents and profits accruing due from attached properties. AIR 1925 Rang 318 (319, 320): 3 Rang 235 (DB).

(13) The Court acting in personam against the judgment-debtors can order them to realise the rents and profits themselves and to hand them over to the receiver along with an account. AIR 1951 Simla (Punj) 277 (278).

(14) Where a receiver has been appointed at the instance of one decree-holder, it is not necessary that every decree-holder should also have a receiver appointed in his own suit in respect of the same property. AIR 1930 Mad 4 (11).

(15) Apart from resorting to appointment of receiver as a mode of execution, Court has power in appropriate cases to obtain the property in custodia legis even after the passing of the decree either for preservation of the property or the interest of the decree-holder therein. Madh B LJ (1955) HCR 604 (604).

(16) The mere appointment of a receiver does not invalidate a mortgage executed by the judgment-debtor subsequent to such appointment. AIR 1951 Simla (Punj) 277 (280).

(17) An order for appointment of receiver in respect of property declared to be evacuee property or deemed to be such cannot be made in view of the express bar under S. 17 of the Administration of the Evacuee Property Act. ILR (1954) Hyd 674 (676) ° AIR 1951 Punj 434 (435): ILR (1951) Punj 306 (DB). (AIR 1950 East Punj 312, Reversed.)

(18) An order for appointment of receiver cannot but be regarded as execution against the proprietary rights in land and therefore it comes within disability imposed on execution by S. 7 (3) of the U. P. Encumbered Estates Act, 25 of 1934. AIR 1952 All 419 (420).

(19) There is no legal bar to the executing Court directing execution of the decree by appointment of a receiver in respect of the tenure in arrears even though the tenure is available for sale. ILR (1955) 1 Cal 122 (124) (DB).

(20) Receiver can be appointed in execution proceedings even under O. 40, R. 1 — Power is not restricted only as mode of execution under S. 51. AIR 1964 Madh Pra 211 (212): 1963 Jab LJ 696.

(21) Neither S. 51 (d) nor O. 40 of the Civil P. C. prescribes for the termination of the office of receivership. The law on the point may briefly be stated thus: (1) If a receiver is appointed in a suit until judgment, the appointment is brought to an end by the judgment, in the action. (2) If a receiver is appointed in a suit, without his tenure being expressly defined, he will continue to be receiver till he is discharged. (3) But, after the final disposal of the suit as between the parties to the litigation, the receiver's functions are terminated, he would still be answerable to the Court as its officer till he is finally discharged. (4) The Court has ample power to continue the receiver even after the final decree if the exigencies of the case so require. AIR 1962 SC 21 (26, 27): (1962) 1 SCR 868.

(22) There is a distinction between an order made under Cl. (d) of S. 51 appointing a receiver as a mode of execution of a decree and an order made under Cl. (b) of that section whereby the Court orders execution by sale without attachment of the properties charged by the decree though the sale is directed to be held by a receiver. In so doing, the Court presses into service its powers under S. 51 (b) of the Code of Civil Procedure and not S. 51 (d). In an order made under S. 51 (b), the accent is on sale in execution, that is, on the judgment-debtor's losing the property to pay the decree-holder's dues, amounting to a negation of the very object of appointing a receiver in execution under S. 51 (d), which is to preserve the corpus for the ultimate benefit of the judgment-debtor, while satisfying the decree-holder's dues out of the income within a reasonable time and without unreasonable harassment and harshness to or upon the judgment-debtor. (1963) 67 Cal WN 350 (354) (DB).

(23) Where a relief under S. 51 (d), Civil P. C., is sought and granted by the execution Court, it is open to the judgment-debtor to show, at any stage of the proceeding, be it appeal or otherwise, that necessary

Section 51 — Note 8 (contd.)
circumstances do not exist or necessary facts have not been proved to justify grant of relief under the section. Hence the objection that as the judgment-debtor failed to raise the point in the Court below it is not open to him in the appellate Court, is not tenable. (1963) 67 Cal WN 350 (354) (DB).

(24) Where a decree in respect of a private debt was granted after the passing of U. P. Encumbered Estates Act, it was open to a decree-holder to proceed only against the proprietary rights in the lands and no receiver could be appointed in respect of the property as the appointment of a receiver was only a process of execution. 1962 All LJ 573 (574) (DB).

(25) In a suit instituted on the original side of the High Court a consent decree was passed by which a charge was created upon the immoveable properties lying and situate at Benaras and the decree-holder was declared to be at liberty to execute the decree by sale of the properties charged by application in execution in the suit without being obliged to institute a suit in Benaras Court:

Held, that the Court had jurisdiction to pass the decree. The giving of a charge upon the land outside the territorial jurisdiction of the Court was not unlawful. The Court had jurisdiction, in execution of the decree, to appoint a receiver of the properties at Benares. Article 261 of the Constitution under which decrees and orders of Courts of one State are capable of being executed in another State was a complete answer to the question of effectiveness of the decree passed. AIR 1961 Cal 422 (426, 427, 428, 429).

(26) An order for payment against a receiver passed under O. 40, R. 4 (2), Civil P. C. can only be enforced under O. 40, R. 4 (3) and not under the provisions of S. 51. A receiver cannot be arrested and detained under provisions of S. 51. 1962 Ker LJ 161: 1962 Ker LT 25 (26).

(27) The Court has the power under the law to appoint a receiver in an appropriate case even in case of a suit on simple mortgage. Appointment of a receiver would depend upon the exceptional circumstances of a particular case and Court will have to determine in each case judicially whether it would be just and convenient to appoint a receiver.

Where the Court is satisfied that the mortgage security is apparently insufficient to liquidate the entire dues of the mortgagee on the foot of the bond in suit, the Court may be inclined to appoint a receiver so as to place the rents and profits of the property in the hands of the Court to be dealt with in accordance with justice and equity of that particular case. AIR 1961 Raj 179 (180): 1960 Raj LW 626. (AIR 1936 All 495 (FB), Not foll.; AIR 1945 Pat 404, Foll.)

8A. "In such other manner" — Clause (e). — (1) Where the property is attachable and the decree-holder asks for execution, then the Court cannot refuse it and say that it has no means of carrying out the execution of the decree. In absence of any specific provision as to the mode of attachment or any appropriate particular form, the Court has ample jurisdiction under S. 51 (e) to evolve a prohibitory order suitable to the nature of the case. Where, therefore, the property to be attached is a right to purchase shares exercisable by judgment-debtor, an order prohibiting him from exercising it and restraining other parties from receiving an assignment or transfer of the same from him is not contrary to law since, it is sufficient 'seizure', being the only way in which the particular movable property can be seized. O. 21, R. 46 can be applied with certain variations. AIR 1966 Cal 134 (140): 69 Cal WN 815 (DB).

(2) Under S. 51 whether by itself or read with S. 151 a decree cannot be executed in circumstances which give a fresh cause of action to the decree-holder. Section 51 (e) cannot enable the Court to give a fresh mandatory direction to remove something which was not in existence at the time of the decree. AIR 1969 Andh Pra 92 (98) (DB).

(3) Section 51 (e) is a residuary clause that comes into play only when the decree cannot be executed in any of the modes provided in clauses (a) to (d). AIR 1961 Punj 547 (549): 63 Pun LR 756 (DB).

9. "On the application of the decree-holder." — (1) The section provides that the Court can act only on the application of the decree-holder. Such application may be inferred from the act of the Court executing the decree. AIR 1920 Lah 443 (446).

(2) Even without an application, the Court can suo motu order the appointment of a receiver under S. 94 (d) and O. 40, R. 1. AIR 1925 Rang 318 (320): 3 Rang 235 (DB).

(3) A stranger to the suit or decree cannot apply for execution though there may be a benefit conferred on him by the decree. AIR 1917 Oudh 182 (184, 185) (DB).
[See however AIR 1932 Mad 193 (194, 195) (DB).]

(4) The judgment-debtor cannot apply under this section, e. g., for the appointment of a receiver. AIR 1922 Pat 369 (371) (DB).

10. Appeal. — (1) An order appointing a receiver in execution, if it falls under O. 40, R. 1, is appealable as an order under O. 43, R. 1 (s). AIR 1956 Mad 163 (165) ° AIR 1927 Lah 190 (190) * (1912) 39 Cal 1010 (1014) (DB).

(2) If the order of appointment of a receiver is only a conditional one on the furnishing of security and security is not furnished, no appeal lies. (1911) 12 Ind Cas 745 (751) (DB) (Cal).

**52. Enforcement of decree against legal representative.**—(1) Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.

(2) Where no such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally.

[1882, S. 252; 1877, Ss. 252 and 234; 1859, Ss. 203 and 210. See O. 22, Rr. 4, 5 and 12.]

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**Section 51 — Note 10** (contd.)

(3) An order refusing to discharge a receiver is one relating to the "execution" of the decree within S. 47 and as such is appealable as a decree. AIR 1918 Pat 60 (61) (DB).

## SECTION 52 — SYNOPSIS


1. Scope.
2. "Legal representative."
3. Decree against legal representative, when and how to be passed and its effect.
4. Decree against some of several legal representatives — Validity and legal effect.
5. Decree against wrong legal representative — Effect.
6. Decree against executor who has not proved the will — Effect.
7. Decree against dead person — Effect.
8. "Out of the property of the deceased."
9. Insolvency of heirs after decree — Effect.
10. Liability of legal representative under the section.
11. Manner of execution.


## TOPIC INDICATOR


"Attachment and sale", meaning of — See Note 11.
Burden of proof — See Note 10.
Doctrine of representation — See Note 4.
Due application, what is — See Note 10.
Personal liability of legal representative — See Note 10.
Where no such property remains — See Note 10.


**1. Scope.**— (1) Where a limited liability company goes into voluntary liquidation and another company takes over its assets and liabilities the latter company is, to all intents and purposes, a representative in interest of the former company and the principle of sub-sec. (2) of this section extends to such a case. (1939) 181 Ind Cas 721 (725) (DB) (Pat).

(2) Where a Hindu widow, under the terms of the will of her husband, is the owner of his property during her lifetime, the person who under the terms of that will is entitled to take the property only if he is alive on the date of the widow's death becomes in a sense the widow's legal representative by accepting a surrender of the property by the widow subject to the stipulation that he is to be liable for the payment of all debts. AIR 1955 All 350 (352) (DB).

(3) The award of the Registrar of Co-operative Societies against the legal representative of a deceased person in respect of a debt due by such person can be executed by attachment and sale of the property of the deceased in the hands of the legal representative. (1939) 181 Ind Cas 512 (513) (DB) (Pat).

(4) Section 52 enables a Court to direct execution against the assets of the deceased debtor. The section is limited to cases where the property of the deceased debtor devolves upon his heir or legal representative. AIR 1957 Andh Pra 47 (48).

(5) The provisions of S. 52 are imperative and not merely directory. In order that execution may be taken against the legal representatives, there must be a decree passed in terms of S. 50. AIR 1963 Ker 263 (264): 1962 Ker LT 673. (AIR 1938 PC 7 and AIR 1938 PC 80 and AIR 1934 Mad 562 (2), Rel. on.)

(6) Section 52 does not fasten liability of attachment and sale to a property which a person inherits not from the deceased debtor but from another person in his own individual right and independently of deceased. 1964 All LJ 1020 (1024).

**2. "Legal representative."** — (1) If a person is really the legal representative and he is on the record as such, he will be competent to represent the estate and the absence of an order in that behalf will not detract from that capacity. AIR 1956 Trav-Co 147 (153): ILR (1955) Trav-Co 823 (FB).

(2) If an estate is in its inherent nature such that it terminates upon the death of its holder, nobody can represent that estate thereafter and nobody can be a legal representative of the estate on account of being in possession of it. 1964 All LJ 1020 (1024).

**3. Decree against legal representative, when and how to be passed and its effect.**— (1) In a suit by a creditor against the heirs of the deceased debtor, the plaintiff is entitled to a decree against the defendants on proof of the debt, whether the deceased left any property or not. AIR 1935 All 390

Section 52 — Note 3 (contd.)
(391) ° (1928) 116 Ind Cas 86 (86) (All) ° AIR 1926 Nag 170 (170, 171) * (1889) 13 Bom 653 (654) (DB).

[But see AIR 1941 Bom 23 (24): ILR (1941) Bom 177 (FB) ° AIR 1923 Lah 471 (473) (DB) ° (1874) 1874 Pun Re No. 65, page 213 (215) * 1936 All WR 32 (33).]

(2) It is not necessary that the plaintiff should prove that the assets of the deceased have come into the hands of the legal representatives; it is sufficient if there are assets of which they may become possessed. (1884) 8 Bom 309 (310) (DB) ° (1911) 33 All 414 (419) ° AIR 1927 All 459 (460, 462, 463):49 All 645 (DB) * AIR 1926 Nag 170 (170, 171).

(3) The question whether the heirs have got assets of the deceased in their hands must be determined in execution and not in the suit. AIR 1935 All 390 (391) ° (1872) 18 Suth WR 185 (188) (PC) ° AIR 1927 All 459 (460): 49 All 645 (DB) * 1881 Pun Re No. 11, page 20 (20) ° AIR 1931 Nag 173 (175): 27 Nag LR 247.

[See however AIR 1948 Nag 168 (169): ILR (1947) Nag 982.]

[But see AIR 1925 Nag 380 (381).]

(4) In a suit against the heirs of deceased Mahomedan for a dower debt due by the deceased the proper form of decree is against each of the heirs of the deceased for that proportion of the plaintiff's joint claim which corresponds to the share of each heir in the estate of the deceased. AIR 1938 PC 80 (84): 65 Ind App 119: 32 Sind LR 362.

(5) The decree against a legal representative under this section should direct the defendant to pay the decree debt out of the assets of the deceased in his hands. AIR 1952 SC 170 (173): 1952 SCR 544: ILR (1952) Punj 254 ° (1908) 18 Mad L Jour 36 (36) (DB) * AIR 1917 Mad 418 (419) (DB) ° AIR 1961 Bom 97 (103): 62 Bom LR 360 (DB). (Suit for compensation under S. 65, Contract Act against legal representative of deceased vendor in respect of sale deed discovered to be void.)

(6) A decree which does not direct the defendant to pay the decree debt out of the assets of the deceased in his hands is an erroneous decree. AIR 1923 Bom 414 (415) (DB) ° 1874 Pun Re No. 65, p. 213 (215).

(7) When a person is not an heir but is sued as a legal representative on the sole assertion that he is intermeddler in the estate, the plaintiff has to establish that the estate belonged to the deceased. ILR (1953) Madh B 381 (382, 383) * AIR 1948 Nag 168 (169): ILR (1947) Nag 982.

(8) The decree referred to in this section is a mere money decree and not one which creates a charge on the assets of the deceased. AIR 1946 Oudh 1 (5): 20 Luck 517.

(9) Certain persons being sued as representatives of deceased person, a decree cannot be passed against them as partners of a firm. (1909) 34 Bom 244 (247) (DB).

(10) A decree merely against the assets of a deceased person without mentioning the name of the legal representative is inexecutable. AIR 1934 Mad 562 (563) (DB).

(11) Where a decree is passed against several heirs of a deceased person and the decree-holder realises the entire decretal amount from some of the heirs alone, the latter can sue the other heirs for contribution. AIR 1938 PC 169 (173, 174): 13 Luck 494: 65 Ind App 219.

(12) A decree may be passed against a person who represents the estate of the deceased in the sense that the descendible part of estate has descended to him either partially or wholly. But if a property was not descendible as a property of the deceased at all the liability to attachment and sale does not arise by the mere fact that it is in possession of the legal representative. 1964 All LJ 1020 (1022, 1024): 1964 All WR (HC) 685. (AIR 1948 PC 1, 1964 All LJ 197, Rel. on.)

(13) Property given under B's will to A absolutely but B to remain in possession during his lifetime — Property acquired by Government and compensation paid to B — After death of B his estate became liable to pay compensation money to A's assignee — Suit for recovery by A — Decree which would be passed would be one for payment of money out of property of deceased. AIR 1962 Cal 513 (518): 66 Cal WN 240.

**4. Decree against some of several legal representatives — Validity and legal effect.** —(1) A decree obtained against some only of several heirs of a deceased person may be binding on the estate in the absence of fraud or collusion, on the principle of substantial representation. AIR 1935 Mad 737 (739) ° (1905) 32 Cal 296 (313): 32 Ind App 23 (PC) ° (1890) 14 Bom 597 (603, 604) * (1879) 6 Ind App 233 (237) (PC) ° AIR 1951 Trav-Co 244 (255): 1950 Trav-Co LR 242 (DB) ° AIR 1947 Pat 365 (368): 25 Pat 550 (DB) ° (1903) 26 Mad 230 (234) (DB) * AIR 1966 SC 792 (798): (1966) 1 SCR 937. (This principle does not apply to cases where there has been fraud or collusion between creditor and heir or where there are other circumstances which indicate that there has not been a fair and real trial or that the absent heir had a special defence which was not and could not be tried in earlier proceedings.)

(2) The doctrine of representation depends upon the representation of the estate in effect and on the honest belief that it is represented, there being no fraud or collusion. The application of that doctrine is not limited to a case where the suit is instituted against a wrong person or to a case where a wrong legal representative is brought on record or where only a few of the legal representatives are impleaded. It has as much application to those cases as to a case where one of the parties to the suit dies and the estate is adequately

**Section 52 — Note 4 (contd.)**

represented by the others and a decree is made without the legal representatives of the deceased having been brought on the record. AIR 1968 Mys 202 (204): (1967) 2 Mys LJ 192. (AIR 1965 SC 1049 and AIR 1966 SC 792, Rel. on.)

(3) The theory of substantial representation should be confined to cases where the Court decides a question as to who is the legal representative of a deceased party and that decision happens to be erroneous. AIR 1956 Trav-Co 147 (154): ILR (1955) Trav-Co 823 (FB) ° AIR 1969 Ker 149 (151): 1969 Ker LT 241.

(4) Where all the heirs are impleaded and some of them are subsequently exempted by the plaintiffs from the array of defendants, the defendant exempted cannot be considered to have been represented by the other defendants. AIR 1932 All 591 (592, 593): 54 All 796 (DB).

(5) In the case of co-administrators or two or more legatees, a decree against one only will not bind the estate. AIR 1917 Pat 432 (433) (DB) ° (1913) 18 Ind Cas 632 (632, 633) (DB) (Mad).

(6) In the case of heirs who are co-owners one of them cannot represent the others. AIR 1956 Trav-Co 147 (154): ILR (1955) Trav-Co 823 (FB). (AIR 1950 Trav-Co 1: 1950 Trav-Co LR 546, Overruled.)

(7) Suit instituted personally against two sons for realisation of deceased father's debt — Widow not impleaded — Decree declaring sons' liability to the extent of assets of deceased in their hands — Sons cannot repudiate their liability to be proceeded against shares in ancestral property — Decree not enforceable against widow's share. (1968) 2 Mys LJ 66: 15 LR 184 (186).

**5. Decree against wrong legal representative — Effect.**—(1) Where a creditor selects from among several rival claimants to the estate of his deceased debtor any one whom he bona fide believes to have the best prima facie title as legal representative and obtains a decree against him, the decree and the consequent execution sale will bind the true heir in the absence of fraud or collusion. AIR 1966 SC 792 (796): (1966) 1 SCR 937. (This principle is part of law of procedure which regulates all matters going to remedy and applies to all parties irrespective of their personal law.) * (1953) 32 Pat 903 (918, 919) ° AIR 1951 Cal 228 (229) (DB) ° AIR 1933 Lah 380 (381): 14 Lah 696 (DB) * AIR 1916 Mad 1022 (1023, 1024) (DB) ° AIR 1937 Mad 930 (938): 54 Mad 212 (DB) ° (1900) 24 Bom 135 (147, 148) (DB) * (1872) 17 Suth WR 459 (461) (PC) ° (1889) 16 Cal 40 (56, 60, 61): 15 Ind App 195 (PC) ° (1896) 23 Cal 374 (388, 389) (DB) * AIR 1961 Mad 428 (434): 73 Mad LW 640 (DB).

[But see (1913) 18 Ind Cas 381 (382) (DB) (Bom).]

(2) The true legal representative cannot, after the decree, be brought on record for the purpose of execution and the deceased debtor's property in his hands cannot be attached and sold in that same suit. AIR 1951 Trav-Co 244 (245): 1950 Trav-Co LR 242 (DB) ° AIR 1932 Lah 314 (315) (DB) ° AIR 1927 Mad 197 (198, 199) * AIR 1916 Cal 661 (662) (DB) ° AIR 1914 Cal 28 (29) (DB).

(3) If a person who has no sort of right to represent the deceased is made a party to the suit and a decree is obtained against him as representing the deceased, such decree cannot bind the true heir. AIR 1951 Trav-Co 244 (255): 1950 Trav-Co LR 242 (DB) ° AIR 1946 Oudh 1 (5): 20 Luck 517 * AIR 1934 All 474 (477, 479) (DB) ° AIR 1933 Mad 43 (46, 48) (DB) ° (1888) 11 Mad 408 (410, 411) (DB).

**6. Decree against executor who has not proved the will — Effect.**—(1) An executor appointed by will does not represent the deceased by virtue of the will until he has obtained probate. Therefore, a suit against him by the creditor is not maintainable unless the executor has intermeddled with the estate. (1912) 16 Ind Cas 690 (691) (DB) (Cal) * (1894) 19 Bom 821 (827) (DB) ° (1909) 2 Ind Cas 818 (819) (DB) (Cal).

(2) In order that the just claims of the creditor may not be defeated by the executor not taking out probate, the persons who take possession of the estate of the deceased will be treated as the representatives of the deceased. Even if the decree obtained against them cannot be executed against the estate in the hands of the executor when he has taken out probate, it is sufficient to enable the plaintiff to bring a suit against the executor in order to have the decree satisfied. (1903) 30 Cal 1044 (1057, 1058, 1059) (DB) ° (1879) 4 Cal 342 (345, 346) (DB) ° AIR 1915 Cal 207 (208) (DB) * (1891) 14 Mad 454 (457) (DB) ° (1908) 35 Cal 276 (279, 280) (DB).

(3) Where an executor is in possession of any portion of the estate of the testator either as executor or as a legatee, a decree passed against him and his co-executors in their representative capacity can be executed against him to the extent of the assets in his hands as a party against whom a decree has been passed as a legal representative of the deceased person. AIR 1949 Cal 690 (692) (DB).

**7. Decree against dead person — Effect** —.(1) If a decree is obtained against a dead person without impleading the legal representative, the decree is a nullity and cannot be executed. AIR 1954 Cal 205 (206) * AIR 1916 Mad 656 (656): 38 Mad 682 ° (1895) 17 All 478 (481, 482) (DB) ° (1913) 20 Ind Cas 506 (506) (DB) (Cal) * AIR 1920 Nag 61 (61, 62): 16 Nag LR 138 ° (1902) 26 Bom 317 (319) (DB).

(2) Death of defendant — Legal representatives brought on record but decree passed against deceased — Decree cannot be executed against legal representatives →

Section 52 — Note 7 (contd.)
Decree-holder can apply for amendment of decree. AIR 1963 Ker 263 (264): 1962 Ker LT 673.

8. "Out of the property of the deceased." —(1) A decree obtained against the legal representative of a deceased debtor can be executed only against the estate of the latter in his hands. AIR 1951 Cal 577 (579): ILR (1952) 2 Cal 310 (DB) ° AIR 1939 Pat 500 (502) (DB) * ('08) 18 Mad L Jour 36 (36, 37) (DB) ° AIR 1927 Bom 52 (52, 53) (DB) ° AIR 1931 Bom 229 (231, 232) (DB) * AIR 1929 Lah 424 (425) (DB) ° AIR 1924 Nag 410 (411): 21 Nag LR 12 ° AIR 1916 All 284 (286) (DB) ° AIR 1961 Andh Pra 335 (337, 338): (1960) 2 Andh WR 241 (FB).

(2) The decree-holder is not entitled to proceed against the separate property of the legal representative. AIR 1917 Pat 536 (537) (DB) * AIR 1925 Oudh 113 (113): 27 Oudh Cas 234 (DB) ° 65 Ind Cas 224 (224) (DB) (Pat) ° (1872) 18 Suth WR 185 (188) (PC) * AIR 1931 All 368 (369) (DB) ° (1897) 4 Cal WN 151 (152) (DB) ° 1888 All WN 49 (50).

(3) The decree itself must indicate that it was intended by the Court to be operative against the estate of a deceased debtor. AIR 1947 Pat 365 (370): 25 Pat 550 (DB).

(4) A consent decree can, by agreement of parties, be made enforceable against the person and property of the judgment debtor leaving out of account the assets of the deceased in his hands but the decree must clearly and in express terms provide for it where the basis of suit is not a cause of action personal to the defendant but is one relating to the estate of the deceased. ILR (1960) 2 Cal 459 (464).

(5) Where the survivor does not inherit as heir of the deceased but gets into the estate in his own individual right, the estate is not liable for the debts of the deceased. AIR 1947 Bom 160 (161) * AIR 1914 Oudh 208 (208) ° (1870) 5 Mad HCR 303 (309) (DB) ° (1887) 10 Mad 117 (121) (DB).

(6) Where lands are attached to a hereditary office and are inalienable, they have not the character of simple heritable property and do not form part of the assets of the deceased person. (1880) 5 Cal 389 (412, 419) (DB) * (1882) 9 Cal 187 (206, 208): 9 Ind App 104 (PC) ° (1888) 15 Cal 471 (481, 482): 15 Ind App 18 (PC) ° (1885) 9 Bom 198 (212, 217, 232) (FB) * AIR 1925 Nag 449 (450).

(7) Where under a grant for maintenance, a grantee has a heritable but non-transferable interest in the property, each successive heir derives his interest by inheritance and the property in his hands forms the assets of the deceased grantee. AIR 1936 Oudh 76 (79) (DB).

(8) A subsequent alteration by law of the characteristics of property and the nature of the rights which a person acquired in that property as an heir cannot make that property to cease to be the assets of the deceased in the hands of that person. (1955) All LJour 242 (243) (DB).

(9) Where a decree is passed against the assets of a deceased person in the hands of his heirs, the rents and profits accruing since his death form part of his assets. AIR 1950 Mad 154 (155) ° AIR 1938 Oudh 45 (48): 13 Luck 689 (DB). (Overruling AIR 1914 Oudh 233: 17 Oudh Cas 207.) ° AIR 1924 Mad 530 (532, 533, 536, 537): 47 Mad 411 (FB) * AIR 1917 Mad 536 (537) (DB) ° AIR 1928 Oudh 40 (40): 2 Luck 408 (DB) ° AIR 1921 Sind 29 (32, 33): 15 Sind LR 47 (DB) * 1964 Raj LW 198 (199): ILR (1964) 14 Raj 801. (Lands inherited from father — Decree against sons for debt of father can be executed by attachment and sale of crops raised on the lands by the sons.) * 1958 All WR (HC) 15 (16). (Crops raised by the legal representative on land belonging to the judgment-debtor and forming part of his assets are liable to be attached and taken away in execution of a decree against the assets of a judgment-debtor.)
[But see (1897) 19 All 235 (236, 237) (DB).]

(9-A) In the case of lands attached to a hereditary office and which are inalienable, the income is not liable to attachment under this section. (1896) 23 Cal 873 (876) (DB) ° AIR 1923 All 169 (169, 170). (Inalienable property.) ° AIR 1924 Mad 707 (707) (DB). (Impartible estates.) ° (1913) 9 Nag LR 137 (139) ° AIR 1916 Lah 313 (314) (DB) * (1870) 5 Mad HCR 303 (310) (DB) ° AIR 1930 Bom 238 (239) (DB).

(10) A right to a share of offerings in a temple which has been inherited by a person forms part of the assets of the deceased. AIR 1936 All 131 (134): 58 All 457 (DB).

(11) Earnings of the heirs which are really for the services they render in the temple cannot be regarded as the assets of the deceased archaka to whose office they have succeeded by inheritance. AIR 1952 Mad 114 (114).

(12) The right to the office of Patwarigiri and to receive its Iskel, being a hereditary right, would be, after the death of the grantee, the assets of the grantee in the hands of his legal representative. AIR 1950 Hyd 48 (49): ILR (1951) Hyd 100 (DB).

(13) Where a decree is passed against the assets of the deceased in the hands of the representative and the representative himself dies thereafter, the property in the hands of his heir or legal representative does not cease to be assets of the deceased debtor. AIR 1914 Mad 668 (669) (DB) ° (1900) 22 All 367 (369, 370) (DB).

(14) The term "property" in the section means only property which is capable of attachment and sale. (1957) 59 Pun LR 47 (48).

**9. Insolvency of heirs after decree — Effect.—(1) Upon the insolvency of the heirs**

**Section 52 — Note 9 (contd.)**
of the deceased after decree, the estate of the deceased vests in the Official Assignee and consequently the creditor can only prove the decree debt in insolvency. AIR 1916 Mad 645 (646) (DB).

(2) If the heir has disposed of the assets to other persons who took the property without notice of the creditors' claims, then the creditors' right to follow the property is lost and it cannot be revived by the fact that the heir is adjudicated insolvent and that his transfer is set aside under the insolvency laws. AIR 1934 Rang 162 (163): 12 Rang 602 (DB).

(3) Where the debtor dies an undischarged insolvent, the creditor cannot sue the Official Assignee as the representative of the deceased debtor. The suit must be filed against those persons who would ordinarily be his legal representatives. (1875) 22 Cal 259 (262, 263) ° (1908) 30 All 486 (487) (DB).

**10. Liability of legal representative under the section.**—(1) The liability of a legal representative extends only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of. AIR 1949 Ajmer 63 (64) * AIR 1937 Rang 274 (274) ° (1884) 7 Mad 255 (257) (DB) ° AIR 1932 Bom 522 (523) * AIR 1914 Lah 144 (145) (DB) ° AIR 1963 Pat 151 (152) (DB). (Legal representative is not personally liable for costs of suit.)

(2) Whenever a decree is passed against the heir, it must be deemed to be executable only as provided in this section, though the decree is erroneously passed as a personal decree. (1921) 65 Ind Cas 224 (224) (DB) (Pat).

(3) The mere fact that the legal representative is a party to the decree obtained against the assets of the deceased does not render him personally liable in the absence of an order of the Court to that effect. AIR 1956 Trav-Co 88 (89): ILR (1955) Trav-Co 1238 (DB).

(4) Where a decree for the payment of money out of the property of the deceased is passed, the decree-holder can proceed only as provided by sub-section (2) of this section. A suit by him for administration of the estate of the deceased will be barred by Section 47. AIR 1942 Mad 588 (590).

(5) It is for the decree-holder to prove in the first instance, that some assets belonging to the estate of the deceased came into the hands of the legal representative. AIR 1955 Raj 33 (36): ILR (1954) 4 Raj 994 (DB) * Madh BLJ 1954 HCR 379 (380) ° AIR 1917 Mad 536 (538) (DB) ° AIR 1924 Mad 466 (467, 469) (DB) * (1900) 4 Cal WN 151 (152) (DB) ° AIR 1952 Kutch 35 (36). (Execution application must disclose a cause of action for proceeding personally against the legal representative as indicated in Section 52 (2).)

[But see 1888 All WN 49 (50).]

**(6) It is for the legal representative to** satisfy the Court as to the extent of the assets received and to account for them. AIR 1955 Raj 33 (36): ILR (1954) 4 Raj 994 (DB) ° Madh B LJ 1954 HCR 379 (380) ° AIR 1951 Simla (Punj) 277 (279) ° AIR 1940 Rang 78 (80) * (1939) 181 Ind Cas 721 (725) (DB) (Pat) ° AIR 1917 Mad 536 (538) (DB) ° AIR 1933 Rang 309 (310) (DB) * AIR 1934 Lah 106 (107) (DB) ° (1911) 12 Ind Cas 253 (253, 255) (DB) (Mad) ° (1963) 2 Mad LJ 478: ILR (1963) Mad 811 (812). (Legal representative must satisfy Court that in disposing of assets of deceased he applied them in paying off debts of deceased.)

(7) If the defendant fails to satisfy the Court that he has duly applied the property of the deceased he is personally liable to the extent of the property in respect of which he has failed to satisfy the Court. AIR 1955 Raj 33 (36): ILR (1954) 4 Raj 994 (DB) ° Madh B LJ 1954 HCR 379 (380) * AIR 1951 Cal 577 (579): ILR (1952) 2 Cal 310 (DB) ° AIR 1950 Mad 407 (408) (DB) ° (1939) 181 Ind Cas 721 (725) (DB) (Pat) * AIR 1933 Rang 309 (310) (DB) ° (1963) 2 Mad LJ 478: 76 Mad LW 327 ° AIR 1960 Madh Pra 68 (69, 70): 1960 MPLJ 81 ° 1955 Madh BLJ HCR 2228.

(8) When a decree has been passed against two or more legal representatives, no judgment-debtor can say that before he is proceeded against, the decree-holder must exhaust his remedies against some one else. AIR 1950 Mad 407 (408) (DB).

(9) Sub-section (2) will apply only when no property of the deceased is in the possession of the judgment-debtor. AIR 1937 Pesh 80 (80) ° AIR 1930 Lah 354 (355).

(10) Every payment on account of a debt is perfectly lawful, irrespective of its effect upon the other creditors. (1903) 26 Mad 792 (796, 797) (DB) * (1906) 30 Bom 270 (273) ° (1895) Pun Re No. 68, p. 337 (337) * AIR 1927 All 459 (460): 49 All 645 (DB).

(11) Where payments are made by the legal representative to the extent of the full value of the property of the deceased which has come into his hands, the decree cannot be executed even though he may still have in his possession property which originally belonged to the deceased. AIR 1951 Cal 577 (581): ILR (1952) 2 Cal 310 (DB) ° (1903) 26 Mad 792 (798) (DB) ° (1913) 9 Nag LR 137 (139).

(12) If the only property of the deceased debtor still in the hands of the judgment-debtors is exempt from attachment and sale, if it can be shown that other property which could have been attached and sold passed from the deceased debtors to his legal representatives, and that they sold such property and do not satisfactorily account for the disposal of the sale proceeds, the decree-holder can legally have recourse to the provisions of Section 52 (2). (1957) 59 Pun LR 47 (48, 49).

**(13) The amendment of an execution petition by the inclusion of a prayer for**

**53. Liability of ancestral property.**—For the purposes of Section 50 and Section 52, property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative.

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Section 52 — Note 10 (contd.)

the arrest of the legal representative of judgment-debtor for the realisation of the sum of money indicated in the order of the executing Court cannot be said to be barred by Section 48 when the order of the executing Court fixing the personal liability of the judgment-debtor is the order which gives the right to demand payment of the money personally against him. AIR 1958 Mad 395 (396).

(14) Under Section 29, Ajmer Land and Revenue Regulation, 1877, a son inheriting property from his deceased father the istimraridar, acquires a right that the property inherited by him cannot be attached and sold to enforce an unsecured liability of the deceased istimraridar. This right is property. But after the coming into force of the Constitution the restriction in the Regulation became void under Art. 14 and hence the money due could be recovered from the property inherited by him. 1963 Raj LW 466 (467).

**11. Manner of execution.**—(1) The question whether a property is liable to be proceeded against in execution under Section 52 should be decided in execution and not referred to a separate suit. AIR 1940 Rang 78 (80) * (1889) 16 Cal 1 (8) (DB) ° (1890) 17 Cal 711 (714, 721) (FB) * (1890) 12 All 73 (78) (DB) * (1886) 10 Mad 117 (121) (DB) ° (1910) 34 Bom 546 (552) (DB).

(2) The decree-holder is entitled to attach and sell any property of the deceased in the possession of his heirs independently of the fact whether the property in such possession is more than his share or not. AIR 1939 Pat 500 (502) (DB) ° AIR 1925 Oudh 515 (515, 516, 517) (DB) * AIR 1914 All 392 (393): 36 All 439 (DB) ° (1909) 33 Mad 6 (8) (DB) ° AIR 1919 Sind 49 (50): 13 Sind LR 138 (DB).

(3) A decree-holder cannot be delayed till the legal representatives are able to ascertain all the creditors and the extent of their debts or till they effect a partition among themselves or settle their disputes inter se, or till probate is obtained, or till the assets are reduced to possession. AIR 1925 Oudh 515 (516) (DB) * (1909) 33 Mad 6 (8, 9) (DB) ° (1899) 22 Mad 194 (195, 196) (DB).

(4) The words "attached and sold" should be taken distributively; so that where income from property in the hands of the legal representative is attached, it is unnecessary to sell it. AIR 1924 Mad 530 (536, 537): 47 Mad 411 (FB).

(5) The fact that at one stage the decree-holder pointed out some assets and subsequently he comes to know about the other assets belonging to the deceased, would not debar him from praying for execution as against the property which he comes to know of at a later stage. AIR 1961 Andh Pra 335 (337, 338): 1961 Andh LT 213 (FB). (Executing court bound to construe decree in light of Section 52 notwithstanding earlier decisions in case concerning assets of deceased.)

(6) An execution petition for realization of the decretal amount or part of it from the legal representative personally under sub-section (2) of Section 52, Civil P. C. must disclose a cause of action, that is, must aver that no property of the deceased has remained in his possession and he has failed to duly apply property of the deceased which came into his possession. AIR 1952 Kutch 35 (36).

(7) An executing petition, seeking to realise decretal amount by attachment and sale of property as of the deceased, cannot be regarded as disclosing cause of action for obtaining execution against the legal representatives personally under S. 52 (2). AIR 1952 Kutch 35 (36).

## SECTION 53 — SYNOPSIS

1. Scope, applicability and object.
2. "Property in the hands of a son or other descendant."
3. Liability under Hindu law.
4. "Deceased ancestor."
5. "Decree."
6. "Property of the deceased."

## TOPIC INDICATOR

Decree directing execution against property belonging to deceased judgment-debtor — See Note 3.
Enforceability under this section in execution and not by separate suit — See Note 1.
Inapplicability of the section to persons other than descendants — See Notes 2 and 3.
Mother succeeding to son — See Note 2.
Mortgage decree — See Note 5.
Property not liable under this section — See Notes 3 and 6.

**1. Scope, applicability and object.**—(1) Section 53 explains the meaning of the words "property of the deceased" and extends the meaning of the term "legal representative" as defined in Section 2, Cl. (11). AIR 1952 SC 170 (178): 1952 SCR 544: ILR 1952) Punj 254 ° AIR 1939 Mad 867 (873): ILR (1940) Mad 123 (DB) * AIR 1937 Mad 785 (785) ° AIR 1936 Bom 456 (459) ° AIR 1923 Pat 143 (144, 147, 148, 149): 6 Pat L Jour 451 (DB).

(2) Reading Sections 50, 52 and 53 together, it is clear that ancestral property

## OBJECTS AND REASONS

"**Clause 53.— Has** been added by the Committee in order to set at rest a question on which the High Courts are divided in opinion. It is true that where a son or grandson takes any ancestral property by survivorship he is bound to pay out of such property all debts of his ancestor not incurred for immoral or illegal purposes; but whether the creditor can follow the property in the hands of the son or grandson in execution is a debtable point under the Code. The question is merely one of procedure, and the Committee have come to the conclusion that any controversy between the parties with regard to the liability of the son or grandson to pay the debts of his ancestor should be determined in execution, it being open to them to raise any objection or defence in such proceedings which they might have raised in a separate suit instituted by the creditor, the clause in question not imposing upon them a greater liability than that imposed by the Hindu law."

—S. O. R.

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**Section 53 — Note 1** (contd.)

in the hands of a son or other descendant can be proceeded against in execution as assets of the deceased in the hands of such descendant. AIR 1947 Mad 162 (163): ILR (1947) Mad 463 (DB) * AIR 1944 Nag 360 (361): ILR (1945) Nag 409 ° AIR 1938 PC 7 (8): 13 Luck 61: 32 Sind LR 221 ° AIR 1935 Pat 275 (280): 14 Pat 732 (FB).

(3) The descendant can, in execution proceedings, show that in fact no pious obligation exists in view of the illegality or immorality or the non-existence of the debt. A separate suit will be barred in respect of that matter by virtue of Section 47. AIR 1952 SC 170 (178): 1952 SCR 544: ILR (1952) Punj 254 * AIR 1954 Mad 203 (208) ° AIR 1965 Andh Pra 285 (286, 288): (1965) 1 Andh WR 369 ° AIR 1962 Raj 136 (137): 1962 Raj LW 194 (DB).

[See however AIR 1939 Mad 867 (873, 874): ILR (1940) Mad 123 (DB).]

(4) This section enacts only a rule of procedure. It is only when the liability of the sons to pay the debts of their father exists under the Hindu Law, that the operation of the section is attracted and not otherwise. AIR 1952 SC 170 (173, 174): 1952 SCR 544: ILR (1952) Punj 254 * (1968) 2 Mys LJ 269 (271). (Decree obtained against Hindu father for debt not illegal, bound the sons as well and ancestral property in their hands was liable to be proceeded against in execution of the decree.)

(5) A suit for administration will not lie where a Hindu father dies leaving no property of his own except his share in joint family property. AIR 1939 Mad 552 (553): ILR (1939) Mad 820 (DB). (Reversing AIR 1937 Mad 785.)

(6) It is open to a decree-holder to agree not to avail himself of the right conferred on him by this section but such an agreement cannot be inferred in the absence of express words of exclusion. AIR 1952 SC 170 (173, 174): 1952 SCR 544: ILR (1952) Punj 254.

(7) The object of the Legislature in enacting Section 53 was to make the property in the hands of a son available for execution of a decree obtained against the father notwithstanding that he had not got it by inheritance but by survivorship. AIR 1957 Andh Pra 47 (48).

(8) Decree against father passed before Civil P. C., was made applicable in the area — Execution against son's interests permissible in terms of S. 53. 1961 Ker LT 1126 (1127).

**2. "Property in the hands of a son or other descendant."**—(1) The only persons who, under the Hindu law, are under a pious obligation to pay their ancestor's debts are the son, the grandson and the great-grandson. AIR 1937 Oudh 327 (328): 13 Luck 241 (DB) ° AIR 1926 PC 105 (106, 107, 108): 48 All 518: 53 Ind App 204 ° AIR 1962 Andh Pra 243 (245): (1962) 1 Andh WR 151 (DB).

(2) The section has no application where the property has passed into the hands of persons other than the ancestor's sons, grandsons and great-grandsons. AIR 1937 Mad 472 (474) * AIR 1957 Andh Pra 47 (48).

**Brother:**

(1904) 27 Mad 106 (108) ° AIR 1916 Bom 262 (263, 264): 40 Bom 329 (DB) ° (1904) 31 Cal 224 (227) (DB).

**Father:**

AIR 1926 All 157 (158): 48 All 4 (DB) * AIR 1915 Nag 39 (40, 41): 11 Nag LR 45.

**Uncle:**

(1877) 2 Bom 479 (480) (DB).

**Nephew:**

AIR 1924 All 873 (875) ° (1910) 5 Ind Cas 362 (364, 365) (Mad) ° AIR 1962 Andh Pra 243 (245): (1962) 1 Andh WR 151 (DB). (Mother succeeding to her son — Property in her hands is not "property in hands of son or other descendants".) * 1960 BLJR 291 (296) (DB).

(3) The property in the hands of a son or other descendant does not cease to be liable for the debt even though he dies and even though the property has passed to his heirs. AIR 1914 Mad 668 (668, 669) (DB).

(4) The property of a deceased person does not cease to be liable where it has passed to the son or other descendant jointly with other persons such as a grandfather or uncle. AIR 1935 Oudh 510 (515): 11 Luck 449 (DB) ° AIR 1934 All 590 (594, 595, 601, 603, 604) (FB). (AIR 1926 All 220: 48 All 245, Overruled.) ° AIR 1933 Lah 857 (858): 15 Lah 50 (DB).

(5) Father's debt — Suit instituted personally against two sons for realisation of

Section 53 — Note 2 (contd.)
deceased father's debt — Widow not impleaded — Decree declaring sons' liability to the extent of assets of deceased in their hands — Sons cannot repudiate their liability to be proceeded against shares in ancestral property — Decree not enforceable against widow's share. (1968) 2 Mys LJ 66: 15 LR 184 (187).

3. Liability under Hindu law.—(1) The liability of property in the hands of a son or other descendant for the debts of an ancestor has to be ascertained by reference to the principles of Hindu law. (1912) 16 Ind Cas 970 (970) (DB) (Cal) * (1888) 11 Mad 373 (374) (DB).

(2) Section 53 does not affect the rule of Hindu law that the property of a coparcener which has been attached in execution of a decree in his lifetime can be proceeded against even subsequent to his death. AIR 1939 Pat 568 (569): 18 Pat 499 (DB) ° AIR 1937 Lah 328 (329) ° AIR 1914 Mad 68 (68, 69) (DB) * (1880) 5 Cal 148 (174): 6 Ind App 88 (PC) ° (1907) 5 Cal L Jour 80 (85, 86, 87) (DB).

(3) Where a mortgage decree is passed against a Hindu father, it can be executed against his son by virtue of Section 53. (1891) 15 Bom 673 (674, 675) ° (1905) 15 Mad L Jour 486 (486) * (1906) 33 Cal 676 (677, 678) ° (1899) 21 All 301 (305, 306, 307, 308) (DB) ° AIR 1923 Pat 143 (147, 148, 149): 6 Pat L Jour 451 (DB).

(4) Section 53 does not affect the provision of Hindu law by which the whole of the family property can be sold in execution of a decree against the father or manager where the latter was sued in a representative capacity. AIR 1937 Mad 610 (618): ILR (1937) Mad 880 (FB) * AIR 1914 PC 136 (137): 41 Ind App 216: 36 All 383 ° (1888) 15 Cal 70 (81, 82): 14 Ind App 187 (PC) ° (1890) 14 Bom 597 (603, 604) (DB) ° (1882) 5 Mad 234 (235) (FB).

(5) A decree-holder cannot take advantage of Section 53 and attach ancestral property in the hands of the legal representative where the decree directs that it shall be realised from such property only as belonged to the deceased personally. (1911) 9 Ind Cas 631 (632) (DB) (All).

(6) A decree passed against the sons as the legal representatives of a Hindu father in a suit by the endorsee of a promissory note executed by the father is a decree for the payment of a debt due by the father within the meaning of this section. AIR 1947 Mad 355 (357).

(7) Where an ancestral estate, though impartible and governed by the rule of primogeniture, has been attached during the lifetime of the Hindu father in satisfaction of a decree against him, the estate remains liable after his death in execution in the hands of his eldest son who succeeds him by survivorship. AIR 1948 PC 1 (3): ILR (1947) Nag 830: 74 Ind App 247.

(8) Money decree against Hindu father before partition — Sons are not relieved of their pious obligation to discharge the debt nor their shares are relieved of their liability to be sold in execution. AIR 1959 SC 282 (287, 288, 289): 1959 SCR 1384.

(9) Tort — Liability for — Does not amount to debt — On death of judgment-debtor his son is bound to satisfy decree if he has received assets. AIR 1963 Madh Pra 49 (51).

4. "Deceased ancestor."—(1) Section 53 deals with the obligation after the death of the ancestor. AIR 1952 SC 170 (177): 1952 SCR 544: ILR (1952) Punj 254 * AIR 1936 Oudh 139 (140): 11 Luck 523 (DB).

(2) Independently of this section, on general principles, if the family continues to be joint at the time when execution is sought, the son's share in the joint family property can be proceeded against in execution of the decree against the father during the lifetime of the father. AIR 1952 SC 170 (174): 1952 SCR 544: ILR (1952) Punj 254 ° AIR 1938 Nag 24 (27): ILR (1938) Nag 136 (DB) ° AIR 1937 Pat 517 (518) (DB).

(3) Where before the decree is passed, partition has taken place between the father and the sons the shares allotted to the sons at such partition cannot be proceeded against in execution during the lifetime of the father. AIR 1952 SC 170 (177): 1952 SCR 544: ILR (1952) Punj 254 * AIR 1954 Mad 864 (867, 868 and 869): ILR (1954) Mad 834 (FB). (AIR 1944 Mad 398, Overruled.) ° AIR 1954 Mad 203 (208) ° AIR 1938 Nag 24 (29): ILR (1938) Nag 136 (DB) * AIR 1959 Bom 141 (141): 60 Bom LR 1015.

[See however AIR 1936 Lah 64 (64).]

(4) Where partition has taken place but the father is dead at the time of execution, the shares allotted to the sons at such partition can be proceeded against in execution under this section. AIR 1949 East Punj 9 (13) (DB) * AIR 1942 All 248 (250, 251): ILR (1942) All 509 (DB) ° AIR 1937 Mad 610 (615): ILR (1937) Mad 880 (FB) * AIR 1952 SC 170 (176, 178): 1952 SCR 544: ILR (1952) Punj 254. ((1899) 22 Mad 519 and AIR 1919 Mad 1175: 41 Mad 136, Overruled.)

(5) Sons are liable to pay pre-partition debts of the father even after partition unless there was an arrangement for payment of these debts at the time of partition. AIR 1952 SC 170 (176): 1952 SCR 544 ° AIR 1964 Cal 562 (565, 566) (DB).

5. "Decree".—(1) Section 53 applies only if there is a decree in respect of the debt sought to be realised out of the property of the deceased. AIR 1927 All 683 (684) ° 1958-1 Andh WR 313 (315).

(2) The word "decree" in the section is not limited to money decrees passed against the ancestor, but also includes decrees against property. AIR 1924 Mad 571 (573, 574, 575) (DB).

**54. Partition of estate or separation of share.**—Where the decree is for the partition of an undivided estate assessed to the payment of revenue to [a][the Government], or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance

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**Section 53 — Note 5 (contd.)**

(3) The expression "Property.....passed" in Section 53 is descriptive of the class of the property which can be reached in execution and cannot be read as limiting the nature of the debt, and the section will apply to a case where the decree is for compensation in lieu of specific performance. AIR 1948 PC 1 (3): ILR (1947) Nag 830: 74 Ind App 247. (AIR 1940 Nag 278: ILR (1941) Nag 632, Reversed.)

(4) Section 53 has no application to the execution, against legal representatives, of mortgage decrees obtained against the ancestor. AIR 1939 Lah 438 (439, 441): 15 Lah 772 (DB).

(5) Where in a suit to enforce a simple mortgage executed by the father the sons are parties and the Court passes a simple money decree against the father alone dismissing the suit against the sons the decree cannot be executed against sons' interest in the joint family property on the ground of pious obligation of sons to discharge father's debts. AIR 1952 All 337 (344): ILR (1952) 1 All 109 (DB) * AIR 1960 Pat 8 (10): 1959 BLJR 329. (AIR 1949 Pat 401 and AIR 1940 Pat 117, Rel. on.)

(6) Where a suit is brought against the sons and grandsons of a deceased Hindu for the recovery of a debt due by the deceased but the suit is dismissed against the grandsons and is decreed only against the sons, the decree will not bind the grandsons' interest in the joint family. AIR 1938 PC 7 (8): 13 Luck 61: 32 Sind LR 221.

(7) Simple money decree passed against estate of deceased father in hands of sons — Suit dismissed against grandsons — Decree can be executed under Section 53 against interest of subsequently born grandsons. AIR 1944 Oudh 131 (133, 135): 19 Luck 481 (DB).

(8) A decree against a son or other descendant is not a personal decree against him but is only one against the assets in his hands. AIR 1937 Mad 813 (816) ° AIR 1935 Bom 287 (292) * AIR 1932 Pat 12 (13, 14) (DB) ° ILR (1960) 2 Cal 459 (464).

**6. "Property of the deceased".**—(1) The words "property of the deceased" do not include the self-acquisitions of the son or other descendant himself. AIR 1952 SC 170 (174): 1952 SCR 544: ILR (1952) Punj 254 ° AIR 1934 Mad 173 (174): 57 Mad 440 (DB).

(2) The property received by the sons at the partition with their father is the property of the deceased ancestor for the purpose of enforcing a decree obtained on a debt incurred by the father before partition. AIR 1955 Raj 11 (14): ILR (1955) 5 Raj 95.

(3) In the case of debts contracted by the father after partition the shares allotted on partition to the sons cannot be made liable for the post-partition debts of the father. AIR 1952 SC 170 (175): 1952 SCR 544: ILR (1952) Punj 254 * 1960 BLJR 291 (296) (DB).

(4) The word "property" is used in this section in its ordinary and general sense. AIR 1929 Bom 233 (234, 235): 53 Bom 463 (DB).

(5) Forest dues which have become due after the death of the father and received by the son can be proceeded against under this section. AIR 1930 Nag 134 (134).

(6) A gratuity given to the heir of a deceased employee by a railway administration is purely a personal one and cannot be attached as assets of the deceased. AIR 1923 Oudh 21 (21, 22): 26 Oudh Cas 53.

(7) The provident fund to the credit of deceased ancestor and paid to his minor son under the Provident Funds Act (XIX of 1925), is, under Section 3, thereof, the property of the son and is not an asset of the ancestor. AIR 1934 Mad 173 (174): 57 Mad 440 (DB).

(8) Where after a decree is obtained against the father alone there is a partition of the family properties the creditor cannot execute his decree against the separated share of the son which cannot be said to belong to the father. AIR 1954 Mad 864 (867): ILR (1954) Mad 834 (FB) ° AIR 1958 Andh Pra 216 (218) (DB).

(9) If there was really no partition and the properties continue to be joint family properties, the son's interests therein could be proceeded against even if the decree is against the father alone. AIR 1958 Andh Pra 216 (218) (DB).

(10) Hindu borrowing debt, dying issueless, leaving only widow — Will by deceased providing that widow was to be owner during her lifetime — After widow, property was to go to J — Decree against widow on basis of debt, to be realised out of estate — Surrender by widow in favour of J — Stipulation in surrender deed for payment of debt by J — Decree is binding on the estate. AIR 1955 All 350 (352): 1955 All LJ 30 (DB).

**SECTION 54 — SYNOPSIS**

1. Scope, object and applicability.
2. "Estate," meaning of.
3. Decree for partition, meaning of.
4. "Shall be made by the Collector."
5. In accordance with law relating to partition.
6. Remedies against the Collector's action.
7. Decree for partition, when and how may be passed.

with the law (if any) for the time being in force relating to the partition, or the separate possession of shares, of such estates.

[1882, 1877, S. 265; 1859, S. 225. See Ss. 67 to 72.]

[a] Substituted by A.L.O., 1950, for "the Crown" which words were substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "the Government".

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Section 54 (contd.)

TOPIC INDICATOR

Applicability of the section if joint liability to revenue is affected and not otherwise — See Note 1.

Applicability of the section to land leased from Government for a term — See Note 2.

Applicability of the section to ryotwari estates or temporarily settled estates — See Note 2.

Applicability to estates assessed in a lump sum and inapplicability to Burma paddy holding — See Note 2.

Civil Court's power to control execution by Collector — See Note 6.

Consent of parties not giving jurisdiction to civil Court for this section ⟶ See Note 4.

Decision of Civil Court to be followed by Collector except to avoid prejudice to revenue — See Note 6.

Inapplicability of the section to a share or plot short of a co-sharer's share — See Note 2.

Inapplicability to a partition of specific land within an estate, whether perfect or "imperfect" partition, under Assam Land and Revenue Regulation — See Notes 2, 5 and 6.

Jurisdiction of Civil Court where Collector has no powers as per revenue laws — See Note 6.

Meaning of "assessed to Government revenue" — See Note 2.

Meaning of "undivided estate" in this section — See Note 1.

Nature of partition suits and applicability of bar of "res judicata" to them — See Note 7.

Non-liability of Revenue Officers to draw up a formal decree even where the title is gone into — See Note 5.

Partition at the instance of Hindu widow and the governing principles — See Note 7.

Remedy against Collector's mistake — Application under Section 47 and not separate suit — See Note 6.

Terms of decree binding on Collector — See Note 6.

**1. Scope, object and applicability.**—(1) The intention of the Legislature in enacting S. 54 is that the interest of the Government with regard to the revenue assessed on the assets would be better safe-guarded by the Collector executing the decree than by the Court. (1888) 15 Cal 198 (201) (DB) * AIR 1933 Mad 259 (259): 56 Mad 443 (DB).

(2) Section 54 does not apply to decrees for partition or separate possession of estates, save where as a result of partition the revenue might be affected. (1888) 10 All 5 (8).

[But see AIR 1951 Hyd 86 (87): ILR (1951) Hyd 436.]

(3) Where no separate allotment of the revenue is asked for and the joint liability of the shares for revenue in respect of the whole estate is left unaffected, this section has no application. AIR 1954 Nag 241 (244): ILR (1954) Nag 589 (DB) ° AIR 1945 Cal 28 (29) (DB) ° (1887) 24 Cal 725 (734, 737, 742, 745) (FB) * AIR 1934 Pat 365 (366): 13 Pat 637 (DB).

(4) An award which did not divide any of the revenue paying properties but only allotted different items intact to the different parties a decree passed in terms of that award would not attract section 54. AIR 1954 Nag 241 (244): ILR (1954) Nag 589 (DB).

(5) Where a prayer is made for division of revenue in the suit, the section becomes applicable though the prayer is made by a defendant. AIR 1931 Cal 93 (94, 95): 58 Cal 122 (DB).

[See however AIR 1951 Hyd 86 (87): ILR (1951) Hyd 436.]

(6) The section does not apply where the decree is for separate possession of a share of a portion of an undivided estate. AIR 1933 Mad 259 (259): 56 Mad 443 (DB) ° AIR 1931 Cal 104 (105) (DB).

(7) After the deletion of Section 182A and the amendment of Section 182B of the U. P. Zamindari Abolition Act, the provisions of Section 54 and Order 20, Rule 18, Civil P. C., shall not apply to suits for partition or division of holding of Bhumidar or Sirdar or for separation of shares, and actual partition shall be done by the Civil Court in accordance with the principles that may be prescribed. 1965 All WR (HC) 584 (585): 1965 All LJ 948.

**2. "Estate", meaning of.**—(1) The word "estate" must be taken to be used in this section in its ordinary signification and not in a limited sense. (1884) 10 Cal 435 (435, 440) (DB) ° (1951) 3 Pepsu LR 173 (175) (DB).

(2) The section applies only to permanently settled estates and not to property temporarily settled. (1884) 7 Mad 382 (384) (FB).

[But see (1892) 16 Bom 528 (532) (DB).]

(3) The section applies only to estates assessed to revenue in one lump sum for

**Section 54 — Note 2 (contd.)**
the whole estate and not to estates assessed at acre rates. AIR 1926 Rang 80 (80): 5 Rang 206 (DB).

(4) The word "estate" cannot be taken to mean isolated plots of land which fall short of being the share of a cosharer of a mahal. AIR 1952 All 191 (193) * (1884) 6 All 452 (454) (DB).

[But see (1888) 10 All 5 (8).]

(5) The words "estate assessed to the payment of revenue ...." do not cover lands which have been built upon and have become houses or factories. AIR 1953 Punj 250 (252): ILR (1954) Punj 372.

(6) Where by agreement the parties expressly agree to exclude certain agricultural lands from partition by the Commissioner and the rest are specifically agreed to be partitioned by the Commissioner, the defendants cannot subsequently raise an objection to the jurisdiction of the Civil Court to partition the property by appointment of a Commissioner. AIR 1953 Punj 250 (250, 252): ILR (1954) Punj 372.

**3. Decree for partition, meaning of.** — (1) A decree for the partition referred to in this section must be drawn up as provided by O. 20, R. 18, cl. (1). AIR 1943 Sind 7 (9): ILR (1942) Kar 162 (DB).

(2) A decree for partition of an estate is a joint declaration of the rights of persons interested in the property sought to be partitioned and is a decree, when properly drawn up in favour of each share-holder. AIR 1950 Mys 60 (62): ILR (1951) Mys 363 (DB) • (1899) 22 Mad 494 (499) (DB) • (1883) 9 Cal 568 (570) (DB) * (1899) 23 Bom 188 (190) (DB).

(3) Unless the decree, not containing directions as required by O. 20, R. 18 (1), is got corrected by the plaintiff within time allowed by law he cannot ask for transfer of proceedings to Collector under S. 54. AIR 1935 Sind 192 (192) (DB).

[See however AIR 1945 Nag 86 (88): ILR (1944) Nag 852 (DB).]

(4) The partition contemplated by this section is not confined to a mere division of the lands but includes also the delivery of the shares to the respective allottees. (1887) 11 Bom 662 (663) (DB) ° AIR 1927 Nag 300 (301).

**4. "Shall be made by the Collector."** — (1) Civil Courts have, under this section, no power to execute the decrees passed in suits for partition or separate possession of estates. AIR 1956 Bom 345 (346) (DB) * AIR 1950 Nag 102 (105): ILR (1949) Nag 836 * AIR 1946 Nag 353 (353) * AIR 1945 Oudh 1 (3) (DB) * (1968) 9 Guj LR 220 (227). (Civil Court passing preliminary decree in partition suit ordering 'a commissioner or a surveyor to be appointed' and not directing collector to effect partition — No objection taken to preliminary decree neither was it appealed against — Final decree passed — Limitation — Final decree cannot be challenged when limitation for appeal against preliminary decree had expired.)

(2) Application for an order for execution is to be made in the Civil Court but the actual execution is to be made only by the Collector. AIR 1950 Nag 102 (105): ILR (1949) Nag 836 ° 1890 All WN 75 (76) (DB).

(3) The Civil Court has no power to execute the decree even by agreement of the parties. AIR 1915 Oudh 28 (28).

(4) Where a decree contemplated in O. 20, R. 18 (1) is passed, an application to the Court to send the papers to the Collector is not an application to execute the decree. AIR 1945 Bom 338 (340, 341, 342): ILR (1945) Bom 799 (FB).

(5) Decree under R. 18 (1) of O. 20 by Civil Court — Final in nature — Application by party to send papers to Collector is only reminder to Court — No period of limitation provided for such reminder — In sending papers to Collector Court is not performing judicial functions — Order of Court directing papers to Collector is purely ministerial — No appeal lies against such order. AIR 1959 Mys 233 (234): 37 Mys LJ 103 (DB).

(6) The Collector cannot refuse to carry out a decree passed under this section nor can he contravene the terms thereof. (1890) 14 Bom 450 (451) (DB).

(7) The Court should, after passing the decree, transmit the record to the Collector for actual partition even though none of the parties may have made an application for that purpose. AIR 1958 All 673 (676).

(8) Where a delivery warrant is issued by the Court for division of properties after passing a preliminary decree for partition, an endorsement of the warrant by the revenue authorities cannot be conclusive evidence of division and giving of possession; it gives rise to a rebuttable presumption that what is stated in the warrant is true. AIR 1957 Mys 71 (72): ILR (1957) Mys 14.

(9) Section 54 is sufficiently complied with if the partition is done under the instructions of the Deputy Commissioner or under his surpervision, and it is perfectly within the competence of the Deputy Commissioner to depute one of his subordinate officials to attend to the manual and ministerial portion of the partition. 1962 Mys LJ (Supp) 472 (473).

(10) Section 54 and O. 20, R. 18 constitute Collector exclusive authority to effect partition and there is no provision in C. P. Code which confers any power on Civil Courts to sit in judgment over partition effected by Collector. (1968) 1 Mys LJ 491: 14 Law Rep 368 (373).

**5. In accordance with law relating to partition.**— (1) The partition to be made by the Collector must be made in accordance with various Rent and Revenue Acts and Regulations, etc., of the various Pro-

**Section 54 — Note 5** (contd.)
vinces. AIR 1945 Oudh 1 (3) (DB) ° (1906) 28 All 375 (376) (DB) * AIR 1931 Cal 104 (105) (DB) ° AIR 1918 Pat 63 (64): 4 Pat L Jour 29 (DB) ° AIR 1949 Oudh 37 (47): 23 Luck 77 (DB) ° (1901) 23 All 291 (303) (FB).

(2) Partition decree by Civil Court — Collector directed to make partition — Party raising objection to partition which was overruled by executing Court and appellate Court — Collector overruling objection by order — Held Collector had no competence to listen to objection repelled by Civil Court especially since order of Civil Court had also become final and Collector was bound by it — Order of Collector is not appealable. AIR 1968 Mys 11 (11, 12): (1967) 1 Mys LJ 97.

**6. Remedies against the Collector's action.** — (1) The Court cannot entertain an application under S. 47 and give directions to the Collector in regard to the manner in which he should execute the decree. AIR 1956 Bom 345 (346) (DB).

(2) The Court can entertain an application to expedite and authorise the Collector to revive and continue the execution proceedings already sent to, and pending before him. AIR 1914 Sind 97 (98): 8 Sind LR 335 (DB).

(3) Where the Collector contravenes the decretal command of the Court his action can be corrected by the Court. AIR 1956 Bom 345 (346) (DB) ° AIR 1943 Sind 7 (9): ILR (1942) Kar 162 (DB) * 1962 MPLJ 330 (332, 333): 1962 Jab LJ 91. (If the Collector refuses to carry out the decree the Civil Court itself can effect the partition. AIR 1951 Nag 359; AIR 1915 Bom 279, Rel. on.)

(4) The Court can decide on application under S. 47, as to who are the transferees affected by the doctrine of lis pendens bound by the decree and subject to the Collector's orders as to partition. AIR 1945 Nag 86 (88): ILR (1944) Nag 852 (DB).

(5) The Court cannot interfere with the Collector's partition on the ground of inequality of partition. (1888) 12 Bom 371 (375) (DB) ° (1891) 15 Bom 527 (529) (DB).

(6) The Civil Court has no power to hear objections to the partition made by the Collector or to modify the partition. AIR 1945 Mad 336 (340): ILR (1946) Mad 10 (FB). (19 Mad 435, Overruled.)

(7) Decree for partition of certain fields sent to Collector for effecting partition — Civil Court cannot direct Collector to effect partition in a particular manner. AIR 1946 Nag 353 (353).

(8) Where the plaintiff does not question the partition effected by the Collector but seeks for delivery of possession of the share allotted to him which the Collector fails to do, the suit is maintainable in the Civil Court. AIR 1950 Nag 102 (107): ILR (1949) Nag 836.

(9) Decision or order of Collector under — Is appealable and revisable under Section 203 and Sec. 211 of Bombay Land Revenue Code (V of 1879). AIR 1968 Bom 198 (199): 69 Bom LR 579 (DB).

(10) Wrong directions to Collector under Sec. 54 — Partition not made or commenced by Collector — Instructions about partition can be recalled and varied by Civil Court and even by appellate Court. AIR 1965 Mys 46 (47): (1964) 1 Mys LJ 29.

(11) Order directing Collector to make partition — Colector can make partition in manner which appears to him to be equitable — He is not bound to make any report to Court nor is obliged to obtain approval from Court — Making of partition does not involve rendering of decision or order by Collector — It is also not proceeding within meaning of S. 203 of Bombay Land Revenue Code and hence cannot be made subject matter of appeal — Party dissatisfied with partition can invoke jurisdiction of Civil Court — Partition entrusted with Collector is not outside orbit of superintendence by Civil Court. AIR 1964 Mys 31 (32, 33) (DB). (AIR 1945 Bom 338, AIR 1956 Bom 345, Foll.; AIR 1945 Mad 336 (FB), Dissented from.)

[But see AIR 1964 Mys 169 (172, 173): (1963) 2 Mys LJ 346 (DB). (Collector is an independent tribunal for effecting partition. Proceedings before him are not proceedings in suit or in execution. He is not subordinate in any manner to the Court passing decree. His actions can be corrected by his higher authorities in appeal or in revision. There is also a final judicial review by High Court under Article 227 of the Constitution.)]

**7. Decree for partition, when and how may be passed.**— (1) Where a Civil Court passes a decree for partition of revenue-paying land it should be presumed that the procedure prescribed in O. 20, R. 18 has been adopted. AIR 1945 Oudh 1 (3) (DB) ° AIR 1965 Mys 73 (74): (1964) 1 Mys LJ 278. (Preliminary decree for partition — Failure to embody direction to effect division under S. 54 cannot affect validity of decree — Orders containing instructions can be subsequently passed.)

(2) Where a decree for partition has not been given effect to and has become unenforceable, a fresh suit for partition may be brought. (1913) 37 Bom 307 (312) (DB) ° (1891) 13 All 309 (313, 314) (DB).

(3) All interests in estates can be partitioned provided there is no inconvenience caused thereby to the other sharers or persons owning interests in that estate. (1897) 24 Cal 575 (582, 583) (FB) ° (1883) 9 Cal 244 (250) (DB).

(4) The partition should be complete, that is, should embrace all the properties in which the plaintiff is interested. (1910)

## ARREST AND DETENTION

**55. Arrest and detention.**—(1) A judgment-debtor may be arrested[e] in execution of a decree at any hour and on any day, and shall, as soon as practicable, be brought before the Court, and his detention may be in civil prison of the district in which the Court ordering the detention is situate, or, where such civil prison does not afford suitable accommodation, in any other place which the [a][aa][State] Government] may appoint for the detention of persons ordered by the Courts of such district to be detained:

Provided, firstly, that, for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset and before sunrise:

Provided, secondly, that no outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the officer authorized to make the arrest has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found:

Provided, thirdly, that if the room is in the actual occupancy of a woman who is not the judgment-debtor and who according to the customs of the country does not appear in public, the officer authorised to make the arrest shall give notice to her that she is at liberty to withdraw, and, after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest:

Provided, fourthly, that, where the decree in execution of which a judgment-debtor is arrested, is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

(2) The [a][aa][State] Government] may, by notification in the [b][Official Gazette], declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the [a][aa][State] Government] in this behalf.

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**Section 54 — Note 7 (contd.)**

34 Mad 269 (275, 277) [c] (1881) 7 Cal 577 (581) (DB) [*] (1900) 24 Bom 128 (130, 133) (DB).

(5) There can be no decree in favour of sharers who do not agree to, or ask for a partition of their own shares. (1890) 12 All 506 (509) (DB).

(6) Where the plaintiff's suit is itself dismissed, there can be no decree in favour of any sharer. (1907) 31 Bom 271 (292).

(7) Where there is a decree in favour of the plaintiff and none in favour of the defendants, the latter's shares cannot be partitioned in execution of the decree. 1884 All WN 215 (216) (DB) [c] (1899) 23 Bom 184 (186, 187) (DB).

(8) Where the proceedings for final decree have to be taken for partition of the house property the Court does not become functus officio after passing the preliminary decree. The operation of the final decree in such a case should be confined to the house property only and in so far as the land is concerned only declaration of parties' rights should be made. (1951) 3 Pepsu LR 173 (181) (DB). (24 Cal 275, Dist. 58 Cal 123 and AIR 1933 Mad 259, Rel. on.)

### SECTION 55 — SYNOPSIS

1. "A judgment-debtor may be arrested."
2. "As soon as practicable."
3. "In any other place which the State Government may appoint."
4. Court's duty to inform judgment-debtor that he may apply to be declared insolvent.
5. Security bond to be given by the judgment-debtor.
6. Bond, if should be in writing.
7. Liability and discharge of surety.
8. Realisation of security.
9. Insolvency, when a protection from arrest.
10. Appeal.

### TOPIC INDICATOR

Judgment-debtor adjudicated when brought under arrest — Security still necessary — See Note 5.
Review of order under sub-sec. (4) — See Note 7.
Simultaneous execution against judgment-debtor and surety whether allowed — See Note 8.
"Within one month" — No power to extend period — See Note 7.

**1. "A judgment-debtor may be arrested."** — (1) The mere fact that a warrant for

(3) Where a judgment-debtor is arrested in execution of a decree for the payment of money and brought before the Court, the Court shall inform him that he may apply to be declared an insolvent, and that he [c][may be discharged] if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force.

(4) Where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court, that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court [d][may release] him from arrest, and, if he fails so to apply and to appear, the Court may either direct the security to be realised or commit him to the civil prison in execution of the decree.

[1877, S. 336; See O. 21, Rr. 37-40.]

[a] Substituted by Government of India (Adaptation of Indian Laws) Order, 1937, (1-4-1937), for "Local Government".

[aa] Substituted for "Provincial" by A.L.O., 1950 (26-1-1950).

[b] Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, (1-4-1937), for "local official gazette".

[c] Substituted by the Code of Civil Procedure (Amendment) Act, 1921 (III of 1921), S. 2, for "will be discharged".

[d] Substituted by Section 2, ibid, for "shall release".

[e] For immunity from arrest for debts, see Section 30 of Act 70 of 1951; Sec. 29 of Army Act, 1950 and Air Force Act, 1950; Sec. 21 of the Navy Act, 1957.

## OBJECTS AND REASONS

**"Clause 55 (1), second proviso.—** The object of this proviso is to prevent vexatious forms of resistance to execution which constantly obstruct decree-holders in the execution of their decrees.

**Clause 55 (2).—** The sub-clause is intended to cover the case of certain persons or classes of persons whose summary arrest might, as in the case of railway servants, be attended with danger or inconvenience to the public." —S. O. R.

**"Clause 55.—** We have carefully considered the provision as to breaking open dwelling-houses and have come to the conclusion that it should be limited to dwelling houses in the occupancy of the judgment-debtor." —S. C. R.

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**Section 55 — Note 1 (contd.)**

attahment of property has been issued may be a sufficient ground for refusing to issue warrant of arrest but when the judgment-debtor has evaded payment it would not be a sufficient ground to refuse warrant of arrest. (1883) 7 Bom 301 (302) (DB).

(2) Decree allowing satisfaction from property or person of judgment-debtor personally — No condition that execution shall first be enforced against property — Decree-holder can execute decree against property or person of judgment-debtor at his option. (1887) 9 All 484 (485) (DB).

[But see (1882) 4 All 497 (498) (DB).]

(3) Where the decree provides for the satisfaction of the judgment-debt only out of the property mortgaged, the judgment-debtor cannot be arrested in execution of the decree. (1887) 11 Bom 537 (539) (DB).

(4) The officer arresting a judgment-debtor must have the warrant of arrest in his possession at the time of making the apprehension. (1883) 5 All 318 (321, 322).

(5) It is not necessary to show the warrant of arrest to the judgment-debtor unless asked to do so. AIR 1921 Cal 79 (79, 80) (DB).

(6) An arrest is not effected unless the officer touches the person of the judgment-debtor. AIR 1930 Rang 131 (132): 7 Rang 598 (DB).

(7) Warrant of arrest executed by person authorised by Nazir — Subsequent endorsement by Naib Nazir does not invalidate arrest. (1884) 6 All 385 (388) (DB) • (1895) 22 Cal 759 (761) (DB).

(8) Bailiff authorised by warrant to arrest judgment-debtor at particular place — Judgment-debtor may be arrested at any other place within Court's jurisdiction. (1940) 42 Pun LR 374 (377).

**2. "As soon as practicable."—** (1) If the Court is closed for vacation, the judgment-debtor should be produced at the next sitting of the Court, and in the meantime, the arresting officer is empowered to confine him even in the decree-holder's house. (1907) 30 Mad 179 (180, 181) (DB).

**Setcion 55 (contd.)**

**3. "In any other place which the State Government may appoint."** — (1) Where a debtor committed to a particular iail is handed over by the officer arresting him ot his own motion, to the officer in charge of a different jail, the imprisonment is unlawful and the prisoner is entitled to be discharged. (1885) 11 Cal 527 (530).

**4. Court's duty to inform judgment-debtor that he may apply to be declared insolvent.** — (1) Where a judgment-debtor is arrested and brought before the Court, it is the duty of the Court to inform him that he may apply to be declared insolvent. 1909 Pun Re No. 16, p. 37 (38) * (1878) 2 Mad 9 (10) (DB) ° AIR 1930 Lah 736 (736).

[See however (1940) 42 Pun LR 374 (378).]

(2) Where the judgment-debtor has already applied in insolvency and the application is pending the Court is not required to inform the judgment-debtor under S. 55 (3). (1910) 7 Ind Cas 351 (2) (352) (Lah).

(3) Where the judgment-debtor has already applied in insolvency the Court has a discretionary power not to put the warrant in force if the judgment-debtor furnishes security for his appearance when called upon. (1898) 22 Bom 731 (733) (DB).

(4) Where the judgment-debtor has already applied in insolvency and his application has been dismissed and he is re-arrested, the executing Court need not inform him that he may apply to be declared insolvent. (1911) 9 Ind Cas 121 (121) (Sind).

(5) Section 55 (3) does not entitle the debtor to be adjudged an insolvent except in conformity with the provisions of the insolvency law. (1913) 21 Ind Cas 293 (297) (DB) (Mad).

**5. Security bond to be given by the judgment-debtor.**— (1) Bonds taken under the section should be carefully worded and should be in terms of the section. AIR 1942 Sind 134 (136): ILR (1942) Kar 79 (DB) ° AIR 1917 Mad 237 (238) (DB).

[See however AIR 1930 Lah 575 (576).]

(2) Where after the arrest has been ordered the judgment-debtor applies to be declared an insolvent and when arrested and brought before the Court produces the adjudication order, the Court is bound to require him to give security before ordering his release. AIR 1925 Rang 305 (306): 3 Rang 187.

(3) No stipulations other than those mentioned in the section, are contemplated by the section. AIR 1936 Sind 244 (246): 30 Sind LR 177 (DB) * (1894) 16 All 37 (39).

(4) Where the bond contained stipulations as to what would happen if the judgment-debtor's application for insolvency was dismissed, it was held that such stipulations could not be enforced in execution under S. 145. (1894) 16 All 37 (39).

(5) Where a surety undertook to produce the judgment-debtor whenever called upon until he was "adjudged and discharged," it was held that the surety was not discharged merely on the filing of the judgment-debtor's application for discharge in insolvency. AIR 1933 Mad 360 (362).

**6. Bond, if should be in writing.**— (1) It is not illegal for the Court to accept a person as surety in proceedings under this Section on oral statements made before it; nor is it obligatory to take a bond in writing. AIR 1937 Lah 772 (776).

**7. Liability and discharge of surety.** — (1) The words "if he fails so to apply and to appear" make it clear that the surety is not discharged by the mere filing of the insolvency application by the judgment-debtor, but that his liability continues until a final order is made on the petition in insolvency. AIR 1922 Bom 340 (340): 46 Bom 702 ° AIR 1914 Mad 270 (271).

(2) A security bond executed under this section can be enforced against the surety although there has been a failure on the part of the judgment-debtor of only one of the two conditions set out in the section. AIR 1942 Sind 134 (136): ILR (1942) Kar 79 (DB) ° AIR 1936 Sind 244 (246): 30 Sind LR 177 (DB) * 1966 Raj LW 186 (187): ILR (1966) 16 Raj 434. ('Within one month so apply and that he will appear' — Word "and" means "or" — Failure of judgment-debtor to appear after filing application for insolvency — Surety bond stands forfeited.)

[But see AIR 1940 All 304 (304): ILR (1940) All 338 (DB).]

(3) A surety is not discharged by a petition by the judgment-debtor to be declared an insolvent where it is not in proper form and not within the prescribed time. AIR 1928 Sind 192 (192).

(4) Where an insolvency application not in a proper form and not accompanied with the necessary deposit is returned for amendment but is not re-presented, the surety is not discharged from his liability. AIR 1928 Sind 192 (192).

(5) Where a surety bond is given undertaking that the judgment-debtor would "continue the insolvency proceedings', the liability continues only up to the adjudication. (1947) 52 Mys HCR 393 (397) (DB) ° AIR 1933 Nag 40 (41, 42): 29 Nag LR 28.

(6) A Court has no jurisdiction to extend the period of one month fixed by the section. AIR 1926 Mad 689 (689, 690) ° AIR 1926 Mad 286 (286).

(7) A security bond under this section is in the nature of a continuing guarantee and the surety is entitled to produce the judgment-debtor before the Court and request it to absolve him from further liability under the bond. AIR 1934 Lah 962 (962) * AIR 1929 Lah 262 (262, 263).

**Section 55 — Note 7 (contd.)**

[But see AIR 1942 Mad 101 (102).]

(8) The production of the judgment-debtor at a time when it is impossible for the Court or the decree-holder to take any steps to have the judgment-debtor taken into custody does not amount to his appearance when called upon to appear and the surety will not be discharged thereby. AIR 1925 All 344 (345) (DB).

(9) Where the judgment-debtor dies before breach of either of the conditions of the bond, the surety is discharged thereby. AIR 1914 Cal 162 (163): 41 Cal 50 (DB) ° (1907) 29 All 466 (468) * (1901) 24 Mad 637 (639) (DB).

(10) Where a judgment-debtor dies after the breach of any one of the conditions, the liability of the surety continues and he is not discharged. AIR 1924 Bom 428 (429): 48 Bom 500 (DB).

(11) Under this section a surety will not be released by the dismissal of the particular execution application. AIR 1917 Mad 237 (239) (DB) * AIR 1932 Lah 492 (493).

(12) Where a breach of the conditions of the bond has occurred before the dismissal of an execution application the surety will not be released. AIR 1939 Sind 270 (272): ILR (1939) Kar 401 (405) (DB) ° AIR 1921 Pat 72 (73) (DB).

(13) The non-production of the judgment-debtor owing to illness which renders his attendance physically impossible does not render the surety liable on the bond. AIR 1929 Lah 479 (480) ° AIR 1938 Mad 530 (531).

(14) A surety cannot be proceeded against while the proceedings in insolvency filed by the judgment-debtor are pending and there is no other default. (1906) 28 All 387 (389).

(15) A decree-holder has no cause of action against an attesting witness to a security bond. (1880) 4 Bom 465 (468) (DB).

(16) Where in execution proceedings against a surety for a judgment-debtor the surety dies, the decree-holder should substitute his legal representatives. The Court should issue notice to them and their objections should be heard before the execution proceeding can be further continued against them. AIR 1940 Pat 142 (144): 18 Pat 761 (DB).

(17) An order u/s. 55 (4) is not open to review and Court cannot direct execution of fresh security bond to the extent of decretal amount on condition that, if judgment-debtor failed in insolvency petition, the surety will pay the decretal amount. Such a condition is not contemplated by S. 55 (4). (1966) 2 Andh WR 306.

**8. Realisation of security.**— (1) A security bond under this section is in favour of the Court and not the decree-holder. AIR 1927 Lah 336 (336) * AIR 1928 Mad 469 (470) (DB).

(2) Where a condition of the bond is broken the option as to whether the security should be realised or the judgment-debtor committed to jail rests with the executing Court and not with the decree-holder. AIR 1929 All 377 (377, 378) ° AIR 1937 Pat 476 (477).

[But see AIR 1942 Pat 506 (507, 508): 21 Pat 344 (DB).]

(3) The Court in a proper case can refuse in its discretion to execute the bond against the surety. AIR 1941 Cal 122 (122, 123) ° AIR 1922 Bom 340 (341): 46 Bom 702.

(4) The Court cannot proceed both against the judgment-debtor and against the surety. It can only proceed against the one or the other. AIR 1942 Pat 506 (507, 508): 21 Pat 644 (DB) * AIR 1929 Lah 479 (480) ° AIR 1933 Nag 38 (38, 39): 29 Nag LR 83 ° AIR 1924 Bom 428 (429): 48 Bom 500 (DB).

(5) A mere issue of a warrant against the judgment-debtor will not bar the Court from proceeding against the surety if the warrant is unfruitful. AIR 1924 Bom 428 (429): 48 Bom 500 (DB).

(6) An arrest without committal of the judgment-debtor will not have the effect of discharging the surety. AIR 1931 Bom 444 (446).

(7) The surety's liability is not extinguished under Sec. 135 of the Contract Act by the decree-holder granting time to the judgment-debtor. AIR 1927 Lah 336 (336).

(8) Money realised from the security cannot be forfeited to Government but should be utilised to satisfy the decree amount. AIR 1936 Sind 244 (246): 30 Sind LR 177 (DB) ° (1912) 39 Cal 1048 (1050).

(9) The decree-holder will not be entitled to anything more than the amount due to him under the decree. AIR 1921 Cal 559 (560) (DB).

[But see observations in 1937 Mad WN 1165 (1165).]

(10) The Court has no power to reduce the amount for which the bond is executed. AIR 1936 Sind 244 (246): 30 Sind LR 177 (DB).

**9. Insolvency, when a protection from arrest.**— (1) A judgment-debtor is not protected from arrest by the mere fact of his having applied in insolvency. (1910) 7 Ind Cas 351 (2) (352) (Lah) ° (1906) 9 Oudh Cas 44 (46) (DB).

(2) An order of adjudication will not protect the debtor in respect of debts not provable in the insolvency proceeding. (1889) 16 Cal 85 (88) (DB).

(3) In respect of debts scheduled in the insolvency petition, there is, by the mere fact of adjudication, a qualified protection inasmuch as the debtor cannot be proceeded against without the leave of the Insolvency Court. AIR 1927 Mad 919 (920): 50 Mad 977.

**56. Prohibition of arrest or detention of women in execution of a decree for money.**—Notwithstanding anything in this Part, the Court shall not order the arrest[a] or detention in the civil prison of a woman in execution of a decree for the payment of money.

[1882, S. 245A.]

[a] As to exemption from arrest of a displaced person or a person in the Naval, Army or Air Force services, see Note (a) to Sec. 55.

**57. Subsistence-allowance.**—The [a][b][State] Government] may fix scales, graduated according to rank, race and nationality, of monthly allowances payable for the subsistence of judgment-debtors.

[1882, 1877, S. 338. See O. 21, R. 39.]

[a] Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, (1-4-1937), for "Local Government".

[b] Substituted for "Provincial" by A.L.O., 1950 (26-1-1950).

**58. Detention and release.**—(1) Every person detained in the civil prison in execution of a decree shall be so detained,—

(a) where the decree is for the payment of a sum of money exceeding fifty rupees, for a period of six months, and

(b) in any other case for a period of six weeks:

Provided that he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be,—

(i) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the civil prison, or

(ii) on the decree passed against him being otherwise fully satisfied, or

(iii) on the request of the person on whose application he has been so detained, or

(iv) on the omission by the person, on whose application he has been so detained, to pay subsistence-allowance:

Provided, also, that he shall not be released from such detention under clause (ii) or clause (iii), without the order of the Court.

(2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be re-arrested under the decree in execution of which he was detained in the civil prison.

[1882, 1877, Ss. 341 and 342; 1859, S. 278.]

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**Section 55 (contd.)**

**10. Appeal.**— (1) An order against the judgment-debtor or against the surety under this section is an order falling within S. 47 and is appealable as a decree. 1895 Pun Re No. 69 p. 338 (338) * AIR 1932 Bom 77 (78).

(2) An order against a decree-holder refusing simultaneous execution against the person and property of the judgment-debtor is appealable as a decree. (1888) 7 Bom 301 (302) (DB).

## SECTION 58 — SYNOPSIS

1. "Subsistence allowance."
2. Omission to pay subsistence allowance.
3. Re-arrest.
4. Period of detention.
5. Application for arrest, if saves limitation.

**TOPIC INDICATOR**

Instalment decree — Separate imprisonments for each default — See Note 3.

Shorter periods of imprisonment than those prescribed — See Note 4.

**1. "Subsistence allowance."** — (1) The costs of clothing, etc., of the judgment-debtor, required to be supplied by the decree-holder under S. 33 of the Prisons Act, is not "subsistence allowance". (1912) 6 Low Bur Rul 61 (61) ° 1893 Pun Re No. 43, p. 202 (203).

**2. Omission to pay subsistence allowance.** — (1) Where, though the subsistence allowance has been sent by money order to the officer in charge of the prison sufficiently early to reach him in time, it does not actually reach him in time, there is an "omission to pay" within S. 58 (b) (iv). AIR 1914 Mad 24 (24).

**59. Release on ground of illness.**—(1) At any time after a warrant for the arrest of a judgment-debtor has been issued the Court may cancel it on the ground of his serious illness.

(2) Where a judgment-debtor has been arrested, the Court may release him if, in its opinion, he is not in a fit state of health to be detained in the civil prison.

(3) Where a judgment-debtor has been committed to the civil prison, he may be released therefrom—

(a) by the [a][b][State] Government], on the ground of the existence of any infectious or contagious disease, or

(b) by the committing Court, or any Court to which that Court is subordinate, on the ground of his suffering from any serious illness.

(4) A judgment-debtor released under this section may be re-arrested, but the period of his detention in the civil prison shall not in the aggregate exceed that prescribed by Section 58.

[1882, S. 653.]

[a] Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, (1-4-1937), for "Local Government".

[b] Substituted for "Provincial" by A.L.O., 1950 (26-1-1950).

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**Section 58 (contd.)**

**3. Re-arrest.** — (1) A judgment-debtor released from detention under this section cannot be re-arrested in execution of the same decree. (1868) 4 Mad HCR 76 (77) (DB).

(2) A judgment-debtor cannot, in execution of an instalment decree, be arrested and imprisoned separately for default in respect of each instalment. (1883) 7 Bom 106 (108) (DB).

(3) The immunity from re-arrests exists only when the judgment-debtor has been actually detained in prison. AIR 1937 Lah 253 (254).

(4) Judgment-debtor released after arrest before actual imprisonment — He can be re-arrested in execution. AIR 1929 Lah 361 (362) * (1904) 26 All 317 (318) (DB) ° (1885) 8 Mad 21 (22) (DB) ° (1896) 23 Cal 128 (129) (DB).

(5) Where a judgment-debtor who has been arrested and imprisoned in execution of a decree applies to be adjudicated an insolvent and obtains an interim protection order and is released, he is liable to be re-arrested under the decree. (1911) 33 All 279 (282) (DB) ° (1902) 26 Bom 652 (659) (DB).

[But see (1895) 20 Cal 874 (878) * (1896) 12 Cal 652 (656, 657) (DB).]

**4. Period of detention.** — (1) The Court has no power at its discretion to fix shorter periods of imprisonment than those prescribed in the section. (1889) 13 Mad 142 (142) (DB) ° (1901) 5 Cal WN 145 (146) (DB).

(2) Where the defendant is under imprisonment under O. 38, R. 4 of the Code, the period of imprisonment after the date of the decree must be taken into consideration in calculating the period prescribed by S. 58. (1883) 7 Bom 431 (437) (SB).

(3) Detention of judgment-debtor in civil prison for breach of decree of permanent injunction under O. 21, R. 32 (1) — Detention for period beyond six weeks is not legal. 1965 Raj LW 466 (467): ILR (1965) 15 Raj 1087.

**5. Application for arrest, if saves limitation.**— (1) An application for the arrest of a judgment-debtor in contravention of this section does not give a fresh starting point of limitation. (1890) 12 All 64 (65) (DB).

**Section 59 — Note 1**

(1) The provisions of this section are based on humanitarian grounds and if a judgment-debtor is suffering from serious illness, the Court would be well advised in ordering his release. AIR 1934 Lah 807 (808).

(2) A Court is not bound in every case to issue a warrant for arrest and if it believes that the judgment-debtor is not in a fit state of health it should issue a notice to him to show cause in the first instance. (1911) 9 Ind Cas 746 (747) (DB) (Oudh).

(3) The discretion exercised in issuing a warrant of arrest will not ordinarily be interfered with in appeal. AIR 1933 Lah 307 (308).

(4) Asthama and indigestion do not constitute "serious illness" sufficient to enable the Court to cancel a warrant of arrest issued against the judgment-debtor. AIR 1933 Lah 307 (308).

## ATTACHMENT

**60. Property liable to attachment and sale in execution of decree.**—(1) The following property is liable to attachment[aa] and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, bank-notes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, moveable or immoveable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf:

Provided that the following particulars shall not be liable to such attachment or sale, namely:—

(a) the necessary wearing-apparel, cooking vessels, beds and bedding of the judgment-debtor, his wife and children, and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman;

(b) tools of artisans, and, where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle and seed-grain as may, in the opinion of the Court, be necessary to enable him to earn his livelihood as such, and such portion of agricultural produce or of any class of agricultural produce as may have been declared to be free from liability under the provisions of the next following section;

(c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him;

(d) books of account;

(e) a mere right to sue for damages;

(f) any right of personal service;

(g) stipends and gratuities allowed to [a][pensioners of the Government], or payable out of any service family pension fund notified in the [b][Official Gazette] by [c][the Central Government or the [d][State] Government] in this behalf, and political pensions;

[e](h) the wages of labourers and domestic servants, whether payable in money or in kind; [f][* * * *];

[g][(i) salary to the extent of the [gg][first two hundred rupees] and one-half the remainder [h][in execution of any decree other than a decree for maintenance]:

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### SECTION 60 — SYNOPSIS

1. Scope and applicability.
2. Property, meaning of.
3. "All other saleable property."
4. "Belonging to the judgment-debtor or over which or the profits of which he has a disposing power."
5. Debts.
6. Proviso to sub-section (1).
7. Necessary wearing apparel, etc. — Clause (a).
8. Tools of artisans, implements of husbandry etc. — Clause (b).
9. Houses, etc. of agriculturists — Clause (c).
10. Local amendments.
11. Right to sue for damages—Clause (e).
12. Right of personal service—Clause (f).
13. Stipend and gratuities allowed to pensioners — Clause (g).
14. Wages of labourers — Clause (h).
15. Salary — Clauses (i) and (ia).
16. Salary of Army Officers.
17. Compulsory deposits, etc. — Clause (k).
18. Allowances of public officers, etc. — Clause (l).
19. Mere expectancy or other contingent or possible right — Clause (m).
20. Right to future maintenance — Clause (n).
21. Moveable property exempt from sale for arrear of land revenue — Clause (p).
22. Explanation II — Salary, meaning of.
23. Objections to attachment.
24. Waiver of benefit of section.

### TOPIC INDICATOR

Adjudication of insolvency in foreign Court — See Note 1.
Agriculturists — See Note 9.
Attachable property — See Notes 2 and 3.
Attachment confers no title — See Note 1.
Auctioneer — See Note 4.

Provided that where such salary is the salary of a servant of the Government or a servant of a railway company or local authority, and the whole or any part of the portion of such salary liable to attachment has been under attachment, whether continuously or intermittently for a total period of twenty-four months, such portion shall be exempt from attachment until the expiry of a further period of twelve months and, where such attachment has been made in execution of one and the same decree, shall be finally exempt from attachment in execution of that decree.]

[h][(ia) one-third of the salary in execution of any decree for maintenance];

(j) the pay and allowances of persons to whom [h][the Air Force Act, 1950 or] [i][the Army Act, 1950], applies [j][or of persons other than commissioned officers to whom [k][° ° °] the Indian Navy (Discipline) Act, 1934,[1] applies];

(k) all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, [m][1925], for the time being applies in so far as they are declared by the said Act not to be liable to attachment;

[n][(l) any allowance forming part of the emoluments of any [o][servant of the Government] or of any servant of a railway company or local authority which the [p][appropriate Government] may by notification in the [q][Official Gazette] declare to be exempt from attachment, and any subsistence grant or allowance made to [r][any such servant] while under suspension;

(m) an expectancy of succession by survivorship or other merely contingent or possible right or interest;

(n) a right to future maintenance;

(o) any allowance declared by [s][any Indian law] to be exempt from liability to attachment or sale in execution of a decree; and

(p) where the judgment-debtor is a person liable for the payment of land-revenue, any moveable property which, under any law for the time being applicable to him, is exempt from sale for the recovery of an arrear of such revenue.

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**Section 60 — Topic Indicator (contd.)**

Bonus by Railway Company — See Notes 4 and 17.
Cattle pledged as security — See Note 8.
Cooking vessels — See Note 17.
Delivery to post office — See Note 17.
In execution of a decree — See Note 1.
Jahagir — See Note 13.
Land assigned for maintenance — See Notes 19 and 20.
Life interest — See Note 4.
Life-policy — See Note 4.
Mutual benefit fund — See Note 4.
Non-transferable office — See Notes 3 and 12.
Ornaments — See Note 7.
Political pensions — See Note 13.
Private pensions — See Note 13.
Profits of property — See Notes 5 and 11.
Restraint upon anticipation — See Note 4.
Right of residence — See Note 3.
Right to claim mesne profits — See Note 11.
Salary of private servants — See Note 15.
Security for performance — See Note 5.
Service of a public nature — See Note 3.
Stipends out of service family fund — See Note 13.
Trustee of a charity — See Note 3.
Uncertain sum of money — See Note 3.

**1. Scope and applicability.** — (1) Section declares what properties are liable to attachment and sale in execution of a decree and what properties are exempt therefrom. AIR 1936 Pesh 109 (110) (DB) * ILR (1953) 3 Raj 759 (762) (DB).

(2) Section does not affect special or local law under which properties attachable under this section are declared to be not attachable in execution of decrees. AIR 1956 Sau 29 (30) (DB). (AIR 1953 Sau 1, Overruled.) ° AIR 1954 Punj 235 (236) (DB) ° AIR 1952 Punj 428 (431): ILR (1952) Punj 546 (DB) * AIR 1940 All 24 (26, 27): ILR (1939) All 901 (DB) ° AIR 1936 Mad 283 (284): 59 Mad 354 (FB) ° (1897) 21 Bom 588 (591) (FB).

(3) Section applies to a money decree and not to a mortgtage decree for execution of which no attachment is necessary. AIR

[t]Explanation I.—The particulars mentioned in clauses (g), (h), (i), (j), (l) and (o) are exempt from attachment or sale whether before or after they are actually payable, [t][and in the case of salary other than salary of a [u][servant of the Government] or a servant of a railway company or local authority the attachable portion thereof is exempt from attachment until it is actually payable,]

[v]Explanation 2.—In clauses (h) and (i), "salary" means the total monthly emolument, excluding any allowance declared exempt from attachment under the provisions of clause (l), derived by a person from his employment whether on duty or on leave.

[w]Explanation 3.—In clause (l) "appropriate Government" means—

(i) as respects any [x][person] in the service of the Central Government, or any servant of [y][a Railway administration] or of a cantonment authority or of the port authority of a major port, the Central Government;

(ii) [z][° ° ° °]; and

(iii) as respects any other [u][servant of the Government] or a servant of any other [z1][° °] local authority, the [d][State] Government.

(2) Nothing in this section shall be deemed—

[z2][°] to exempt houses and other buildings (with the materials and the sites thereof and the lands immediately appurtenant thereto and necessary

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**Section 60 — Note 1 (contd.)**

1947 Sind 32 (32, 33): ILR (1946) Kar 311 (DB) * AIR 1929 Rang 275 (275) (DB).

(4) Section applies to execution of order for alimony under Divorce Act. AIR 1943 Nag 1 (2, 3): ILR (1943) Nag 1 (DB).

(5) Court has no power under Code to prescribe what course decree-holder has to take for realisation of his claim or what property he can attach. (1865) 3 Suth WR (Misc.) 16 (16) (DB).

(6) Decree-holder is not restricted to attaching properties of judgment-debtor only to extent necessary for satisfaction of decrees. (1912) 16 Ind Cas 708 (710) (DB) (Cal).

(7) Decree-holder has no vested right to proceed against any property. He can have remedy only according to law for the time being in force. ('52) 1952 Raj LW 368 (369).

(8) Section cannot be applied to distraint of property. AIR 1939 Sind 276 (277): ILR (1939) Kar 566 (DB).

(9) Section does not apply to attachment of pension due for realisation of punitive police tax. AIR 1949 Oudh 31 (32) (DB).

(10) Section does not create any priority in favour of State in respect of arrears of sales tax out of moneys in hands of receiver appointed by Court and directed to be paid by Court to decree-holder prior to any intervention by State. AIR 1955 Cal 423 (426).

(11) As the words "attachment and sale" have to be treated separately application of section is not confined to cases in which attachment is followed by sale. AIR 1943 Nag 1 (2): ILR (1943) Nag 1 (DB).

(12) Any objection that properties are exempt from attachment and sale under S. 60, C. P. Code and therefore could not vest in the receiver and are not divisible among the creditors, could not be under S. 60 or S. 151, C. P. Code, S. 60 merely provides a guide or standard by which the insolvency court can decide whether any particular property does not vest in the receiver under S. 28 (2) because it is exempt under S. 28 (5). Section 60 therefore may be the law applicable to a claim under Section 28 (5) but provides for no remedy under the insolvency proceedings. The only remedy is under Section 28 (5) read with S. 4, of the Insolvency Act. AIR 1967 All 520 (523): 1967 All LJ 139.

(13) In view of Ss. 2 (2) and 5 (1), Provincial Insolvency Act, in the matter of attachment and sale of insolvent's properties the provisions applicable under the Provincial Insolvency Act must be regarded as materially the same as those of the Civil P. C.

The exemptions contained in S. 60, Civil P. C., are based on reasonable and equitable grounds and considerations and they are applicable to the proceedings by way of attachment and sale taken out by the Official Receiver in exercise of the powers vested in him under the Provincial Insolvency Act, 1920. AIR 1960 Andh Pra 458 (459).

(14) Clauses (a) to (i) of S. 60 of Civil P. C. confer a substantive right inasmuch as they protect certain classes of property from attachment. These clauses cannot be held to be procedural and therefore any amendment of these clauses cannot have retrospective operation since this will lead to strange results. AIR 1968 All 147 (148).

(15) Attachment in S. 145 —It cannot be understood in the sense of 'attachment' as used in S. 145. 1968 Cr LJ 1136 (Guj.).

(16) Judgment-debtor getting Rs. 80 per month by way of salary and allowance is not liable to arrest in execution of decree

for their enjoyment) from attachment or sale in execution of decrees for rent of any such house, building, site or land. [z2][°]

[z2][° ° °]

[aa] For immunity from attachment granted to persons subject to those Acts, see Army Act, 1950 (46 of 1950), S. 28; Air Force Act, 1950 (45 of 1950), S. 28 and S. 20 of Navy Act, 1957 (62 of 1957).

[a] Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937 and A.L.O., 1950, for "pensioners of the Crown".

[b] Substituted by A.O., 1937, for "Gazette of India".

[c] Substituted by ibid, for "the Governor-General-in-Council".

[d] Substituted for "Provincial" by A.L.O., 1950 (26-1-1950).

[e] Clauses (h) and (i) substituted by the Code of Civil Procedure (Second Amendment) Act, 1937 (IX of 1937), Section 2, for the original clauses (h) and (i). This amendment shall not have effect in respect of any proceedings arising out of any suit instituted before 1-6-1937; see ibid, Section 3.

[f] The words "and salary to the extent of the first hundred rupees and one-half the remainder of such salary" were omitted by the Code of Civil Procedure (Amendment) Act, 1943 (V of 1943).

[g] Clause (i) and the proviso thereto were substituted for the original clause (i) and the proviso, ibid.

[gg] Substituted for the words 'the first hundred rupees' by the Code of Civil Procedure (Amendment) Act, 1963 (26 of 1963), Sec. 2 (4-9-1963).

[h] Inserted by the Code of Civil Procedure (Amendment) Act, 1956 (66 of 1956), S. 6 (2-12-1956).

[i] Substituted for "the Indian Army Act, 1911, or the Burma Army Act", by the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), S. 10 (1-4-1951).

[j] Inserted by the Amending Act, 1934 (XXXV of 1934), Section 2 and Schedule.

[k] The words "The Naval Discipline Act as modified by" were omitted by A.L.O., 1950

[l] Now see the Navy Act, 1957 (LXII of 1957), S. 20.

[m] Substituted by the Code of Civil Procedure (Second Amendment) Act, 1937 (IX of 1937), Section 2, for '1897".

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**Section 60 — Note 1 (contd.)**

— Order issuing warrant of arrest against him is wrong. 1963 Ker LT 392.

(17) Distinction between — Exemption under Ss. 60 and 61 is partial but under O. 38, R. 12, it is complete. AIR 1962 Ker 261 (263, 264): 1961 Ker LT 946.

(18) Mere obtaining a money decree does not create a vested right in favour of the decree-holder in all the procedure to be followed subsequently for achieving the fruits of the decree. A money decree does not ipso facto result in the creation of any lien or charge. 1964 Jab LJ 606. (1963 MPLJ 660 (SC), Rel. on.)

(19) Section 60 (1) (c) is not inconsistent with the provisions of Art. 14 of the Constitution. AIR 1964 Punj 254 (256): 56 Pun LR 382.

(20) Attachment of property in execution of a decree confers no title on the attaching creditor, but merely prevents a private alienation of the attached property. AIR 1961 Punj 510 (515): 63 Pun LR 391 (DB).

(21) Adjudication of insolvency in foreign Court — Immovable property of insolvent situated in India is not affected. AIR 1962 Punj 228: ILR (1961) 2 Punj 166.

(22) Exemption from attachment under Section 60 enjoyed by judgment-debtor — Kept intact by S. 52A of Land Acquisition Act, 1894. AIR 1968 Punj 239 (240).

(23) Attacment — Exemption from — Provision is mandatory — Property not liable to attachment — Judgment-debtor agreeing to its attachment — He cannot be pinned down to an agreement, to waive protection given under S. 60. 1961 Raj LW 261.

(24) Wrongful attachment — Damages — Malice on part of defendant attaching the property need not be proved — Defendant is answerable in tort. AIR 1965 Raj 121 (124): 1965 Raj LW 56.

(25) In the absence of any such intention on the part of the Legislature the Travancore Amendment Act of 1121 which amends Tra. C. P. C., cannot affect the validity of an attachment effected without Govt. sanction before the date of the Act as provided in S. 3 of the General Clauses Act. AIR 1957 Trav-Co 171 (172, 173): 1956 Ker LT 766 (DB).

**2. Property, meaning of.** — (1) 'Property' includes every possible interest which a per-

[n] Clause (l) substituted by ibid, for the original clause. This amendment shall not have effect in respect of any proceedings arising out of any suit instituted before 1-6-1937, see ibid, S. 3.

[o] Substituted for "public officer" by the Code of Civil Procedure (Amendment) Act, 1943 (V of 1943).

[p] Words "appropriate Government" substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Governor-General-in-Council".

[q] Words "Official Gazette" substituted by ibid, for "Gazette of India".

[r] Substituted for the words "any such officer or servant" by the Code of Civil Procedure (Amendment) Act, 1943 (V of 1943).

[s] Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "any law passed under the Indian Councils Acts, 1861 and 1892".

[t] The original Explanation was re-numbered Expln. 1 by the Code of Civil Procedure (Second Amendment) Act, 1937 (IX of 1937), S. 2 and the words within square brackets inserted by ibid. This amendment shall not have effect in respect of any proceedings arising out of any suit instituted before 1-6-1937; see ibid, S. 3.

[u] Substituted for the words "public officer" by the Code of Civil Procedure (Amendment) Act, 1943 (V of 1943).

[v] Explanation 2 inserted by S. 2 of the Code of Civil Procedure (Second Amendment) Act, 1937 (IX of 1937). This amendment shall not have effect in respect of any proceedings arising out of any suit instituted before 1-6-1937; see ibid, S. 3.

[w] Explanation 3 inserted by the Government of India (Adaptation of Indian Laws) Order 1937.

[x] Substituted for the words "public officer" by the Code of Civil Procedure (Amendment) Act, 1943 (V of 1943).

[y] Substituted for "a Federal Railway" A. L. O., 1950 (26-1-1950).

[z] Clause (ii) was omitted by A.C.A.O., 1948 (23-3-1948).

[z1] The words "railway or" were omitted by A.L.O., 1950 (26-1-1950).

[z2] The letter and brackets "(a)", the word "or" and clause (b) were repealed by the Repealing and Amending Act, 1914 (X of 1914), S. 3 and Sch. II.

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**Section 60 — Note 2 (contd.)**

son can have. AIR 1950 Cal 174 (176) (DB) ° AIR 1942 Cal 92 (99): ILR (1942) 1 Cal 169 (DB) ° (1836) 5 LJ Ch 87 (90) * AIR 1925 PC 18 (26): 6 Lah 1: 52 Ind App 22.

(2) Intangible interests in property also come within description of "property". (1891) 13 All 432 (461, 473) (FB) ° (1911) 34 Mad 442 (449) (DB) * (1871) 7 Beng LR 318 (320) (SB).

(3) Tangible objects which in their nature are incapable of appropriation, such as air and water in their natural state, are not property. Salmond's Jurisprudence, 3rd Edition, page 169.

(4) Following are instances of attachable property:

(a) Equity of redemption. (1894) 21 Bom 226 (228) (DB) ° (1905) 8 Oudh Cas 327 (331) (DB).

(b) Partner's interest in partnership assets. AIR 1925 Sind 18 (18, 19): 17 Sind LR 334 (DB) ° AIR 1929 Mad 641 (646): 52 Mad 563 (FB).

(c) Purchasers' interest in property for which he has paid full consideration. AIR 1918 Cal 923 (925) (DB).

(d) Surety's interest in surplus security. AIR 1930 All 225 (242): 52 All 619 (FB).

(e) Malikana right to receive percentage from muafidars. AIR 1923 All 304 (304, 305) (DB).

(f) Interest of life-tenant charged with maintenance and education of children when latter have received other property for maintenance. (1899) 23 Bom 1 (10, 11).

(g) Right of usufructuary mortgagee of occupancy holding. AIR 1949 All 637 (638).

(h) Rights of patentee. AIR 1939 Cal 283 (284): ILR (1938) 2 Cal 618.

(i) Right to get reconveyance and possession of property. AIR 1921 Mad 498 (502) (DB).

(5) Mere right to give lease is not transferable property. AIR 1936 Pesh 90 (90) (DB).

(6) Mere right to sue is not 'property' but is only a title to recover future property. AIR 1936 Nag 218 (220) * AIR 1935 Cal 751 (752) (DB) ° (1871) 14 Moo Ind App 40 (51) (PC).

(7) The word 'property' has nowhere been defined under the Transfer of Property Act. Taking into consideration the provisions of Ss. 6 (d) and 105 of the T. P. Act it can be said that, where the enjoyment of tenancy right has not been restricted to the tenant

## STATE AMENDMENTS

**Andhra Pradesh**

Andhra Area—In its application to the Andhra area of the State of Andhra Pradesh, in clause (g) of the Proviso to sub-section (1) of Section 60, after the words "stipends and gratuities allowed to pensioners of the Government" insert the words "or of a local authority".—Code of Civil Procedure (Andhra Pradesh) (Andhra Area) Amendment Act, 1950 (XXXIV of 1950),[a] S. 2 (w.e.f. 2-1-1951).

[a] The title of this Act was originally "the Code of Civil Procedure (Madras Amendment) Act, 1950 (Mad. XXXIV of 1950)'. This title is amended by the Andhra Pradesh Act IX of 1961 to read as above.

Andhra and Telangana Areas—In its application to the whole of the State of Andhra Pradesh, in the Proviso to sub-section (1) of Section 60—

(a) after clause (k) insert the following clause, namely:—

"(kk) amounts payable under policies issued in pursuance of Rules for (Andhra area:—) the Andhra Pradesh Government Life Insurance and Provident Fund;/(Telangana area:—) the Hyderabad State Life Insurance and Provident Fund;"

(b) after Explanation 2, insert the following Explanation, namely:—

"Explanation 2A.—Where any sum payable to a Government servant is exempt from attachment under the provisions of clause (kk), such sum shall remain exempt from attachment notwithstanding the fact that owing to the death of the Government servant it is payable to some other person."

—Andh. Pra. Act XI of 1953,[a] S. 2 (9-6-1953) read with A. P. Act X of 1962, S. 2 (7-4-1962).

[a] Formerly this was Hyd. Act XI of 1953.

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**Section 60 — Note 2 (contd.)**

personally under the terms of the lease or there is no enactment which restricts the enjoyment of the tenancy right to the tenant himself, the right of the tenant is a property. AIR 1959 Assam 61 (62): ILR (1958) 10 Assam 407 (DB).

(8) One-fourth share in land which is the only source of livelihood — Not exempt from attachment. AIR 1968 Bom 380 (381): 70 Bom LR 285 (DB).

(9) A right to purchase shares for an agreed consideration or even an option to do so is a right to property under a completed contract. Such a right is a beneficial interest in movable property, which is itself movable property, assignable and transferable. The benefit under the contract is not made non-assignable by a mere condition that for the purchase of the shares certain consideration has to be paid. Such a right can also be the subject-matter of an attachment. AIR 1966 Cal 134 (135, 137, 138, 139): 69 Cal WN 815 (DB). (ILR 33 Cal 702, Rel. on.)

(10) Interest of member of Kashatriya Tarwad in Tarwad properties is attachable. AIR 1961 Ker 105 (106, 107, 108): 1960 Ker LT 698 (FB).

(11) Subsequent to the execution of a partition deed the equity of redemption of plaint item which was allotted to a branch was attached and sold in execution of a decree. No member of the Karadiparambu branch was impleaded in the execution proceedings.

Held, that even if it was admitted for arguments' sake that the decree was obtained against one N in his representative capacity as karnavan of the Purathanai tarwad, the attachment and sale of the equity of redemption of the plaint item after the partition was not binding on the Karadiparambu branch. The tarwad had ceased to exist with the partition and after the partition the equity of redemption belonged to the Karadiparambu branch alone and no one else had any right in it. AIR 1954 Trav-Co 251 (252): 1954 Cri LJ 669: 1953 Ker LT 863 (DB).

(12) Decree against Hindu father — Decree can be executed by attachment of sons' interest in joint family property. AIR 1967 Raj 184 (189): 1967 Raj LW 290.

(13) Although tenancy rights of a tenant cannot be attached or sold but agricultural produce or other profits from tenancy land is not exempt and can be attached. As such a Receiver can be appointed to recover such produce or profits. ILR (1966) 16 Raj 445: 1966 Raj LW 179.

(14) Margin of profit that might be coming to Mutawalli after performance of the religious duties and also meeting his personal requirements and subsistence is liable to attachment. (1966) 1 Andh LT 168.

**3. "All other saleable property."** — (1) Property to be attachable under section, must be "saleable property". AIR 1938 Nag 504 (506): ILR (1940) Nag 261.

Telangana Area—In its application to the Telangana area of the State of Andhra Pradesh, in the Proviso to sub-sec. (1) of Section 60—

(a) after clause (g) insert the following clause namely :—

"(gg) pension granted or continued by the Central Government the Government of the pre-Reorganisation Hyderabad State or any other State Government on account of past services or present infirmities or as a compassionate allowance;"

(b) Explanation 2A is the same as given above with the addition of the word, brackets and letters "clause (gg) or" after the words "under the provisions of".

—Andhra Pradesh Act XVIII of 1953,[a] S. 2 (w.e.f. 2-12-1953)

[a] Formerly this was Hyderabad Act XVIII of 1953.

**Gujarat**

In sub-section (1) of S. 60—

(a) after clause (g) of the proviso, the following new clause shall be inserted, namely :—

"(gg) stipends and gratuities allowed to pensioners of a local authority"; and

(b) in Explanation 1, after the brackets and letter "(g)" the brackets and letters "(gg)" shall be inserted.

—Code of Civil Procedure (Bombay Amendment) Act, 1948 (Bom. Act LX of 1948), S. 2 [30-11-1948] and Bombay Reorganisation Act 1960 (11 of 1960) S. 87 [1-5-1960].

**Haryana:** Amendments in the section are the same as in Punjab—see Punjab Reorganisation Act, 1966 (31 of 1966) S. 88 [1-11-1966].

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**Section 60 — Note 3 (contd.)**

(2) Word "saleable" in section means saleable by court auction at a compulsory sale. AIR 1916 Cal 175 (175) (DB).

(3) Sale of non-saleable property in execution without any objection by judgment-debor — Question of non-saleability of house cannot be raised in subsequent proceedings. AIR 1961 All 178 (180).

(4) Section 108 (j), T. P. Act clearly lays down that the right of a lessee is transferable and saleable. Section 6 (1) (d) of the Assam Urban Areas Rent Control Act does not take it out of the purview of S. 108 (j) of the T. P. Act. Section 6 (1) (d) of the Assam Act itself assumes that there is a power of transfer in the lessee. It cannot be said that this section has the force of rendering the tenancy right as non-saleable. AIR 1959 Assam 61 (63): ILR (1958) 10 Assam 407 (DB). (AIR 1931 Pat 364 and AIR 1937 All 389 and AIR 1939 Pat 598 and AIR 1932 All 473, Disting.)

(5) Uncertain, future and fluctuating profits derivable from property is not saleable property. AIR 1929 Cal 352 (353) (DB) • (1865) 4 Suth WR 87 (90) (PC) ° AIR 1920 Pat 651 (651) (DB) ° (1894) 4 Mad L Jour 13 (14) • (1901) 28 Cal 483 (485) (DB) ° AIR 1916 Cal 269 (270, 271): 43 Cal 28 (DB).

(6) Interest of Budhist Couple in marriage property which is an indeterminate interest varying according to contingencies is not saleable property. AIR 1927 Rang 274 (275): 5 Rang 478 (DB).

(7) Uncertain sum which may or may not be payable by one partner to another is not saleable property. (1887) 14 Cal 384 (385) (DB).

(8) Following properties capable of being transferred are saleable:

(a) Interest of Hindu coparcener in joint family property. (1877) 3 Cal 198 (205): 4 Ind App 247 (PC) ° (1891) 18 Cal 157 (161): 17 Ind App 194 (PC).

(b) Trees forming part of exproprietary holding. (1883) 5 All 616 (618, 619) (DB).

(c) Unenfranchised inam lands. (1909) 4 Ind Cas 1057 (1057) (DB) (Mad) • (1910) 5 Ind Cas 41 (42) (DB) (Mad).

(d) Hereditary interest of tenants in a holding subject to payment of quit rent. (1875) 24 Suth WR 309 (309).

See also the following cases:

(e) Owner's interest in splints and veneers. AIR 1953 Mad 478 (480) (DB). ((1908) 32 Bom 157, Foll.; AIR 1940 All 24: ILR (1939) All 901; AIR 1931 Pat 97 and AIR 1931 Pat 364: 10 Pat 582, Disting.)

(f) Patent right. AIR 1939 Cal 283 (284): ILR (1938) 2 Cal 618.

(g) Inam for maintenance alienable during Inamdar's life time. AIR 1937 Nag 202 (204).

(h) Right of occupier of state land to occupy such land. AIR 1937 Rang 74 (75, 76): 14 Rang 619 (DB).

(i) Interest of lessee under government. 1882 All WN 100 (100) (DB).

**Himachal Pradesh**

In Section 60, sub-section (1)—

(i) at the end of clause (c) add the following words, namely,--

"or compensation paid for such houses and buildings (including compensation for the materials and the sites and the land referred to above) acquired for a public purpose;"

and

(ii) after clause (c), insert the following, namely,—

"(cc) compensation paid for agricultural lands belonging to agriculturists and acquired for a public purpose;"

—Code of Civil Procedure (Himachal Pradesh Amendment) Act, 1956 (6 of 1956), S. 2 [17-5-1956].

**Kerala**

In its application to the State of Kerala including the Malabar district, in Cl. (g) of the Proviso to sub-section (1), after the words "stipends and gratuities allowed to pensioners of the Government" insert the words "or of a local authority".—Code of Civil Procedure (Kerala Amendment) Act, 1957 (XIII of 1957), S. 3 [w. e. f. 1-10-1958].

Note.—In its application to the Malabar district in the State of Kerala, the Madras Amendment Act XXXIV of 1950 is repealed and the amendment made by that Act is omitted.

**Maharashtra**

In its application to the Bombay area and the whole State of Maharashtra, in sub-section (1) of Section 60—

(a) after Cl. (g) of the Proviso insert the following new clause, namely,—

"(gg) stipends and gratuities allowed to pensioners of a local authority;"

(b) after Cl. (k) insert the following clause, namely,—

(kk) amounts payable under policies issued in pursuance of the Rules for The Hyderabad State Life Insurance and Provident Fund;"

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**Section 60 — Note 3 (contd.)**

(j) Movable property of Malabar tarwad. (1904) 27 Mad 375 (376, 377) (DB).

(k) Life interest in trust funds. (1889) 12 Mad 250 (252, 253).

(l) Letters in Post Office addressed to judgment-debtors. (1890) 13 Mad 242 (246, 247).

(m) Country liquor. (1908) 32 Bom 157 (161) (DB).

(n) Beer brewed within local limits to which Excise Act applies. AIR 1915 Nag 21 (23, 24): 11 Nag LR 67 (DB).

(9) Property in which the judgment-debtor has no legally transferable interest is not saleable property. AIR 1939 Pat 598 (600, 601): 18 Pat 370 (DB) * AIR 1938 Mad 623 (631): ILR (1938) Mad 767 (DB) * AIR 1936 Oudh 235 (235, 236): 12 Luck 59 (DB) * (1907) 30 Mad 378 (380) (DB) * (1898) 20 All 248 (251) (DB) ** (1882) 12 Cal L Rep 60 (61) (DB).

(10) Property transfer of which is prohibited by any law in force, cannot be sold in court-auction and will not be saleable property. (1883) 9 Cal 722 (724) (DB) * AIR 1927 All 779 (779).

[See also AIR 1956 Pat 4 (6): 34 Pat 746 (DB).]

(11) Agreement between parties that property should not be transferred, will not make it non-transferable in law. AIR 1916 Cal 175 (175) (DB) * (1893) 20 Cal 273 (278) (DB).

(12) Following property being inalienable cannot be sold in execution:

(a) Religious office. (1882) 4 Mad 391 (392) (DB) * (1909) 36 Cal 975 (977) (DB) * (1896) 23 Cal 645 (665) (DB) * (1896) 20 Bom 495 (501) (DB) * (1903) 26 Mad 31 (33) (DB).

(b) Right to manage and officiate at worship in temple and receive offerings. (1876) 1 Mad 235 (250): 4 Ind App 76 (PC) * AIR 1952 Punj 138 (138, 139) * (1881) 6 Bom 298 (300) (DB).

(c) Properties of charitable trust. (1837-41) 2 Moo Ind App 390 (421) (PC).

(d) Properties of public religious endowments. AIR 1939 All 387 (388, 389) (DB) * (1882) 6 Bom 546 (552) (FB) * (1881) 5 Bom 393 (396) (DB).

(e) Occupancy holding not transferable by customs, or law or usage. AIR 1937 All 389 (390): ILR (1937) All 542 (DB).

[But see AIR 1921 Cal 15 (29, 30): 48 Cal 184 (SB) * AIR 1922 Pat 114 (116, 117): 1 Pat 317 (FB).]

(f) Mere right of residence. AIR 1937 Lah 433 (434): ILR (1937) Lah (486) (DB) * (1908) 31 Mad 500 (501) (DB).

(g) Right of Muhammadan widow in possession of husband's land for dower debt. AIR 1932 Nag 18 (19, 20): 27 Nag LR 389.

(c) in Explanation 1, after the brackets and letter "(g)" insert the brackets and letters "(gg)".—and

(d) after Explanation 2, the following Explanation shall be inserted, namely :—

"Explanation 2A.—Where any sum payable to a Government servant is exempt from attachment under the provisions of clause (kk), such sum shall remain exempt from attachment notwithstanding the fact that owing to the death of the Government servant it is payable to some other person".—Code of Civil Procedure (Bombay Amendment) Act, 1948 (60 of 1948), S. 2 (30-11-1948) and Code of Civil Procedure (Maharashtra Amendment) Act, 1953,[a] S. 2 as amended and extended by Maharashtra Act 6 of 1965 [27-1-1965].

[a] Formerly this was Hyderabad Act XI of 1953 [2-12-1953].

Amendments in (a) and (c) relate to Bombay Area while those in (b) and (d) apply to whole State of Maharashtra.

**Mysore**

In its application to the Mysore Area of the State of Mysore, in the Proviso to sub-section (1) of Section 60, after Cl. (p) add the following, namely,—

(pp) where the judgment-debtor is a servant of the State Government who has insured his life under the rules in force relating to the Official Branch of the Mysore Government Life Insurance Department,—

(1) in the case of insurance effected prior to the ninth day of May, 1911, the whole of the bonus payable or paid thereunder to such servant, or in the event of his death to his nominee or other person or persons entitled to such bonus under the said rules; and

(2) in the case of insurance effected on or after the ninth day of May, 1911, and such insurance is compulsory, then the bonus in respect of the compulsory premia payable or paid to such servant, or in the event of

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**Section 60 — Note 3 (contd.)**

(h) Service tenure. AIR 1939 Pat 242 (244) (DB) * AIR 1936 Bom 227 (242): 60 Bom 516 (DB) * AIR 1929 Nag 232 (232) (DB) ° (1912) 39 Cal 1010 (1015) (DB) * AIR 1922 Mad 197 (198, 200): 45 Mad 620 (SB).

[But see (1888) 15 Cal 471 (481): 15 Ind App 18 (PC) * (1921) 64 Ind Cas 522 (523) (DB) (Pat).]

(13) Priest's share of net balance in offerings or other profits of temple can be attached and sold. AIR 1927 Bom 143 (144) (DB) ° (1880) 5 Cal 438 (444, 445): 6 Ind App 182 (PC).

(14) Right, title and interest of priest in temple lands in his possession as remuneration can be sold subject to interest of purchaser ceasing on death or removal from office of priest. (1882) 6 Bom 596 (597) (DB).

[See also (1888) 15 Cal 329 (340, 341): 15 Ind App 1 (PC).]

(15) Right to receive offerings at temple which is independent of obligation to render services involving qualifications of personal nature, is attachable. AIR 1936 All 131 (133): 58 All 457 (DB).

(16) Standing crops on property constituting endowments or archakatwam service are liable to attachment and sale in execution. AIR 1957 Andh Pra 349 (350).

(17) Gift of idol belonging to private endowment made with concurrence of whole family, to another family for regular worship, is valid. (1890) 17 Cal 557 (560) (DB).

(18) Occupancy holding is not, as such, non-transferable and exempt from attachment. AIR 1926 Cal 337 (337) (DB).

[See AIR 1953 Sau 1 (1).]

(19) Impartible estate is not necessarily inalienable. AIR 1927 Nag 15 (16).

(20) Doors and windows of house cannot be separately attached. (1890) 13 Mad 518 (520) (DB) ° (1885) 11 Cal 164 (166) (DB) ° (1891) 14 Mad 467 (469) (DB).

**4. "Belonging to the judgment-debtor or over which or the profits of which he has a disposing power."** — (1) Following are saleable property there being no prohibition against attachment of them:

(a) Interest of widow who under Sec. 8, Mysore Hindu Law Women's Rights Act (10 of 1933) has become co-sharer surviving coparcener. (1951) 29 Mys L Jour 64 (68) (DB).

[See AIR 1960 Mad 347 (347): (1960) 2 Mad LJ 135. (Interest of widow under S. 3 (2) of Hindu Women's Rights to Property Act, 1937.)]

(b) Interest of person taking settlement of land from under-raiyat for residential purposes. AIR 1941 Pat 485 (486) (DB).

(c) Right to enjoy rents and profits under grant subjected to prohibition on alienation. AIR 1938 Mad 623 (631): ILR (1938) Mad 767 (DB).

his death to his nominee or other person or persons entitled to such bonus under the said rules."

—Code of Civil Procedure (Mysore Amendment) Act, 1952 (XIV of 1952), S. 2 [w. r. e. f. 1-4-1951].

**Punjab**

In its application to the State of Punjab including the Pepsu area thereof as it was immediately before the 1st November, 1956—

(a) In sub-section (1), in the proviso—

(i) In clause (c), for the words "occupied by him" the following words shall be deemed to be substituted, viz. :—

"not proved by the decree-holder to have been let out on rent or lent to persons other than his father, mother, wife, son, daughter, daughter-in-law, brother, sister or other dependants or left vacant for a period of a year or more;"

(ii) After clause (c), the following clauses shall be deemed to be inserted, viz. :—

"(cc) milch animals, whether in milk or in calf, kids, animals used for the purposes of transport or draught cart and open spaces or enclosures belonging to an agriculturist and required for use in case of need for tying cattle, parking carts or stacking fodder or manure;

(ccc) one main residential house and other buildings attached to it (with the material and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to a judgment-debtor other than an agriculturist and occupied by him; Provided that the protection afforded by this clause shall not extend

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**Section 60 — Note 4 (contd.)**

(d) Preliminary decree in suit for recovery of unpaid consideration due under mortgage bond. AIR 1937 All 652 (653): ILR (1937) All 823 (DB).

(e) Interest of heir after payment of expenses and debts by administrator. AIR 1929 Lah 600 (601) (DB).

(f) Property acquired by adverse possession. (1896) 24 Cal 244 (248) (DB).

(g) Judgment-debtor's interest in property till Court auction-sale is confirmed. AIR 1931 Mad 511 (512) (DB).

(h) Vested remainder. AIR 1930 Rang 182 (185) (DB).

(2) Insolvent's money in Court as security for costs of appeal is attachable subject to result of appeal. AIR 1929 Pat 97 (98): 8 Pat 478 (DB).

(3) Crops grown by judgment-debtor is attachable. AIR 1914 Low Bur 268 (269): 7 Low Bur Rul 294.

[See however AIR 1924 Lah 335 (335).]

(4) Compensation money payable to sharers of estate taken under Madras Estates (Abolition and Conversion into Ryotwari) Act, 25 of 1948 is the property of those sharers and attachable. AIR 1957 Mad 670 (671).

(5) Although forcible deductions by Government from judgment-debtor's salary for contribution to provident fund as well as instalment due for advance taken from that fund belong to the judgment-debtor he may not have disposing power over them. AIR 1943 Lah 60 (61, 62): ILR (1944) Lah 63 (DB) ° AIR 1961 Pat 384 (386): 1961 (2) Cri LJ 522: 1961 BLJR 261 (DB). (Prohibition under S. 3, Provident Funds Act, (1925) is absolute.)

(6) Amount of cheque cannot be attached in execution of a decree against payee by means of a prohibitory order under O. 21, R. 52, on banker. AIR 1942 Rang 59 (60): 1941 Rang LR 759.

(7) Property not belonging to the judgment-debtor may still be attachable if he has a disposing power over it exercisable for his own benefit. AIR 1956 SC 336 (341): 1956 SCR 100: 1956 Cri L Jour 366. (AIR 1951 Pat 488: 29 Pat 488, Reversed.) * AIR 1942 Cal 92 (99): ILR (1942) 1 Cal 169 (DB) ° AIR 1937 Mad 424 (425): ILR (1937) Mad 1004 (DB) ° (1903) 26 Mad 214 (222, 223) (DB) * (1886) 11 Bom 37 (41) (DB) ° (1881) 4 Mad 302 (307) (DB) • (1904) 27 Mad 375 (376) (DB) * ILR (1965) 2 All 901.

(8) On partition between Hindu father and his sons father will cease to have disposing power over shares allotted to his sons. AIR 1954 Mad 864 (867): ILR (1954) Mad 834 (FB) • AIR 1956 Mad 445 (447): ILR (1956) Mad 1101 (DB). (Case of tarwad.) * AIR 1938 Nag 24 (27, 29): ILR (1938) Nag 136 (DB) ° AIR 1959 Bom 141 (141): 60 Bom LR 1015. (AIR 1952 SC 170, Foll.)

[But see AIR 1950 All 704 (709) (DB).]

(9) Decree-holder cannot attach interest of individual member of branch of Aliyasantana family in family properties in execution of the decree. 1954-2 Mad L Jour 516 (519).

to any property specifically charged with the debt sought to be recovered."

(b) After sub-section (2), the following sub-sections shall be deemed to be inserted viz. :—

"(3) Nowithstanding any other law for the time being in force an agreement by which a debtor agrees to waive any benefit of any exemption under this section shall be void.

(4) For the purposes of this section the word 'agriculturist' shall include every person whether as owner, tenant, partner or agricultural labourer who depends for his livelihood mainly on income from agricultural land as defined in the Punjab Alienation of Land Act, 1900.

(5) Every member of a tribe notified as agricultural under the Punjab Alienation of Land Act, 1900, and every member of a scheduled caste shall be presumed to be an agriculturist until the contrary is proved.

(6) No order for attachment shall be made unless the Court is satisfied that the property sought to be attached is not exempt from attachment or sale."

—Punjab Relief of Indebtedness Act, VII of 1934, S. 35 (as amended by Punjab Acts, XII of 1940 and VI of 1942) [w. e. f. 19-4-1935] and Punj. Act XLIV of 1960, S. 3 [30-12-1960].

**Rajasthan**

In its application to the State of Rajasthan, in the Proviso to sub-section (1) of Section 60—

(i) in clause (b), after the word "agriculturist" insert the words "his milch cattle and those likely to calve within two years."

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**Section 60 — Note 4 (contd.)**

(10) Hindu widow has no disposing power over property which she is entitled to enjoy for her life but not to alienate. AIR 1937 Mad 864 (864) ° AIR 1923 Bom 276 (280): 47 Bom 597.

(11) Judgment-debtor purchasing property on hire purchase system has no disposing power over the property till he fully pays the price. AIR 1940 Rang 1 (3): 1939 Rang LR 649 (FB).

(12) Retiring gratuity or bonus declared by railway company, but not completed by either registered document or payment, is not attachable in execution of a decree against person in whose favour it is. AIR 1924 Bom 88 (88).

(13) Member of mutual benefit fund or society has no disposing power over moneys payable after his death to his nominee or legal heir. AIR 1939 Sind 15 (17) * 162 Ind Cas 889 (892) (Mad).

(14) Person who holds properties in trust for another person or for other purposes has no disposing power over them. 1905 Pun LR No. 7 p. 47 (48).

(15) Corpus of trust property in hands of trustee cannot be attached in execution. (1887) 15 Cal 329 (340, 341, 342): 15 Ind App 1 (PC) ° (1902) 6 Cal WN 663 (665, 667) (SB).

(16) Beneficiary can attach property in trust for him as property belonging to trustee himself. AIR 1956 Andh 109 (110): ILR (1955) Andh 444 (DB).

(17) Mere fact that Insurance policy is expressed to be for benefit of assured's wife creates no trust in their favour in cases to which Married Women's Property Act, 1874 does not apply. In such cases assured's creditor can attach the policy in execution. AIR 1956 Cal 275 (278) ° (1913) 37 Bom 471 (477) (DB) * AIR 1928 Cal 518 (521): 55 Cal 1315 (DB).

(18) Person after transferring his property has no disposing power over it. AIR 1925 Pat 372 (374) (DB) ° (1870) 2 NWPHCR 337 (337).

[See (1879) 4 Cal 402 (408): 5 Ind App 211 (PC).]

(19) Subordinate interest reserved to himself by transferor when conveying property can be attached in execution of a personal decree against the transferor. AIR 1954 Cal 400 (402): ILR (1956) 1 Cal 15 (DB).

(20) Auctioneer has no disposing power over sale proceeds of goods sold, except to the extent of his commission. (1901) 23 All 135 (136).

(21) Where money is deposited in Court, limited right of depositor to dispose of the money subject to result of suit or proceeding can be attached by his creditor. AIR 1950 Cal 174 (176) (DB) * AIR 1953 Trav-Co 21 (22, 23, 24) (DB).

[See however AIR 1954 Punj 257 (258): ILR (1954) Punj 916.]

(22) Deposit ear-marked for payment to a party cannot be attached by creditors of depositor. 1949 Trav-Co LR 102 (104) (DB) * (1898) 19 All 256 (258) (DB).

(23) Where property is not custodia legis, or where levy or custody is invalid or

—Code of Civil Procedure (Rajasthan Amendment) Act, 1958 (XIX of 1958), S. 2 [18-4-1958].

(ii) after clause (k), insert the following :—

"(kk) moneys payable under Life Insurance Certificates issued in pursuance of the Rajasthan Government Servants Insurance Rules, 1953;"

(iii) after Explanation 3 insert the following Explanation :—

Explanation 4. — Where any money payable to a Government servant of the State is exempt from attachment under the provision contained in Cl. (kk), such money shall remain exempt from attachment notwithstanding the fact that owing to the death of a Government servant it is payable to some other person."

—Ibid, 1957 (XVI of 1957), S. 2 [6-6-1957].

**Tamil Nadu**

In its application to the State of Madras including the Kanyakumari district and the Shencottah taluk of the Tirunelveli district, and the added territories the amendment made in Section 60 is the same as that of Kerala.—Code of Civil Procedure (Madras Amendment) Act, 1950 (XXXIV of 1950), S. 2 [w. e. f. 2-1-1951] and Madras Act XXII of 1957, S. 3 [18-12-1957] and Mad. (A. T.) A. L. O., 1961 [w. e. f. 1-4-1960].

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**Section 60 — Note 4 (contd.)**

wrongful, or where legal custody is discharged or abandoned or where custody is changed from custodia legis into personal obligation to owner, protection from attachment cannot be claimed. AIR 1954 Punj 257 (258): ILR (1954) Punj 916.

(24) Judgment-debtor's share in property which belongs to him and other persons jointly is liable to attachment. AIR 1937 Cal 199 (200): ILR (1937) 2 Cal 48 (DB).

(25) Where a mortgagor in whose favour a decree for redemption of a mortgage has been passed, deposits the full decretal amount in Court in execution of the decree, the amount ceases to be the property of the mortgagor the moment it is deposited and he cannot except with the consent of the mortgagee seek to withdraw the same or otherwise deal with it. As such the amount of deposit cannot be attached by another creditor of the mortgagor in execution of his decree. The fact that the decretal amount includes the value of improvements made by the mortgagee and that the decree gives him option either to remove the improvements or to accept its value cannot make any difference in the position. 1950 Ker LT 538: 1949 TCLR 102 (DB). (28 TLI 633, Dist.)

**5. Debts.**—(1) 'Debt' is money now payable or payable in future by reason of a present obligation. AIR 1942 Lah 275 (278): ILR (1943) Lah 17 (FB) • AIR 1942 Sind 47 (48): ILR (1941) Kar 401 (DB) • ('09) 36 Cal 936 (938, 939) (FB).

(2) "Debt" means an actually existing debt, a perfected and absolute debt. AIR 1942 Lah 275 (278): ILR (1943) Lah 17 (FB) * AIR 1935 Mad 181 (184): 58 Mad 693 (FB) • AIR 1925 Cal 561 (563) (DB) • AIR 1928 All 193 (193): 50 All 507 (DB) * 1908 All WN 129 (129) (DB) • 16 All 286 (293, 294) (DB).

[But see (1886) 6 Mad 418 (419) (DB).]

(3) Money which may or may not become due or payment of which depends upon contingencies which may or may not happen is not a 'debt'. AIR 1942 Lah 275 (278): ILR (1943) Lah 17 (FB) • AIR 1933 Rang 23 (24): 11 Rang 116 (FB) • AIR 1950 Lah 240 (241, 242, 243): Pak LR (1950) Lah 587 (DB) * AIR 1936 Lah 727 (728, 729): 17 Lah 270. (AIR 1935 Lah 141, Reversed.) • (1908) 30 All 252 (254, 255) (DB) • (1901) 28 Cal 483 (485) (DB) • AIR 1952 Trav-Co 508 (508): ILR (1952) Trav-Co 358 (DB) • AIR 1928 All 193 (193): 50 All 507 (DB) • AIR 1925 Rang 318 (319): 3 Rang 235 (DB) * (1883) 11 QBD 518 (526, 527) • (1909) 31 All 304 (305) • (1911) 11 Ind Cas 423 (425) (DB) (Cal) * AIR 1938 Lah 533 (534): ILR (1938) Lah 548 (DB) • (1881) 3 All 12 (14) (DB) • AIR 1932 Pat 311 (313): 11 Pat 584 (DB) * (1858) 27 LJ QB 234 • 2 Hay 142.

(4) Compensation payable to evacuee under Displaced Persons (Compensation and Rehabilitation) Act, 1954 out of the compensation pool is not a debt and is exempt from attachment. AIR 1958 Punj 436 (437): ILR (1958) Punj 1099.

[See also AIR 1961 Punj 164 (164): ILR (1960) 1 Punj 412 (DB). (Debt incurred after coming to India after partition — Protection from attachment of property under Section 31 (3), Displaced Persons (Debts Adjustment) Act (1951).)]

(5) Debt may become due though payable in the future. AIR 1943 Bom 258 (258) • AIR 1942 Sind 47 (48): ILR (1941) Kar 401 (DB) • AIR 1937 Nag 391 (393): ILR (1938) Nag 402 * (1871) 14 Moo Ind App 40 (50) (PC) • (1905) 9 Cal WN 703 (704) (DB) • AIR 1920 Low Bur 46 (47) (DB).

[But see AIR 1929 Mad 347 (347, 348).]

**Union Territory (Chandigarh)**

In its application to the Union Territory of Chandigarh, amendments in the section are the same as in Punjab — Punjab Reorganisation Act, 1966 (31 of 1966) Sec. 88 [1-11-1966].

**Union Territory (Pondicherry)**

In its application to the Union Territory of Pondicherry amendment in the section is the same as in Tamil Nadu — Pondicherry (Extension of Laws) Act, 1968, (26 of 1968, S. 3 (i) and Sch., Part II [w. e. f. 5-9-68].

**Uttar Pradesh**

Add the following Explanation 1A after the Explanation 1 in S. 60, sub-sec. (1) :—

"Explanation 1A.—Particulars mentioned in clause (c) are exempt from sale in execution of a decree whether passed before or after the commencement of the Code of Civil Procedure (United Provinces) (Amendment) Act, 1948, for enforcement of a mortgage or charge thereon."

—Code of Civil Procedure (United Provinces) (Amendment) Act, 1948 (U. P. Act XXXV of 1948), S. 2 [28-8-1948].

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**Section 60 — Note 5 (contd.)**

(6) Money due will be a "debt" though exact amount due is not ascertained at the time of attachment. AIR 1939 Oudh 86 (90) * (1894) 16 All 286 (294) (DB).

(7) Mere claim for unliquidated damages is not a debt. (1884) 12 QBD 525 (529).

(8) That garnishee is beyond limits of India would not, of itself, render debt not liable to be attached. (1881) 5 Bom 249 (252) (DB).

(9) Judgment-debtor's share in a debt due jointly can be attached and sold in execution. AIR 1937 Cal 199 (200): ILR (1937) 2 Cal 48 (DB).

(10) Bank holding power of attorney to collect bills due to executant towards Bank advances — Order for payment to Bank endorsed on bill sent for collection — Held it was an equitable assignment of specific fund and not a pay order and could not be attached under the section. AIR 1969 SC 313 (315): (1969) 1 SCJ 367. (AIR 1963 MP 132, Reversed.)

(11) Amount payable to displaced person under Displaced Persons (Compensation and Rehabilitation) Act determined — It becomes debt payable to him and can be attached and sold in execution. AIR 1962 Bom 121 (123, 124): 63 Bom LR 684. (AIR 1958 Punj 436, Dissented from.)

(12) Decree against father for pre-partition debt — Decree passed after division in status — Son's shares are not liable to attachment. AIR 1962 Mad 383 (385) (1962) 2 Mad LJ 132.

(13) Debt contracted by insolvent after his adjudication — Decree obtained in respect of the debt can be executed by attachment of a portion of the salary of insolvent which had been excluded from distribution among the creditors — Debt or the obligation to pay it having been incurred by insolvent after his adjudication and not before, it is not provable under the Act — Hence creditor is at liberty to commence proceeding for recovery of the debt notwithstanding Section 28 (2) of Insolvency Act. (1962) 40 Mys LJ 673.

**6. Proviso to sub-section (1).**—(1) Exemption in section has to be strictly construed. It belongs to property of judgment-debtor and therefore in a case where the property is not exempt it cannot become so by any act of his legal representative. ILR (1953) 3 Raj 759 (761, 762).

(2) Proviso applies both to attachments and sales. Ground of exemption which exists at time of sale but not attachment could be urged against sale. AIR 1938 All 85 (86).

(3) Word 'or' is used in conjunctive and not in disjunctive sense. Property mentioned in proviso is neither liable to attachment nor sale. AIR 1944 Lah 29 (32): ILR (1943) Lah 666 (DB).

(4) Judgment-debtor may claim benefit of more than one clause at the same time. AIR 1940 Mad 766 (768) ° AIR 1939 Rang 432 (432): 1939 Rang LR 504.

(5) Exemptions from attachment and sale do not apply to mortgage decrees. AIR 1945 Lah 123 (124, 125): ILR (1945) Lah 373 (FB) ° AIR 1952 Kutch 90 (90) * ('24) AIR 1924 All 328 (334, 335, 337): 46 All 489 (FB).

[But see AIR 1941 Pesh 53 (55, 56) (DB).]

(6) The material date for raising a plea under Section 60 (1) (c) is any date before the sale is actually held. The words "shall not be liable to attachment or sale" clearly mean that, although a proclamation for the sale of the house might have been issued under Order 21, Rule 66, Civil P. C., the actual sale shall not be held if the judgment-debtor satisfies the Court before the date of the sale that he is an agriculturist and the house is occupied by him as such. (1957) Nag LJ 469: (1957) 59 Bom LR 282.

**7. Necessary wearing apparel, etc. — Clause (a).**—(1) Necessary wearing apparel of a person cannot be attached in execution. (1872) 9 Bom HCR 272 (275) (DB).

(2) Mangalsutra worn by a Hindu married woman cannot be attached in execu-

**Section 60 — Note 7 (contd.)**

tion. (1885) 9 Bom 106 (107) (DB).

(3) Cooking vessels include vessels required for cooking operations, such as a thali and a gagru. AIR 1932 All 344 (345): 54 All 399.

**8. Tools of artisans, implements of husbandry, etc. — Clause (b).**—(1) 'Artisan' is a person engaged in mechanical employment. AIR 1955 Cal 290 (291) (DB) ° AIR 1943 Mad 523 (523).

(2) Musicians and washermen are not 'artisans' and music instruments are not 'tools of artisans'. AIR 1942 Mad 4 (5) * AIR 1917 Upp Bur 4 (5): 2 Upp Bur Rul 133.

(3) The connotation of the term 'artisan' occurring in Section 60 (1) must be restricted to a handicraftsman or artificer who is employed in any of the industrial arts. A goldsmith is an artisan. AIR 1962 Mad 444 (447): (1962) 2 Mad LJ 259. ((1943) 1 MLJ 414: AIR 1943 Mad 523; (1941) 2 MLJ 671: AIR 1942 Mad 4, Rel. on: AIR 1935 All 848: ILR 54 All 399, Diss. from.)

(4) Instruments of surgeon or doctor do not come within clause (b). AIR 1934 Lah 936 (936): 15 Lah 26.

(5) Sewing machine is a 'tool of an artisan'. AIR 1942 Mad 4 (4) ° AIR 1941 All 157 (158): ILR (1941) All 278 ° AIR 1923 Nag 289 (289): 19 Nag LR 22.

(6) Utensils used by a sweetmeat vendor for preparation of sweets are tools of an artisan. AIR 1935 All 848 (848).

[But see AIR 1957 Raj 353 (353): ILR (1957) 7 Raj 438 * AIR 1943 Mad 523 (523, 524).]

(7) Personal employment in and dependence for living on proceeds of handicraft are essential to constitute an artisan. AIR 1943 Mad 523 (524) ° AIR 1939 Lah 388 (392): ILR (1940) Lah 23 (FB).

(8) The term 'tools' occurring in Section 60 (1) (b) includes not only simple instruments but also complicated mechanical implements (such as a cutting press, a machine for processing plates and pieces of dyes used by a goldsmith) used by artisans for purpose of their trade. AIR 1962 Mad 444 (446): (1962) 2 Mad LJ 259. (AIR 1941 All 157 and AIR 1958 All 561, Rel. on.)

(9) All tools used by artisan and not only such tools as are necessary for maintenance are exempt from attachment. AIR 1941 All 157 (157): ILR (1941) All 278 ° AIR 1957 Raj 353 (353): ILR (1957) 7 Raj 438.

(10) Status of the person and position of affairs at time of execution and not subsequent events which determines whether he is an artisan or not. AIR 1941 All 157 (158): ILR (1941) All 278.

(11) Charaks, kadhais, and planks of timber used by an agriculturist for pressing sugarcane grown on his field are implements of husbandry and are exempt from attachment. AIR 1924 Bom 294 (294, 295) (DB) ° AIR 1928 Lah 943 (944).

(12) Term "implements of husbandry" should not be interpreted in a narrow sense. It will include an engine or a water pump necessary to irrigate fields. AIR 1939 Sind 96 (97): ILR (1939) Kar 499 (DB).

[See however AIR 1959 Madh Pra 375 (375, 376): 1959 MPLJ 872 (DB). (Water pump lying idle due to well having permanently dried up — Engine for working pump used for flour mill and the pump can be attached.)

(13) Tractor which is found to be indispensable to the farmer for cultivating his farm and earn his livelihood is entitled to exemption from attachment. AIR 1958 All 561 (562).

[But see AIR 1939 Nag 3 (4): ILR (1939) Nag 355.]

(14) Cattle and seed-grain which in the Court's opinion, are necessary for agriculturist to make a living are not attachable. (1921) 61 Ind Cas 777 (778) (All).

(15) Fodder required for cattle is exempt from attachment. 1907 Pun Re No. 82, p. 406 (407).

(16) Cattle pledged as security can fall within operation of clause (b). (1921) 61 Ind Cas 777 (777) (All).

(17) Court should express its opinion that cattle or seed-grain for which exemption is sought are necessary to judgment-debtor to earn his livelihood. (1883) 10 Cal 39 (40) (DB).

(18) Dispute as to necessity to agriculturist of the thing for which exemption is sought must be decided by executing Court. AIR 1920 Sind 14 (15): 13 Sind LR 210 (DB) ° (1883) 10 Cal 39 (40) (DB) ° (1921) 61 Ind Cas 777 (778) (All).

(19) Attachment of such cattle and seed-grain will be valid where the judgment-debtor is easily able to replace them. AIR 1915 Mad 320 (321) (DB).

(20) Implement of agriculture over which mortgage lien has been created by decree can be attached and sold under that decree. AIR 1947 Sind 32 (32, 33): ILR (1946) Kar 311 (DB).

(21) Implements of husbandry of agriculturist — Attachment — Exemption — Such implements are exempt from attachment under Section 282 of U. P. Act 1 of 1951 only if they are movable property — Immovable property, such as tube well and its mechanical parts, are liable to be attached in proceedings under Section 286 — Agriculturist not entitled to the protection of Section 60 of C. P. Code as the section applies only to execution of decree and not to proceedings under Section 286. 1966 All WR (HC) 810: 1967 All LJ 46.

(22) A firm is not an artisan, though individual members of a firm may be artisans. The protection given by Section 60 (1) (b) is to individuals and not to firms because the whole idea is that persons who carry

**Section 60 — Note 8 (contd.)**
on their livelihood as artisans or as agriculturists should not be prevented from eking out their existence. The same cannot however be said about firms. A firm does not individually work as an artisan or as an agriculturist. AIR 1960 Bom 276 (277): 61 Bom LR 1356. (AIR 1939 Lah 388 (FB), Rel. on.)

**9. Houses, etc., of agriculturists — Clause** (c).—(1) Object of proviso (c) is protection of agriculturist from deprivation of his means of livelihood by having his house and other buildings taken from him. ILR (1941) Lah 441 (447) * AIR 1932 All 508 (508): 54 All 736 (DB).

(2) The provision in Section 60 (1) (c) is for the individual benefit of an agriculturists judgment-debtor and is not based on any public policy. The law does not prohibit transfer of a house belonging to and occupied by an agriculturist. The fact that the law allows an agriculturist to mortgage or sell his house which is occupied by him as an agriculturist proves that it is not public policy that is behind the provision of Section 60 (1) (c). If a house of an agriculturist and occupied by him as such is sold in execution of a decree and the sale is confirmed without an objection by the judgment-debtor the sale is binding upon him notwithstanding the bar imposed by Section 60 (1) (c) and he is precluded from raising the question in a subsequent proceeding. 1963 All LJ 832: ILR (1963) 2 All 976.

(3) 'Agriculturist' means person, who earns his livelihood wholly or principally by cultivating land either personally or through servants. AIR 1954 Punj 254 (255) ° AIR 1952 Mad 807 (808) * AIR 1944 Pat 272 (273): 23 Pat 348 (DB) * AIR 1937 Mad 551 (553): ILR (1937) Mad 777 (FB) ° AIR 1935 All 448 (448) (DB) * AIR 1923 Bom 12 (13) (DB) * AIR 1916 Cal 891 (891) (DB) * AIR 1925 All 432 (433) (DB) ° 1966 All WR (HC) 678. (Person having his main source of income as cultivation does not cease to be an agriculturist, if he supplements his income by doing a labourer's work.)

[But see AIR 1939 Lah 388 (393): ILR (1940) Lah 23 (FB).]

(4) To be agriculturist, ownership of land cultivated is not necessary. (1900) 13 CP LR 30 (32) * AIR 1938 Nag 366 (369): ILR (1938) Nag 461 (DB) ° AIR 1917 Bom 253 (253): 41 Bom 475 (DB) ° AIR 1963 Andh Pra 445 (445, 446, 447): (1963) 1 Andh WR 380. (The definition of the word "agriculturist" given in the Madras Agriculturists' Relief Act, 1938, being one in a special enactment, cannot be accepted for construing Section 60 (1) (c), Civil P. C. Agriculturist is one who tills the soil and is unable to maintain himself otherwise. A person, therefore, who cultivates the land as a labourer, though neither a land owner nor a tenant, is an agriculturist within the meaning of Section 60 (1) (c).)

(5) The test where question is whether one is agriculturist is to look at his chief source of livelihood. AIR 1944 Pat 272 (273): 23 Pat 348 (DB) * AIR 1927 Mad 342 (343) (DB) * AIR 1931 All 20 (20) ° AIR 1961 All 183 (188, 189): 1961 All LJ 88 (FB). (The person concerned must in order to qualify as an agriculturist devote the major part of his time, labour, attention and skill to cultivation of land. (Per Majority). AIR 1935 All 448 and AIR 1960 All 429 both partially not correctly decided. (Per Mukherji J.)— AIR 1935 All 448 correctly decided, AIR 1960 All 429 not correctly decided.) ° AIR 1960 All 429 (430, 431): 1960 All LJ 177. (Receipt of pension is not sufficient to deprive a person of his status as agriculturist as long as he continues to live in the village and cultivates his holding — Note: The case was held by majority in AIR 1961 All 183 (FB) as partially not correctly decided and by Mukerji, J. as not correctly decided—Ed.)

[But see AIR 1928 Nag 23 (24) ° AIR 1938 Nag 366 (369): ILR (1938) Nag 461 (DB).]

(6) If a person's chief source of livelihood is other than cultivation of land he is not an agriculturist though he may also cultivate lands. AIR 1946 Lah 267 (268) ° AIR 1936 Pesh 151 (152) * AIR 1935 All 448 (449) (DB) ° (1921) 63 Ind Cas 681 (682) (DB) (Cal) * AIR 1948 Bom 229 (230, 231): ILR (1947) Bom 687 (DB) ° AIR 1926 Mad 350 (351): 49 Mad 227 (DB) ° AIR 1932 Oudh 76 (76) (DB). (AIR 1926 Mad 350: 49 Mad 227, Followed.) * (1913) 35 All 307 (308) (DB). (This was however doubted in AIR 1928 All 211 by Ashworth, J., sitting as a single Judge.) ° AIR 1917 All 427 (428) (DB).

[See also AIR 1937 Mad 551 (553): ILR 1937 Mad 777 (FB). (Dissenting from observations of Coldstream, J. in AIR 1936 Lah 737.)]

[But see AIR 1942 Pesh 65 (69) (DB).]

(7) The word 'agriculturist' in clause (c) must carry the same meaning as the word 'agriculturist' in Cl. (b) and the house must be occupied by him as such. Where the person had a substantial income from lands other than the lands cultivated in home farm and had also a substantial cash allowance from village officers of inam villages, such a person is not an agriculturist within the meaning of Section 60. A wada belonging to such a person, where he keeps his cattle and seeds and where his servant's stay, is not exempt from attachment. AIR 1961 SC 589 (595, 599): (1961) 2 SCR 168. (Sarkar, J. Contra.)

(8) Onus lies on person claiming exemption of agriculturist to establish that his chief source of livelihood is by cultivation of land. AIR 1942 Oudh 308 (309) * AIR

**Section 60 — Note 9 (contd.)**

1936 Lah 532 (533) * AIR 1925 All 432 (433) (DB) ° AIR 1923 Bom 12 (13) (DB).

(9) Person who lets out his land to another for cultivation, reserving either money or produce as rent, is not agriculturist. AIR 1938 Nag 366 (369): ILR (1938) Nag 461 (DB). (Overruling AIR 1920 Nag 45: 16 Nag LR 89 and AIR 1927 Nag 374.)

[But see AIR 1942 Cal 425 (425) (DB).]

(10) Occupancy tenant does not cease to be agriculturist by obtaining permission to build houses on a portion of the land which was formerly his occupancy tenancy. AIR 1932 All 499 (499) (DB).

(11) A person who turns Akali does not become non-agriculturist. AIR 1925 Lah 331 (331).

(12) Owner of large extent of lands much of which is cultivated through servants is not a non-agriculturist. AIR 1938 Nag 366 (369): ILR (1938) Nag 461 (DB).

[See AIR 1936 Rang 215 (215) (DB).]

(13) House of judgment-debtor who at time of sale is agriculturist although not so at time of its attachment cannot be sold. AIR 1938 All 85 (86) ° AIR 1932 All 499 (499) (DB).

(14) Houses and other buildings belonging to and occupied by person proved to be an agriculturist are exempted from attachment. AIR 1936 Bom 315 (319) (DB) * AIR 1917 All 10 (11): 39 All 120 (DB) • AIR 1933 Nag 80 (81): 29 Nag LR 106.

[See also AIR 1933 Rang 227 (229): 11 Rang 372 (FB).]

(15) Legal representative of deceased judgment-debtor who occupies dwelling house of deceased as agriculturist can claim exemption under Section. (1883) 7 Bom 530 (532) (DB) ° AIR 1932 All 508 (508): 54 All 736 (DB).

[See AIR 1940 Lah 320 (320): ILR (1941) Lah 588 (FB).]

[But see AIR 1943 Lah 19 (21, 22): ILR (1943) Lah 242 (FB) * ILR (1953) 3 Raj 759 (761, 762) (DB).]

(16) House used for purposes subservient to agriculture will not lose protection from attachment by mere fact that it has been mortgaged. Madh B LJ 1955 HCR 1137 (1139).

(17) Clause contemplates occupation by agriculturist as owner and not as tenant. AIR 1936 Oudh 155 (156).

[But see AIR 1938 Lah 736 (737).]

(18) Words "occupied by" mean living in or using for agricultural purposes. AIR 1942 Mad 375 (375) ° AIR 1942 Oudh 308 (309) ° AIR 1941 Pesh 68 (69) * AIR 1938 Nag 366 (367): ILR (1938) Nag 461 (DB). (AIR 1919 Nag 54: 15 Nag LR 83, Followed.) ° AIR 1936 Rang 215 (216) (DB) * AIR 1930 Lah 1034 (1035): 12 Lah 367 (DB).

(19) House need not necessarily be dwelling house of agriculturist provided it is "occupied by" him as agriculturist. AIR 1919 Nag 54 (55): 15 Nag LR 83 ° AIR 1927 Lah 66 (66) ° 1909 Pun Re No. 65 p. 214 (215).

(20) Occupied by him — Meaning — Actual physical possession contemplated — Building not in physical possession and not used for agricultural purposes — Exemption does not apply. AIR 1961 All 566 (566, 567). (AIR 1928 Nag 23, Disting.)

(21) Town residence of an agriculturist is not exempt from attachment. AIR 1935 Pat 496 (497) (DB) ° (1905) 7 Bom LR 685 (686) (DB) ° AIR 1918 All 250 (251).

(22) Town residence to which judgment-debtor takes his cattle and spends his nights is exempt from attachment even though he has a house in the vicinity of his lands. AIR 1926 Lah 230 (230) * AIR 1930 Rang 129 (129): 7 Rang 766.

(23) House if shown to be one in which agriculturist ordinarily resides it becomes immaterial whether he tethers cattle and stores implements there or not. AIR 1945 Mad 276 (276).

(24) House in ruins is not exempt from attachment. AIR 1927 All 214 (214).

(25) Vacant site is not exempted from attachment even if used by agriculturist for storing manure and fodder. 1902 Pun Re No. 59, p. 221 (222) • AIR 1917 Lah 21 (22).

(26) House or building occupied by agriculturist even if dilapidated will be exempt from atachment unless owner is proved to have no intention to rebuild. AIR 1928 Nag 23 (23).

(27) Property not necessary for agricultural purposes is not exempt from attachment, though occupied by agriculturist. AIR 1948 Nag 392 (394): ILR (1948) Nag 530 (DB) ° AIR 1934 Lah 168 (169).

(28) House of agriculturist specifically mortgaged by him, can be sold in execution of mortgage decree. AIR 1945 Lah 123 (124, 125): ILR (1945) Lah 373 (FB) * AIR 1952 Kutch 90 (90) * (1879) 4 Bom 25 (26) (DB) ° (1911) 34 All 25 (28, 29, 30) (FB) * AIR 1924 All 328 (336): 46 All 489 (FB).

(29) House appurtenant to agricultural holding which is not transferable by law cannot be sold even in execution of mortgage decree. (1912) 34 All 25 (30) (FB) ° AIR 1919 All 222 (223) (DB) * (1909) 1 Ind Cas 362 (363) (DB) (Cal).

[See however AIR 1952 All 680 (681).]

[But see AIR 1941 Pesh 53 (55) (DB).]

(30) Sale of ancestral house in execution of decree against Hindu father after dismissal of his objection under the clause for default is binding on his minor sons and their suit to restrain decree-holder from interfering with their possession is not maintainable. AIR 1939 All 399 (400): ILR (1939) All 602 (FB). (AIR 1930 All 727, Overruled.)

(31) Section 60 (1), proviso Cl. (c) exempts not only houses but also buildings.

**Section 60 — Note 9 (contd.)**

The expression 'house' includes a tiled house and a 'building' certainly includes a tiled house. Therefore a tiled house belonging to an agriculturist which is required by him and is in his possession and enjoyment is exempt from attachment under S. 60 (1), proviso (c). AIR 1960 Andh Pra 458 (459).

(32) A resale under O. 21, R. 87 is only a continuation of sale proceedings so that the judgment-debtor can put forward his objection under Section 60 (1) Proviso (c) before resale actually takes place. AIR 1960 Andh Pra 631 (632, 633): (1960) 1 Andh WR 417 (DB). (AIR 1924 Mad 1 (FB) and AIR 1939 FC 74, Rel. on.)

(33) Applicability — Only houses used by agriculturists for the purpose of cultivating the lands are exempted under the Section — House four or five miles away from lands used for residence and storing of grain is not exempt. AIR 1964 Andh Pra 514 (516): (1964) 1 Andh WR 319 (DB).

(34) Clause (c) of Section 60 does not contemplate division of a house a portion to be exempted and a portion to be attached. Either the whole house is exempted or whole of it is liable to be attached. If the house is occupied by an agriculturist then it will be exempt notwithstanding that a portion of it is occupied by a tenant. 1966 All LJ 344: (1966) All WR (HC) 133.

**10. Local amendments. — Punjab.**— (1) Milch cows whether belonging to agriculturists or not are exempt under Proviso (cc) to sub-section (1). AIR 1942 Lah 88 (89).

(2) Proviso (ccc) to sub-section (1) is not retrospective in operation. AIR 1944 Lah 29 (32): ILR (1943) Lah 666 (DB) * AIR 1942 Lah 102 (103, 105): ILR (1942) Lah 349 (FB) ° AIR 1943 Lah 170 (175): ILR (1943) Lah 646 (FB). (AIR 1937 Lah 560 and AIR 1939 Lah 168, Overruled.)

(3) Official Receiver in whom residential house is vested cannot sell it after proviso (ccc) to sub-section (1) has come into force. AIR 1943 Lah 19 (20, 21, 22): ILR (1943) Lah 242 (FB).

(4) Protection under proviso (ccc) is not affected by temporary absence for short period. (1956) 58 Pun LR 4 (7).

(5) After merger of erstwhile Pepsu with Punjab S. 60 (1) (ccc) as applicable to areas so merging cannot be struck down as discriminatory under Article 14 of the Constitution of India. AIR 1958 Punj 326 (327).

(6) A house used for residential purposes does not cease to be residential house by existence of shop on ground floor. AIR 1951 Punj 433 (434) ° AIR 1957 Punj 293 (297): ILR (1957) Punj 1558.

(7) Residential house is a building used as a place of abode, in which people reside or dwell in contradistinction to one which is used for commercial or business purposes. AIR 1958 Punj 326 (327) * AIR 1957 Punj 293 (297): ILR (1957) Punj 1558.

(8) Applicability — Building used for residential purposes with shops attached to it is exempt from attachment. (1963) 65 Punj LR 641.

(9) Applicability — Attachment before judgment — Attachment before judgment not being attachment in execution, S. 60 does not apply to such attachment. (1963) 65 Punj LR 609.

(10) Fraudulent transfer — Avoidance of — Transferor's locus standi to object to attachment. AIR 1961 Punj 423 (424): ILR (1960) 2 Punj 551.

(11) Judgment debtor's only residential house — Before passing order of attachment, the Court must decide that the property is not exempt from attachment — Failure to do so renders the order null — Sale effect in pursuance of such an order must be set aside — Benefit of section cannot be waived and more so by constructive res judicata. 1966 Cur LJ 921: ILR (1967) 1 Punj 821.

(12) An attachment before judgment is not an attachment in execution of a decree. To such an attachment S. 60, C. P. Code has no application. The decree-holder can only claim to have the house put to sale if it stands attached in the execution of the decree under S. 60 of the Code. For the application of Section 60 the matter must be viewed only from the date of execution application and from no other date. The rights of the parties can also be seen only from that date for that date alone is relevant under Section 60. A house was attached before judgment and before the decree was passed, Punjab Relief of Indebtedness Act VII of 1934 was extended to the Union Territory of Delhi. Subsequent to the decree when execution was taken out, the judgment-debtor claimed exemption under Section 60 (1) (ccc), Civil P. C. The Punjab Act 7 of 1934 having no retrospective operation, the question was whether by virtue of the attachment before judgment the decree-holder had acquired vested right in the house to have it sold and whether it continued till the decree was passed and the house was available for sale: Held, that since on the date on which the execution application was made, Punjab Act No. 7 of 1934, had come into force. To the execution of the decree and the execution application of the decree-holder that Act became applicable immediately as the application was made in the executing Court. The attachment before judgment did not become attachment in execution of the decree according to Section 60 (1) (ccc), Civil P. C. because such an effect, even by operation of law, had been taken away by the said exemption clause. The attachment before judgment, in the circumstances, did not continue in perpetuity but exhausted and it then ceased to exist. AIR 1959 Punj 324 (325): 61 Punj LR 219.

**Section 60 — Note 10 (contd.)**

(13) In order to earn exemption under Section 60 (1) (ccc) (Punj.) not only the building must be main residential house belonging to judgment-debtor but it must also be occupied by him. The portion of building which is let out to tenants is not exempt from attachment and sale. AIR 1963 Punj 205 (206): 64 Pun LR 1081.

(14) House of an agriculturist — Mortgage deeds in respect of house handed over to creditor — No sale deed offered as security — House property held not specifically charged — Proviso not applicable. AIR 1963 Punj 205 (206): 64 Pun LR 1081.

(15) Appellant obtaining attachment of house in execution of money decree — Compromise for payment by instalment with condition that default would entitle recovery in lump sum and sale of house — Default — Objection by respondent under Cl. (ccc) and also that the compromise was not registered — Held the appellant could not execute the decree. AIR 1966 Punj 412 (415): 1965 Pun LR (Supp) 176 (DB).

(16) Expression 'main residential house' in S. 60 (1) (ccc) is qualified by expression 'occupied by him' — Where judgment-debtor voluntarily or involuntarily lets out a part of his main residential house or of the building attached to the main residential house, to a tenant, that part cannot be treated as being occupied by judgment-debtor and will not be entitled to exemption from attachment and sale in execution of decree. (Per Majority). AIR 1967 Punj 53 (57 to 61): 68 Punj LR 591 (FB).

(17) Provision which has the effect of conferring a privilege on certain classes of debtors and of trenching on the ordinary right of creditor to realize his money from debtor's property must receive strict construction. AIR 1967 Punj 53 (59): 68 Pun LR 591 (FB).

**Pepsu.** — (18) Proviso (ccc) added to sub-sec. (1) by Patiala Relief of Indebtedness Act (5 of 1999) has no retrospective effect. AIR 1951 Pepsu 33 (38): 2 Pepsu LR 245 (FB).

(19) Clear scope of proviso (ccc) is that it does not protect mortgaged property whether specifically charged with debt to be recovered or with any other debt. AIR 1958 Punj 326 (326).

**Rajasthan**—(20) The scope and purpose of Section 24 of the Regulation 9 of 1926 is identical with those of the provisions in S. 60, Civil P. C., exempting certain properties from attachment or sale in execution of decrees. Section 24 of the Regulation merely supplementing S. 60, Civil P. C., does not apply to execution of mortgage decrees nor does it extend the exemption from attachment. 1960 Raj LW 658: ILR (1961) 11 Raj 816.

**11. Right to sue for damages — Clause (e).** — (1) Mere right to sue for damages cannot be attached and sold. AIR 1935 Nag 135 (137): 31 Nag LR 235 ° AIR 1931 Oudh 398 (399) (DB) ° AIR 1919 Mad 864 (864) (DB).

(2) Purchaser of mere right to sue for damages will not get any right or title thereby. AIR 1925 Sind 98 (99).

(3) Words 'a mere right to sue for damages' are restricted to damages arising from bodily or mental suffering or injury to person or reputation of debtor and not to damages for breach of contract. AIR 1949 All 433 (437) (DB) ° AIR 1924 Sind 89 (91): 17 Sind LR 52.

(4) Right to claim mesne profits for wrongful possession is a right to sue for damages and cannot be attached. (1883) 9 Cal 695 (697) (DB).

(5) Decree awarding damages can be attached. (1871) 15 Suth WR 34 (34) (SB).

(6) Right to get a reconveyance and possession of property under contract of sale is property and attachable in execution. AIR 1921 Mad 498 (502) (DB).

(7) Right to sue for contribution of an insolvent — Not a right or property within this section, exempting it from being vested in the official liquidator. AIR 1969 Andh Pra 23 (24).

**12. Right of personal service — Clause (f).** — (1) Right of personal service cannot be attached and sold in execution of decree, though private alienations thereof are not absolutely prohibited. AIR 1936 Pat 10 (10) (DB) * (1889) 23 Bom 131 (135) ° AIR 1929 Oudh 444 (445): 5 Luck 206 (DB) ° (1888) 12 Bom 366 (367) (DB) * AIR 1918 All 380 (380) * (1871) 16 Suth WR 171 (171) (DB).

(2) Interest of utpat priest officiating in the Pandharpur temples in net balance of offerings to deity is not exempt from attachment and sale. AIR 1927 Bom 143 (144) (DB).

(3) Jatri bahi of Gayawal judgment-debtor which can be used only by him in order to perform personal service to the pilgrims cannot be attached and sold in execution. AIR 1922 Pat 556 (556): 1 Pat 619 (DB).

(4) Right to receive offerings made at temple which is independent of any obligation for rendering personal service is liable to attachment and sale in execution. AIR 1936 All 131 (133): 58 All 457 (DB).

(5) Palas for worship of certain deities transferable by custom by private treaty can be sold in execution limiting class of persons entitled to bid and purchase. AIR 1935 Pat 131 (132).

(6) Money due to the firm of managing agents of a company from the company is not a right to personal service. AIR 1941 Cal 240 (241).

(7) The melavaram right, considered as a service tenure the services of which have become obsolete, is attachable under S. 60 (f), C. P. C. Once the services become obsolete and the need to perform them vanishes, the necessity for inalienability also disappears and the property thereafter becomes ordi-

**Section 60 — Note 12 (contd.)**
nary property subject to the ordinary laws of alienation, succession, etc. 1963 Ker LT 177.

(8) Service grant — No saleable interest of the tenant — Not attachable under S. 60 (1) (f) Civil P. C. AIR 1951 Orissa 240 (243): ILR (1950) Cut 561 (SB).

(9) Jagir grant — Succession — Nature of grant in the hands of successor to last holder — Grant neither fresh nor personal one — Recognition of grant to successor relates back to death of last holder — Compensation bonds paid for resumption of Jagir — Bonds are property liable to attachment and sale. 1961 Raj LW 429.

(10) Rehabilitation grants and compensation bonds paid in lieu of resumption of Jagir — Nature of — Liability to attachment and sale — Decree against Jagirdar — Execution — Decree can be executed against such grants and bonds. 1961 Raj LW 429.

**13. Stipends and gratuities allowed to pensioners — Clause (g).** — (1) Word "pension" in clause has same meaning as under S. 11, Pensions Act (XXIII of 1871). AIR 1914 Cal 765 (766) (DB) • (1904) 26 All 617 (621) (DB) • AIR 1931 PC 160 (161): 59 Cal 1: 58 Ind App 215.

[But see AIR 1937 Lah 178 (179): ILR (1937) Lah 415 (DB).]

(2) Pension must be a grant, not in respect of any right, privilege, perquisite or office, but on political considerations or on account of past services or present infirmities or as compassionate allowance. AIR 1937 Nag 202 (203) * (1880) 4 Bom 432 (436) (SB).

(3) Following are not pensions:

(a) Grant of money or land revenue. AIR 1914 Cal 765 (766) (DB) • (1909) 4 Ind Cas 1057 (1057) (DB) (Mad) • AIR 1930 Lah 816 (817) (DB) * 1902 All WN 161 (162) (DB).

(b) Grant of Zamindari. (1904) 26 All 617 (621, 622) (DB).

(c) Grant of land. AIR 1940 All 373 (377): ILR (1940) All 603 (FB) ° AIR 1938 Nag 269 (270): ILR (1939) Nag 679 ° AIR 1917 PC 94 (95) * (1909) 31 All 382 (384, 386) (DB) ° AIR 1914 All 475 (476): 36 All 318 (DB) ° AIR 1931 PC 160 (161): 58 Ind App 215: 59 Cal 1.

(d) Compensation for resumption of grantee's land. (1904) 8 Cal WN 665 (667) (DB).

(e) Cash allowance on service lands for which service has been commuted into annual fixed payment. AIR 1948 Bom 143 (144) (DB).

(f) Toda giras haq. (1876) 1 Bom 203 (207) (DB) * (1880) 4 Bom 432 (436) (SB) ° (1909) 33 Bom 258 (263) (DB).

(4) Malikana allowance payable from Government treasury is in nature of pension and cannot be attached in execution of money decree. (1912) 13 Ind Cas 194 (194) (DB) (All).

(5) Pension granted by the Government by virtue of a treaty obligation contracted with another State is political pension. (1890) 18 Cal 216 (223): 17 Ind App 181 (PC) ° AIR 1927 Mad 604 (606): 50 Mad 711 (DB).

(6) Pension granted for reasons of State is political pension. AIR 1937 Lah 178 (179): ILR (1937) Lah 415 (DB) * (1903) 26 Mad 423 (427) (DB).

(7) Following allowances are political pensions:

(a) Wasika allowance guaranteed by British Government by treaty in consideration of loan by Ruler of Oudh. (1909) 12 Oudh Cas 323 (329) (DB).

(b) Pension granted to descendants of Kings of Ceylon. (1903) 26 Mad 423 (425) (DB).

(c) Pension paid to members of Mysore royal family. (1867) 7 Suth WR 169 (169) (DB).

(d) Pension paid to descendants of Nawab of Carnatic. (1869) 4 Mad HCR 277 (279) (DB).

(e) Pension granted by foreign State to deposed Maharaja by arrangement with Government of India. AIR 1927 Mad 604 (606, 607): 50 Mad 711 (DB).

(f) Privy Purse to Ruler of former Indian State — Is a political pension and protected from execution — It is not a debt or other property within main part of S. 60 (1). AIR 1965 SC 1798 (1802): (1965) 3 SCR 201. (AIR 1962 Madh Pra 320, Reversed.)

(8) Jahgir may be a political pension. 1888 Pun Re No. 133, p. 361 (361) • AIR 1937 Lah 178 (179): ILR (1937) Lah 415 (DB).

(9) There is no initial presumption that Jahgir is political pension. AIR 1930 Lah 816 (818) (DB) ° (1928) 111 Ind Cas 838 (839) (Lah).

(10) Court should inquire, in each case, into nature of jahgir and see whether it is liable to attachment. 1893 Pun Re No. 47, p. 212 (213) * AIR 1932 Mad 417 (417) ° 1888 Pun Re No. 133, p. 361 (361) ° 1904 Pun LR No. 92, p. 320 (321) (DB) ° AIR 1914 Cal 765 (765) (DB) * AIR 1922 All 429 (429): 44 All 697 (DB).

(11) Jahgir if in nature of pension will be exempt from attachment. AIR 1951 Simla (Punj) 225 (227) ° 1890 Pun Re No. 137, p. 439 ° 1900 Pun Re No. 35, p. 129 (134)

(12) Annual money allowances forming part of Jaghir granted by way of compensation on account of forest dues and not burdened with any condition of service have been held to be personal property of holder and liable to attachment in hands of Government. AIR 1948 Nag 194 (196, 197): ILR (1947) Nag 616 (DB).

(13) Political pensions and other Government pensions are exempt from attachment so long as they are in hands of Government, notwithstanding that the amounts

**Section 60 — Note 10 (contd.)**

(13) In order to earn exemption under Section 60 (1) (ccc) (Punj.) not only the building must be main residential house belonging to judgment-debtor but it must also be occupied by him. The portion of building which is let out to tenants is not exempt from attachment and sale. AIR 1963 Punj 205 (206): 64 Pun LR 1081.

(14) House of an agriculturist — Mortgage deeds in respect of house handed over to creditor — No sale deed offered as security — House property held not specifically charged — Proviso not applicable. AIR 1963 Punj 205 (206): 64 Pun LR 1081.

(15) Appellant obtaining attachment of house in execution of money decree — Compromise for payment by instalment with condition that default would entitle recovery in lump sum and sale of house — Default — Objection by respondent under Cl. (ccc) and also that the compromise was not registered — Held the appellant could not execute the decree. AIR 1966 Punj 412 (415): 1965 Pun LR (Supp) 176 (DB).

(16) Expression 'main residential house' in S. 60 (1) (ccc) is qualified by expression 'occupied by him' — Where judgment-debtor voluntarily or involuntarily lets out a part of his main residential house or of the building attached to the main residential house, to a tenant, that part cannot be treated as being occupied by judgment-debtor and will not be entitled to exemption from attachment and sale in execution of decree. (Per Majority). AIR 1967 Punj 53 (57 to 61): 68 Punj LR 591 (FB).

(17) Provision which has the effect of conferring a privilege on certain classes of debtors and of trenching on the ordinary right of creditor to realize his money from debtor's property must receive strict construction. AIR 1967 Punj 53 (59): 68 Pun LR 591 (FB).

**Pepsu.** — (18) Proviso (ccc) added to sub-sec. (1) by Patiala Relief of Indebtedness Act (5 of 1999) has no retrospective effect. AIR 1951 Pepsu 33 (38): 2 Pepsu LR 245 (FB).

(19) Clear scope of proviso (ccc) is that it does not protect mortgaged property whether specifically charged with debt to be recovered or with any other debt. AIR 1958 Punj 326 (326).

**Rajasthan**—(20) The scope and purpose of Section 24 of the Regulation 9 of 1926 is identical with those of the provisions in S. 60, Civil P. C., exempting certain properties from attachment or sale in execution of decrees. Section 24 of the Regulation merely supplementing S. 60, Civil P. C., does not apply to execution of mortgage decrees nor does it extend the exemption from attachment. 1960 Raj LW 658: ILR (1961) 11 Raj 816.

**11. Right to sue for damages — Clause (e).** — (1) Mere right to sue for damages cannot be attached and sold. AIR 1935 Nag 135 (137): 31 Nag LR 235 ° AIR 1931 Oudh 398 (399) (DB) ° AIR 1919 Mad 864 (864) (DB).

(2) Purchaser of mere right to sue for damages will not get any right or title thereby. AIR 1925 Sind 98 (99).

(3) Words 'a mere right to sue for damages' are restricted to damages arising from bodily or mental suffering or injury to person or reputation of debtor and not to damages for breach of contract. AIR 1949 All 433 (437) (DB) ° AIR 1924 Sind 89 (91): 17 Sind LR 52.

(4) Right to claim mesne profits for wrongful possession is a right to sue for damages and cannot be attached. (1883) 9 Cal 695 (697) (DB).

(5) Decree awarding damages can be attached. (1871) 15 Suth WR 34 (34) (SB).

(6) Right to get a reconveyance and possession of property under contract of sale is property and attachable in execution. AIR 1921 Mad 498 (502) (DB).

(7) Right to sue for contribution of an insolvent — Not a right or property within this section, exempting it from being vested in the official liquidator. AIR 1969 Andh Pra 23 (24).

**12. Right of personal service — Clause (f).** — (1) Right of personal service cannot be attached and sold in execution of decree, though private alienations thereof are not absolutely prohibited. AIR 1936 Pat 10 (10) (DB) * (1889) 23 Bom 131 (135) ° AIR 1929 Oudh 444 (445): 5 Luck 206 (DB) ° (1888) 12 Bom 366 (367) (DB) * AIR 1918 All 380 (380) * (1871) 16 Suth WR 171 (171) (DB).

(2) Interest of utpat priest officiating in the Pandharpur temples in net balance of offerings to deity is not exempt from attachment and sale. AIR 1927 Bom 143 (144) (DB).

(3) Jatri bahi of Gayawal judgment-debtor which can be used only by him in order to perform personal service to the pilgrims cannot be attached and sold in execution. AIR 1922 Pat 556 (556): 1 Pat 619 (DB).

(4) Right to receive offerings made at temple which is independent of any obligation for rendering personal service is liable to attachment and sale in execution. AIR 1936 All 131 (133): 58 All 457 (DB).

(5) Palas for worship of certain deities transferable by custom by private treaty can be sold in execution limiting class of persons entitled to bid and purchase. AIR 1935 Pat 131 (132).

(6) Money due to the firm of managing agents of a company from the company is not a right to personal service. AIR 1941 Cal 240 (241).

(7) The melavaram right, considered as a service tenure the services of which have become obsolete, is attachable under S. 60 (f), C. P. C. Once the services become obsolete and the need to perform them vanishes, the necessity for inalienability also disappears and the property thereafter becomes ordi-

**Section 60 (contd.)**

**15. Salary — Clauses (i) and (ia).—** (1) Bar of attachment to extent laid down in section is based on grounds of public policy. Section cannot be circumvented by appointment of receiver by way of equitable execution to reach exempted payments. AIR 1958 Cal 19 (21).

(2) Unexempted portion of salary could be attached. (1883) 6 Mad 179 (180) (DB) * AIR 1914 Cal 1 (2) (DB).

(3) That debtor is a European and his pay is not enough to maintain his family is no ground for refusing attachment of attachable portion of his salary. AIR 1918 All 248 (248, 249): 40 All 213.

(4) Advocate coducting on daily fees civil litigation on behalf of Government is "public officer" within meaning of clause. AIR 1939 Pat 77 (80): 17 Pat 706 (DB).

(5) In proceeding arising out of suit instituted before 1st June 1937 liability of judgment-debtor's salary to attachment is governed by S. 60 as it stood before amendment Act IX of 1937. AIR 1946 Bom 102 (104): ILR (1945) Bom 899 (DB).

[But see AIR 1950 Mad 114 (116).]

(6) Decree-holder can attach salary of private servant only at point of time when it becomes payable and has not yet been paid, which in a majority of cases it would be almost impossible. Hence although Legislature has made part of such salary attachable, yet in effect by not providing proper remedy it has practically made the whole of the salary unattachable. AIR 1955 Bom 450 (451): ILR (1955) Bom 589.

(7) Attachable portion of salary of a servant of Government may be attached before or after it becomes actually payable. AIR 1947 FC 23 (28): ILR (1947) Kar (FC) 52: 1947 FCR 89 ° AIR 1953 Mys 127 (128): ILR (1954) Mys 5.

(8) Section 60 or R. 48 of O. 21 does not bar Government from claiming that it is not bound to pay the salary or that the matter is one of bounty; but if Government elects to pay the salary, then after it has been attached it must pay it into Court and not to the civil servant. AIR 1951 All 205 (217): ILR (1952) 2 All 467 (DB).

(9) Moneys payable by Government to inamdar for services cannot be attached before they are paid over to inamdar. AIR 1943 Bom 258 (259).

(10) Practice of loitering outside railway confines and attaching and recovering amount of pay of railway employee when he comes out is illegal. 1944 AMLJ 40 (41).

(11) Crops on temple land in possession of archakas by way of remuneration cannot be described as salary within this clause. AIR 1956 Andhra 109 (110): ILR (1955) Andhra 444 (DB).

(12) Exemption allowed by clause does not extend to arrears of salary. AIR 1952 SC 227 (230): 1952 SCR 765.

(13) Attachment of unequal amounts from salaries of two judgment-debtors drawing different amounts of substantive pay does not offend Art. 14 of the Constitution. AIR 1956 Pat 159 (160): 34 Pat 406 (DB).

(14) Objection that could legitimately be raised on behalf of judgment-debtor under the proviso to clause cannot be availed of by execution creditor to defeat claim of another creditor under S. 73. AIR 1956 Cal 112 (113). ((1909) 4 Ind Cas 52 (Cal) and AIR 1941 Nag 289, Approved; AIR 1945 Bom 76, Dissented from.)

(15) Salary of private employee cannot be attached in advance or in anticipation of its becoming due. AIR 1964 Andh Pra 395 (397): (1964) 2 Andh WR 1.

(16) Though salary before payment is exempt from attachment under S. 60 (1), proviso (i), after payment to judgment-debtor can be taken into account in considering his means to pay. AIR 1961 Bom 142 (144): 1960 Nag LJ 463 (DB).

(17) The executing Court has no power to directly attach the pay of the Chief Accounts Officer of the Railway on the ground that its order under O. 21, R. 48, against the judgment-debtor, a railway employee, was not being complied with. Even assuming that O. 21, R. 46 (b) applies to such case the Chief Accounts Officer is not the garnishee but the Government who is the employer of the judgment-debtor. AIR 1951 Cal 315 (315).

(18) A salary represents the total monthly remuneration received by an employee for services rendered by him to his employer and a part of it cannot be said to be his salary and if such a part is deducted by the employer and held in deposit for the purpose of meeting the dues of the employee's creditors, it cannot be said that the sum which is made up of such deductions represents the salary of employee. In the second place S. 60, Cl. (1) does not apply to arrears of salary. AIR 1959 Cal 666 (667): 1958 Cal LJ 208 (DB). (AIR 1952 SC 227: 1952 SCJ 326: (1952) 2 Mad LJ 235, Rel. on.)

**16. Salary of army officers.—** (1) Pay or allowances of any person subject to the Indian Army Act of 1911, cannot be attached. AIR 1926 All 122 (124): 48 All 73 (DB) ° AIR 1933 All 153 (153).

(2) Section cannot prevail over other special provisions in the Army Act relating to 'soldiers' and providing that their pay shall not be attached in execution. AIR 1933 Bom 185 (187) (DB) ° AIR 1934 Bom 31 (32) (DB) * AIR 1919 Bom 133 (134): 43 Bom 368 (DB).

[See also AIR 1937 All 129 (141): ILR (1937) All 350 (FB).]

**17. Compulsory deposits, etc. — Clause (k). —** (1) Deposit by an optional subscriber to a provident fund to which Provident Funds Act (1925) applies is also a compul-

**Section 60 — Note 13 (contd.)**
have become due. (1870) 5 Mad HCR 371 (372) (DB) ° (1903) 26 Mad 69 (71) (DB).

(14) On receipt of political pension by the pensioner it becomes attachable. (1909) 12 Oudh Cas 323 (331) (DB) ° 1867 Pun Re No. 79 p. 155 (155).

(15) Pensions not granted by Government are private pensions. 1884 Pun Re No. 58, p. 155 (156) * AIR 1924 Lah 688 (688).

(16) Private pensions could be attached only to extent of sums that have become due. (1880) 6 Cal L Rep 19 (20).

(17) Gratuity or bonus allowed by Government to its servants in addition to pension is exempt from attachment whether granted to non-pensioner or to pensioner. ILR (1955) Mys 419 (420) ° (1884) 6 All 173 (174) (DB) ° (1882) 5 Mad 272 (273) (DB).

(18) Amount of gratuity in hands of G. I. P. Railway Co. cannot be attached in execution of decree against deceased railway employee though it has been credited to the account of deceased. AIR 1943 Bom 453 (454, 455).

(19) Section has no application to attachment of pension by District Magistrate for realisation of punitive police tax. AIR 1949 Oudh 31 (32) (DB).

(20) Paying capacity of debtor — Determination of — Property, what is — 'Pension' received by the debtor to be excluded while determining capacity. (1962) 2 Andh WR 82.

(21) The word "Pensioners" in S. 60 (1) (g) is not limited to Government servants in actual receipt of pension. It comprises all ex-servants of the Government i.e., retired Government servants. Therefore the gratuity payable to an employee of the Gold Mines who has become the servant of the Government of the State of Mysore by virtue of S. 5 the Kolar Gold Mining Undertakings (Acquisition) Act, 1956, upon the termination of the services are exempt from attachment under Sec. 60 (1) (g) of the Civil P. C (1965) 1 Mys LJ 562.

**14. Wages of labourers — Clause (h). —** (1) Wages of labourers and domestic servants are wholly exempt from attachment. AIR 1942 Bom 191 (193): ILR (1942) Bom 287 * AIR 1942 Pat 194 (194): 20 Pat 866 (DB).

(2) 'Labourer' within meaning of clause is one who earns his living by personal manual labour, or occupations which require little or no art, skill or education. AIR 1942 Bom 191 (192): ILR (1942) Bom 287 ° AIR 1957 Mad 773 (777).

(3) A weaver in a textile mill is a labourer. AIR 1956 Bom 276 (276).

(4) Coolies employed and paid according to quantity of earth carried are 'labourers'. (1880) 5 Bom 132 (134) (DB).

(5) Clerk in a mill doing no manual labour is not a labourer or domestic servant. AIR 1946 Bom 102 (104): ILR (1945) Bom 899 (DB).

(6) Bonus although an ex gratia payment can assume permanency and become part of wages by statute or agreement. AIR 1957 Mad 773 (777) ° (1968) 81 Mad LW 629: 18 Fac LR 82. (AIR 1959 Mys 96, Foll.)

(7) Bonus payable by agreement depending on kind of work done and the number of working days is 'wages'. AIR 1954 Sau 19 (20) ° AIR 1945 Bom 119 (122): ILR (1945) Bom 46.

[See however ILR (1960) 1 Cal 895.]

(8) Crops on temple land in possession of archakas by way of remuneration are not wages. AIR 1956 Andhra 109 (110): ILR (1955) Andhra 444 (DB).

(9) A contingent payment like a profit sharing bonus cannot be held to be a part of the wages of a workman within the meaning of S. 60 (1) (h). ('59) 63 Cal WN 207 * AIR 1962 Ker 63 (64): 1961 Ker LT 796. (When the payment of bonus is contingent upon the accrual of profits such bonus is not part of the wages of the workmen within the meaning of S. 60 (1) proviso Cl. (h), and is not exempt from attachment.)

[See AIR 1963 Punj 478 (479): 65 Pun LR 679. (Bonus payable to employee under an agreement is wages within S. 60 (1), Proviso (h).) * AIR 1959 Mys 96 (98): 36 Mys LJ 204. (Where it is clear from an award made in an Industrial Dispute that the bonus paid under the award was not intended as an ex gratia payment but was intended to be an addition to the actual wages paid it becomes a part of the wages and therefore not attachable in execution of a decree.) ]

(10) "Labourer" within the meaning of Cl. (h) of sub-s. (1) is one who does or is expected to do that class of work which requires manual labour. A junior operator in a boiler house, who according to the Boilers Act of 1923, requires technical qualification and skill and whose duties show that his is not manual labour, does not come within the meaning of 'labourer' in S. 60 (h): 1960 Ker LT 483: 1960 Ker LJ 467. ((1881) 5 Bom 132; AIR 1942 Bom 191; AIR 1946 Bom 102 and AIR 1957 Mad 773, Rel. on.)

(11) Labourer — Person doing manual work requiring skill acquired as a result of training while on job held not labourer AIR 1964 Pat 443 (443, 444) (DB).

(12) "Wages" — Meaning — Term includes also gratuity payable to a workman on the termination of his employment — Definition of 'Wages' in special Acts such as Payment of Wages Act (1936), Minimum Wages Act (1948), etc., does not govern the matter — It is the general meaning of the term having regard to the objects of S. 60 (1) (h) that ought to govern the matter. AIR 1962 Madh Pra 361 (362, 363): 1963 Jab LJ 33 ° AIR 1965 Madh Pra 42 (43): 1965 MPLJ 276 (DB).

**Section 60 — Note 17 (contd.)**
object to its attachment. AIR 1962 Cal 169 (173): 65 Cal WN 848 (DB).

(20) Railway provident fund standing to credit of subscriber — Decree against his wife prior to his death for joint debt of herself and deceased subscriber — Fund is immune from liability of attachment. AIR 1965 Mys 303 (305): (1965) 1 Mys LJ 35.

**18. Allowances of public officers, etc.— Clause (1).** — (1) Dearness allowance received by private employee is not exempt from attachment. AIR 1946 Bom 102 (103, 104): ILR (1945) Bom 899 (DB).

(2) Dearness allowance must be deemed to be part of "salary" unlike travelling allowance, housing allowance etc. AIR 1957 Mad 622 (622): ILR (1958) Mad 201.

[See also AIR 1959 Mad 79 (80). (Notification of State Government under cl. (l) exepmting from attachment dearness allowance is not applicable to non-Government servants or decree for maintenance.)]

(3) Bihar Government has exempted dearness allowance paid to a government servant from attachment. AIR 1956 Pat 159 (160): 34 Pat 406 (DB).

**19. Mere expectancy or other contingent or possible right — Clause (m).** — (1) Mere contingent right though transferable inter vivos is not attachable. AIR 1957 SC 255 (259): 1957 SCR 77.

[See AIR 1960 Mad 347 (347): (1960) 2 Mad LJ 135. (Interest of widow in joint family property devolving on her under S. 3 (2) of Hindu Women's Rights to Property Act, 1937.)]

(2) An expectancy of succession by survivorship, or other merely contingent or possible right or interest, cannot be attached in execution. AIR 1939 PC 6 (7): 32 Sind LR 963: ILR (1939) Bom 36. (Confirming AIR 1936 Sind 65: 30 Sind LR 50.) • ('31) AIR 1931 Oudh 398 (399) (DB).

(3) Right of Hindu reversioner to succeed to properties inherited by Hindu widow or other Hindu Woman cannot be attached. (1899) 21 All 71 (80): 25 Ind App 183 (PC). (25 Cal 778, Overruled.) ° 2 Ind Jur (NS) 277 (FB) * (1898) 22 Bom 984 (985, 986) (DB) * (1902) 29 Cal 355 (361, 363) (DB) * (1866) 6 Suth WR 34 (34) (DB) * (1871) 7 Beng LR 341 (345, 346) (FB) * (1882) 10 Cal L Rep 61 (65) (PC) * (1906) 29 Mad 120 (120) (DB).

(4) Right of son to succeed to his father's specific share of property by survivorship cannot be attached and sold. (1867) 8 Suth WR 253 (254) (DB).

(5) Chance of Mahomendan heir apparent to succeed to property of owner, cannot be the subject of a sale or attachment. 1894 Pun Re No. 58, p. 185 (188) ° (1909) 1 Ind Cas 590 (591) (Cal) * (1907) 31 Bom 165 (171) (DB).

(6) Interest in the pre-empted property of successful pre-emptor who has not paid pre-emptive price cannot be attached. (1906) 28 All 383 (384) (DB).

(7) Right of Mulgeni tenant in South Canara to compensation for improvements is a contingent and inchoate right. AIR 1919 Mad 864 (864) (DB).

(8) Interest of coparcener in Hindu joint family property is not a merely contingent or possible right or interest. AIR 1942 Mad 97 (99) (DB).

(9) Vested remainder not being a mere expectancy though liable to be displaced can be attached and sold. AIR 1936 Cal 802 (803): ILR (1937) 1 Cal 583 (DB) ° (1908) 32 Bom 172 (177) (DB) ° (1891) 18 Cal 164 (177): 17 Ind App 201 (PC) ° AIR 1930 Rang 184 (185) (DB) * (1888) 10 All 462 (466) (DB).

(10) A beneficial interest which judgment-debtor possesses under trust deed provided it is also a vested interest can be attached in execution. AIR 1957 SC 255 (259): 1957 SCR 77.

(11) Reversionary interest vesting in Hindu widow after she alienates her husband's property without legal necessity can be attached in execution of decree for debt due by husband. AIR 1916 Mad 347 (350): 59 Mad 565 (DB).

(12) Vested interest does not cease to be so merely because person in whom it is vested will be entitled to receive the property at a future date. AIR 1943 PC 121 (123): ILR (1943) Kar (PC) 117 ° (1912) 13 Ind Cas 795 (795) (DB) (Mad) • AIR 1926 Mad 371 (373) (DB).

(13) Because the property is the subject of an existing suit vested interest therein does not cease to be so. (1873) 19 Suth WR 132 (133) (DB).

(14) Resulting trust is not a mere expectancy or contingency. (1899) 1 Bom LR 303 (307).

(15) Right of judgment-debtor to surplus amount of sale proceeds deposited in Court pending confirmation of sale held in execution of mortgage decree is not a contingent interest contemplated by this clause. AIR 1937 Nag 391 (392): ILR (1938) Nag 402.

(16) The testator by will gave a certain amount to his son. His wife was directed to pay the amount after the death of the testator when his son attained the age of 35 together with interest due from the date of the death of the testator. The will further provided that if she felt that the son would waste the money she was given the option to pay the yearly interest.

Held, that the amount was an outright gift and there was an immediate vesting of the amount. Only the payment was deferred to a future date. The stipulation for interest also showed, that a present gift was intended. The amount was therefore, not exempt from attachment under S. 60 (1) (m). 1960 Ker LT 705: 1960 Ker LJ 501. (50 Mad LJ 79, Foll.)

(17) Properties charged under maintenance decree — Charge is not extinguished

**Section 60 — Note 19 (contd.)**

even if property is sold in execution to satisfy claims of arrears of maintenance — Liability for future maintenance still attaches to property — No waiver for estoppel of rights of maintenance can be inferred from omission to mention charge in sale proclamation in execution of charge decree. AIR 1967 Mad 126 (127): (1966) 2 Mad LJ 245.

**20. Right to future maintenance — Clause** (n). — (1) Judgment-debtor's right to future maintenance cannot be attached in execution of decree. AIR 1957 Andh Pra 216 (220): ILR (1955) Andhra 370 (DB) * 1954-2 Mad L Jour 516 (519) ° AIR 1952 All 662 (665): ILR (1951) 1 All 740 (DB) ° AIR 1952 Pat 78 (80): 30 Pat 1146 (DB) ° AIR 1950 Orissa 220 (224) (DB) * AIR 1937 Nag 202 (203) ° AIR 1917 Mad 79 (82): 40 Mad 302 (DB).

[See however AIR 1942 Oudh 410 (411, 412): 18 Luck 147 (DB).]

(2) Right to maintenance is a personal right and which in accordance with public policy ought to be inalienable. AIR 1952 All 662 (665): ILR (1951) 1 All 740 (DB) ° AIR 1957 Andh Pra 215 (220): ILR (1955) Andhra 370 ° AIR 1942 Oudh 410 (411): 18 Luck 147 (DB) * AIR 1933 Bom 350 (351): 57 Bom 507 (DB).

(3) Hereditary right of maintenance which is not mere personal right but alienable one can be attached in execution. AIR 1957 Andh Pra 215 (220): ILR (1955) Andhra 370 (DB) ° AIR 1947 Pat 404 (405): 25 Pat 705 (DB) • AIR 1942 Oudh 410 (411): 18 Luck 147 (DB) * AIR 1936 Oudh 76 (79) (DB) * (1907) 30 Mad 279 (280) (DB) • (1884) 10 Cal 521 (522) (DB) ° AIR 1921 Oudh 164 (165): 24 Oudh Cas 250 • AIR 1931 PC 160 (161): 58 Ind App 215: 59 Cal 1.

(4) Interest in property transferred in lieu of maintenance is not exempt from attachment. AIR 1938 Nag 269 (270): ILR 1939 Nag 679 ° AIR 1937 Nag 202 (203) ° 1883 All WN 9 (10) (DB) * AIR 1916 Mad 833 (834) (DB) ° AIR 1925 All 297 (298) (DB) ° (1905) 32 Cal 683 (689) (DB) * (1909) 36 Cal 943 (952): 36 Ind App 176 (PC) * (1906) 33 Cal 1158 (1162) (DB).

(5) Property transeferred in lieu of maintenance but restricted in its enjoyment to grantee personally is not a saleable property attachable under section. AIR 1917 Mad 624 (624) (DB) ° AIR 1923 Bom 276 (277): 47 Bom 597 (DB).

(6) Right of mortgagor under terms of the usufructuary mortgage to receive periodical payment for maintenance is not exempt from attachment. AIR 1935 Mad 815 (815).

[But see AIR 1942 Oudh 410 (411) (DB).]

(7) Right to maintenance may in a case be enforceable against a particular fund or interest in land or maintenance may be payable out of a particular estate but still it will not be an interest in the property, so as to take it out of application of the clause. (1910) 7 Ind Cas 80 (86) (DB) (Cal) ° AIR 1925 PC 176 (176): 47 All 385: 52 Ind App 262 * AIR 1960 Pat 360 (360): 1960 BLJR 299 (DB).

(8) Annuity charged upon estate is property which can be attached. AIR 1936 Lah 55 (58): 17 Lah 378 (DB) ° (1912) 17 Ind Cas 284 (286) (DB) (Cal) ° (1901) 23 All 164 (165) (DB).

(9) Attachment of arrears of maintenance which have fallen due is not prohibited. AIR 1950 Orissa 220 (221) (DB) * (1910) 38 Cal 13 (23) (DB) • (66) 6 (Suth WR (Misc) 64 (64) (DB) * AIR 1965 Punj 79 (80): 1965 (1) Cri LJ 203: 66 Pun LR 1111. (If the maintenance granted under Section 488 of Criminal Procedure Code has not been realised by the person held entitled to it, it remains a right of future maintenance within the meaning of clause (n) of the Proviso to sub-sec. (1) of S. 60 of the Code of Civil Procedure.)

(10) Arrears of maintenance under order of Criminal Court under S. 488 of Criminal Procedure Code are not attachable. AIR 1935 Cal 578 (579, 580): 62 Cal 404 (DB).

[See however AIR 1960 Andh Pra 353 (354): (1959) 2 Andh WR 524. (Property granted to maintenance holder in lieu of maintenance — Property relinquished in favour of grantor in lieu of payment of maintenance — Property is not subject to attachment and cannot vest in Official Receiver on insolvency of maintenance holder.) ]

(11) Attachment of maintenance allowance or a portion of it, as it falls due, is not attachment of a right to future maintenance. Executing Court is not barred in the circumstances of any case, from restricting exemption to maintenance pure and simple and denying it to what is in its opinion in excess of maintenance. AIR 1954 Mad 946 (947).

(12) Although right of judgment-debtor to reside in particular house is exempt from attachment there is no bar to appointment of a receiver to realise rents of house not occupied but let out by judgment-debtor and apply them in discharge of decree. AIR 1937 Lah 433 (434): ILR (1937) Lah 486 (DB).

(13) Land belonging to judgment-debtor although required for his and his family's maintenance is not exempt from attachment. AIR 1936 Lah 448 (448).

(14) Pocket money not being maintenance is liable to attachment. 1945 AMLJ 12 (13).

(15) General declaration of unattachability by statute in respect of future right of maintenance cannot be construed as nullifying charge expressly created by O. 33, R. 10 for specific and limited purpose. AIR 1950 Orissa 220 (224) (DB).

(16) This clause does not control the provisions of O. 33, R. 10. AIR 1955 Punj 22 (24): ILR (1955) Punj 122 (DB).

(17) Section 60 (1) (n) C. P. Code says that a 'right to future maintenance' cannot be attached. The expression 'right to future

**Section 60 — Note 20 (contd.)**
maintenance need not be given a restricted interpretation and hence not to apply to cases where the right to such maintenance is derived by a document or a decree.

The right to maintenance need not be founded on family relationship or under personal law. The deciding factor is whether the right is a right to future maintenance and not whether the right is created for the first time or is in lieu of a pre-existing right under personal law. If the Court concludes that the amount payable in future is maintenance, it is not attachable. (1969) 1 Andh WR 299: (1968) 2 Andh LT 274.

(18) Decree passed in favour of plaintiff for future maintenance in suit filed in forma pauperis — Plaintiff made liable to pay the court-fee payable on the plaint — Execution for recovery of the court-fee should not be levied against the right of future maintenance which is exempt from attachment, even by the appointment of a receiver to realise the amount payable under the maintenance decree. (1964) 2 Andh WR 388.

(19) Where the decree passed before the amendment of 1956 provided for a recurring right to recover future maintenance, the point of time at which the attachment under Cl. (i-a) was effected would be the material date and the recovery of arrears for the years subsequent to the amendment of 1956 would be regulated by the amended clause and not by the provision of the Code as it was prior to the amendment. (1964) 1 Andh WR 264: (1964) 2 Andh LT 133.

(20) Where a decree for maintenance is passed prior to the amendment of the Code in 1956 an assumption cannot be made that the judgment-debtor has a vested right to exemption from attachment under the unamended Code. Section 60 (1) of the Code embodies a saving clause referring to the particulars stated in the proviso. The saving clause confers no right of exemption from attachment and, therefore, it cannot be said that the proviso confers such a right, apart from the fact that a right has to be conferred clearly and unequivocally by statute. (1964) 1 Andh WR 264: (1964) 2 Andh LT 133.

(21) The effect of the amendment of Sec. 60 (1), Civil P. C., introduced by the Amendment Act (66 of 1956) is to render liable two-thirds of the salary in execution of any decree for maintenance whereas prior to the amendment salary to the extent of the first hundred rupees and one half of the remainder shall not be liable to attachment and sale. The amended provision, which is procedural, applies even to decrees passed prior thereto. Further, the decree for maintenance, in the instant case, provided for a recurring right to recover future maintenance and the point of time at which the attachment was effected would be the material date. (1964) 1 Andh WR 264: (1964) 2 Andh LT 133.

(22) How and in what way a maintenance decree-holder should proceed to realise what she obtained under the decree appears more procedural than otherwise. Thus Cl. (i-a) of the proviso, which is procedural, applies even to decrees passed prior to the amendment of 1956 and is, therefore, retrospective. (1964) 1 Andh WR 264: (1964) 2 Andh LT 133.

**21. Moveable property exempt from sale for arrear of land revenue — Clause (p). —** (1) Clause has no application to imoveable property. AIR 1935 Pesh 113 (114).

**22. Explanation II — Salary, meaning of. —** (1) Before Amending Act of 1937 added the Explanation daily remuneration of counsel charged by Government to conduct civil litigation on its behalf, was held to be "salary" of a public servant. AIR 1939 Pat 77 (80): 17 Pat 706 (DB).

(2) Salary under Explanation means the total gross salary including amounts which are recovered by deductions from the salary. AIR 1943 Lah 60 (61, 62): ILR (1944) Lah 63 (DB).

(3) Profits accruing to ghatwal from his estate are not "salary". AIR 1939 Pat 242 (244) (DB).

**23. Objections to attachment.—** (1) Decree-holder is not precluded from taking any of his judgment-debtor's properties in execution of his decree merely because he has a lien on particular properties. (1872) 4 NWP HCR 99 (100) (DB).

(2) Because judgment-debtor denies interest in the properties decree-holder will not be precluded from executing decree. (1866) 1 Agra 169 (171).

(3) Decree-holder effecting wrong attachment, will be liable in damages, though he may have acted in good faith. AIR 1925 Nag 390 (391).

(4) Person claiming exemption from attachment should prove circumstances entitling him to do so. AIR 1942 Lah 153 (157): ILR (1942) Lah 559 (FB) ° (1903) 28 Bom 125 (128) (DB).

(5) Party to order for sale or one who was aware of it but has not objected to the attachment cannot object to the attachment after sale. AIR 1946 Pat 309 (310) (DB) * AIR 1944 Mad 548 (548, 549): ILR (1945) Mad 211 (DB) ° AIR 1931 All 112 (113): 52 All 1027 (DB) ° AIR 1918 All 305 (306): 40 All 680 (DB) * (1913) 37 Bom 415 (425) (DB) ° AIR 1936 Bom 315 (317, 319) (DB) ° AIR 1934 Nag 82 (83): 30 Nag LR 135 * (1905) 9 Cal WN 972 (973) (DB) ° (1907) 34 Cal 199 (206) (DB). (9 Cal WN 972, Followed.) ° AIR 1926 Mad 12 (13) (DB). (9 Cal WN 972 and AIR 1918 All 305: 40 All 680, Followed.) ° AIR 1931 Bom 446 (447) (DB).

[See also AIR 1942 Lah 153 (157, 158, 160): ILR (1942) Lah 559 (FB). (AIR 1939 Lah 113: ILR (1939) Lah 103, Overruled.)]

[But see AIR 1939 Lah 256 (257) * AIR 1935 All 1016 (1017): 58 All 360 (DB).]

**61. [New] Partial exemption of agricultural produce.**—The [a][[b][State] Government] [c][° ° °] may, by general or special order published in the [d][Official Gazette], declare that such portion of agricultural produce, or of any class of agricultural produce, as may appear to the [a][[b][State] Government] to be necessary for the purpose of providing until the next harvest for the due cultivation of the land and for the support of the judgment-debtor and his family, shall, in the case of all agriculturists or of any class of agriculturists, be exempted from liability to attachment or sale in execution of a decree.

[a] Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government".
[b] Substituted for "Provincial" by A.L.O., 1950 (26-1-1950).
[c] The words "with the previous sanction of the Governor-General-in-Council" were omitted by the Devolution Act, 1920 (XXXVIII of 1920), S. 2 and Sch. Pt. I.
[d] Substituted by A.O., for "Local Official Gazette".

## OBJECTS AND REASONS

"Clause 61.— The words "be exempted from liability to attachment or sale in execution of a decree" have been substituted for the words' 'be released from attachment and shall be free from liability to sale in execution of a decree' in order to make it clear that the exemption extends to produce which has been hypothecated."

—S. C. R.

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**Section 60 — Note 23 (contd.)**

(6) One who was not such a party to or was not aware of the proceedings which ended in the order for sale can object to the attachment even after sale. AIR 1942 Lah 153 (159): ILR (1942) Lah 559 (FB).

(7) Sales by Collector — Objection to attachment cannot be taken after the sale by one who was pary to order for sale or was aware of it. But such objection can be taken by one who was neither. (1900) 22 All 108 (110) (DB).

(8) Objection to attachment need not be taken at earliest possible stage in execution proceedings. (1936) 38 Pun LR 669 (669, 670) ° AIR 1935 Lah 942 (943) ° AIR 1930 All 727 (729) (DB) * AIR 1930 Nag 11 (12).

(9) In cases of attachment before judgment objection to attachment can be taken after decree is passed. (1951) 3 Pepsu LR 710 (717, 718) ° (1911) 38 Cal 448 (450) (DB).

[See (1969) 1 Mad LJ 386: 81 Mad LW 523. (Attachment before judgment merging with attachment after judgment — Second claim petition maintainable.)]

(10) Objection under proviso (c) to S. 60 (1) — Can be raised by judgment-debtor at the time of attachment as well as sale. 1962 Ker LT 675: 1962 Ker LJ 668.

(11) Constructive res judicata — Applicability to execution proceedings — Notice of attachment of particular property not given to J. D. — Objection to attachment under Section 60 (1), Proviso (c) not raised — Objection not res judicata at subsequent stage of execution proceedings. 1962 Ker LJ 668.

(12) Applicants objecting to attachment on ground that they did not come into possession of any property of deceased and that their property cannot be attached under Section 60 (c) — Executing Court must first decide whether applicants were in possession of any property of deceased and then decide question of exemption under Section 60 (c). Madh B LJ 1955 (HCR) 2228.

**24. Waiver of benefit of section.**—(1) Benefit conferred by section is based on public policy and cannot be waived by judgment-debtor. AIR 1952 All 680 (681) ° AIR 1951 Simla (Punj) 225 (227) * AIR 1950 Bom 155 (157, 158): ILR (1950) Bom 185 (DB) * AIR 1950 Mad 402 (404) ° AIR 1950 Mad 114 (116) * AIR 1941 Bom 389 (392): ILR (1941) Bom 415 (DB) ° AIR 1942 Mad 391 (391, 392): ILR (1942) Mad 340.

[But see AIR 1948 Nag 391 (394): ILR (1948) Nag 530 (DB) * AIR 1944 Mad 548 (548, 549): ILR (1945) Mad 211 (DB) ° AIR 1927 Pat 233 (233): 6 Pat 254 (DB) ° AIR 1920 Cal 424 (425) (DB) * AIR 1952 Pat 78 (80): 30 Pat 1146 (DB) ° AIR 1935 Lah 164 (164) (DB) * AIR 1927 Pat 233 (233): 6 Pat 254 (DB) ° AIR 1920 Cal 424 (425) (DB).]

(2) In Punjab, by express provision of Section 35, Punjab Relief of Indebtedness Act (VII of 1934) an agreement to waive benefit of any exemption under section is void, hence benefit of section cannot be waived. AIR 1944 Lah 168 (168) (DB). (AIR 1943 Lah 268 and AIR 1941 Bom 389 (FB), Foll.) ° AIR 1943 Lah 268 (274): AIR 1944 Lah 379 (FB). (AIR 1933 Lah 251; AIR 1939 Lah 316; AIR 1939 Lah 539 and AIR 1940 Lah 65, Overruled; AIR 1940 Lah 126 and 42 Pun LR 261, must also be deemed as Overruled — AIR 1935 Lah 164 is no longer good law as it was decided before amendment.)

### SECTION 61 — NOTE 1

(1) Exemption of agricultural produce from attachment under Section 61 is only partial while under Order 38, Rule 12 it is complete. AIR 1962 Ker 261 (263): 1961 Ker LT 946.

**62. Seizure of property in dwelling-house.**—(1) No person executing any process under this Code directing or authorizing seizure of moveable property shall enter any dwelling-house after sunset and before sunrise.

(2) No outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the person executing any such process has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe any such property to be.

(3) Where a room in a dwelling-house is in the actual occupancy of a woman who, according to the customs of the country, does not appear in public, the person executing the process shall give notice to such woman that she is at liberty to withdraw; and, after allowing reasonable time for her to withdraw and giving her reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the same time every precaution, consistent with these provisions, to prevent its clandestine removal.

[1882 and 1877, S. 271; See O. 21, R. 43.]

**OBJECTS AND REASONS**

"Clause 62.— The committee have inserted a new provision to authorise the breaking open of the outer door of a judgment-debtor's house. They do not think that it would be safe to extend the operation of this provision to the house of a stranger." —S. O. R.

"Clause 62 has been brought into line with clause 55 as now amended." —S. C. R.

**63. Property attached in execution of decrees of several Courts.**—(1) Where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached.

(2) Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees.

[1882 and 1877, S. 285; See Order 21.]

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**SECTION 62 — SYNOPSIS**

**1. Scope.**
**2. "Dwelling-house."**
**3. Damages for wrongful seizure.**

**1. Scope.**—(1) A seizure of moveables will not be invalidated by the fact that the bailiff entered the house, which had been closed, after the same had been opened by a certain person who gained entrance into it by getting over the roof. AIR 1915 Mad 320 (321) (DB).

(2) The particular room in question need not be in the occupancy of the judgment-debtor. It is sufficient that the decree-holder or the person making the attachment should consider that there may be property of the judgment-debtor in that room. AIR 1935 All 490 (491).

**2. "Dwelling house."**—(1) A shop or a godown is not a 'dwelling-house'. (1879) 3 Bom 89 (90) (DB).

(2) A store-house or barn standing at a distance from a dwelling house and not forming parcel of it is not a 'dwelling house. (1871) 8 Bom HCR (AC) 127 (129) (DB).

**3. Damages for wrongful seizure.**—(1) A bailiff who breaks open the doors of a house belonging to a third person in execution of a decree against the judgment-debtor is a trespasser, if it turns out that the person or goods of the debtor are not in the house. (1870) 7 Bom HCR (Crown Cas) 83 (86) (DB).

(2) The attaching creditor will be liable in damages to the person injured by unlawful attachment though he may have acted bona fide without malice and under mistake. (1878) 3 Bom 74 (83) (DB) * AIR 1916 Cal 428 (429, 431): 43 Cal 511 (FB) ° (1890) 17 Cal 436 (443): 17 Ind App 17 (PC). (Attachment before judgment of goods not belonging to the judgment-debtor.) ° AIR 1929 Lah 200 (201). (Attachment in execution of property of stranger.) * AIR 1925 Nag 390 (391). (Do.)

**SECTION 63 — SYNOPSIS**

**1. Scope, object and applicability.**
**2. "Is under attachment."**
**3. "Shall receive or realize."**
**4. Claim or objection.**
**5. "Court of highest grade."**
**6. Sub-section (2).**
**7. Procedure when inferior Court sells property.**
**8. Appeal.**

Section 63 (contd.)

TOPIC INDICATOR

Attachment by Courts of different grades — Validity of sale by inferior Court — See Notes 6 and 7.
Attachment by Courts of same grade — Validity of sale by one — See Note 5.
Attachment by Revenue and Civil Courts —See Note 1.
"Decrees of more courts than one" — See Note 1.
Effect of non-compliance with sub-s. (1) — See Note 6.
Rateable distribution — See Notes 4 and 7 and Section 73.

**1. Scope, object and applicability.**—(1) The object of the section is to avoid conflicting claims which might arise out of the attachment and sale of the same property by different Courts. AIR 1946 Nag 170 (172): ILR (1946) Nag 400 ° AIR 1957 Mad 159 (159) ° AIR 1921 Pat 140 (141): 6 Pat L Jour 332 * 1963 Jab LJ 769 (771): ° AIR 1960 Bom 230 (232): 61 Bom LR 1665 (FB).

(2) This section deals merely with procedure and does not affect the substantive rights of the decree-holders inter se. AIR 1914 Mad 454 (455) (DB) ° (1894) 21 Cal 200 (203) * AIR 1935 Bom 176 (177): 59 Bom 310 (DB).

(3) Section does not affect the jurisdiction of Courts. (1907) 34 Cal 836 (838) (DB) ° (1898) 22 Bom 88 (92) (DB) ° AIR 1961 Andh Pra 298 (300): (1961) 1 Andh WR 218 (DB).

(4) The words "property not in the custody of any Court' 'includes immovable property. 1881 Bom PJ 210 (DB) * (1884) 7 Mad 47 (48) (DB).

[But see (1881) 7 Cal 410 (413) (DB).]

(5) The section will not apply to attachments made by a Civil and also by a Revenue Court. AIR 1921 All 142 (143): 43 All 612 (DB).

(6) The section applies also to a case where the property has been attached by different Courts though the decrees have been passed by the same Court. AIR 1936 Mad 797 (799): 59 Mad 1028 (DB).

(7) This section applies to Small Cause Courts also. (1895) 19 Bom 127 (129) (DB).

(8) The term 'Court' used in Section 63, means a Court to which the Code applies and the Registrar of Co-operative Societies is not a Court of this kind although his attachment order has the same force and effect as the attachment order of a competent Civil Court. AIR 1965 Assam 21 (25): ILR (1965) 17 Assam 140 (DB) ° (1966) 2 Andh WR 177 (179).

**2. "Is under attachment."**—(1) Where a valid attachment is made only by one Court and an attachment by the superior Court is void the section has no application. AIR 1946 Nag 170 (172): ILR (1946) Nag 400.

(2) Where immovable property which is under attachment is sold for arrears of land revenue, the attachment does not cease but fastens itself to the balance of the sale proceeds that remains after paying the revenue. AIR 1937 Nag 80 (83): ILR (1937) Nag 219.

(3) A charging order under Order 21, Rule 49 should be deemed to be an attachment for the purposes of this section. AIR 1947 Lah 13 (17): ILR (1947) Lah 417 (FB).

**3. "Shall receive or realize."**—(1) These words will include the sale of the attached property. AIR 1939 Mad 169 (170): ILR (1939) Mad 248 (DB).

[See AIR 1947 Lah 13 (18): ILR (1947) Lah 417 (FB).]

**4. Claim or objection.**—(1) Section contemplates only such claims and objections as can be summarily decided in execution proceedings. (1909) 3 Ind Cas 105 (108) (DB) (Cal).

(2) The section does not indicate that the Court should suo motu ascertain who are the various claimants to the property attached. AIR 1941 Mad 125 (126).

(3) Words "any claim" in Section 63 include claim for rateable distribution under Section 73. AIR 1937 Nag 80 (83): ILR (1937) Nag 219.

**5. "Court of highest grade."**—(1) The grade of any Court depends upon the pecuniary or other limitations of jurisdiction of the particular Court. AIR 1931 Nag 127 (127) (DB) ° AIR 1957 Cal 648 (649) ° AIR 1936 Nag 270 (270): ILR (1937) Nag 122 ° AIR 1963 Raj 224 (224): 1963 Raj LW 254.

[See AIR 1947 Lah 13 (18): ILR (1947) Lah 417 (FB).]

(2) A District Court is of a higher grade than a Subordinate Judge's Court. AIR 1922 Mad 3 (4, 5).

(3) Subordinate Judge's Court is of a higher grade than that of the District Munsif. (1902) 29 Cal 773 (778) (DB) ° AIR 1957 Cal 648 (649) * AIR 1936 Lah 519 (520).

(4) The Small Cause Court is inferior in grade to the Subordinate Judge's Court. (1895) 19 Bom 127 (129) (DB).

(5) The Court of a Munsif must be regarded as a Court of higher grade than a Court of Small Causes. (1894) 16 All 11 (16) (FB).

[See also AIR 1938 Oudh 12 (14). (Court of Civil Judge is superior to a Small Cause Court.) ° AIR 1963 Raj 224 (224): 1963 Raj LW 254. (Rajasthan Court of Additional Civil Judge is superior in grade to Judge of Court of Small Causes — ILR 16 All 11 (FB), Rel. on.)]

(6) Court of Civil Judge in Rajasthan is of higher grade than that of an Additional Munsiff. AIR 1968 Raj 296 (297): 196[illegible] Raj LW 430.

**6. Sub-section (2).**—(1) A sale in contravention of the section will be protected inde-

**64. Private alienation of property after attachment to be void.**—Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.

Explanation.—For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.

[1882 and 1877, S. 276; 1859, S. 240. See O. 21, R. 58.]

### OBJECTS AND REASONS

"Clause 64.— An explanation has been added to make it clear that claims within the protection of this clause include claims for rateable distribution of assets."

—S. O. R.

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**Section 63 — Note 6 (contd.)**

pendent of any question of notice either to the Court or to the purchaser. AIR 1919 Cal 545 (546): 46 Cal 64 (DB) ° AIR 1935 Oudh 154 (156) (DB) *AIR 1936 Mad 797 (798): 59 Mad 1028 (DB) ° AIR 1961 Andh Pra 298 (300): (1961) 1 Andh WR 218.

[But see AIR 1921 Pat 140 (141): 6 Pat L Jour 332 (DB). (Sale would be invalid if it was held with notice of prior attachment by superior Court.) ° AIR 1934 Pat 511 (513): 13 Pat 765 (DB). (Do.) * AIR 1965 Assam 21 (25, 29): ILR (1965) 17 Assam 140 (DB). (When a Court knowingly violates Section 63 (1), Section 63 (2) is no protection.)]

(2) Where, after the sale by the inferior Court in contravention of the section, the property is sought to be sold by the superior Court, then the purchaser as a representative of the judgment-debtor may apply to the superior Court under Section 47 to stop the sale. AIR 1924 Mad 889 (890) (DB).)

[But see (1911) 9 Ind Cas 194 (194, 195) (DB) (Cal).]

(3) Even if a sale is liable to be set aside for irregularities under Section 63, it cannot be impeached in collateral proceedings, or by persons who are not parties to the proceedings. AIR 1917 Mad 602 (603).

(4) The order allowing set-off of the decretal amount must also be considered to be validated by the sub-section so as to exempt the amount so allowed to be set off from the claims of other decree-holders for rateable distribution. AIR 1937 Cal 55 (56) (DB).

[But see AIR 1935 Bom 176 (177): 59 Bom 310 (DB) ° AIR 1936 Mad 797 (798): 59 Mad 1028 (DB) * AIR 1946 All 291 (294): ILR (1946) All 346 (DB) ° AIR 1960 Bom 230 (232): 61 Bom LR 1665 (FB). (AIR 1931 Bom 350, Overruled.) ]

(5) Where an inferior Court sells the property and pays out the sale proceeds to the decree-holder in ignorance of an attachment in a pending execution proceeding of a superior Court the superior Court has no jurisdiction to order restitution and rectify the error. AIR 1930 Mad 699 (700).

(6) Property attached by higher grade Court — Same property sold in pursuance of charge created by decree subsequently by Court of lower grade without having notice of attachment — Property sold by lower grade court was sold under charge and not in execution of decree by attachment. AIR 1963 Guj 140 (141): (1963) 4 Guj LR 503.

**7. Procedure when inferior Court sells property.**—(1) Where the inferior Court has sold the property, the superior Court should not re-sell it but should adopt the sale held by the inferior Court and after getting the sale proceeds transferred to itself should distribute them rateably among the decree-holders. AIR 1932 All 2 (3, 4): 53 All 759 (DB) ° AIR 1931 Bom 350 (352, 354): 55 Bom 473 (DB) * AIR 1936 Cal 723 (726): ILR (1937) 1 Cal 391 ° AIR 1936 Mad 797 (798): 59 Mad 1028 (DB) * 1964 All LJ 602.

(2) As to the procedure to be adopted in getting such sale proceeds transferred to the superior Court, see the undermentioned cases. AIR 1946 All 291 (294): ILR (1946) All 346 (DB) * AIR 1925 Bom 420 (422): 49 Bom 655 (DB) ° AIR 1935 Mad 988 (994, 995) ° AIR 1921 Pat 140 (142): 6 Pat L Jour 332 (DB) * AIR 1936 Cal 723 (726): ILR (1937) 1 Cal 391 ° AIR 1947 Lah 13 (18): ILR (1947) Lah 417 (FB).

**8. Appeal.**—(1) An order of the inferior Court refusing to proceed with the execution on the ground of pendency of execution against the same property in a superior Court is one under Section 47 and is appealable as a decree. AIR 1917 Cal 182 (182) (DB).

### SECTION 64 — SYNOPSIS

1. **Scope and object.**
2. **"Where an attachment has been made."**
3. **Attachment before judgment.**
4. **Effect of attachment.**
5. **Effect of removal of attachment.**
6. **Abandonment or discontinuance of attachment.**
7. **Revival of attachment.**
8. **"Private transfer or delivery of the property attached or of any interest therein."**
9. **"Contrary to such attachment."**

**Section 64 — Synopsis (contd.)**

**10. Transfer void only as against claims enforceable under attachment.**

**11. Explanation.**

**12. Effect of vesting order or winding up order after attachment.**

**13. Prior contract for sale of property.**

**14. Objections to attachment.**

**15. Waiver of benefit under the Section.**

**TOPIC INDICATOR**

Alienation under irregular attachment — See Notes 2 and 10.

Attachment after private alienation — See Note 11.

Attachment by prohibitory order — See Note 2.

Attachment creates no charge — See Note 4.

Attachment raised and restored later — See Note 5.

Attachment subject to prior obligation— See Note 9.

During continuance of attachment — See Note 5.

Evidence and proof — See Notes 2, 14.

Effect of adjudication — See Notes 4, 8 and 12.

Right of decree-holder to question transfer — See Note 10.

Transfer to decree-holder — See Note 9.

Transfer under O. 21, R. 83 — See Note 9.

Transfer when not void. — See Notes 5 and 8.

**1. Scope and object.**—(1) Section 64 enacts that a private alienation of property after attachment is void as against claims enforceable under the attachment. (1902) 6 Cal WN 57 (59) (DB) * AIR 1920 Mad 626 (626) (DB). * ILR (1965) 1 All 99 (103) (DB).

(2) The object of the section is to prevent fraud on decree-holders and to secure intact the rights of attaching creditors. AIR 1940 Mad 385 (408) : ILR (1940) Mad 526 (FB) * AIR 1917 Cal 561 (561) (DB) * (1906) 30 Bom 337 (339) (DB) * AIR 1916 Cal 927 (927) (DB).

(3) It is immaterial for the application of the section whether the decree had or had not been passed before the time when the transfer was effected. AIR 1917 Cal 561 (561) (DB).

(4) Whether the transferee acted in good faith or not is immaterial for the application of S. 64. AIR 1919 Oudh 4 (7) : 23 Oudh Cas 18 (DB).

(5) The provisions of S. 64 should be strictly construed. (1885) 7 All 702 (707) (DB) * (1872) 14 Moo Ind App 548 (549) (PC).

(6) The provisions of S. 64 cannot be extended to cases not contemplated by the section. AIR 1916 Cal 927 (928) (DB).

(7) A transfer by a successful claimant after the date of the claim order but before institution of a suit under O. 21, R. 63 is not prevented by the section. AIR 1915 Mad 495 (497) : 38 Mad 535 (540) (DB).

(8) The provisions of the section relate to execution and a suit by the attaching creditor to avoid an alienation made during attachment is not maintainable. (1901) 28 Cal 492 (497, 499) (DB).

**2. "Where an attachment has been made."**—(1) The words "where an attachment has been made" show that the section has no application to transfers made before the attachment is levied. AIR 1942 Mad 522 (523) * AIR 1932 Sind 164 (165): 26 Sind LR 158 (DB) * AIR 1936 Nag 209 (213, 214): ILR (1936) Nag 127 (DB) * (1966) 1 Mad LJ 413 : ILR (1966) 1 Mad 600 (DB).

(2) For S. 64 to have effect the mere fact that an order of attachment has been passed is not sufficient. (1966) 1 Mad LJ 413: ILR (1966) 1 Mad 600 (DB).

(3) An attachment takes effect not from the date of the Court's order but only from the date of its actual promulgation in the manner prescribed. AIR 1954 Bom 251 (253): ILR (1954) Bom 695 (DB) * ILR (1954) Cut 394 (396, 397) * AIR 1946 All 438 (442, 443): ILR (1946) All 788 (DB) * AIR 1945 Cal 308 (310) : ILR (1945) 1 Cal 601 (DB).

(4) No property can be declared to be attached unless first, the order of attachment has been issued and secondly, in execution of that order the other things prescribed by the rules in the Code have been done. AIR 1928 PC 139 (142): 51 Mad 349: 55 Ind App 256 * (1966) 1 Mad LJ 413 : ILR (1966) 1 Mad 600 (DB).

(5) Section 64 will not apply:—

(a) where a transfer is made after an order of attachment but before it was actually effected. AIR 1955 Pat 231 (234): 33 Pat 256 (DB) * ILR (1955) 1 All 673 (681) (DB) * AIR 1920 Mad 804 (807): 42 Mad 844 (852, 853) (FB) * AIR 1929 Bom 395 (396) : 53 Bom 851.

(b) where the mode prescribed is not complied with. ILR (1955) 5 Raj 648 (649) * ILR (1954) Cut 394 (394, 397) * AIR 1953 Sau 127 (128) (DB) * AIR 1946 All 438 (442, 443) : ILR (1946) All 788 (DB).

(c) where there is a material misdescription or other defect in the attachment. (1881) 3 All 698 (701) (DB) * ('85) 7 All 731 (733) (DB) * AIR 1923 Mad 567 (568) (DB).

(d) where the order of attachment is ultra vires or obtained collusively. 1881 All WN 117 (118) (DB) * (1912) 14 Bom LR 511 (519, 520).

(6) Whether property is or is not, at a given moment, under attachment is a question of fact, capable of absolute demonstration. AIR 1943 Nag 101 (105): ILR (1943) Nag 390 (DB) * AIR 1941 Pesh 18 (20) (DB) * (1905) 8 Oudh Cas 409 (417) (DB).

(7) An order for temporary injunction would not amount to an order for attach-

**Section 64 — Note 2 (contd.)**

ment and S. 64 would have no application. AIR 1954 All 422 (423) (DB).

(8) Where there is evidence of attachment, in the absence of evidence to the contrary, it ought to be presumed that all necessary formalities were complied with. AIR 1934 PC 217 (218) : 15 Lah 836 : 61 Ind App 371 * (1966) 1 Mad LJ 413: ILR (1966) 1 Mad 600 (DB). (Presumption does not come in when there is no evidence that the act has been performed or the evidence that is let in does not warrant an inference of performance.)

(9) In the absence of proof that an attachment, good in law, was ordered and was effected in due manner and without any defect, prior to alienation, the alienation will be upheld. (1890) 13 All 119 (124) (DB) * (1910) 33 Mad 429 (432, 433) (DB) * AIR 1914 Oudh 308 (309) * (1966) 1 Mad LJ 413 : ILR (1966) 1 Mad 600 (DB).

(10) The onus of proving that an alienation is void owing to a prior valid attachment of the property is on the person challenging the alienation and it is for him to prove that the requirements of law as regards a valid attachment were fulfilled. ILR (1954) Cut 394 (397) * AIR 1937 Lah 671 (672).

(11) That the attachment was subsisting at the date of alienation has to be proved by the person challenging the alienation. AIR 1943 Nag 101 (106) : ILR (1943) Nag 390 (DB).

**3. Attachment before judgment.** — (1) The section makes no distinction between attachment before judgment and attachment in execution of a decree. AIR 1945 Cal 308 (310): ILR (1945) 1 Cal 601 (DB) * AIR 1929 Cal 494 (495, 496) : 57 Cal 274 (DB) * AIR 1934 All 165 (166).

(2) A private alienation of property pending a valid attachment before judgment is void as against claims enforceable under the attachment. AIR 1956 Andh 59 (60) (DB) * AIR 1922 Nag 238 (239) * AIR 1919 Mad 752 (754) : 42 Mad 1 (DB).

(3) Where the formalities laid down by O. 38, R. 5 were not complied with, the attachment was held ultra vires and an alienation pending such attachment was held to be valid. AIR 1936 Andhra 59 (60) (DB) * AIR 1954 Bom 251 (254): ILR (1954) Bom 695 (DB) * AIR 1967 All 136 (140) : 1966 All LJ 990 (DB). (If no attachment comes into effect according to procedure prescribed, any step taken towards achievement of that object is a mere nullity and has no effect on that property.) * AIR 1963 Pat 286 (287) : 1963 BLJR 445 (DB). (AIR 1927 Cal 885 Foll.) * (1950) 55 Mys HCR 330.

(4) Where the property attached before judgment is sought to be sold in execution, the decree-holder is not bound to take note of a private sale after the attachment and issue notice to the alienee under O. 21, R. 22. AIR 1957 Andh Pra 38 (40).

**4. Effect of attachment.**—(1) An attachment has merely the effect of preventing all private alienations of the property. It confers no title, charge, lien or priority in the property in favour of the attaching creditor. AIR 1954 Trav-Co 243 (246) : ILR (1953) Trav-Co 281 (FB) * AIR 1952 Bom 70 (71): ILR (1952) Bom 83 (DB) * (1880) 5 Cal 148 (174) : 6 Ind App 88 (PC) * AIR 1914 PC 129 (130): 42 Cal 72: 41 Ind App 251. (Reversing 15 Ind Cas 288.) * (1898) 25 Cal 179 (185): 24 Ind App 170 (PC) * (1902) 29 Cal 428 (431) (FB) * (1890) 12 All 440 (445) (FB) * AIR 1968 Pat 181 (182) * (1967) 2 Mad LJ 462 : 80 Mad LW 492 * AIR 1965 Andh Pra 52 (54, 55, 57) : (1964) 2 Andh WR 435 * AIR 1962 Madh Pra 217 (220): 1962 MPLJ 419.

(2) An attaching creditor obtains by the attachment a right to have the attached property kept in custodia legis for the satisfaction of his debt. AIR 1956 Trav-Co 34 (35) * (1961) 2 Guj LR 625 (627). (That being so, the Revenue authorities are not competent to deal with the property which is under attachment under the order of the Court.)

(3) A person who cuts and carries away crops which have been attached, will be liable in damages to the attaching creditor. (1907) 30 Mad 413 (415, 416) (DB).

(4) An attachment does not prevent an alienation by operation of law. AIR 1914 PC 129 (130): 42 Cal 72: 41 Ind App 251. (Reversing 15 Ind Cas 288.) * AIR 1968 Pat 181 (182, 183) * AIR 1965 Andh Pra 52 (55) : (1964) 2 Andh WR 435 * AIR 1961 Andh Pra 298 (300) : (1961) 1 Andh WR 218 (DB).

(5) A judicial sale of property in pursuance of an attachment carries with it any enlargement thereof that accrues after the attachment and before the sale. (1891) 18 Cal 164 (176) : 17 Ind App 201 (PC).

**5. Effect of removal of attachment.** — (1) A transfer by the judgment-debtor after an attachment has been removed or withdrawn is valid and a subsequent attachment cannot be made so as to relate back to the date of the first attachment and operate against a transfer in the interval, even though the removal or withdrawal of the first attachment was under a misapprehension. AIR 1929 Rang 229 (237): 7 Rang 201 * (1895) 22 Cal 909 (920) : 22 Ind App 129 (PC) * AIR 1962 Ker 106 (109) : 1961 Ker LT 974 (DB).

(2) A private transfer pending an attachment which has subsequently ceased will be valid. AIR 1955 Hyd 101 (103, 104) : ILR (1954) Hyd 822 * AIR 1943 Mad 165 (167) : ILR (1943) Mad 175 (DB) * AIR 1932 Rang 103 (104) : 10 Rang 199 (DB) * (1873) 12 Beng LR 411 (421) (PC).

[But see AIR (1944) All 176 (177) : ILR (1944) All 230 (DB) * (1936) 163 Ind Cas 812 (813) (DB) (Cal) ]

**Section 64 (contd.)**

**6. Abandonment or discontinuance of attachment.** — (1) An attachment may cease.—

(a) by an express order withdrawing or putting an end to the attachment. AIR 1921 Oudh 176 (183, 184) (DB) * 1908 Pun Re No. 81 p. 381 (385) (DB).

(b) by the decree being discharged by payment out of Court. (1899) 23 Mad 478 (482) (DB) * (1911) 35 Bom 516 (523, 525) (DB) * (1882) 8 Cal 279 (281) (DB).

(c) by the decree being discharged by sale of the attached property in execution. (1886) 12 Cal 317 (322) (DB) * ('05) 8 Oudh Cas 409 (417) (DB) * AIR 1920 Pat 75 (77).

(d) by the decree being set aside. (1906) 29 Mad 175 (176) (DB).

(e) in cases of attachment before judgment, by the suit being dismissed. (1888) 10 All 506 (511) (DB).

(2) Where the decree-holder took no steps to enforce his rights for a very long time after the attachment was made, and the application for execution was consequentliy 'struck off' it was held that the attachment must be presumed to have been abandoned. (1873) 20 Suth WR 133 (136) (PC) * (1873) 20 Suth WR 418 (418) * AIR 1921 Mad 30 (32) : 44 Mad 232 (DB).

(3) Mere lapse of time after the attachment will not be sufficient to prove abandonment. AIR 1915 Mad 61 (61) (DB).

(4) The mere fact that the decree-holder applies for fresh attachment does not necessarily imply an abandonment of the attachment already made. (1913) 18 Ind Cas 691 (694) (DB) (Mad) * AIR 1915 Mad 386 (386) * ('81) 6 Cal 129 (133).

(5) An attachment does not abate on the death of the judgment-debtor. (1890) 12 All 440 (445) (FB).

(6) Attachment ceases only upon the decree being fully satisfied. Where the property was sold in execution of a decree and the sale was subsequently set aside on a condition that the judgment-debtor should deposit decretal amount in Court in instalments, on failure of judgment-debtor to pay instalments no fresh attachment was necessary before the property could be brought to sale again. AIR 1964 All 548 (552): 1963 All LJ 969 (DB).

(7) Proceedings under S. 145 (4) Criminal P. C. and attachment of land — Proceedings dropped — Attachment will not automatically cease. (1965) 31 Cut LT 132: ILR (1964) Cut 878.

**7. Revival of attachment.** — (1) An attachment cannot be said to have come to an end so long as the order releasing the attachment is liable to be set aside by way of appeal or otherwise. AIR 1924 Cal 744 (747): 51 Cal 548 (DB).

(2) Where the order of wrong release is set aside in appeal, an alienation made between the date of the order of release and the date of the order in appeal, will be void against all claims enforceable under the attachment. AIR 1950 Mad 740 (742): ILR (1951) Mad 219 (DB) * ILR (1949) 1 Cal 177 (182, 185) (DB) * AIR 1920 All 356 (357): 42 All 39 (DB).

(3) Where the order in the claim petition is set aside in the suit, the attachment is revived so as to affect the alienations made in the interval. AIR 1922 Mad 176 (178): 45 Mad 84 (DB) * AIR 1921 Cal 101 (103) (DB).

(4) An attachment before judgment comes to an end upon the dismissal of the suit and is not revived upon the reversal of the judgment in appeal. AIR 1921 Cal 101 (103) (DB) * AIR 1934 All 165 (167).

(5) An attachment is not revived on an execution sale being set aside by a deposit under Order 21, Rule 89. AIR 1962 Ker 106 (109, 110): 1961 Ker LT 974 (DB). (1963 Ind Cas 587 (Cal) and AIR 1921 All 45 and AIR 1942 Mad 522 and AIR 1943 Mad 165, Foll.)

**8. "Private transfer or delivery of the property attached or of any interest therein."** — (1) The word 'transfer' is used in the most generic sense and includes all species of contract which pass real rights in property from one person to another. (1883) 5 All 121 (137) (FB) * (1891) 13 All 432 (476) (SB).

(2) A transfer purporting to be made by a deed of appointment is a 'transfer.' (1895) 22 Cal 185 (202) (SB).

(3) A 'private transfer' means a voluntary transfer such as a sale, mortgage, lease or gift and not a transfer by operation of law. ILR (1955) Nag 607 (609) (DB) * AIR 1954 Trav-Co 176 (177): ILR (1953) Trav-Co 936 * AIR 1945 Cal 264 (266): ILR (1945) 2 Cal 98 (DB) * (1882) 4 All 219 (225) (FB) * (1881) 7 Cal 107 (118): 8 Ind App 65 (PC).

[But see AIR 1946 Pat 306 (308): 25 Pat 13 (DB).]

(4) The enforced execution of a conveyance or assignment in obedience to the order of the Court is not a private transfer. AIR 1945 Bom 481 (482) * AIR 1943 Bom 283 (285) (DB) * (1882) 4 All 219 (225, 226) (FB).

(5) A transfer effected by an award which has been given effect to by a decree is not a transfer within Section 64. AIR 1949 Mad 649 (650) * AIR 1943 Bom 283 (286) (DB) * (1882) 4 All 219 (225, 226) (FB) * AIR 1932 PC 235 (237): 59 Ind App 405: 13 Lah 702.

(6) Where a transfer is embodied in a decree but the decree is entirely based on an agreement between the parties, the transfer is a 'private' transfer. AIR 1945 Mad 412 (414) * AIR 1934 Rang 313 (315) (DB) * AIR 1962 Assam 56 (58) (DB).

(7) A vesting order in insolvency is a transfer by operation of law and is not within the mischief of this section. (1895) 20 Bom 403 (407) (DB) * AIR 1935 Mad

**Section 64 — Note 8 (contd.)**
151 (151): 58 Mad 403 (DB) * AIR 1933 Nag 229 (230): 29 Nag LR 303 (DB).

(8) Where the adjudication order is made by a foreign Insolvency Court, it cannot have the effect of prevailing over a prior attachment effected by the order of an Indian Court. AIR 1940 Mad 47 (48) (DB) * AIR 1933 PC 134 (135, 136): 60 Ind App 167: 56 Mad 405. (Reversing AIR 1931 Mad 474: 54 Mad 727.)

(9) The prohibition under the section extends to all private transfers. ILR (1954) Madh B 378 (382) * AIR 1927 Mad 1147 (1148) (DB) * AIR 1929 Rang 229 (234): 7 Rang 201.

(10) A consent given by heirs of a Mahomedan after his death, to a bequest made by him, does not amount to an alienation of property. (1902) 26 Bom 497 (499) (DB).

(11) The operation of the right of survivorship among members of a Hindu joint family is not a private transfer; but independently of this section, when a judgment-debtor dies after an attachment in execution is effected on his undivided share, the right of survivorship of his coparceners does not prevail over the rights enforceable under the attachment. AIR 1955 Mys 13 (15): ILR (1954) Mys 361 * AIR 1951 Nag 270 (274): ILR (1950) Nag 491 (DB) * (1879) 5 Cal 148 (174): 6 Ind App 88 (PC) * AIR 1962 All 125 (127).

(12) Where the Hindu joint family property is under attachment, at the time of the adjudication of the karta as an insolvent, the Official Receiver's powers of disposal over such property are not unrestricted but subject to the clog created upon it by the attachment. AIR 1943 Nag 101 (108): ILR (1943) Nag 390 (DB) * AIR 1942 Mad 330 (332, 333) (DB) * AIR 1937 Cal 517 (519): ILR (1937) 2 Cal 675 (DB) * AIR 1959 Ker 141 (146): 1958 Ker LT 995 (DB).

(13) Two properties were attached in execution of a decree obtained by A against the judgment-debtor against whom B also had obtained a decree. The execution petition was dismissed, but the attachment was continued for two months. Subsequent to the attachment B brought to sale one of the attached properties in execution of his decree relying on a security bond executed by the judgment-debtor when the attachment in A's execution was in force. It was held that the sale was not hit by Section 64. AIR 1958 Mad 531 (531).

**9. "Contrary to such attachment."** — (1) The words 'contrary to the attachment' mean that the transfer must be prejudicial to the interests of the attaching creditor or the auction-purchaser. AIR 1934 All 902 (903) * (1936) 164 Ind Cas 1031 (1032) (DB) (Oudh).

(2) An alienation which does not in any way prejudice the rights of the attaching creditor or the auction-purchaser is not affected by the section. AIR 1938 Lah 737 (739): (1962) 40 Mys LJ 1019. (When an alienee actually makes a payment to the decree-holder under Rule 89, he cannot be said to enforce the rights acquired by him under the alienation in opposition to or with a view to prejudicially affect the claims enforceable under the attachment.)

(3) If the attachment is subject to the obligation under a prior contract of sale, the sale in pursuance of the contract will not be a transfer contrary to the attachment. AIR 1942 Mad 67 (69).

(4) Where a mortgage is executed for the purpose of discharging prior mortgages, the transfer is not contrary to the attachment. AIR 1942 Bom 227 (229, 230): ILR (1942) Bom 67 (DB) * (1902) 29 Cal 154 (165, 166): 29 Ind App 9 (PC) * AIR 1935 All 391 (397) (DB).

(5) A sale pending attachment for the purpose of discharging a prior mortgage debt will be one 'contrary to attachment,' but if the vendee has paid off the prior mortgagee, he is entitled to stand in the shoes of that mortgagee in respect of the amount so paid off. (1882) 8 Cal 530 (533) (DB) * AIR 1926 Mad 1082 (1083) (DB).

(6) Where a decree which is under attachment is assigned, the right of the assignee to execute the decree is only a permissive right and is subject to the rights of the attaching decree-holder to be paid out first from out of the moneys recovered in execution. AIR 1927 Mad 1025 (1026, 1027) (DB).

(7) The attachment referred to in the section is the particular attachment under which a claim is being made and when an alienation is not contrary to such attachment the section has no application. AIR 1928 Bom 545 (547) (DB) * AIR 1937 Mad 843 (844): ILR (1937) Mad 970 (DB) * AIR 1934 All 165 (167, 168).

(8) An alienation, resulting in the satisfaction of the decree in execution of which the attachment is made, is not 'contrary to such attachment' within the meaning of the section. AIR 1956 Cal 462 (464) * AIR 1918 Mad 127 (131): 41 Mad 266 (FB) * AIR 1922 PC 393 (396).

(9) The mere fact that the debtor does not pay money into the hands of the judgment-debtor but to somebody else will not make it any the less a payment contrary to the attachment, if the payment is voluntarily made at the instance of or for the benefit of the judgment-debtor. AIR 1936 Mad 251 (252).

**10. Transfer void only as against claims enforceable under attachment.** — (1) A private transfer is not wholly void but is void only as against claims enforceable under the attachment. AIR 1956 Cal 462 (464) * ILR (1955) 1 All 673 (681) (DB) * AIR 1953 Mad 399 (400) * AIR 1939 Mad 702 (706): ILR (1939) Mad

**Section 64 — Note 10 (contd.)**
853 (DB) * AIR 1965 All 135 (141): (1963) 2 Com LJ 74 (DB).

[But see (1896) 18 All 123 (124) (DB).]

(2) A private transfer is void only to the extent necessary to meet claims enforceable under the attachment. AIR 1942 Bom 227 (230): ILR (1942) Bom 67 (DB) * (1881) 7 Cal 107 (118): 8 Ind App 65 (PC) * (1902) 29 Cal 154 (166): 29 Ind App 9 (PC) * (1966) 1 Mad LJ 413: ILR (1966) 1 Mad 600 (DB).

(3) The only persons who are entitled to object to an alienation pending attachment are those who have legal claims enforceable thereunder. AIR 1943 Nag 101 (108): ILR (1943) Nag 390 (DB) * AIR 1929 Pat 1 (3): 7 Pat 726 (DB) * AIR 1937 All 63 (64).

(4) An auction-purchaser at the sale held in pursuance of the attachment being a person whose claim is enforceable under attachment, can object to the private transfer. AIR 1941 Mad 161 (173): ILR (1941) Mad 438 (FB) * AIR 1951 Nag 311 (312, 313): ILR (1951) Nag 416 * (1913) 20 Ind Cas 241 (243) (DB) (Cal) * AIR 1965 Madh Pra 275 (285): 1966 Jab LJ 32 (DB).

(5) A person liable to satisfy a decree as a surety can obtain the benefit of the section if he purchases the property of the judgment-debtor at the sale held in execution of the decree against the judgment-debtor alone. AIR 1951 Nag 311 (313): ILR (1951) Nag 416.

(6) The attachment referred to in the section is the attachment in respect of which the property was sold and it is that attachment alone which can be employed for the purpose of impugning a private alienation. AIR 1916 PC 238 (241): 44 Ind App 72: 44 Cal 662 * AIR 1933 Nag 230 (232) * (1884) 6 All 33 (36) (DB).

(7) If an attachment is not properly perfected, no claim can be enforced thereunder. (1885) 7 All 702 (708) (DB).

(8) If the attachment comes to an end by the satisfaction of the decree in execution of which it was attached, all claims enforceable under the attachment also cease to be enforceable and the section does not apply. AIR 1943 Mad 165 (166, 167): ILR (1943) Mad 175 (DB) * AIR 1942 Mad 522 (523) * AIR 1928 Bom 545 (548) (DB).

(9) Where a judgment-debtor sells the property to another person pending attachment and a part of the consideration is left with the purchaser to be paid to the decree-holder the decree-holder cannot take out garnishee proceedings against the purchaser in respect of this money. AIR 1940 All 500 (504): ILR (1940) All 681 (DB).

(10) The section does not make a sale deed executed in respect of the attached property inadmissible in evidence nor does it make any acknowledgment therein inadmissible in evidence, invalid or void as against the attaching creditor. AIR 1945 All 224 (225, 226): ILR (1945) All 120.

(11) Arrears of income-tax do not constitute a charge, upon the property with the result that if the property is sold the property in the hands of the purchaser will not be subject to any such charge. Under Section 64 of the Civil P. C. after the Income-tax Department effected an attachment of the property no subsequent rights under a charge can survive as against the Department. (1963) 2 Mad LJ 256: 76 Mad LW 509.

**11. Explanation.** — (1) Under the Explanation claims enforceable under an attachment include claims under S. 73 of the Code for rateable distribution of assets. AIR 1940 Mad 385 (395): ILR (1940) Mad 526 (FB) * AIR 1934 All 896 (897) (DB) * AIR 1933 Nag 349 (352).

(2) The explanation to Section 64, Civil P. C. makes it clear that the wider meaning given to the words 'claims enforceable under the attachment' by that explanation is for the purpose of S. 64 only. AIR 1965 Punj 206 (210): ILR (1965) 1 Punj 160 (DB).

(3) In order that the Explanation may apply, there must be assets held by the Court. AIR 1943 Bom 261 (262, 264): ILR (1943) Bom 514 (DB) * AIR 1937 Nag 1 (4): ILR (1937) Nag 291 (DB) * (1936) 163 Ind Cas 587 (589) (DB) (Cal).

[But see AIR 1940 Mad 385 (401): ILR (1940) Mad 526 (FB).]

(4) For the applicability of the Explanation the claim of the decree-holder must be one enforceable under the particular attachment in respect of which the assets have been realised. AIR 1942 Mad 522 (522, 523) * AIR 1916 PC 238 (241): 44 Ind App 72: 44 Cal 632.

(5) A obtains a decree against B and attaches his properties in execution. B transfers the property pending the attachment to C. Subsequently, X attaches the same properties in execution of his decree against B, brings it to sale and purchases it himself. If assets are held by the Court in X's execution, A will be entitled to rateable distribution. But he cannot question C's title. AIR 1916 PC 238 (241): 44 Ind App 72: 44 Cal 662.

(6) An attachment effected after a private alienation is not assisted by an attachment before alienation. If the execution proceedings in which the second attachment has been made have been instituted before assets have been brought into Court, the creditor will be entitled to rateable distribution if the property is sold in the earlier execution proceedings, but if the sale takes place after the private alienation, a person who buys that property at the court-auction will not obtain a good title and the alienation would not be void as against his title.

**Section 64 — Note 11 (contd.)**
AIR 1940 Mad 385 (399): ILR (1940) Mad 526 (FB).

(7) A obtains a decree against B and attaches his properties in execution. C also obtains a decree against B and applies for execution of his decree. B then transfers the property to D and discharges A's decree. Here no assets are received at all and C has no right to any rateable distribution. He cannot consequently question D's title to the property. AIR 1921 All 45 (46): 43 All 399 (DB) * AIR 1918 Mad 127 (132): 41 Mad 265 (FB) * AIR 1928 Bom 545 (547) (DB) * AIR 1937 All 641 (642) (DB) * AIR 1934 All 1057 (1060) (DB).

(8) In order that a claim for rateable distribution may be 'enforceable' it is not necessary that the claim should have been in existence on the date of the alienation. AIR 1922 Bom 241 (242): 46 Bom 895 (DB) * (1892) 16 Bom 91 (101, 102) * AIR 1926 Mad 307 (308, 310): 49 Mad 38 (DB) * AIR 1917 Cal 561 (561) (DB).

[But see AIR 1921 Cal 801 (805, 806) (DB).]

(9) As soon as assets are received in Court they will be available for rateable distribution among the decree-holders who had already applied for execution. It is not necessary that all the decree-holders should have attached the property. AIR 1954 Hyd 238 (239): ILR (1954) Hyd 411 (FB). (AIR 1931 All 92 and AIR 1920 Cal 785, Rel. on.)

**12. Effect of vesting order or winding up order after attachment.** — (1) Where the judgment-debtor is adjudicated an insolvent, the whole of his property vests in the Official Receiver or Official Assignee and an attaching creditor has no priority over the Official Receiver or Official Assignee. AIR 1944 Mad 333 (334) * (1884) 10 Cal 150 (157, 159) (FB) * (1902) 29 Cal 428 (432, 433) (FB) * (1903) 26 Mad 673 (679, 680) (SB) * AIR 1933 Nag 229 (230): 29 Nag LR 303 (DB).

[But see AIR 1953 Bom 101 (103 to 105).]

(2) Where the debtor is adjudicated insolvent after the alienation, the property does not vest in the Official Receiver. AIR 1943 Mad 179 (180): ILR (1943) Mad 659 (DB) * AIR 1936 Mad 100 (101).

(3) An order for liquidation does not vest the property of the company in the liquidator and an attachment made on the property of the company at the instance of the decree-holder before the winding up of the company will prevail over the rights of the liquidator. AIR 1916 Cal 918 (919): 43 Cal 586 (DB).

**13. Prior contract for sale of property.** — (1) An alienation of immovable property pending its attachment can be avoided under this section, although the alienation has been made in pursuance of a contract entered into before the attachment. AIR 1955 Tripura 30 (32) * AIR 1935 Lah 71 (75): 16 Lah 328 (DB) * (1909) 5 Low Bur Rul 6 (6) * AIR 1929 Cal 494 (495, 496): 57 Cal 274 (DB).

(2) As the contract entered into before attachment could be enforced under Section 27 (b) of the Specific Relief Act, against the transferee in Court auction and the attaching creditor, the claim of the latter is not one enforceable under the attachment against the sale executed in pursuance of such a contract and therefore cannot prevail against the sale. (1910) 7 Ind Cas 795 (796) (DB) (Mad) * AIR 1943 Bom 145 (145).

(3) The contract of sale creates an obligation annexed to the ownership of the property under Section 40 of the Transfer of Property Act and the attachment and sale must be deemed to have been made of the property only subject to such obligation. AIR 1917 Mad 4 (5) (DB) * AIR 1916 Cal 917 (928) (DB) * AIR 1942 Mad 67 (68) (DB) * AIR 1939 Mad 702 (707): ILR (1939) Mad 853 (DB) * AIR 1935 Mad 872 (873): 59 Mad 1 (DB) * AIR 1941 Bom 198 (200, 201): ILR (1941) Bom 290 (DB) * AIR 1936 Nag 163 (165): ILR (1936) Nag 172.

(4) A contract creates an obligation annexed to the ownership of the property and as what is attached is the right, title and interest of the debtor in the property, the attachment cannot be free from any obligation to which the debtor is subject in respect of the property at the date of the attachment. AIR 1952 Trav-Co 467 (469): ILR (1952) Trav Co 201 (DB) * AIR 1942 Mad 67 (68) * AIR 1917 Mad 4 (5) (DB).

**14. Objections to attachment.** — (1) The onus of proving that an attachment prima facie legal is not legal is on the party pleading it. 1899 All WN 127 (128) (DB) * (1881) 6 Cal 129 (134): 7 Ind App 157 (PC).

(2) A judgment-debtor who consents to an attachment of an occupancy holding is not estopped from objecting to the sale of the holding on the ground of its non-transferability. AIR 1918 Pat 604 (605) (DB).

(3) A party who does not object to the attachment before judgment is not estopped from objecting to its validity after the decree. (1911) 10 Ind Cas 305 (306) (DB) (Cal).

(4) Where the purchaser pending attachment challenges the validity of the attachment the Court cannot, without any investigation or enquiry into the matter, summarily hold the sale to be void under Section 64 and order delivery of the property to the decree-holder purchaser on his application under Order 21, Rule 95. AIR 1962 Madh Pra 62 (63): 1961 Jab LJ 751.

**15. Waiver of benefit under the section.** — (1) The section being intended

## SALE

**65. Purchaser's title.**—Where immoveable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.

[1882, S. 316; 1859, S. 259; See O. 21, Rr. 82 and 92.]

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**Section 64 — Note 15 (contd.)**
for the benefit of the attaching creditor, the benefit can be waived by him. AIR 1923 Mad 230 (231) (DB) * 1886 All WN 176 (176) (DB) * AIR 1934 Pat 685 (693): 13 Pat 446 (DB)

[See however AIR 1927 Mad 648 (649).]

(2) The mere fact that the decree-holder in taking out execution referred to a mortgage that had been executed pending attachment will not amount to a waiver of the plea under Section 64. AIR 1928 Bom 444 (447) (DB).

(3) The fact that a mortgage executed pending attachment was notified in the proclamation of sale does not amount to a waiver of the plea under Section 64. AIR 1922 All 443 (445): 44 All 714 (DB).

### SECTION 65 — SYNOPSIS

**1A. Scope.**
**1. Effect of reversal of decree before confirmation.**
**2. "Shall be deemed to have vested."**
**3. Right to possession, when accrues.**
**4. Right to mesne profits.**
**5. Liability for rent and revenue.**
**6. Successive execution sales — Priority.**
**7. Revenue sales.**

### TOPIC INDICATOR

"Become absolute" — See S. 47 and O. 21, Rr. 89 to 92.
Effect of renewal of decree after confirmation — See Section 47.
What passes under Court-sale — See S. 47 and O. 21, R. 94.

**1A. Scope.** — (1) Displaced Persons (Compensation and Rehabilitation) Act (1954), S. 29 (1) — Evacuee property — Sale by auction — Period of special prosecution from ejectment available to displaced persons starts from date of issue of certificate and not from date of auction — Analogy of S. 65, Civil P. C. not applicable. AIR 1962 Madh Pra 307 (308): 1962 MPLJ 790.

**1. Effect of reversal of decree before confirmation.** — (1) A sale in favour of a bona fide purchaser not a party to the suit will not be set aside merely because the decree has been reversed before confirmation. AIR 1933 Mad 598 (603, 604, 605): 56 Mad 808.

**2. "Shall be deemed to have vested."**— (1) Until the sale is confirmed, title does not vest in the purchaser. AIR 1953 Trav-Co 574 (575) * AIR 1952 Punj 407 (410) (DB) * AIR 1933 Sind 198 (200): 27 Sind LR 256 (DB) * ILR (1965) 1 All 99 (104, 105, 106) * 1961 Ker LT 951: 1961 Ker LJ 1026. (Purchase by a decree-holder in auction sale — Satisfaction does not take place till confirmation of sale — Judgment-debtor can take advantage of provisions of Travancore-Cochin Indebted Agriculturists Relief Act (3 of 1956) till then.)

(2) Where on confirmation, title vests in the purchaser, it shall be deemed to have vested from the date of sale. In other words, the vesting relates back to the date of sale. AIR 1952 Kutch 10 (11) * AIR 1950 All 644 (646) (DB) * AIR 1949 Nag 127 (128): ILR (1948) Nag 610 * (1912) 40 Cal 89 (102, 103): 39 Ind App 228 (PC) * AIR 1915 Mad 805 (806) (DB) * AIR 1930 Bom 81 (83) (DB) * (1964) 66 Punj LR 1013: 1964 Cur LJ 264 * AIR 1961 Mad 105 (107): (1960) 2 Mad LJ 346 (DB).

(3) The fact that the sale certificate is issued on a later date than that of the confirmation, does not affect the vesting of title on the confirmation of the sale. AIR 1952 Punj 407 (410) (DB) * AIR 1950 All 644 (646) (DB) * (1888) 12 Bom 589 (594, 595) (DB) * AIR 1932 Pat 80 (83): 10 Pat 670 (DB) * AIR 1931 Pat 241 (245): 10 Pat 670 (FB) * (1964) 66 Punj LR 1013: 1964 Cur LJ 264.

(4) The fact that the purchaser had not taken delivery of possession does not detract from the completeness of the purchaser's title. AIR 1953 Trav-Co 574 (575) * AIR 1954 Trav-Co 384 (386) (DB) * AIR 1952 Punj 407 (410) (DB).

(5) When a decree-holder himself purchases the property in execution the decree must be deemed to be satisfied to the extent of the amount of the sale price, as from the date of the sale, and not from the date of the confirmation of the sale, and to that extent the amount on which the decree-holder may be entitled to interest will be reduced. AIR 1951 Mad 844 (850) (DB).

(5-A) The property is no doubt deemed to have vested in the purchaser from the date of the sale, if, and only if the sale is confirmed. But that does not in any way affect the date on which the decree-holder becomes entitled to withdraw and appropriate the purchase money in satisfaction of his decree.

If the decree-holder purchaser is not entitled to have the decretal amount set off against the purchase-money until the confirmation of the sale, the decree can-

**Section 65 — Note 2 (contd.)**
not be said to have been realized until the sale is confirmed. The decree-holder would, therefore, be entitled to interest up to the date of the confirmation of the sale. AIR 1959 Madh Pra 115 (116, 117): 1959 MPLJ 473. ((1951) 1 MLJ 298, Dissented from. 64 MLJ 544, Foll.)

(6) The legal effect of the relation back of the vesting of the title to the date of the sale is that the auction-purchaser will be entitled to rights in the property and be liable to the obligations in respect of the same as from the date of sale. (1913) 40 Cal 89 (102, 103, 104): 39 Ind App 228 (PC) * (1898) 2 Cal WN 589 (591) (DB) * AIR 1926 Nag 17 (19): 24 Nag LR 48 * AIR 1966 All 360 (366): 1966 All LJ 269 (FB). (The auction purchaser is one who has since after the sale a subtantial right in the immovable property sold.) * ILR (1965) 1 All 99 (104, 105, 106).

[See also 1966-1 Mad LJ 324 (DB). (Case under S. 9 (e) of Presidency Towns Insolvency Act (3 of 1909).]

(7) The provisions of the sections as to the retrospective vesting of title do not come into operation until and unless the sale has become absolute. Hence, the profits of the property for the period between the sale and its confirmation must be deemed, for purposes of Income-tax, as accruing to the purchaser on the date of the confirmation. AIR 1933 PC 101 (106): 12 Pat 305: 60 Ind App 133.

(8) Legislation before confirmation of sale exempting the property from attachment or sale will not affect the rights of the auction-purchaser unless there is a clear provision to the contrary. AIR 1942 Lah 102 (103, 104): ILR (1942) Lah 349 (FB).

(9) Sale of house in execution of ex parte money decree — Judgment-debtor not applying under Rule 89 for setting aside sale but applying for setting aside decree — Reversal of decree — After reversal, application by auction-purchaser under Rule 92 for confirmation of sale — Held, sale must be confirmed notwithstanding reversal of decree after sale — Title of purchaser related back to date of sale and not to that of its confirmation. AIR 1967 SC 608 (609, 613, 614): (1967) 2 SCR 77.

(10) Auction-purchaser purchasing property of judgment-debtor — Acts in relation to property by judgment-debtor during sale and its confirmation are not void but voidable at instance of auction-purchaser. ILR (1965) 1 All 99 (104, 105, 106).

(11) Under Section 65 the vesting of the property is related "when such sale has become absolute." It indicates that the purchase becomes a fact when the sale becomes absolute that is only when it is confirmed by the Court. ILR (1962) 1 Ker 143 (147, 148): 1961 Ker LT 951.

(12) Appellate Court restoring and remanding application to set aside sale after setting aside order of confirmation — Application to set aside sale dismissed for default by executing Court — Order of confirmation is automatically revived by such dismissal and title vests in purchaser from date of sale under S. 65. AIR 1964 Ker 314 (316): 1964 Ker LT 449.

**3. Right to possession, when accrues.** — (1) The right of the auction-purchaser to the property arises on confirmation of the sale; therefore, it is not necessary to obtain a sale certificate before applying for possession. ILR (1954) Mad 1213 (1219) (DB) * AIR 1940 Lah 230 (233): ILR (1941) Lah 91 (DB) * (1883) 5 All 305 (309) (FB) * (1888) 11 Mad 296 (299, 300) (DB).

**4. Right to mesne profits.** — (1) The section entitles the auction-purchaser to claim mesne profits from the date of sale. AIR 1952 Kutch 10 (11) * AIR 1951 Mad 844 (850, 851) (DB) * AIR 1940 Lah 230 (233): ILR (1941) Lah 91 (DB) * AIR 1937 All 661 (662, 663).

[See also 1961 Ker LT 984: 1962 Ker LJ 362. (Mesne profits from date of sale — Proceedings to set aside sale or negligence of auction-purchaser in obtaining delivery does not disentitle him to such profits.)]

(2) The mesne profits will be deemed to have arisen, for purposes of income-tax, only on the confirmation of the sale. AIR 1933 PC 101 (106): 12 Pat 305: 60 Ind App 133.

(3) The provisions of Section 65 only recognize the vesting of the property from the back date or retrospectively and would only mean that the auction purchaser became entitled to recover the rents and profit from that date though at the same time between the date of the sale and confirmation he had no legal right to realise the same and the person who could realize the profit and rent was the judgment-debtor. AIR 1963 All 44 (46): 1962 All LJ 763.

**5. Liability for rent and revenue.** — (1) The liability of an auction-purchaser of a lease-hold interest for rent and revenue dates from the date of the sale as his title relates back to that date and the judgment-debtor is not liable for the rent between the sale and the confirmation thereof. AIR 1919 Cal 341 (342) (DB) * AIR 1914 Cal 785 (785, 786) (DB).

[But see AIR 1943 Pat 320 (322, 324): 22 Pat 280 (DB) * AIR 1940 Pat 673 (675): 19 Pat 824 (DB).]

**6. Successive execution sales — Priority.** — (1) Where on the date of the later sale the earlier sale was for any reason not in fact subsisting, as for example, where it had been set aside under Order 20, Rule 90, it will not acquire priority on being revived in due course of law. (1900) 22 All 168 (176,

66. **Suit against purchaser not maintainable on ground of purchase being on behalf of plaintiff.**—(1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims.

(2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser on the ground that it is liable to satisfy a claim of such third person against the real owner.

[1882, S. 317; 1877, Ss. 316 and 317; 1859, S. 260.]

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**Section 65 — Note 6 (contd.)**

179) (DB) * (1896) 23 Cal 857 (861, 862) (DB) * AIR 1925 Bom 483 (484) (DB).

[But see AIR 1949 Pat 304 (306): 27 Pat 1132 * (1893) 20 Cal 25 (28) (DB).]

(2) In deciding the question of priority between two successive purchasers of the same property in execution of different mortgage decrees against the same judgment-debtor, the determining date is the date of the execution sale and not of the mortgages. AIR 1954 Mad 266 (266) * 26 Mad 486 (487) (DB) * (1880) 5 Cal 265 (268) (DB) * AIR 1921 Pat 344 (347) (DB).

**7. Revenue sales.** — (1) In the case of sales by Revenue Courts for arrears of Government revenue the purchaser gets no title, if it is subsequently declared in a suit that no arrears exist or no revenue is payable. AIR 1921 Bom 257 (258, 259, 260): 45 Bom 45 (DB).

## SECTION 66 — SYNOPSIS


**1. Scope, object and applicability.**
**2. Revenue sales.**
**3. Sale by Revenue Court.**
**4. "No suit shall be maintained."**
**5. Plea in defence, if can be raised.**
**6. Suits outside the section.**
**7. Suit by beneficial owner in possession or his successor in title for declaration of title.**
**8. Suits by third person.**
**9. Suits on grounds other than those mentioned in the section.**
**10. Suits by joint purchasers.**
**11. Purchase by Hindu coparcener.**
**12. Suit for specific performance of agreement to sell.**
**13. Suit against certified purchaser and persons claiming through him is barred.**
**14. Name inserted in the certificate fraudulently or without the consent of the real purchaser.**
**15. Objection as to bar by Section 66, when can be raised.**


## TOPIC INDICATOR


Benami sales not illegal, unless fraudulent and unless fraud is carried out — See Note 1.
Benami transaction, meaning and effect of — See Note 1.
Benamidar's or real owner's right to apply for setting aside execution sale — See O. 21, R. 90.
Benamidar's right to execution of decrees — See O. 21, R. 16.
Strict construction of the section — See Note 1.
Suits falling under this section — See Notes 1 and 4.


**1. Scope, object and applicability.** — (1) Section 66 protects a certified purchaser at an auction sale from any claim that his purchase was made not on his own behalf but on that of the plaintiff. AIR 1951 Mad 943 (945) (DB) * AIR 1946 All 85 (87): ILR (1946) All 89 (DB) * AIR 1939 Rang 122 (123) (DB) * AIR 1937 Mad 362 (363).

(2) The object of Section 66 is to put an end to purchases in Court auction by one person in the name of another. AIR 1956 Mad 10 (14) * AIR 1939 Nag 274 (275) (DB) * (1874) 12 Beng LR 317 (329) (PC) * AIR 1920 PC 30 (32): 43 Mad 643: 47 Ind App 108 * (1872) 14 Moo Ind App 496 (525) (PC) * (1875) 2 Ind App 154 (155, 156) (PC) * AIR 1915 PC 81 (82): 37 All 545: 42 Ind App 177.

(2a) Object of the section being to check the practice of making benami purchase in execution sales, it cannot be taken to affect the rights of members of a joint Hindu family, who by operation of law, and not by virtue of any private agreement, are entitled to treat as part of their common property an acquisition, however made, by one member of the family in his own name, if made by the use of the family funds. (1965) 2 Mad LJ 383: 78 Mad LW 518.

(2b) Section 66 (1) seeks to oust the jurisdiction of the Court to give effect to real as against benami title. The object of the clause is to prevent claims before the civil Court that the certified purchaser purchased the property benami for another person. Thereby the jurisdiction of the civil Court to give effect to the real as against the nominal title is restricted and the section must be strictly construed. AIR 1967 SC 1124: (1967) 1 SCR 93.

(3) The section is designed to prevent fraud against third parties resulting from the collusive action of the real and certified purchasers. AIR 1956 Mad 10 (14) *

**Section 66 — Note 1 (contd.)**
AIR 1934 Cal 568 (568): 61 Cal 440 (DB) * ('86) 12 Cal 204 (206).

(4) Section 66 should not be extended beyond its actual terms but should be construed strictly. AIR 1951 Mad 943 (945) (DB) * AIR 1958 Ker 368 (374) (DB) * AIR 1950 Bom 277 (277): 1LR (1950) Bom 362 * AIR 1920 Cal 48 (49) (DB) * (1872) 14 Moo Ind App 496 (527, 528) (PC) * (1875) 2 Ind App 154 (155) (PC).

(5) The section applies only to execution sales. AIR 1955 Andhra 10 (11) * AIR 1937 All 176 (179): ILR (1937) All 113 (DB) * AIR 1942 Mad 154 (155) * AIR 1941 Nag 84 (86): ILR (1941) Nag 90 (DB) * AIR 1937 Pat 324 (325) (DB).

(6) A sale by a receiver is not within the section. AIR 1926 All 124 (125, 126): 48 All 209 (DB) * (1866) 6 Suth WR 160 (161) (DB).

(7) The section does not apply to a sale held in execution of an award of the Registrar of Co-operative Societies under the rules made under the Madras Co-operative Societies Act (6 of 1932). AIR 1955 Andhra 10 (12).

(8) In order that Section 66 may apply, the suit must be against the certified purchaser or his representative, on the ground that the purchase was made on behalf of the plaintiff or his predecessor-in-interest. AIR 1954 Orissa 244 (247) (DB) * AIR 1938 Cal 874 (877) (DB) * AIR 1935 All 143 (146) * AIR 1920 Lah 491 (493) * AIR 1925 Nag 41 (44) * AIR 1916 Mad 657 (658) (DB).

(9) The test to see whether a suit is based on the ground that the auction-purchase was made on behalf of the plaintiff is whether the plaintiff can get any relief or any material relief without proving that the purchase was made on behalf of the plaintiff. AIR 1951 Mad 943 (948) (DB) * AIR 1938 Cal 602 (604) (DB).

(10) The section does not extinguish the rights of the real owner but only prevents him from enforcing them in a Court. ('96) 23 Cal 699 (701) (DB) * AIR 1917 Mad 324 (325) (DB).

(11) The exception in Section 66 (2) should not be narrowly construed. AIR 1945 Cal 355 (360): ILR (1945) 2 Cal 375.

(12) The protection under Section 66 (1) is available not only against real purchaser but also against persons claiming under him. Sub-section (2) refers to claims of creditors and not transferees. A transferee from the real purchaser would be precluded by Section 66 (1) from suing for declaration of title and confirmation of possession. AIR 1964 SC 1254 (1255, 1256): (1964) 6 SCR 780.

(13) A case falling within the provisions of Order 21, Rule 15 must be outside the purview of Section 66 of the Code. The mischief which is meant to be prevented under Order 21, R. 15 cannot possibly be defended under S. 66 of the Code. AIR 1960 Pat 56 (57): 1959 BLJR 688.

(14) Section 66, literally construed, would take in every claim based on benami purchase. It does not exclude from its purview benami purchases made for the benefit of a plaintiff by a defendant in his own name who was already acting as the agent of the plaintiff. The only test is whether the court-auction-purchase was made on behalf of the plaintiff or of someone to whom the plaintiff traces his title. The section does not render benami sales illegal or invalid. Therefore, it was intended to include all categories of benami transactions unless they are saved by sub-section (2). AIR 1962 Andh Pra 49 (51, 52, 54): (1961) 2 Andh WR 196 (FB).

(15) Section 66 does not prohibit benami transaction which have always been recognised in this country and the bar under the section is limited to cases where the suit is brought against the certified purchaser or his representatives. There is nothing in the section to forbid the recognition of the real owner's title by the benami Court auction purchaser or his heirs. (1969) 1 Mad LJ 173: 81 Mad LW 301.

(16) Suit for declaration of title and recovery of possession alleging that defendants were benamidar in Court auction purchase — Section 66 (1) is attracted and hence suit not maintainable — Section 82, Trusts Act excludes from its scope Section 66 (1), Civil P. C. — Section 88, Trusts Act has no application where purchaser is benamidar. AIR 1965 Pat 384 (386): 1966 BLJR 277 (DB). (AIR 1962 Andh Pra 49 (FB), Foll. AIR 1915 PC 81, Rel. on.)

**2. Revenue sales.** — (1) Section 66 has no application to revenue sales. AIR 1953 Nag 259 (260): ILR (1952) Nag 366 (DB) * AIR 1958 Ker 368 (374) (DB) * AIR 1941 Nag 84 (86): ILR (1941) Nag 90 (DB) * (1906) 29 Mad 473 (476) (FB). (25 Mad 665, Overruled.)

**3. Sale by Revenue Court.** — (1) The section is not applicable to sales in execution of a decree for arrears of rent by a Revenue Court under the Madras Estates Land Act. AIR 1942 Mad 154 (156).

**4. "No suit shall be maintained."** — (1) The words "no suit shall be maintained" in the section mean "no suit shall be instituted and if it is instituted, it shall fail." (1899) 21 All 238 (242) (DB).

(2) The words "no suit" show that not even a suit for the return of the purchase money from the benamidar will lie. (1910) 6 Ind Cas 404 (405) (DB) (All).

[But see AIR 1936 Pat 429 (430).]

**5. Plea in defence, if can be raised.**— (1) Where a suit is brought by the certified purchaser or his representative against the real owner, the latter can

**Section 66 — Note 5 (Contd.)**

plead that the purchase was only benami for him. The section does not bar a plea of benami in defence. AIR 1950 Bom 277 (277): ILR (1950) Bom 362 * AIR 1948 Pat 350 (353) . 26 Pat 505 (DB) * AIR 1945 Pat 390 (391): 24 Pat 279 (DB) * (1872) 14 Moo Ind App 496 (526, 527) (PC) * (1875) 2 Ind App 154 (155, 156) (PC) * (1905) 27 All 443 (446) (SB).

[See also AIR 1961 Cal 151 (152): ILR (1961) 1 Cal 519. (S purchasing land at auction sale in name of his son — Land let out by S to predecessor-in-interest of defendants — Plaintiffs, deriving their title through S, bringing suit against defendants for assessment of fair and equitable rent — Defendants held were estopped from challenging title of S and raising plea of bar under S. 66. AIR 1920 Cal 48, Rel. on.) ]

**6. Suits outside the section.**—(1) A suit by a certified purchaser for declaration of his own title to the property purchased is not barred by the section. (1896) 9 CPLR 55 (55, 56) * (1896) 18 All 461 (463) (DB) * (1899) 21 All 29 (43).

**7. Suit by beneficial owner in possession or his successor in title for declaration of title.**—(1) Where the beneficial owner is in possession and brings a suit against the benamidar for declaration of his title, the suit is barred by S. 66. AIR 1938 Cal 602 (604) (DB) * (1901) 23 All 175 (178, 180) (DB) * AIR 1933 Pat 264 (266, 267): 12 Pat 616 (DB) * AIR 1926 Cal 542 (543, 544): 53 Cal 297 (DB) * AIR 1917 Mad 324 (325) (DB).

[But see (1896) 23 Cal 699 (701) (DB)* AIR 1914 Low Bur 275 (276): 7 Low Bur Rul 260.]

(2) An auction-purchaser may, by his conduct, be estopped from pleading the bar under S. 66. (1913) 36 Mad 564 (569).

(3) Where the real owner sells the property to a third person with the consent and attestation of the benamidar auction-purchaser and the third person brings a suit against the benamidar, the latter will be estopped from pleading that the suit is barred under S. 66. (1913) 36 Mad 564 (569).

(4) A suit by the real owner against the certified purchaser on the ground that the plaintiff was in possession but was recently dispossessed by the defendant who was his benamidar at the Court sale is barred by this section. AIR 1950 Bom 277 (278): ILR (1950) Bom 362 * AIR 1960 Pat 56 (58): 1959 BLJR 688. (A obtaining decree in name of B and purchasing property in execution also in name of B — A dispossessed by B's son — Suit for declaration of title and for possession against is not barred by S. 66.)

(5) Where the true owner has perfected his title by adverse possession for twelve years, a suit by him against the certified purchaser for declaration of his title will not be barred as it is based on title by adverse possession. AIR 1954 Orissa 244 (246) (DB) * AIR 1938 All 391 (393) : ILR (1938) All 556 (DB) * AIR 1929 PC 228 (231): 56 Ind App 330: 51 All 675.

(6) If the possession of the real owner or his transferee ripens into title by adverse possession as against the benami purchaser or a transferee from him and the former's possession is disturbed, he can sue the latter to obtain possession for, he does not then rely on the benami nature of the purchase. But such claim must be made clearly and proved. AIR 1964 SC 1254 (1256): (1964) 6 SCR 780.

**8. Suits by third person.**—(1) A third person, such as a creditor of the real owner can sue to enforce his claims against the property purchased on the ground that the purchase was benami for the real owner. AIR 1954 Nag 223 (224): ILR (1954) Nag 457 (DB) * AIR 1920 Mad 422 (423) * (1913) 35 All 138 (143).

(2) Where A contracts to sell B certain property which A intends to purchase at a Court sale, a suit by B for the specific performance of the contract against C on the ground that C was benamidar of A is barred as B must be regarded as claiming through his vendor A. AIR 1945 Cal 355 (359): ILR (1945) 2 Cal 375 (DB).

**9. Suit on grounds other than those mentioned in the section.**—(1) A suit lies to eject a certified purchaser by a person alleging that the purchase was really effected for his benefit, if the relief is not sought on the ground that the certified purchaser was only a name lender for the plaintiff, but on certain facts which establish certain other kinds of legal relations between the parties which entitle the plaintiff to rely on them. AIR 1955 Mad 648 (651) (DB) * AIR 1954 Orissa 244 (246) (DB) * AIR 1952 Bom 30 (31) : ILR (1952) Bom 40 (DB) * AIR 1940 PC 202 (203) : ILR (1940) Kar PC 406 * AIR 1915 PC 81 (82): 37 All 545: 42 Ind App 177 * AIR 1962 Madh Pra 28 (30, 31): 1961 MPLJ 675 (DB). (Sale of property in execution — One partner purchasing it in his own name with partnership fund — Suit by other partner claiming his share — Not barred by S. 66.)

(1a) If the plaintiff's title depends ultimately on the benami nature of the transaction then S. 66 would certainly be a bar, but if the plaintiff's title is dependent upon other facts and circumstances like, for example, the application of the general law or the carrying out of a separate contract, then S. 66 would not be a bar. AIR 1959 Ker 249 (252): 1959 Ker LT 304 (DB).

(2) A sues and obtains a decree against B. In execution of the decree B's house is sold in Court auction and is purchased by C, the paid agent of A, with A's money, but without his knowledge. A then sues C for possession, on the ground that

**Section 66 — Note 9 (contd.)**
the purchase by the agent enures to the benefit of the principal. The suit is not barred. AIR 1919 Mad 942 (943) (DB) * (1895) 18 Mad 436 (437) * (1894) 21 Cal 375 (378) (DB).

[See however (1900) 22 All 434 (438, 440).]

(3) A and B are joint mortgage decree-holders against C, A applies on behalf of himself and B to execute the decree and purchases C's property in the Court sale in his own name, the purchase money being set off against the whole decree amount. B then sues A for recovery of his share of the properties purchased by A. The suit is not barred. AIR 1915 PC 81 (82): 42 Ind App 177 : 37 All 545 * AIR 1924 Oudh 218 (221) (DB) * (1907) 29 All 557 (561).

(4) In execution of A's decree against B, C purchases certain properties in Court auction and then agrees with A to convey the property to him. A brings a suit for specific performance of the contract against C. The suit is not barred. AIR 1919 Mad 94 (95) : 42 Mad 615 (FB)* AIR 1931 Bom 578 (581) * AIR 1921 Pat 39 (41).

(5) A purchases certain properties in Court auction with his own funds, but in the name of B. A continues in possession of the properties purchased for over twelve years. He then sues B for a declaration that he is entitled to the properties. The suit is not barred. AIR 1948 Pat 350 (353): 26 Pat 505 (DB) * AIR 1929 PC 228 (231): 56 Ind App 330: 51 All 675. (Reversing AIR 1921 All 165: 43 All 416.)

**10. Suits by joint purchasers.**—(1) Where without being decree-holders, two persons enter into a joint venture to buy a property at a Court sale, the funds being provided jointly, but the sale certificate is issued in the name of one of them only, a suit by the other claiming half the property on the ground that the purchase was made for both is barred under S. 66. AIR 1939 Pat 207 (208) : 18 Pat 181 (DB) * AIR 1937 All 176 (182): ILR (1937) All 113 (DB) * AIR 1934 Cal 322 (324): 61 Cal 371 * AIR 1967 Mad 437 (439, 440): (1967) 2 Mad LJ 162.

[But see AIR 1926 Bom 525 (525): 50 Bom 600 (DB) * AIR 1940 Nag 1 (3, 4) (DB).]

(2) Section 66 will bar a claim based on the ground that the execution purchase was made in part on behalf of the plaintiff by the auction purchaser. AIR 1940 PC 202 (203): ILR (1940) Kar (PC) 406 * AIR 1967 Mad 437 (439, 440): (1967) 2 Mad LJ 162.

(3) Where, out of two joint mortgagees one alone sues making the other a pro-forma defendant and obtains a decree, in execution of which he purchases the property in his own name, a suit by the other joint mortgagee claiming a share of the property purchased is barred by section 66. AIR 1923 All 401 (406).

[But see AIR 1933 All 854 (856) (DB).]

(4) Where A and B both applied to purchase a property at an auction sale in a certain proportion, agreeing to pay the price in that proportion and actually paid the 25 per cent. of the purchase money in that proportion, but the balance was wholly paid by B and he obtained the sale certificate in his name, it was held that a suit by A for his share of the property purchased was not barred. AIR 1926 Cal 719 (719, 720) : 51 Cal 992 (DB).

**11. Purchase by Hindu co-parcener.**—(1) A suit by one co-parcener to share in the property purchased by another at a court sale with joint family funds is not barred by S. 66. AIR 1915 Oudh 194 (195)* AIR 1934 Cal 567 (568) : 61 Cal 440 (DB) * (1874) 12 Beng LR 317 (330) (PC) * AIR 1917 Oudh 143 (145) * (1899) 9 Mad L Jour 298 (300) (DB) * AIR 1967 SC 1124 (1129, 1130) : (1967) 1 SCR 93 * (1965) 2 Mad LJ 383: 78 Mad LW 518.

(2) Where the managing member of a Hindu family makes a purchase with joint family funds but takes the sale in the name of a third person, any member of the family can sue the third person on the ground that the purchase was benami for the managing member and so enures to the benefit of the family. AIR 1955 Mad 648 (650) (DB) * AIR 1922 Mad 481 (482, 483, 484) : 45 Mad 856 (DB) * (1893) 6 Mad 135 (137) * (1897) 20 Mad 349 (353).

[But see AIR 1921 All 185 (187): 43 All 711 (DB) * AIR 1928 All 619 (621): 50 All 512.]

**12. Suit for specific performance of agreement to sell.**—(1) Where before the date of a Court-sale A and B agree that B should buy the property in his name with funds supplied by A and should convey the property to A thereafter, a suit by A for specific performance of such an agreement will be barred by section 66. AIR 1951 Mad 943 (950) (DB).

(2) Where, before the Court-sale B intends to buy the property for himself with his own funds but agrees to convey the same to A for consideration, the purchase by B is not a benami transaction and a suit by A for specific performance of the contract is outside S. 66. AIR 1953 SC 443 (446) * AIR 1952 Bom 30 (31) : ILR (1952) Bom 40 (DB).

(3) If the circumstances show that notwithstanding the purchase was made with his own funds, B never intended to buy on his own behalf but intended to do so only on behalf of A, the case clearly falls within the mischief of Section 66. AIR 1951 Mad 943 (946) (DB) * AIR 1919 Pat 523 (525, 526) (DB) * AIR 1916 Mad 1156 (1157) (DB).

(4) Where B agrees with A subsequent to the purchase (whether made on his

**67. Power for State Government to make rules as to sales of land in execution of decrees for payment of money —** [a][(1)] The [b][c][State] Government] [d][° ° °] may, by notification in the [e][Official Gazette], make rules for any local area imposing conditions in respect of the sale of any class of interests in land in execution of decrees for the payment of money, where such interests are so uncertain or undetermined as, in the opinion of the [b][c][State] Government], to make it impossible to fix their value.

[a][(2) When on the date on which this Code came into operation in any local area, any special rules as to sale of land in execution of decrees were in force therein, the [b][c][State] Government] may, by notification in the [e][Official Gazette], declare such rules to be in force, or may, [d][° ° °] by a like notification, modify the same.

Every notification issued in the exercise of the powers conferred by this sub-section shall set out the rules so continued or modified.]

[1882, 1877, S. 327; See Ss. 54 and 68 to 72.]

[a] Section 67 was renumbered as sub-section (1) and sub-section (2) was inserted by the Code of Civil Procedure (Amendment) Act, 1914 (I of 1914), Sec. 3.

[b] Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937 (1-4-1937), for "Local Government".

[c] Substituted for "Provincial" by A.L.O., 1950 (26-1-1950).

[d] The words "with the previous sanction of the Governor-General-in-Council" were omitted by the Devolution Act, 1920 (XXXVIII of 1920), Sec. 2 and Sch. I, Pt. I

[e] Substituted by A.O., 1937, for "Local Official Gazette".

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**Section 66 — Note 12 (contd.)**

own behalf or on behalf of A) to sell the property purchased, and A sues B for specific performance of that agreement, the suit is not barred by the section. AIR 1948 Pat 350 (353) : 26 Pat 505 (DB) * AIR 1945 Cal 355 (358): ILR (1945) 2 Cal 275 (DB) * AIR 1919 Mad 94 (95): 42 Mad 615 (FB) * AIR 1920 PC 30 (32, 33) : 43 Mad 643 : 47 Ind App 108.

**13. Suit against certified purchaser and persons claiming through him is barred.—** (1) Section 66 applies to the successors-in-title of a certified purchaser. AIR 1954 Orissa 244 (247) (DB) * AIR 1935 All 143 (146) * AIR 1938 Cal 602 (604) (DB) * AIR 1920 Nag 51 (51) : 16 Nag LR 87.

(2) Where the defendant is neither the certified purchaser nor his successor-in-title but a third person, the section has no application. AIR 1928 Cal 448 (449) : 55 Cal 1070 (DB) * AIR 1929 Pat 664 (674) : 8 Pat 585 (DB).

(3) Where the real purchaser sues the certified purchaser and a third person on the ground that the purchase was made on behalf of the plaintiff, and the certified purchaser either is ex parte or admits plaintiff's title or does not contest the plaintiff's claim or executes a release deed in plaintiff's favour or is otherwise liable to him under a contract made after the sale which he duly admits, the section does not bar it. AIR 1938 Cal 874 (877) (DB) * AIR 1923 Cal 302 (302, 303) (DB) * AIR 1920 Cal 932 (935) * AIR 1925 All 47 (48) * (1903) 13 Mad L Jour 354 (355) (DB).

**14. Name inserted in the certificate fraudulently or without the consent of the real purchaser.—** (1) A certified purchaser is not protected if he is guilty of fraud or gets his name inserted in the sale certificate without the consent of the real purchaser. AIR 1954 Orissa 244 (246) (DB) * AIR 1945 Cal 355 (359) : ILR (1945) 2 Cal 375 (DB) * AIR 1934 Cal 567 (567, 568) : 61 Cal 440 (DB).

(2) Where the pleader of a party, by means of treachery and fraud, purchases at an inadequate price the property of the party in a court sale, S. 66 will not operate as a bar to a suit against him for the recovery of the property on the ground that he must be taken to have made the purchase as trustee of the plaintiff. (1896) 23 Cal 805 (813) (DB).

**15. Objection as to bar by S. 66. when can be raised.—** (1) A plea that a suit is barred by the provisions of S. 66 may be put forward and given effect to at any stage of the suit, even in appeal for the first time. AIR 1917 Oudh 143 (144) * AIR 1932 Cal 170 (170).

**Section 67 — Note 1**

(1) Where the special rules under Section 67 (1) which were already in existence at the time of 1908 Code came into force, are continued in force under Section 67(2) it is not necessary to observe any of the conditions or restrictions for exercise of the power under S. 67(1). (1962) 40 Mys LJ 964 (966).

(2) In substance and effect the Notification No. 14 dated 5th March 1914 issued by the Chief Commissioner of Coorg merely continued the special rule which was in existence even prior to the Code of 1877 and therefore the rule cannot be

## DELEGATION TO COLLECTOR OF POWER TO EXECUTE DECREES AGAINST IMMOVEABLE PROPERTY

**68.** [Omitted by Code of Civil Procedure (Amendment) Act, 1956 (66 of 1956), S. 7 [1-1-1957].]

**69.** [Omitted by Code of Civil Procedure (Amendment) Act, 1956 (66 of 1956), S. 7 [1-1-1957].]

**70.** [Omitted by Code of Civil Procedure (Amendment) Act, 1956 (66 of 1956), S. 7 [1-1-1957].]

**71.** [Omitted by Code of Civil Procedure (Amendment) Act, 1956 (66 of 1956), S. 7 [1-1-1957].]

**72.** [Omitted by Code of Civil Procedure (Amendment) Act, 1956 (66 of 1956), S. 7 [1-1-1957].]

## DISTRIBUTION OF ASSETS

**73. Proceeds of execution sale to be rateably distributed among decree-holders.**—(1) Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution

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**Section 67 — Note 1 (contd.)**

challeged on the ground that it is inconstent with the Code within the meaning of S. 157. The constitutionality of the notification cannot also be attacked on the basis of Art. 14 of the Constitution. (1962) 40 Mys LJ 964 (967).

**Section 68 — Note 1**

Cases decided under the omitted sections:

(1) Application for dismissal of execution in respect of decrees transferred to Collector — Execution Court to be the proper forum and not the Collector. AIR 1968 All 125 (126).

(2) Benefit of para 11(3) of Sch. 3 (as prior to 1956) can be claimed in respect of decrees not transferred to Collector for execution. ILR (1963) Mys 1102.

(3) Attachment of agricultural land in execution of money decree — Case transferred under S. 68 to Collector for its sale — Collector proceeding under Pr. I (c) and reporting non-satisfaction — Subsequent execution after 12 years of date of decree — Paras 11 (2) and 11 (3) not applicable — Execution held barred by S. 48 except as regards the land in prior execution. AIR 1964 Bom 157 (159, 160): 65 Bom LR 452.

(4) Decree transferred to Collector for execution — Property sold — Application under R. 89 of O. 21 made to executing Court transferring decree and not to Collector — Application is in order — AIR 1963 Mys 175 (178): 40 Mys LJ 1009.

(5) Decree in suit on mortgage — Mortgage comprising several pieces of land — Executing Court authorizing Collector under S. 68 to sell some items only — Alienation by judgment-debtor after sale proclamation of items of lands not mentioned in the order was held not void. AIR 1965 Mys 250 (252) : (1965) 1 Mys LJ 613 (DB).

(6) Executing Court making order for sale of mortgaged lands — Direction to Collector that land A should be sold after sale of other 2 lands if decree not satisfied — Collector acquires power to sell land A also — Private sale by judgment-debtor of that land after sale proclamation is void. AIR 1965 Mys 250 (252): (1965) 1 Mys LJ 613 (DB).

(7) Decree transmitted to Collector for execution — Collector alone is seized of the matter — No further steps need be taken in civil Court — Decree cannot become time barred. (1966) 68 Punj LR 420 (427).

(8) Civil Court decree — Transferred to Collector for execution under S. 68, Civil P. C. — Sale of tenancy holding by Collector cannot be treated as sale under process of civil court within S. 37, Rajasthan Act 3 of 1955 and as such cannot be challenged — Collector functions not as an agent but independently of Civil Court. 1960 Raj LW 458 (459).

(9) Executing Court has no jurisdiction to transfer execution proceeding to Collector for sale of property in respect of which sale proceedings are pending before Collector in another execution. The validity of sale can be determined only by separate suit and not under S. 47 either by the executing Court or the Collector. ILR (1958) Mys 432.

### SECTION 73 — SYNOPSIS

1. Scope and object.
2. There must be assets held by the Court.
3. Claimant for rateable distribution and attaching decree-holder must be holders of decrees for the payment of money.
4. Such decrees should have been obtained against the same judgment debtor.
5. Claimant for rateable distribution must have applied for execution to the Court by which assets are held.

of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons:

Provided as follows:—

(a) where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale;

(b) where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold;

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**Section 73 — Synopsis (contd.)**

**6. Effect of dismissal of the application for execution.**
**7. Claimant attaching before judgment.**
**8. The application should have been made before the receipt of assets by the Court.**
**9. "And have not obtained satisfaction thereof."**
**10. Jurisdiction of Court to inquire into the validity of the decree under which rateable distribution is claimed.**
**11. Insolvency or liquidation, how far affects the right of rateable distribution.**
**12. Sale subject to mortgage — Mortgagee cannot get rateable distribution — Proviso (a).**
**13. Sale free of mortgage — Rights of mortgagee — Proviso (b).**
**14. Sale in execution of decree on mortgage — Mode of applying the sale proceeds — Proviso (c).**
**15. Suit for refund of assets — Sub-section (2).**
**16. Priority of debts—Sub-section (3).**
**17. Mode of distribution.**
**18. Appropriation of amount received by way of rateable distribution.**
**19. Appeal.**
**20. Revision.**

**TOPIC INDICATOR**

Application for rateable distribution, conditions of — See Note 5.
Deposit under O. 21, R. 89 — See Note 2.
Distinction between "held" and "realized" — See Note 2.
Distribution of assets realised by rent decree — See Note 16.
Effect of attachment before judgment— See Note 7.
Effect of rateable distribution on debtor's surety — See S. 145.
Fund in Court — Rateable distribution of — See Note 8.
Higher Court to determine claims for rateable distribution — See Note 5.
Illustrative cases when applications were held not to be applications in execution — See Note 5.
Inter-relation between S. 73 and O. 21, R. 52 — See Notes 8 and 16.
Limitation for suit for refund — See Note 15.
Order 21 Rule 72 does not affect S. 73 — See Notes 2 and 8.
Priority of attachment confers no prior right — See Note 1.
Property declared not liable but sold by another decree-holder — First decree-holder entitled —See Note 16.
Right of rival decree-holder to challenge decree — See Note 10
"Shall be rateably distributed." — See Notes 4, 10, 17.
To the Court — See Note 5.
Transfer of assets whether necessary — See Note 8.
Whether Small Cause Court can try suit for refund — See Note 15.
Who can apply — See Notes 3 and 10.

**1. Scope and object.** — (1) Section 73 places all decree-holders on an equal footing regardless of any priority in attachment or of the application for rateable distribution. AIR 1941 All 110 (111): ILR (1941) All 77 (FB) * AIR 1951 Ajmer 58 (2) (58, 59) * AIR 1922 Mad 236 (236) * AIR 1961 All 371 (374): 1961 All LJ 435. (No special right in regard to priority on the creditor is conferred.) * AIR 1961 Punj 292 (293): ILR (1960) 1 Punj 809.

(2) The object of the section is to prevent unnecessary multiplicity of execution proceedings and to secure an equitable administration of the property by placing all the decree-holders on the same footing and making the property rateably divisible among them. AIR 1941 All 110 (111, 112): ILR (1941) All 77 (FB) * 1924 Cal 801 (805) : 51 Cal 761 (DB) * AIR 1935 Nag 214 (215) : 31 Nag LR 423 * AIR 1962 Mys 12 (13) : 39 Mys LJ 536.

(3) The rule enunciated in this section is only a rule of procedure. It does not, however, alter or limit the substantive rights of rival decree-holders. AIR 1941 All 110 (115) : ILR (1941) All 77 (FB) * (1884) 10 Cal 567 (576) (DB) * AIR 1926 Oudh 616 (617) : 1 Luck 569 (DB).

(4) Where some of the decree-holders who had filed suits against the judgment-debtor, a public officer, before 1st June

(c) where any immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied—

first, defraying the expenses of the sale;
secondly, in discharging the amount due under the decree;
thirdly, in discharging the interest and principal monies due on subsequent incumbrances (if any); and
fourthly, rateably among the holders of decrees for the payment of money against the judgment-debtor, who have, prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof.

(2) Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.

(3) Nothing in this section affects any right of [a][the Government].

[1882, 1877, S. 295; 1859, S. 270; See S. 64, O. 21, Rr. 52, 72, 89 and 90.]

[a] Substituted by A.L.O., 1950, for "the Crown" which were substituted by the Government of India (Adaptation of Indian Laws) Order, 1937 (1-4-1937), for "the Government".

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**Section 73 — Note 1 (contd.)**

1937, attached a portion of the amount of his salary which the other decree-holders who had filed their suits after 1st June 1937 would not have been able to attach by reason of the amendment of S. 60(1)(i) the latter can have no right to share by way of rateable distribution in that amount. AIR 1945 Bom 76 (77, 78).

[But see AIR 1956 Cal 112 (113).]

(5) The scheme of the section is rather to enable the Judge as a matter of administration to distribute the price according to what seem, at the time, to be the rights of the parties, without this distribution importing a conclusive adjudication on those rights which may be subsequently re-adjusted in a suit. (1901) 23 All 313 (322) : 28 Ind App 203 (PC).

(6) The Deputy Registrar, under Co-operative Societies Act, is not a civil Court or in any case a subordinate Court within meaning of S. 63, C. P. C. Therefore S. 73 of the Code is inapplicable. (1966) 2 Andh WR 177 : (1966) 1 Andh LT 409.

**2. There must be assets held by the Courts.**— (1) Where the property attached is purchased by the attaching decree-holder privately, no right to rateable distribution arises. AIR 1943 Bom 261 (262, 265) : ILR (1943) Bom 514 (DB) * AIR 1937 Pat 609 (610).

(2) Where there are cross-decrees, if the smaller decree is attached by other persons holding decrees against the person, in whose favour such smaller decree was passed, they cannot claim any right of rateable distribution in the amount of such decree. AIR 1940 PC 173 (175, 176): ILR (1940) Kar (PC) 312: 67 Ind App 350: ILR (1941) Mad 1.

(3) The word "assets" means all a man's property, of whatever kind which may be used to satisfy debts or demands existing against him. (1892) 16 Bom 91 (98) * AIR 1934 Pat 685 (692) : 13 Pat 446 (DB) * AIR 1939 Pat 392 (396) : 18 Pat 404 (DB).

(4) The five percentum of the sale price which is deposited under O. 21, R. 89 for payment to the auction-purchaser as compensation is not an asset of the judgment-debtor. AIR 1952 Cal 840 (841, 842) : ILR (1953) 1 Cal 125 * AIR 1957 Trav-Co 107 (109) : ILR (1955) Trav-Co 1028 (DB) * AIR 1939 Pat 392 (396) : 18 Pat 404 (DB).

(5) Where the manager of a joint Hindu family is adjudicated an insolvent, all that vests in the Official Receiver is the right or the capacity which the insolvent had of making such interest available for the benefit of joint creditors under certain conditions recognised by the Hindu law. Hence, proceeds realised by the sale of shares of other members in execution of decrees obtained against them will be "assets" available for rateable distribution. AIR 1939 Cal 279 (281) (DB).

(6) The expression "assets held by the Court" conveys the idea of assets realised or converted into cash. AIR 1954 Andhra 44 (45) * AIR 1925 Nag 157 (157, 159) * AIR 1939 Cal 530 (535): ILR (1939) 2 Cal 143 * 1966 All LJ 605 : 1966 All WR (HC) 487. (The term 'assets' cannot include immovable property, though after the auction thereof the sale proceeds would be assets liable to rateable distribution.) * 1964 BLJR 387.

(7) A cheque may, in certain circumstances amount to an 'asset'. (1941) 45 Cal WN 674 (678) (DB).

(8) In case of a cheque received by the Court from a garnishee a prayer by the decree holder-creditor for endorsement of

**Section 73 — Note 2 (contd.)**

the cheque in his favour is essential before the cheque becomes an 'asset received' by the Court. AIR 1968 Raj 3

(9) Where a decree is attached by several decree-holders and one of them executes the decree, any money recovered by such execution will be assets liable to rateable distribution. AIR 1940 PC 173 (176): ILR (1940) Kar (PC) 312: ILR (1941) Mad 1 : 67 Ind App 350.

(10) Where immovable property of a person is sold by the Collector in execution of an award under the Bombay Co-operative Societies Act, VII of 1925, the sale proceeds of the property in the hands of the Collector are not assets held by a Court. AIR 1938 Sind 157 (160): ILR (1939) Kar 104.

(11) The words "assets held by a Court" include all moneys obtained in any manner whatsoever by the Court whose duty it is to execute the decree under execution for the purpose of satisfying the said decree. AIR 1950 Orissa 230 (233) : ILR (1950) Cut 208 (DB) * AIR 1949 Pat 128 (128, 129) : 27 Pat 816 (DB) * AIR 1944 Nag 313 (314) : ILR (1945) Nag 427.

(12) Where the salary of a Government officer was once attached under the Code of Civil Procedure and then another attachment took place the party attaching subsequently was entitled to claim rateable distribution under S. 73 of the Code, because the salary attached amounted to assets within the meaning of that section. ILR (1960) 1 Cal 177.

(13) In order that S. 73 may apply, it is not necessary that the receipt of assets should have been under a process of execution, but it is necessary that the assets should have reached the hands of the Court in execution. AIR 1949 Pat 128 (128, 129) : 27 Pat 816 (DB) * AIR 1930 Sind 300 (300, 301): 25 Sind LR 178 * AIR 1939 Bom 112 (113): ILR (1939) Bom 133 (DB) * AIR 1939 Pat 392 (393, 394) : 18 Pat 404 (DB).

(14) The following are not "assets held by a Court" not being obtained by the Court in execution:

(a) Money paid in Court to avoid arrest before judgment. AIR 1915 Upp Bur 15 (16) : 2 Upp Bur Rul 91.

(b) Money paid to the decree-holder out of Court under a private arrangement. AIR 1920 Lah 94 (94).

(c) Money paid to the decree-holder out of Court by surety. ILR (1951) 1 Raj 377 (383) (DB).

(d) Money paid by defendant into Court pending suit to satisfy the plaintiff's claim. AIR 1927 Rang 278 (278, 279): 5 Rang 753.

(15) Money paid into Court by a judgment-debtor under O. 21, R. 55 for payment of the amount due to the decree-holder who got the property attached is subject to rateable distribution. AIR 1919 Mad 647 (648): 41 Mad 616 (617) (DB) * AIR 1926 Mad 307 (308) : 49 Mad 38 (DB) * AIR 1920 Cal 785 (786) : 47 Cal 515 (520, 521) * AIR 1939 Pat 392 (394): 18 Pat 404 (DB) * AIR 1921 Cal 749 (750) * AIR 1941 Nag 239 (240) * AIR 1919 Bom 152 (153) * AIR 1926 Bom 242 (245).

[But see AIR 1915 Mad 236 (236) * (1912) 36 Bom 156 (163, 164) (DB) * AIR 1920 Sind 118 (119) : 14 Sind LR 164 * AIR 1925 Nag 157 (158) * AIR 1927 Rang 278 (278, 279): 5 Rang 753 * AIR 1915 Upp Bur 15 (16): 2 Upp Bur Rul 91.]

(16) Money paid by the judgment-debtor under S. 55(4) to the warrant officer arresting him is not an asset subject to rateable distribution. AIR 1917 Bom 275 (276).

(17) Where a payment has been made for a specific purpose or specifically towards a particular decree, the money so paid is not liable for rateable distribution. AIR 1955 Cal 423 (426) * AIR 1939 Bom 468 (470) * AIR 1939 Bom 112 (113, 114): ILR (1939) Bom 133 (DB) * AIR 1918 Mad 704 (704).

(18) Assets held by a Court — Includes money intended for a particular decree. AIR 1966 Raj 194 (197): 1966 Raj LW 175. (AIR 1939 Bom 112, Dissented from.)

(19) The amount deposited under O. 21. R. 89 is not available for rateable distribution as it is intended solely for the purpose of paying to the decree-holder in execution of whose decree the properties were brought to sale. AIR 1954 Mad 581 (584. 585) * AIR 1952 Cal 840 (841, 842, 843, 845) : ILR (1953) 1 Cal 125 * (1966) 32 Cut LT 555 : (1967) 9 Orissa JD 35 * AIR 1962 Ker 106 (109) : 1961 Ker LT 974 (DB). (AIR 1932 Nag 156 and AIR 1933 Nag 347 and AIR 1933 Nag 349 and AIR 1933 Pat 303 and AIR 1938 Cal 521, Diss. from.)

[See however 1961 Ker LT 767: (1961) 2 Ker LR 201. (A deposit made by the judgment-debtor for the purpose of setting aside the execution sale under O. 21, R. 89, can be regarded as assets liable to rateable distribution under S. 73. Such deposit does not enure to the benefit of a particular decree-holder alone but to all those execution creditors who have acquired a claim to rateable distribution under S. 73. ILR 40 Cal 519, Not foll.)]

(20) When there are several decrees outstanding against a judgment-debtor and all the requirements of S. 73 are complied with, the judgment-debtor cannot prevent rateable distribution by merely earmarking his payments for the benefit of one of the decree-holders. AIR 1939 Pat 392 (393, 394) : 18 Pat 404.

(21) Distinction in the form in which execution has been had, in the precise extent to which execution has been allowed to run, in the exact source or genesis of the fund in Court are no part of the definition of the assets that are subject to distribution rateably. AIR 1920 Cal 785 (787): 47 Cal 515.

(22) Where a judgment-debtor has already assigned certain property to a parti-

**Section 73 — Note 2 (contd.)**
cular decree-holder or created a charge on a certain property in favour of a particular decree-holder, such property is not liable to the claims of other decree-holders, for rateable distribution. AIR 1937 All 424 (428) (DB).

(23) Where the assets in the Court represent security given for the satisfaction of a particular decree, the holders of other decrees are not entitled to rateable distribution out of such assets. AIR 1918 Mad 442 (442) : 41 Mad 327 (DB) * AIR 1915 Lah 147 (150) (DB) * AIR 1937 Mad 531 (532) (DB) * AIR 1939 Bom 112 (114); ILR (1939) Bom 133 (DB).

(24) Even where the assets held by the Court are derived from property which is not liable to be proceeded against in execution of the decree under which the claim for rateable distribution is made the holder of such decree will not be entitled to share in such assets. AIR 1941 Sind 96 (96) * AIR 1938 Sind 144 (145) * AIR 1941 Nag 239 (241).

[But see (1880) 4 Bom 429 (432) (DB).]

(25)The costs of realisation must be deducted in calculating the assets available for rateable distribution under this section. AIR 1940 Sind 17 (18).

**3. Claimant for rateable distribution and attaching decree-holders must be holders of decrees for the payment of money.**— (1) Where an execution sale is set aside and the decree-holder is ordered to refund the sale price the order is one under Section 47 and therefore amounts to a decree. Hence, where such order is executed the proceeds of such execution are liable to rateable distribution under this section. AIR 1940 Nag 267 (268): ILR (1942) Nag 136.

(2) A payment order under Section 186 of the Companies Act (1913) being, under Section 199 of the Act, enforceable as a decree, is to be treated as a decree for purposes of rateable distribution under this section. AIR 1945 PC 60 (61): 72 Ind App 85: 20 Luck 162: ILR (1945) Kar (PC) 148. (AIR 1940 Oudh 237: 15 Luck 322, Reversed.) * AIR 1941 Lah 273 (273) ILR (1942) Lah 460 (DB).

(3) An attorney effecting an attachment in execution of an order for costs made in his favour under Section 48 of Chap. 38 of the Calcutta High Court Original Side Rules is entitled to participate in rateable distribution under the Section. AIR 1954 Cal 6 (7, 8).

(4) A barrister practising in the erstwhile Hyderabad State was held not entitled to rateable distribution for his fees. AIR 1956 Hyd 65 (75): ILR (1956) Hyd 79 (FB).

(5) As a general rule, every decree by virtue of which money is payable is to that extent a "decree for money." (1885) 11 Cal 718 (729, 730) (DB).

(6) A decree for the payment of mesne profits is a "decree for the payment of money." AIR 1934 Mad 604 (605): 58 Mad 223 (DB) * (1882) 5 Mad 123 (124) (DB).

(7) A judgment entered up under Section 86 of the Insolvent Act is a "decree for the payment of money." ('84) 8 Bom 511 (520) (DB).

(8) A holder of a mortgage decree or of any decree under which money is payable and other relief granted, is the holder of a "decree for the payment of money." (1885) 11 Cal 718 (729, 730) (DB).

(9) A mortgage decree is one for the payment of money whether there is a direction to pay personally or not. (1905) 28 Mad 473 (477) (FB) * (1902) 25 Mad 244 (286, 287) (FB).

(10) Where a mortgage decree expressly exempts the defendants from personal liability, it is not a money decree under the section. (1912) 17 Ind Cas 940 (942) (DB) (Mad).

(11) A mortgage decree is not a decree for the payment of money even though it provides for the deficiency of the decree amount being realised, after sale of the hypotheca personally from the mortgagor. (1894) 16 All 418 (420) (DB) * (1903) 25 All 541 (542, 543) (DB) * (1899) 26 Cal 166 (171) (DB) * (1900) 27 Cal 285 (289) (DB) * AIR 1939 Lah 303 (304).

(12) A composite mortgage decree for sale including a personal decree for the balance will become a decree for the payment of money within the meaning of this section. AIR 1934 Cal 764 (766) : 60 Cal 22 (DB).

(13) A personal decree obtained by a mortgagee independently of his mortgage and found insufficient to satisfy the mortgage debt is a decree for payment of money. AIR 1924 Pat 434 (436) (DB).

(14) A personal decree for interest due on the mortgage is a decree for payment of money. AIR 1919 Oudh 351 (352): 22 Oudh Cas 150 (DB).

(15) A personal decree for the balance due after the mortgage property is sold is a decree for payment of money. (1904) 31 Cal 792 (795, 796) (DB).

(16) A decree for money personally against B and against the properties of C and D does not thereby lose its character as a money decree against B for the purpose of claiming rateable distribution of the assets of B held by the Court. (1888) 10 All 35 (38) (DB).

(17) The section applies to transferees of decrees also who apply for rateable distribution. AIR 1941 Mad 795 (796).

**4. Such decree should have been obtained against the same judgment-debtor.** — (1) One of the conditions for the applicability of the section is that the decrees should have been obtained against the same judgment-debtor. AIR 1941 All 110 (117) : ILR (1941) All 77 (FB) * AIR 1915 Cal 658 (660) : 42 Cal 1 (DB) * AIR 1934 Nag 62 (63, 64).

(2) It is not necessary that all the judgment-debtors in each of the several de-

**Section 73 — Note 4 (contd.)**

crees should be identically the same. (1903) 30 Cal 583 (586, 587) (DB) * AIR 1923 Pat 521 (522, 523) (DB) * AIR 1924 Cal 801 (804, 805) : 51 Cal 761 (DB) * AIR 1935 Mad 399 (401).

(3) For the applicability of S. 73 it is sufficient if there is one judgment debtor common to all the decrees. AIR 1924 Cal 801 (804, 805): 51 Cal 761 (DB) * AIR 1936 Mad 40 (41) : 59 Mad 93 (FB).

[But see AIR 1919 Mad 758 (758) (DB).]

(4) Where X gets a decree against A, Y, a decree against A and B and Z, a decree against A, B and C if assets are realised from C or his property, X and Y are not entitled to claim rateable distribution. AIR 1933 Pat 277 (278).

(5) There will be a difference in the extent of the share of the assets in which each of the decree-holders can claim rateable distribution according as the properties of the one common judgment-debtor or of such debtor and of others, are sold in execution. (1903) 30 Cal 583 (586 (FB)* (1905) 27 All 158 (160) (DB) * (1905) 29 Bom 528 (529, 530) (DB).

(6) Where A and B constitute a joint Hindu family of which A is the manager and X obtains a decree against A as manager of the joint family and Y obtains a decree against both A and B eo nomine as members of the joint family, both A and B would be judgment-debtors under both the decrees and X will be entitled to a rateable distribution of the proceeds obtained by the sale of the entire family properties and not only to a rateable share in the proceeds obtained by the sale of A's share in the properties. AIR 1947 Bom 18 (23): ILR (1947) Bom 120 (FB). (AIR 1941 Bom 324 : ILR (1941) Bom 540, Overruled.) * AIR 1936 Mad 123 (125).

(7) X obtains a decree against A, a Hindu father and Y obtains a decree against A and his sons B and C, and the entire joint family properties belonging to A, B and C are sold in execution of Y's decree, X is entitled to claim a share in the entire proceeds. In other words, all the judgment-debtors must be considered to be the same under both the decrees. AIR 1940 Mad 525 (526, 527) (FB). (AIR 1937 Mad 253. Overruled.) * AIR 1937 Mad 504 (508, 509) * (1903) 26 Mad 179 (181, 182) * AIR 1947 Bom 18 (23): ILR (1947) Bom 120 (FB). (AIR 1941 Bom 324 : ILR (1941) Bom 540, Overruled.)

(8) Where, a decree is passed in a suit against A, the son, individually and another decree is passed in another suit against B, the father, the fact that property in the hands of A may be resorted to as that of the legal representative of his father in execution of the decree passed against the father, B cannot make the two decrees passed "against the same judgment-debtor." AIR 1954 Bom 446 (450) : ILR (1954) Bom 704.

(9) The words "same judgment-debtor" will not include a person who does not occupy the same character in all the decrees. AIR 1936 Mad 40 (42) : 59 Mad 93 (FB).

(10) Where X obtains a decree against A in his personal capacity and Y obtains a decree against him as heir of P, the two decrees are not against the same judgment-debtor. AIR 1941 Bom 327 (328): ILR (1941) Bom 544 (DB) * AIR 1919 Oudh 326 (328): 22 Oudh Cas 194 (199, 200) (DB) * AIR 1936 Mad 40 (42): 59 Mad 93 (FB).

[But see AIR 1936 Cal 210 (212): 63 Cal 923 * (1885) 1 Cal 718 (728).]

(11) The expression "same judgment-debtor" does not include the legal representatives of the judgment-debtor. AIR 1944 Sind 81 (83): ILR (1943) Kar 426 (DB).

(12) A decree against A in his personal capacity and a decree against a firm of which A is a partner are not decrees against the same "judgment-debtor." AIR 1956 Mad 192 (195) * AIR 1915 Cal 658 (660) : 42 Cal 1 (9) (DB) * AIR 1937 Lah 937 (938) : 18 Lah 637 (DB) * AIR 1953 Punj 43 (45): 64 Pun LR 863 (DB). (AIR 1938 Cal 316 and AIR 1943 Bom 156, Dissented from.)

(13) A decree passed against a firm is really one against the individuals constituting the firm and hence, the judgment-debtors under a decree against a firm and under a decree against the individuals constituting the firm are the same for the purpose of this section. AIR 1938 Cal 316 (318) * AIR 1943 Bom 156 (158): ILR (1943) Bom 306 * AIR 1963 Mys 16 (16): 40 Mys LJ 1043.

[But see AIR 1949 Cal 396 (401): ILR (1945) 1 Cal 153.]

(14) Where a decree is passed against A during his lifetime and another decree is passed against A's heirs after A's death, the two decrees are against the same judgment-debtor. AIR 1936 Mad 40 (41, 42): 59 Mad 93 (FB) * AIR 1941 All 110 (118): ILR (1941) All 77 (FB). (AIR 1939 All 545, Overruled.) * AIR 1943 Lah 148 (154) (FB) * AIR 1953 Bom 65 (71): ILR (1953) Bom 15 (FB). (AIR 1937 Bom 461: ILR (1937) Bom 795 and (1901) 25 Bom 494, Overruled.) * 1965 Jab LJ 98: 1965 MPLJ 171. (Identity of judgment-debtors is to be seen with reference to the decrees in various cases and not with reference to various applications for execution on the basis of such decrees. Words 'the same judgment-debtors' do not imply that all the judgment-debtors should be identical.) * AIR 1961 Raj 118 (119, 120): 1961 Raj LW 28. (Stress is more on identity of property than on identity of judgment-debtor — Legislature did not intend that the expression 'the same judgment-debtor' should be construed in a strictly technical sense.) * AIR 1959 Mad 218 (219, 220): 72 Mad LW 19. (No distinction can be drawn between a decree obtained

**Section 73 — Note 4 (contd.)**
against a Hindu widow as representing her husband's estate and one obtained against her personally.)

[But see AIR 1935 Cal 738 (739) (DB). (Section 146 cannot enlarge the scope of Section 73.) * AIR 1930 Cal 454 (455) * AIR 1940 Rang 243 (246): 1940 Rang LR 492.]

(15) Where A and D each obtained a decree against B, and after B's death C who was the legal representative of B purchased A's decree with moneys not belonging to B's estate, C is not disentitled to claim rateable distribution, along with B, by reason only of his being the legal representative of B. (1889) 13 Bom 171 (176) (DB).

(16) Property in hands of heir of judgment-debtor — Heir not made party to execution proceeding — Rateable distribution cannot be claimed against such heir. AIR 1964 Raj 122 (123): 1963 Raj LW 597.

(17) Where A and B each obtains a decree against the same judgment-debtor C, and D stands surety for C in regard to A's decree, D cannot be considered to be a judgment-debtor under B's decree and B cannot claim rateable distribution of the money paid by D in respect of the decree in A's favour. AIR 1942 Oudh 491 (492) * AIR 1940 Nag 79 (79).

[But see AIR 1958 Andh Pra 334 (335).]

(18) V getting immovable property of judgment-debtor attached in execution of his decree— T, who had a decree against same judgment-debtor applying to Court under Section 73 for rateable distribution of property — T also applying to Court for permission to bid at auction of property but that was rejected — Property put to sale — T bidding at auction and purchasing property — Application by judgment-debtor to set aside sale — Held, on facts that as T had applied under Section 73, property was also being sold in execution of his decree — T's case, therefore, clearly fell under Rule 72. AIR 1967 Punj 128 (129): ILR (1967) 1 Punj 368.

(19) Surety of a judgment-debtor — Not himself a judgment-debtor — His liability arises because of same judgment-debtor — Section 73 applies. AIR 1966 Raj 194 (197): 1966 Raj LW 175. (AIR 1942 Oudh 491 and AIR 1940 Nag 79, Dissented from.)

(20) Amount deposited by surety of a judgment-debtor — Decree-holder concerned has no equitable lien on it — Amount is available for rateable distribution among other decree-holders. AIR 1966 Raj 194 (198): 1966 Raj LW 175.

**5. Claimant for rateable distribution must have applied for execution to the Court by which assets are held.** — (1) In order to claim rateable distribution, a decree-holder must have applied under Order 21, Rule 11 of the Code for execution of his decree. AIR 1957 Andh Pra 1017 (1017) * AIR 1941 Mad 125 (126) * AIR 1940 Rang 201 (202): 1940 Rang LR 421 (FB) * AIR 1929 Nag 148 (150): 25 Nag LR 94 (DB) * AIR 1929 Mad 703 (704): 52 Mad 760 (FB) * 1963 Jab LJ 769 * AIR 1962 Mys 12 (13): 39 Mys LJ 536.

(2) An application under Order 21, Rule 11 is necessary, not only for the enforcement of his right to rateable distribution but also to control similar rights of rival decree-holders. ('06) 33 Cal 639 (643).

(3) It is not necessary for a decree holder to make a specific application for rateable distribution. AIR 1955 Cal 573 (574) (DB) * AIR 1957 Andh Pra 1017 (1018) * AIR 1933 All 337 (338) (DB) * AIR 1968 Raj 3 (4): 1968 Raj LW 111 * AIR 1962 Mys 12 (13): 39 Mys LJ 536 * AIR 1961 All 371 (374): 1961 All LJ 435.

(4) A mere omission in the application to give certain particulars or other technical defects will not invalidate an application for execution for the purposes of Section 73. AIR 1929 Mad 703 (704): 52 Mad 760 (FB) * AIR 1928 Nag 332 (333) * ('92) 15 Mad 372 (377) (DB).

[But see AIR 1928 Mad 496 (497) (DB).]

(5) Decree-holder praying to participate in assets held by Court — Application for execution not accompanied with certified copy of decree not proper application — Decree-holder not entitled to participate in assets — Provisions of Rule 10 of High Court Original Side Rules are mandatory. AIR 1963 Cal 104 (107, 110) (DB).

(6) It is not necessary that attachment should be asked for or should follow the application for execution. AIR 1954 Hyd 238 (239): ILR (1954) Hyd 411 (FB) * AIR 1931 All 92 (94): 53 All 125 (DB) * AIR 1930 Mad 4 (11) * AIR 1968 Andh Pra 113 (115): (1968) 1 Andh LT 89. (It is enough if person not attaching property applies for execution before assets are received by attaching Court.)

[See however AIR 1940 Bom 190 (192): ILR (1940) Bom 146.]

(7) An execution application merely praying for rateable distribution is in accordance with law for the purposes of Section 73. AIR 1961 Madh Pra 145 (146, 147): 1961 MPLJ 256 (FB). (AIR 1929 Nag 148, Dissented from.) * AIR 1959 Cal 566 (566, 567): 63 Cal WN 983 (DB). AIR 1929 Nag 148, Dissented from.) * AIR 1969 Guj 200 (201, 202): 10 Guj LR 148.

(8) The following have been held not to be applications for execution, for the purposes of Section 73:

(a) An application merely for rateable distribution. AIR 1929 Nag 148 (150): 25 Nag LR 94 (DB) * (1910) 34 Mad 25 (27) (DB) * AIR 1933 Oudh 75 (75) * 1963 Jab LJ 769.

**Section 73 — Note 5 (contd.)**

[See however 1956-2 Mad LJ 1 (2) * AIR 1969 Guj 200 (201, 202): 10 Guj LR 148.]

(b) An application merely for attachment of property without anything more. AIR 1926 Cal 249 (250) (DB).

(c) An application to a superior Court to transfer to itself, an execution case from an inferior Court. AIR 1921 Cal 87 (89) (DB).

(d) An application for payment out of Court, by a Judge's summons. AIR 1916 Mad 792 (793): 38 Mad 221 (224).

(9) An application for execution must have been made to the Court i.e., the Court which holds the assets. ILR (1939) 1 Cal 488 (492) (DB) * (1912) 35 Mad 588 (589) * AIR 1965 Mad 511 (512): (1965) 2 Mad LJ 17 * AIR 1965 Punj 412 (413): 66 Punj LR 1032. (Words 'application to the Court for execution' indicate that execution application is to be made to the appropriate Court which passed the decree and not to Court which holds the assets of the judgment-debtor.)

[See however AIR 1939 Bom 468 (470).]

(10) Where the assets are held by Court A and the decree under which the claim for rateable distribution is being made has been passed by Court B, such claim cannot be allowed unless before the receipt of assets by Court A an application has been made to that Court for execution of the decree. (1912) 35 Mad 588 (590, 591).

(11) Where the assets are held by Court A and the decree in respect of which rateable distribution is claimed has been passed by Court B, it is not necessary that the copy of the decree must have actually reached Court A. It is enough if Court B has ordered the transfer. AIR 1933 Mad 627 (627): 56 Mad 692 (DB) * (1912) 35 Mad 588 (591).

[See however AIR 1956 Hyd 65 (72): ILR (1956) Hyd 79 (FB).]

(12) Where the same property of the judgment-debtor has been attached by both the superior and inferior Courts and the property or its proceeds are received or realised by the superior Court, the decree-holder who has obtained decree in the inferior Court and applied to that Court for execution will be entitled to a rateable share of such property or proceeds, although he has not applied for execution to such superior Court, nor has got his execution case transferred to such Court. AIR 1939 All 159 (161): ILR (1939) All 162 (DB) * AIR 1935 Bom 176 (178): 59 Bom 310 (DB) * AIR 1936 Cal 723 (727): ILR (1937) 1 Cal 391 * AIR 1938 Lah 754 (756) * AIR 1936 Mad 797 (798): 59 Mad 1028 (DB) * AIR 1914 Mad 454 (455) (DB) * AIR 1937 Nag 80 (82): ILR (1937) Nag 219 * AIR 1931 Rang 111 (112) * AIR 1960 Pat 754: 1960 Bom LR 524.

[But see AIR 1921 Cal 87 (89) (DB) * AIR 1926 Lah 538 (539) * AIR 1928 Rang 96 (97): 5 Rang 757 * AIR 1926 Sind 177 (177): 20 Sind LR 111.]

(13) If the assets are held by a Court of an inferior grade, a decree-holder who has attached the property through a Court of a superior grade will be entitled to rateable distribution, although he has not applied for execution to the Court of the inferior grade. AIR 1935 Mad 988 (995).

(14) Where there is no application for execution made to the Court holding the assets before the receipt of such assets, and the claim for rateable distribution is only based on the applicant having attached the same property through another Court, he is not entitled to share rateably in all the assets held by the Court but only to share in that portion of it which represents the property attached by him. AIR 1936 Cal 723 (725): ILR (1937) 1 Cal 391 * (1912) 35 Mad 588 (590).

[But see AIR 1914 Mad 454 (456) (DB).]

(15) A, B and C each obtain a money decree against D, respectively in Courts X, Y and Z. X and Y are Courts of the same grade and Z is a Court of a higher grade than either X or Y. A attaches certain property belonging to the judgment-debtor in execution of his decree through Court X, C attaches the same property in execution through Court Z. The property is sold and the sale proceeds are held by Court Z. In such a case, A will be entitled to rateable distribution of the assets although he has not applied for execution to Court Z. B who has neither attached the property through Court Y nor applied for execution to Court Z will also be entitled to a rateable share of such assets. AIR 1937 Nag 80 (83): ILR (1937) Nag 219.

(16) If the decree is on the face of it one which could not be executed against the property represented by the money in the Court. the Court cannot allow the holder of such decree to share in the rateable distribution of the money. AIR 1938 Bom 90 (90): ILR (1938) Bom 98.

(17) For the purposes of Section 73 an ordinary Civil Court and the same Court invested with Small Cause powers are distinct Courts. AIR 1943 Mad 262 (263).

(18) Sub-section (2) of Section 63 does not in any way affect the liability cast upon the decree-holder who is allowed a set off under Rule 72 (2) of Order 21, to refund or pay back the amount, if it is required for rateable distribution under Section 73. AIR 1960 Bom 230 (232): 61 Bom LR 1665 (FB). (AIR 1931 Bom 350, Overruled.)

**Section 73 — Note 5 (contd.)**

(19) Custody Court cannot decide question of rateable distribution falling under Section 73 — It is attaching Court alone that can do it. AIR 1968 Andh Pra 113 (115): (1968) 1 Andh LT 89.

(20) Application pending in different Courts — Attachment not made — Decree not transferred to superior Court where assets are lying — Rateable distribution cannot be allowed. 1961 All LJ 963: 1961 All WR (HC) 749.

**6. Effect of dismissal of the application for execution.** — (1) To claim rateable distribution it is necessary that the claimant's application for execution should be pending and undisposed of at the time of the receipt of the assets. AIR 1953 Trav-Co 475 (475): ILR (1952) Trav-Co 746 * AIR 1940 Nag 302 (303): ILR (1942) Nag 139 * AIR 1935 Rang 135 (137): 13 Rang 514 * AIR 1966 Mad 406: (1965) 2 Mad LJ 499. (Order dismissing application under Order 21, R. 57 (1) (Madras) — Held application was pending and decree-holder was entitled to share in assets.) * 1961 Ker LT 531: 1961 Ker LJ 764. (AIR 1956 Hyd 65, Dissented.)

[But see AIR 1956 Hyd 65 (71): ILR (1956) Hyd 79 (FB).]

(2) If the application had been struck off or dismissed before the receipt of the assets, the decree-holder cannot participate in the distribution. AIR 1944 All 245 (246, 247): ILR (1944) All 321 (DB) * AIR 1916 Cal 264 (266) (DB).

(3) Dismissal of execution before receipt of assets not pressed — Attachment to continue — Execution should be deemed to be pending for claiming rateable distribution. AIR 1959 Mad 218 (219): 72 Mad LW 19.

(4) A dismissal of the application after the date of the receipt of assets will not affect the right to rateable distribution which had accrued to the decree-holder earlier at the time of the receipt of assets. AIR 1956 Cal 373 (374) (DB) * AIR 1940 Nag 302 (303): ILR (1942) Nag 139 * AIR 1937 Pat 92 (93) (DB).

**7. Claimant attaching before judgment.** — (1) A decree-holder who has obtained an attachment before judgment will not thereby become entitled to get rateable distribution unless he applies for execution after getting his decree. AIR 1956 Hyd 65 (72): ILR (1956) Hyd 79 (FB) * AIR 1941 Mad 125 (126) * AIR 1915 All 275 (277): 37 All 578 (DB).

**8. The application should have been made before the receipt of assets by the Court.** — (1) In order to claim rateable distribution, a decree-holder must have applied for execution before the receipt of assets by the Court. AIR 1956 Hyd 65 (72): ILR (1956) Hyd 79 (FB) * AIR 1958 Andh Pra 334 (334) * ILR (1957) 7 Raj 124 (126) * AIR 1955 Cal 573 (574) (DB) * AIR 1943 Mad 165 (166): ILR (1943) Mad 175 (DB) * (1968) 2 Mad LJ 544: 81 Mad LW 266 * AIR 1965 Mad 511 (512): (1965) 2 Mad LJ 17 * AIR 1961 Andh Pra 422 (424).

(2) When assets are received by the Court during the vacation, an application for execution presented on the re-opening day cannot be considered to be in time for the purpose of this section. AIR 1937 Nag 16 (17): ILR (1937) Nag 420.

(3) Where the sale held was unauthorised but was subsequently ratified by the Court, it was held that the date on which the price was paid into the Court after ratification was the date on which the assets were 'received." AIR 1940 Mad 826 (828).

(4) Where a fund belonging to the defendant is attached before judgment and the same is deposited in Court to the credit of that suit, it does not become assets until the plaintiff, after getting a decree, applies for execution and the same is ordered by the Court. The date of receipt of assets is the date of the order. AIR 1923 Mad 505 (507): 46 Mad 506 (DB).

(5) If the fund attached is lying in Court to the credit of a suit, other than the one in which it is attached it is further necessary that the fund should be transferred to the credit of the suit in which it is attached. The date of receipt of assets will, in such a case be the date of the transfer. AIR 1923 Mad 505 (507): 46 Mad 506 (DB) * AIR 1921 Mad 218 (222, 223): 44 Mad 100 (FB) * AIR 1927 Bom 247 (250) (DB) * AIR 1930 Mad 4 (7, 11).

[See however AIR 1954 Trav-Co 6 (7) * AIR 1922 Mad 236 (236).]

(6) Where a fund in Court to the credit of the judgment-debtor in some other matter is attached by a decree-holder in execution of his decree, the money must be treated as "received" by the Court in execution of the decree as soon as it is so attached although there is no entry in the books transferring the money to the credit of the suit in which the decree has been passed. AIR 1935 Pat 201 (204)

(7) Where the amount belonging to the judgment-debtor in the hand of a third person is attached by a prohibitory order under Order 21, Rule 46 and the garnishee deposits the amount in Court under Order 21, Rule 46 (3), the date of the receipt of assets will be the date on which the garnishee makes the deposit. (1896) 19 Mad 72 (74) (DB) * AIR 1930 Cal 623 (624): 57 Cal 736 (DB).

(8) A decree-holder, who applies for execution after the 25 per cent. deposit under Order 21, Rule 84 is made but before the balance is paid. is entitled to come in under Section 73. AIR 1953 Trav-Co 213 (214, 215): ILR (1953) Trav-Co 56 (DB) * AIR 1926 Mad 872 (875); 49 Mad 570 (DB) * AIR 1921 Pat 401 (402): 5 Pat L Jour 415 (DB).

**Section 73 — Note 8 (contd.)**

(9) A decree-holder who applies for execution after the balance of the deposit is paid will not be entitled to rateable distribution even if his application is before the date of the confirmation of the sale. (1882) 6 Bom 16 (18) (DB) * AIR 1925 Cal 966 (967) (DB).

(10) Where the whole of the purchase money is deposited before the expiry of the time granted for depositing the 75 per cent., i.e., on the very date of the sale, the assets are received by the Court when the money is deposited in Court. AIR 1953 Trav-Co 213 (214, 215): ILR (1953) Trav-Co 56 (DB).

(11) Where immovable property of the judgment-debtor is sold in several lots in execution of a decree, the assets are deemed to be received, when the entire amount of the purchase money in respect of all the parcels are paid. (1903) 26 Mad 179 (181) * AIR 1926 Nag 380 (383) * AIR 1921 Cal 801 (802) (DB).

[But see AIR 1925 Cal 966 (967) (DB).]

(12) Where assets realised in execution by an inferior Court are transferred to the superior Court, the assets are deemed to have been received when they are received by the superior Court and not when they are received by the inferior Court. AIR 1950 Mad 34 (35) * AIR 1927 Bom 247 (250) (DB) * 1964 All LJ 602. (Property attached in Civil Judge's Court sold in execution of decree against same judgment-debtor in Munsiff's Court — Civil Judge is entitled to call for the proceeds lying in that Court— Assets are deemed to be received by transferee Court when they are actually received by that Court — No separate application under Section 73 is required for rateable distribution.)

(13) Receipt of assets and application for execution made on same day — No presumption as to order of events — Court to determine question on priority. AIR 1919 Mad 758 (758) (DB) * AIR 1937 Mad 504 (509).

(14) Fund in Court attached in execution — Mere attachment does not amount to receipt of the sum by the executing Court — Sum will be deemed as "received" by the executing Court only after final order transferring the sum to the credit of the suit in executing Court. AIR 1962 Madh Pra 217 (219, 220): 1962 MPLJ 419.

(15) Attachment of certain amount held by Receiver— Amount attached sent to attaching Court by cheque on 24th July, 1962 — Cheque realised on 31st July, 1962 — Held, assets should be deemed to have been received by attaching Court only on 31st July, 1962. AIR 1968 Andh Pra 113 (115): (1968) 1 Andh LT 89.

(16) Where an order has been passed by an executing Court in favour of the decree-holder-auction-purchaser for set off of the bid money towards the decretal dues the bid money is available for rateable distribution, till the sale is actually confirmed. Hence a decree-holder who has applied for execution of his decree prior to the holding of such sale would be entitled to share in the rateable distribution of the bid money even if the application for rateable distribution is filed after the sale is held. (1961) 27 Cut LT 316. ((1942) 2 Mad LJ 607: AIR 1943 Mad 165; 65 Mad LJ 569; AIR 1933 Mad 804, Dissented from.)

**9. "And have not obtained satisfaction thereof.** — (1) Where the decree of any of the claimants for rateable distribution has been partially satisfied, only the unsatisfied portion of the decree should be taken into account in considering the question of rateable distribution. AIR 1942 Mad 262 (265, 266): ILR (1942) Mad 360 * AIR 1934 Mad 426 (427).

**10. Jurisdiction of Court to enquire into the validity of the decree under which rateable distribution is claimed.** — (1) A and B obtain decrees for money against C and apply for execution before the assets are received by the Court. In the proceedings for rateable distribution, A contends that B's decree is collusive, fraudulent and is otherwise invalid. The Court cannot go into this question. AIR 1922 Bom 31 (32): 46 Bom 635 (FB). (Overruling 13 Bom 154.) * AIR 1924 Nag 39 (40): 19 Nag LR 172 * AIR 1926 Pat 497 (498): 5 Pat 445 (DB) * AIR 1918 Mad 825 (826, 827): 40 Mad 841 (843, 845) (DB) * AIR 1935 Cal 290 (294): 62 Cal 715 (FB). (16 Ind Cas 795 (Cal); AIR 1914 Cal 575 and 11 Cal 42, Overruled.)

[But see (1912) 17 Ind Cas 940 (943) (DB) (Mad).]

(2) The question as to the validity of the decree can be gone into in a suit under sub-section (2) of the section. AIR 1916 Mad 792 (793): 38 Mad 221 (223) * AIR 1920 Mad 605 (613, 614): 43 Mad 381 (389, 391, 392) (DB) * (1906) 3 Cal L Jour 385 (386) (DB).

(3) Where on the face of it a decree is inexecutable against the property from which the assets held by the Court are derived, the Court cannot grant the claim for rateable distribution. AIR 1938 Bom 90 (90): ILR (1938) Bom 98.

**11. Insolvency or liquidation, how far affects the right of rateable distribution.** — (1) An order for rateable distribution under this section is not affected by the subsequent adjudication of the judgment-debtor as an insolvent. (1900) 27 Cal 351 (353) * AIR 1922 Mad 31 (31, 32) (DB) * AIR 1919 Cal 43 (44) (DB).

(2) Realisations subsequent to the vesting order will vest in the Official Receiver or Assignee and will not be available for rateable distribution. (1900) 27 Cal 351 (353, 354) * (1902) 29 Cal 428 (432) (FB) * (1897) 21 Bom 205

**Section 73 — Note 11 (contd.)**
(219) * AIR 1916 Oudh 274 (275): 18 Oudh Cas 268 (DB).

(3) An application for rateable distribution presented by an insolvent (in regard to a decree passed in his favour before his adjudication) after adjudication and before his discharge is competent. AIR 1939 Mad 196 (198).

**12. Sale subject to mortgage — Mortgagee cannot get rateable distribution — Proviso (a).** — (1) Where a property is sold in execution of a money decree subject to a mortgage, the mortgagee is really not affected by such sale, and will not be entitled to share in the proceeds of the sale along with other decree-holders. (1883) 5 All 566 (568) (DB) * (1884) 10 Cal 567 (576) (DB) * AIR 1919 Low Bur 124 (125) * ILR (1967) Andh Pra 325 (335). (Puisue mortgagee cannot claim to be paid out of the surplus sale proceeds under Section 73, Cl. (1).)

(2) If a mortgagee holds a money decree and the mortgaged property is sold in execution subject to the mortgage, the mortgagee is not barred from sharing, as a money decree-holder, in the rateable distribution. AIR 1919 Oudh 351 (352): 22 Oudh Cas 150 (DB).

**13. Sale free of mortgage — Rights of mortgagee — Proviso (b).** — (1) A mortgagee has an alternative remedy under this section of consenting to sale of the property free of his mortgage and having the same right in the sale proceeds as he had against the property. (1883) 5 All 566 (568) (DB) * AIR 1930 Mad 138 (141): 53 Mad 670 (DB).

(2) Proviso applies to a mortgagee whose charge is valid. AIR 1924 Pat 434 (436) (DB).

(3) For the applicability of the Proviso the sale must have been validly held by the Court. (1899) 22 Mad 241 (245) (DB) * AIR 1924 Lah 132 (135) (DB).

(4) Where a private alienation is made with the sanction of the executing Court, this proviso does not apply. AIR 1924 Lah 132 (135) * AIR 1958 Madh Pra 201 (202, 203).

(5) The consent of the mortgagee is necessary for a sale under this proviso. AIR 1919 Upp Bur 18 (19): 3 Upp Bur Rul 139 (140, 141) * (1906) 3 Low Bur Rul 258 (260) * (1884) 10 Cal 567 (575) (DB).

(6) If the mortgagee consents but the fact of mortgage or the amount of mortgage-money is disputed, the Court should make a summary enquiry under O. 21, Rule 66 (4) and state the result of the inquiry in the proclamation of sale. AIR 1919 Upp Bur 18 (19): 8 Upp Bur Rul 139 * (1906) 3 Low Bur Rul 275 (277) (DB).

(7) The words "any property" in Clauses (a) and (b) of the proviso show that a mortgage of moveables is included therein. AIR 1924 Cal 990 (991).

**14. Sale in execution of decree on mortgage — Mode of applying the sale proceeds — Proviso (c).** — (1) This proviso applies only where any immovable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon. (1890) 13 All 76 (78) (DB) * AIR 1933 Lah 48 (50): 14 Lah 243 * AIR 1915 Cal 380 (381) (DB).

(2) The words "and incumbrance" mean only the incumbrance sued on and not other incumbrances. (1890) 12 All 546 (547) (DB).

(3) The words of the proviso are general and apply not only to a pre-existing incumbrance, but also to an incumbrance which is created by the decree itself. AIR 1935 Mad 713 (713).

(4) If, after the payment of subsequent incumbrances, there is a surplus, it should be applied rateably between the money decree-holders. AIR 1920 Bom 35 (37) (DB) * ('32) AIR 1932 Bom 622 (624) * (1894) 21 Cal 809 (816).

(5) Where there is a competition between an incumbrancer and a money decree-holder, the Court should satisfy itself that the former is lawfully entitled to priority over the latter. AIR 1942 Sind 120 (120): ILR (1942) Kar 200 * AIR 1921 Cal 801 (803) (DB).

(6) An incumbrance, which came into existence pending an attachment by a money decree-holder, cannot be given priority over the latter. AIR 1921 Cal 801 (803) (DB).

(7) Although a mortgagee decree-holder cannot, by the disabling provisions of the Madras Indebted Agriculturists (Repayment of Debts) Act, 1 of 1955, take the entire proceeds of the sale held in execution of the mortgage decree passed in his favour, the surplus that would be left after payment of the instalment due to him would still be part of his security and cannot form assets of the judgment-debtor so as to be available for rateable distribution among his simple money decree-holders. 1958-2 Mad L Jour 566 (567).

**15. Suit for refund of assets — Sub-section (2).** — (1) Sub-section (2) enacts that a suit will lie for refund of assets wrongly distributed. AIR 1940 Pesh 36 (37) * AIR 1924 Mad 97 (98) (DB) * AIR 1917 All 276 (280): 39 All 322 (333) (DB) * AIR 1960 Mad 263 (264): (1959) 2 Mad LJ 443.

(2) Where the assets are not liable to be rateably distributed at all, sub-s. (2) will not apply. AIR 1922 Mad 99 (100) (DB) * AIR 1933 Pat 277 (278) * AIR 1920 Mad 403 (404) (DB).

[But see AIR 1943 Nag 7 (9): ILR (1942) Nag 685 * AIR 1939 All 545 (548) (DB).]

(3) A executing first mortgage in favour of B, second mortgage in favour of C and third mortgage again in favour of B — Suit on first mortgage decreed

**Section 73 — Note 15 (contd.)**

— In execution mortgaged property sold — Surplus in Court after satisfying decree — B obtaining decree on third mortgage and in execution drawing out balance in Court — C not made party to second suit — C filing suit against B for recovery of amount withdrawn — Suit is not under sub-section (2). (1914) 41 Cal 654 (661): 41 Ind App 45 (PC).

(4) In order to enable the Court to adjudicate upon and settle effectually and completely all the questions involved, it is necessary that all the decree-holders who have obtained rateable distribution should be impleaded as parties to the suit. AIR 1944 Nag 313 (314): ILR (1945) Nag 427 * (1900) 27 Cal 493 (497, 498) (DB) * (1886) 13 Cal 159 (162) (DB).

(5) A suit under this sub-section is not one for setting aside the order for distribution. (1901) 23 All 313 (322): 28 Ind App 203 (PC).

(6) A suit under sub-section (2) need not be brought within one year from the date of the order under Article 13 of the Limitation Act. (1901) 23 All 313 (323): 28 Ind App 203 (PC) * (1891) 15 Bom 438 (440) (DB) * (1899) 1 Bom LR 795 (797) (DB).

(7) A suit under sub-section (2) is virtually a suit for money had and received and can be brought within three years from the date of the receipt of the assets by the defendant. AIR 1915 Mad 405 (407): 39 Mad 62 (66) (DB) * AIR 1931 Rang 56 (58): 8 Rang 485 * AIR 1917 All 276 (279, 280): 39 All 322 (DB).

(8) The cause of action for a suit under sub-section (2) is the wrongful receipt by the defendant and, consequently, a suit does not lie where merely an order for payment is made, but the money is not actually paid. (1885) 11 Cal 718 (727) (DB) * AIR 1918 All 327 (327) (DB) * AIR 1921 Nag 60 (62) * AIR 1931 Pat 359 (360, 361): 10 Pat 830 (DB).

(9) The fact that the remedy by way of suit under Section 73 (2) is open does not prevent the Court from exercising its inherent powers and passing appropriate orders by reversing, where the ends of justice require, its own wrong order. Madh BLJ 1954 HCR 286 (289) * AIR 1947 Mad 339 (340).

**16. Priority of debts — Sub-section (3).**

— (1) A obtains a decree personally against B, C obtains a decree against B making him liable to the extent of the assets of his father in his hands. C cannot claim any priority against A. AIR 1918 Mad 512 (513) (DB).

(2) A judgment-debt due to the State is entitled to priority over all other decrees. AIR 1939 Lah 488 (490) : ILR (1940) Lah 124 * AIR 1958 All 636 (637) (DB) * AIR 1957 Bom 91 (92): ILR (1956) Bom 743 * AIR 1933 Sind 368 (369): 27 Sind LR 444 * AIR 1936 Mad 602 (603): 59 Mad 872.

(3) The sub-section does not confer any jurisdiction on the executing Court to entertain a claim on behalf of the Government in the absence of any decree in support of it. AIR 1935 Lah 319 (320) (DB). *AIR 1961 Punj 292 (293): ILR (1960) 1 Punj 809.

[But see AIR 1957 Bom 91 (93): ILR (1956) Bom 743 * 1968-2 Andh WR 394. (AIR 1938 Mad 360 (FB), Rel. on.) * AIR 1961 Ker 18 (20, 21): 1960 Ker LT 716 (DB).]

(4) Section 73(3) does not confer any priority on the State. AIR 1955 Cal 423 (426).

[See however AIR 1937 Rang 380 (382): 1937 Rang LR 344 (DB).]

(5) Section 73 does not affect the rights of Government to claim preferential treatment and an application for getting that relief can be made to the execuing Court at any time prior to the appropriation made by the decree-holders in pursuance of an order under S. 73. (1966) 1 Andh WR 102: (1966) 1 Andh LT 14. (Applications filed after sale of judgment-debtors property but long before passing any order under S. 73 — Government entitled to preferential payment.)

(6) Where State's preferential rights in respect of its claim are not limited by any special Act it is entitled to priority in payment of its claim for revenue taxes over the unsecured creditors out of the assets of the judgment-debtor. AIR 1960 J & K 45 (47) (DB).

(7) There is no warrant for distinguishing the right of Government to priority in respect of arrears of income-tax and sales tax. Therefore, where there is a competition between private unsecured creditors and the State, the claim of the State will prevail. AIR 1963 All 495 (495, 496).

(8) Deposit on application under O. 40, R. 1 — Attachment in execution — Doctrine of priority of Crown debts — Held applicable. AIR 1964 Andh Pra 74 (76) : (1963) 2 Andh WR 232 (DB).

(9) Recognition of the principle that as between the creditors in equal degrees the sovereign Government would be entitled to priority in the matter of payment does not amount in discrimination of one class of creditors against another and does not violate Art. 14 of the Constitution. AIR 1963 Mad 209 (210): (1962) 46 ITR 825 (DB).

(10) The English Common Law Doctrine of the priority of Crown debts has been given judicial recognition in the territory known as 'British India' prior to 1950 in regard to the recovery of tax dues in priority to other private debts of the tax-payer. The doctrine, however was not given judicial recognition in the territory of Hyderabad State before its incorporation into the Indian Republic. AIR 1967 SC 1831 (1835, 1836) : (1967) 3 SCR 855.

(11) A debt due to a co-operative society under S. 19 of the Co-operative

**Section 73 — Note 16 (contd.)**
Societies Act, 1912, is entitled to no priority. AIR 1915 Cal 197 (197): 42 Cal 377 (380) (DB).

(12) The costs of realisation of the assets will have to be paid in priority to the other debts. AIR 1956 Hyd 65 (71) : ILR (1956) Hyd 79 (FB) * AIR 1946 Sind 17 (18).

(13) Executing Court allowing claim for rateable distribution — Subsequently letter of attachment in respect of public demand due from judgment-debtor received by executing Court — Court cannot take any action on letter. AIR 1956 Cal 23 (24) (DB).

(14) Decree-holder purchaser in execution sale — Permission to bid and set-off obtained — No preferential claim by Government — Order of Court directing decree-holder to deposite entire sale price in Court. — Order held not proper. AIR 1964 Mad 120 (121): 77 Mad LW 462.

**17. Mode of distribution.** — (1) Where decree-holders obtain decrees against two brothers forming a joint Hindu family and certain other decree-holders obtain decrees only against one of the brothers, the principle that should be followed by the Court for the purpose of rateable distribution is to take the sale proceeds and divide it into two halves, distribute one-half belonging to one of the brothers having no personal decrees against him amongst all the decree-holders who have obtained decrees against both the brothers. and the sale proceeds representing the other's share amongst all the decree-holders who have obtained decrees not only against both the brothers but against the latter alone proportionately. AIR 1928 Mad 362 (363) * AIR 1934 Mad 426 (428): 58 Mad 59.

(2) X obains a decree against the estate of F in the hands of A, B and C who represent only three-fourths of the estate of F. Y obtains a decree against the same estate in the hands of all the heirs. The property is sold in execution of Y's decree and X applies for rateable distribution. The amount to be rateably distributed between X and Y is only three-fourths of the amount recovered in execution of Y's decree. AIR 1918 All 327 (327) (DB).

(3) Rateable distribution should be made according to the amount due to each decree-holder at the time of distribution. AIR 1935 Nag 214 (215): 31 Nag LR 423.

(4) An order for rateable distribution is enforceable by summary process in execution. AIR 1937 Nag 383 (384): ILR (1937) Nag 466.

(5) An order for rateable distribution is not a ministerial order. ILR (1957) 7 Raj 124 (126).

**18. Appropriation of amount received by way of rateable distribution.** — (1) A decree-holder is not entitled to appropriate the sum he receives by way of rateable distribution in any way he likes. What he receives goes towards the payment of every rupee of his debt. AIR 1939 Mad 268 (269): ILR (1939) Mad 301.

(2) Until the Court has directed appropriation of the amount to the claim of creditors entitled to rateable distribution, the amount received in Court continues to remain as of the judgment-debtor and is not held by the Court for and on behalf of or as a trustee for the creditors. AIR 1957 Bom 91 (92): ILR (1956) Bom 743 * ILR (1966) Andh Pra 1268 (1272) (DB).

**19. Appeal.** — (1) An order under this section is not appealable as an order. (1892) 14 All 210 (211) (DB) * AIR 1938 Lah 307 (308) * AIR 1936 Lah 181 (181).

(2) An order under this section will be appealable as a decree if the conditions of S. 47 are satisfied. AIR 1918 Mad 1322 (1324) (DB) * AIR 1921 Pat 401 (402): 5 Pat L Jour 415 (DB) * AIR 1924 Cal 801 (803): 51 Cal 761 (767, 771, 773) (DB) * AIR 1935 Lah 302 (303) : 16 Lah 990 (DB).

(3) Where an order determines questions between parties i.e., between the judgment-debtor on the one hand, and the decree-holder on the other, it will fall under S. 47 and become appealable as a decree. AIR 1943 Nag 320 (320) : ILR (1943) Nag 562 * AIR 1916 Mad 20 (21, 22) : 39 Mad 570 (DB) * AIR 1931 Bom 252 (253) (DB).

(4) An order under this section determining a question betwen rival decree-holders will not be appealable as a decree. AIR 1954 Bom 446 (447): ILR (1954) Bom 704 * AIR 1958 All 636 (638) (DB) * AIR 1941 Rang 113 (114) : 1940 Rang LR 718 (DB) * AIR 1922 Mad 99 (99) (DB) * AIR 1914 Mad 437 (437) (DB) * AIR 1931 Bom 350 (351) : 55 Bom 473 (DB) * AIR 1937 Rang 134 (135) (DB).

[See however AIR 1931 Pat 359 (360) : 10 Pat 830 (DB).) ]

(5) Where an order which determines a question between rival decree-holdrs is also one between the judgment-debtor and the decree-holders, it would be appealable. AIR 1943 Nag 320 (324) : ILR (1943) Nag 562 * AIR 1939 Bom 468 (469) * AIR 1916 Mad 20 (21, 22): 39 Mad 570 (DB) * AIR 1938 Pesh 63 (65) (DB).

(6) Where an order under the section affects not only the rival decree-holders inter se but also the surety for the judgment-debtor an appeal will lie from the order under S. 47 read with section 145 of the Code. AIR 1939 Bom 112 (114) : ILR (1939) Bom 133 (DB).

(7) Order under S. 73 (1) is appealable despite right of suit given by sub-section (2). AIR 1963 Cal 104 (106) (DB).

(8) Order allowing or refusing prayer for rateable distribution — Appealable

## RESISTANCE TO EXECUTION

**74. Resistance to execution.—** Where the Court is satisfied that the holder of a decree for the possession of immoveable property or that the purchaser of immoveable property sold in execution of a decree has been resisted or obstructed in obtaining possession of the property by the judgment-debtor or some person on his behalf and that such resistance or obstruction was without any just cause, the Court may, at the instance of the decree-holder or purchaser, order the judgment-debtor or such other person to be detained in the civil prison for a term which may extend to thirty days and may further direct that the decree-holder or purchaser be put into possession of the property.

[1882, 1877, S. 330; 1859, S. 228; See O. 21, Rr. 97 to 103.]

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**Section 73 — Note 19 (contd.)**
under Cl. 15 of Letters Patent. AIR 1963 Cal 104 (106) (DB).

**20. Revision.** — (1) The High Courts will not as a general rule, interfere in revision with a wrong order of distribution under this section. AIR 1954 Mad 201 (202) * AIR 1940 Nag 302 (303) : ILR (1942) Nag 139 * AIR 1933 Sind 329 (330): 27 Sind LR 190 (DB) * 1906 Pun Re No. 128 p. 481 (485) (DB) * AIR 1932 Lah 96 (97).

(2) When remedy by way of a suit under S. 73(2) is available to the aggrieved party, High Court would not interfere in revision against an order allowing the opposite party's application for rateable distribution of assets of the judgment-debtor. AIR 1965 Punj 412 (412) : 66 Punj LR 1032.

(3) In proper cases the High Court will interfere in revision with an order under S. 73. AIR 1954 Mad 201 (202) * AIR 1940 Ondh 237 (238): 15 Luck 332 (DB) * AIR 1928 Rang 163 (164) : 6 Rang 582 (DB) * AIR 1939 Bom 112 (114): ILR (1939) Bom 133 (DB).

(4) The High Court will interfere in revision in the following cases:

(a) where the lower Court acts without jurisdiction or declines to exercise jurisdiction. AIR 1956 Hyd 65 (73) : ILR (1956) Hyd 79 (FB) * AIR 1954 Mad 201 (202) * AIR 1950 Orissa 230 (232): ILR (1950) Cut 208 (DB) * AIR 1939 Mad 196 (196) * 1964 All LJ 602. (Lower Court's order rejecting application for rateable distribution not in accordance with law.)

(b) where the remedy by suit is so inconvenient as to practically amount to no remedy. AIR 1954 Mad 201 (202) * AIR 1944 Nag 295 (296) : ILR (1944) Nag 806 (DB) * AIR 1932 All 411 (412) : 54 All 516 (DB).

(c) where the remedy by suit is manifestly wrong. AIR 1954 Mad 201 (202 * AIR 1941 Oudh 277 (279) * AIR 1927 Mad 1030 (1030) (DB).

(d) where the result of the suit, if brought, would be definite success. AIR 1954 Mad 201 (202) * AIR 1927 Mad 944 (944) * (1909) 32 Mad 334 (336).

(5) Where the Court sets aside the order, it can order the amount wrongly paid to be returned to Court. AIR 1916 Cal 264 (265) (DB) * AIR 1931 Pat 405 (408) : 11 Pat 250 (DB).

(6) In a revision petition filed against a common order giving rateable distribution to some of the decree-holders and withholding in the case of another, it is not necessary that the aggrieved party should file as many revision petitions as there are rateable decree-holders. Single revision petition is sufficient. AIR 1958 Mad 170 (171).

(7) An order passed by a Court determining the creditors, who were entitled to rateable distribution under S. 73, amounts to "case decided" under S. 115, Civil P. C. AIR 1961 All 371 (372) : 1961 All LJ 435.

(8) Decree-holder applying by mistake to wrong Court and rateable distirbution ordered by such Court — No interference in revision. AIR 1960 All 730 (731, 732): 1960 All LJ 220.

(9) Order directing pari passu distribution of assets amongst all decree holders — One of decree-holders not made party — Held revision must fail. AIR 1968 Andh Pra 113 (114) : (1968) 1 Andh LT 89.

**Section 74 — Note 1**

(1) A decree for partition is a decree for possession within the meaning of this section. (1893) 16 Mad 127 (130) (DB).

(2) A person who, on behalf of the judgment-debtor, obstructs the decree-holder in obtaining possession, is not a party to the suit within the meaning of S. 47. (1898) 2 Cal WN 311 (314) (DB).

(3) The word "possession" is not limited to actual physical possession. The section is wide enough to cover cases of constructive possession such as that by a tenant. (1901) 25 Bom 478 (493) * (1906) 33 Cal 487 (491) (DB).

## PART III
## INCIDENTAL PROCEEDINGS
### COMMISSIONS

**75. [New] Power of Court to issue Commissions.**—Subject to such conditions and limitations as may be prescribed, the Court may issue a commission—

(a) to examine any person;

(b) to make a local investigation;

(c) to examine or adjust accounts; or

(d) to make a partition.

[See Order 26.]

**76. Commission to another Court.**—(1) A commission for the examination of any person may be issued to any Court (not being a High Court) situate in a [a][State] other than the [a][State] in which the Court of issue is situate and having jurisdiction in the place in which the person to be examined resides.

(2) Every Court receiving a commission for the examination of any person under sub-section (1) shall examine him or cause him to be examined pursuant thereto, and the commission, when it has been duly executed, shall be returned together with the evidence taken under it to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order.

[1882, S. 386; 1877, Ss. 383, 384, 385, 386 (2); 1859, S. 175; See O. 26, R. 4]

[a] Substituted for "Province" by A. L. O., 1950 (26-1-1950).

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**Section 75 — Note 1**

(1) The detailed provisions as regards issue of commissions are set forth in Order 26, but they do not amplify the scope of this Section. AIR 1949 Lah 72 (76): Pak LR (1948) Lah 94 (DB) * AIR 1922 Lah 47 (48) : 3 Lah 209 (DB).

(2) Where it is not necessary for the purposes set forth in the section to issue a commission, it is not competent for the Court to do so. (1912) 13 Ind Cas 440 (443) (DB) (Cal).

(3) Though the Court has power to issue a commission, it cannot make over the whole case to the Commissioner for trial on the merits. AIR 1926 Lah 145 (146) (DB) * AIR 1926 Cal 57 (57, 58) (DB).

(4) A Court should not issue a commission to two persons. AIR 1929 Mad 661 (663) (DB).

(5) Section 75 and O. 26 do not apply to cases in which the parties consent or agree to the appointment of a Commissioner for any particular purpose. AIR 1938 All 266 (267, 268) : ILR (1938) All 370 (DB).

(6) A Court ought not to hold a local investigation with a view to gather information on which it may base its judgment, though it may inspect the locality with a view to understand the evidence. (1912) 14 Ind Cas 377 (379) (DB) (Cal).

(7) Where a matter has been referred to a Commissioner for local investigation, it is not safe for the Court to overrule the report of the Commissioner whose integrity is unquestioned. AIR 1924 Cal 620 (622) (DB).

(8) Suit for accounts by beneficiary against trustee — Commissioner cannot be appointed to ascertain value of movables in defendant's possession. AIR 1940 Cal 337 (343) : ILR (1940) 1 Cal 372 (DB).

(9) Civil Court cannot, under inherent powers, appoint Commissioner to seize account books in possession of Plaintiff on ground of defendants' apprehension that they would be tampered with. AIR 1961 SC 218 (220, 221): 1961 (1) Cri LJ 322: (1961) 1 SCR 884. (AIR 1959 All 707, Reversed.)

(10) A commissioner cannot be deputed to determine the value of the property payable by one party to another. A commissioner may be deputed to gather date to help such determination by the Court. 1967 Ker LT 200 (202).

(11) Issue of a commission to a Court at Pakistan — Existence of reciprocity — Petition by plaintiff for issue of commission dismissed on ground of laches — Held, on the facts that there were no laches and the Court could not refuse to issue commission — Contention that the decree was likely to be delayed was not relevant as the plaintiff himself had filed the petition. AIR 1958 All 19, held bad law. 1966 All WR (HC) 650.

(12) Contents of document — Proofs — Non-production of attesting witness on the ground that he was leper — Not proper — Leper held could be examined on commission. AIR 1963 Orissa 30.

**77. [New] Letter of request.**—In lieu of issuing a commission the Court may issue a letter of request to examine a witness residing at any place not within [a][India].

[See O. 26, Rr. 5 and 6.]

[a] Substituted for "the States" by the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), S. 3 (1-4-1951).

**78. Commissions issued by foreign Courts.**—[a][Subject to such conditions and limitations as may be prescribed, the provisions as to the execution and return of commissions for the examination of witnesses shall apply to commissions issued by or at the instance of—

(a) Courts situate in any part of India to which the provisions of this Code do not extend; or

(b) Courts established or continued by the authority of the Central Government outside India; or

(c) Courts of any State or country outside India.]

[1882, 1877, S. 391.]

[a] Substituted for S. 78, by the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), S. 11 (1-4-1951). The old S. 78 was as follows:—

"S. 78. Subject to such conditions and limitations as may be prescribed, the provisions as to the execution and return of commissions for the examination of wit nesses shall apply to commissions issued by or at the instance of—

(a) Courts situate beyond the limits of the States and established or continued by the authority of the Central Government; or

(b) Courts of any Part B States; or

(c) Courts of any State or country outside India."

## PART IV

## SUITS IN PARTICULAR CASES

## SUITS BY OR AGAINST [a][THE GOVERNMENT] OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY

[b]**79. Suits by or against Government.**—In a suit by or against the Government, the authority to be named as plaintiff or defendant, as the case may be, shall be—

(a) in the case of a suit by or against the Central Government, [c][the Union of India], and

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### SECTION 79 — SYNOPSIS

1. In what cases suit will lie against the Government.
2. Suits by or against State Railways.
3. Cases in which Government is a necessary party.
4. Form of suit by or against Government.

TOPIC INDICATOR

Act of State — See Section 9.
Procedure in suits by or against Government — See Section 80 and Order 27.
Tortious act by Government servant — See Note 1.
Suit by or against Part C States — See Note 4.
Writ petition against Collector — See Note 4.

**1. In what cases suit will lie against the Government.**—(1) The Government in India is liable in respect of detention of land, chattels or money and breach of contract. AIR 1915 Mad 434 (438, 439): 37 Mad 55 ° AIR 1957 Cal 617 (622) ° (1890) 17 Cal 590 (604): 17 Ind App 40 (PC) ° (1861) 8 Moo Ind App 529 (554) (PC).

[But see (1867) Beng LR (Sup Vol.) 630 (632) ° (1875) 1 Cal 11 (26, 27) (DB).]

(2) In respect of torts by its servants in the exercise of sovereign powers, the Government in India will not be liable unless it has ordered or ratified the tortious act. AIR 1915 Mad 434 (441): 37 Mad 55 * (1903) 27 Bom 189 (211, 212) * AIR 1915 Mad 993 (998): 39 Mad 351 (DB) ° AIR 1920 Lah 362 (364): 1919 Pun Re No. 143 (DB).

(3) The doctrine of principal and agent cannot apply where the acts done by the officers of the Government are done in the

(b) in the case of a suit by or against a [d][State] Government, the [e][State].
[1882, S. 416; Para 1; 1877, S. 416; See O. 27]

[a] Substituted for "the Crown" by A. C. A. O., 1948 [23-3-1948].

[b] Section was substituted for original S. 79, ibid.

[c] Substituted for "the Dominion of India" by A. L. O., 1950 [26-1-1950].

[d] Substituted for "Provincial", ibid.

[e] Substituted for "Province", ibid.

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**Section 79 — Note 1 (contd.)**

perofrmance of duties imposed by the Legislature, though the officers themselves are appointed by the Government; and in exercising or exceeding such authority they cannot be considered to have been the agents of the appointing authority so as to render the latter liable. (1884) 10 Cal 445 (461) (DB) * AIR 1915 Mad 434 (441): 37 Mad 55 ° AIR 1920 Lah 362 (364): 1919 Pun Re No. 143 (DB) ° (1904) 28 Bom 314 (325, 326) (DB) * (1882) 5 Mad 91 (105) (FB).

(4) Tortious act by servant of State of Rajasthan — Act done in the course of employment but not in connection with sovereign powers of State — Still the State like any other employer is vicariously liable. AIR 1962 SC 933 (935, 940): (1962) Supp (2) SCR 989.

(5) The Government in India will be liable in respect of those acts which might be done by private individuals without the delegation of sovereign rights. AIR 1952 Assam 141 (145): ILR (1951) 3 Assam 279 (DB) ° AIR 1957 Cal 617 (622) ° (1875) 1 Cal 11 (13, 14) (DB) * AIR 1915 Mad 434 (438): 37 Mad 55: 19 Ind Cas 353 (357).

(6) The liabilities of the Government of India were the same as those of the East India Company which though not a sovereign had sovereign powers and was also engaged in private or commercial undertakings. This position has never changed as the competent supreme legislature has never intervened to affect those liabilities. AIR 1957 Cal 617 (622).

(7) Where a property is taken over by an agent of the Government, it is not at all necessary that the Government must have any proprietary interest in the property to be answerable for an action in tort. It is sufficient if the Government is interested in its retention and management by its agent or paid public servant. AIR 1957 Andh Pra 714 (718): ILR (1957) Andh Pra 837 (DB).

(8) Supply of hard coke by plaintiff to Military Department of Government of India — Supply rejected — Direction as to its disposal by Deputy Coal Commissioner — Suit by plaintiff to recover price — Suit brought against Union of India is not competent — Doctrine of respondeat superior does not apply. AIR 1959 Pat 347 (348): 1959 BLJR 259.

**2. Suits by or against State Railways.** — (1) In a case where a railway is administered by a Government or State, a suit can be brought against the Government or the State concerned. It is not necessary that the Railway Administration, as such through the manager or anybody else, should be impleaded as a party defendant to the suit. AIR 1953 Assam 193 (195): ILR (1953) 5 Assam 326 (FB) ° AIR 1957 Madh Pra 157 (158) (DB) ° AIR 1956 Pat 511 (513, 514) (DB).

(2) Section 79 declares the rule of procedure enacted in Article 300 (1) of the Constitution. Since the railways are owned by the Union Government any claim against the railway administration must be against the Union of India. AIR 1964 Andh Pra 172 (182, 183) ° AIR 1965 Ker 277 (278): 1965 Ker LT 627 (FB).

[See also AIR 1962 Punj 262 (266): 64 Pun LR 267 (FB). (Notice contemplated by Section 80, C. P. C. is required to be served on General Manager, though suit is to be instituted against Central Government named as Union of India.)

(3) Suit for compensation against railway — Defendant described as Union of India without mentioning the State Railway concerned — Frame of suit is not bad. ILR (1964) 1 Ker 355.

(4) Through booked goods — Goods lost after reaching destination — Suit for loss of goods — Suit is to be filed against Central Government. AIR 1960 Ker 257 (258): 1960 Ker LT 352.

**3. Cases in which Government is a necessary party.**—(1) The rules governing the joinder of ordinary persons as parties would also apply to the joinder of the Government as a party. AIR 1919 PC 225 (228).

(2) In a suit to set aside a sale under the Bengal Public Demands Recovery Act, I of 1895 (now see Bengal Act III of 1913), the Government is in the position of a decree-holder and as such is a necessary party. (1902) 31 Cal 159 (161) (DB).

(3) When a government order setting aside a revenue sale is sought to be cancelled in a suit, the government is a necessary party to the suit. AIR 1956 Trav-Co 181 (182): ILR (1956) Trav-Co 62 (FB).

(4) Unregistered lease by Government in favour of A — Subsequent lease of same land in favour of B — Suit by A against B for declaration of his rights without impleading Government — Suit held was not maintainable. AIR 1956 Tripura 22 (24).

(5) Suit for declaration that grant by State to defendant is illegal — Plaintiff offering payment of Nazrana to State for decree for possession — State is necessary party. AIR 1953 Bilaspur 7 (9).

**80. [Notice.**—No suit [a][shall be instituted against the Government (including the Government of the State of Jammu and Kashmir)] or against a public officer[k] in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been [b][delivered to, or left at the office of —

(a) in the case of a suit against the Central Government, [c][except where it relates to a railway], a Secretary to that Government;

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**Section 79 — Note 3 (contd.)**

(6) It is not the law that wherever the interpretation of a section is sought the State is a necessary party. AIR 1955 Bom 101 (103): ILR (1954) Bom 1187 (DB).

(7) Management of enemy firm handed over to defendant firm by Central Government — Suit against defendant firm as representing enemy firm — Governor-General in Council held was not necessary party. AIR 1954 Pat 596 (609) (DB).

(8) Suit for possession by plaintiff as reversioners to last male-holder — Defendants contending that property was taken by escheat by State and granted to them on receipt of nazrana — Government held was only proper party. AIR 1953 Him Pra 123 (124).

(9) Rival question of tenure-holdership under S. 176 of U. P. Zamindari Abolition and Land Reforms Act there being no statutory provision for impleading the State in such a case the State is a proper party and its non-impleadment cannot be held to be fatal defect. AIR 1967 All 481 (483): 1967 All LJ 92.

(10) Suit for declaration that properties do not belong to assessee and are not liable to be attached for income-tax arrears — Income-tax Commissioner held neither necessary nor proper party to suit — Obiter — If at all, Union of India could be added as party. ILR (1962) 2 Ker 699.

(11) Challenge to vires of rules framed by Government — Vires not examined as Government which had framed the rule was not impleaded as a party. AIR 1968 Ker 35 (38): 1967 Ker LT 331.

(12) Revenue sale for realisation of Government dues — Suit filed to set aside such sale — Government is necessary Party in such Suit. AIR 1967 Madh Pra 120 (122): 1966 MPLJ 1062.

(13) Grant by Collector of Gochar plots in favour of ex-landlords in exchange — Villagers challenging validity of such grant — Government is necessary party. AIR 1963 Orissa 186 (187, 188): ILR (1963) Cut 841.

**4. Form of suit by or against Government.** —(1) The fact that a suit was instituted in the name of the Governor-General in Council "through the Military Estates Officer, Central Provinces Circle, Jubbulpore" was held not to affect the position as the words were surplusage. AIR 1945 Nag 255 (256, 257): ILR (1945) Nag 629 (DB).

(2) Before the Constitution (Seventh Amendment) Act (1956), in a suit by or against a Part C State the authority to be named as plaintiff or defendant was the Union of India. AIR 1956 Vindh Pra 1 (5) * AIR 1953 Bhopal 37 (37).

(3) Contract by Government of Vindhya Pradesh — Suit against Government — Proper defendant was State of Vindhya Pradesh and not Union of India — Section 79 (a) did not apply to Part C State but only Clause (b) applied. AIR 1962 SC 145 (147): (1961) 2 SCR 794. (AIR 1956 Vindh Pra 1, Affirmed.)

(4) In suit by or against a Union territory the administration of that territory alone and not the Central Government should be named as plaintiff or defendant in view of Article 239 of Constitution. AIR 1959 Tripura 41 (45, 46): (1960) 30 Com Cas 324.

(5) A petition for writ of mandamus against the Collector and the Assistant Collector cannot be interpreted as directed against the State Government. AIR 1952 Him Pra 16 (17).

(6) Where a notice under Section 80, merely stated that a suit against "your railway" for loss would be instituted and it was addressed to the Secretary for Railways Central Government, New Delhi, it was held that the notice had satisfied the requirements of Setcions 79 and 80 though not stating that the suit would be against the Governor-General in Council. AIR 1952 Mad 502 (503).

(7) A suit instituted by the Union of India for the recovery of freight for carrying goods on two railways is valid though in the cause title of the suit the Union of India is mentioned as owning the two railways. AIR 1958 Madh Pra 425 (432) (DB).

(8) Writ petition against 'Himachal Pradesh Administration' as main respondent — Himachal Pradesh being Union Territory administered by the President through Administrator — Neither President nor Administrator impleaded — 'Himachal Pradesh Administration' being not a juristic person cannot sue or be sued. AIR 1964 Him Pra 19 (22).

(9) Land Acquisition Act, Section 54 — Collector can file appeal on behalf of State Government. AIR 1964 Madh Pra 196 (199): 1964 MPLJ 220.

## SECTION 80 — SYNOPSIS

1. Scope and object.
2. Applicability.
3. Act purported to be done in official capacity.
4. Suits against Municipalities.
5. Suits against Railway administration.
6. Notice condition precedent to suit.
7. Suits on contracts and suits for injunctions.

[d][e](b) in the case of a suit against the Central Government where it relates to a railway, the General Manager of that railway;]

[i][(bb) in the case of a suit against the Government of the State of Jammu and Kashmir, the Chief Secretary to that Government or any other Officer authorised by that Government in this behalf;]

(c) in the case of a suit against [f][any other State Government,] a Secretary to that Government or the Collector of the District, [g][° °];

(d) [h][° ° ° ° °].]

and, in the case of a public officer, delivered to him or left at his office stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

[1882, 1877, S. 424; See O. 27.]

[a] Substituted for the words "shall be instituted against the Government" by the Code of Civil Procedure (Amendment) Act, 1963 (26 of 1963), S. 3 (a) [w. e. f. 5-6-1964].

[b] Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the District."

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**Section 80 — Synopsis (contd.)**

**8. Form and sufficiency of notice.**
**9. Service of notice.**
**10. Waiver of notice and effect.**
**11. Notice, if necessary, for amendment of plaint.**
**12. Plaint must aver delivery of notice.**
**13. Suit during currency of notice.**
**14. Computation of period of notice.**
**15. Variance between notice and plaint.**
**16. Death of intending plaintiff after notice.**
**17. Exclusion of period of notice for purposes of limitation — See Notes on S. 15, Limitation Act (1963).**

TOPIC INDICATOR

Act of State — See Section 9.
Adding or substituting Secretary of State and notice — See Note 11.
Administrator-General and Official Trustee — See Note 2.
Burden of Proof — See Note 6.
Cases in which Government is a necessary party — See S. 79.
Common manager under S. 95, Bengal Tenancy Act, VIII of 1885 — See Note 7 and S. 2 (17).
Constitutionality of the section — See Note 1.
Cantonment Committee — See S. 2 (17).
Dispensing with notice — See Note 7.
Notice if part of cause of action — See Section 20.
Notice to Collector — See Note 9.
Notice to Public Officer — See Notes 1 and 9.
Object of notice — See Note 1.
Official Receivers — See S. 2 (17).
One of several plaintiffs — Notice by — See Note 8.
Persons bringing suit and sending notice must be identical — See Note 8.
Provision mandatory — See Note 6.
Public Officer who is — See Section 2 (17).
"Secretary of State in Council" — See Note 1.
Suit against Court of Wards — See Note 3.
Want of notice — Time for objection — See Note 10.

**1. Scope and object.** — (1) Necessity for notice to Government before suit depends upon whether S. 80 applied to case at time when it was instituted and if not, whether under law in force there was any corresponding provision. AIR 1953 Hyd 139 (140): ILR (1952) Hyd 983 (DB) ° AIR 1951 Sau 16 (16) (DB).

(2) The word 'State Government' in S. 80 (c) of the Code refers to any State in India and does not refer to the States where the C. P. Code is in force. Therefore, if a suit is filed in any State against any other State Government, a notice under S. 80 of C. P. Code must be served, even though such notice may not be necessary under the law of that State. AIR 1969 Cal 11 (12): 72 Cal WN 795.

(3) Non-compliance with provisions of section cannot have any adverse effect in a place to which the Code is not applicable although the Courts of that place followed the Code in spirit. AIR 1958 Manipur 7 (11).

(4) Pleadings should be scrutinised in light of provisions in Code to see whether notice under section is necessary. AIR 1950 Pat 527 (531) (DB) * AIR 1960 Cal 264 (266): 64 Cal WN 272 (DB). (Overruled on another point in AIR 1964 SC 600.)

(5) Section enacts only rule of procedure. AIR 1951 SC 253 (266): 1951 SCR 474 * AIR 1967 Bom 472 (477): 69 Bom LR 52 (DB) ° AIR 1961 Pat 200 (201) * AIR 1960 Cal 391 (393, 394): 64 Cal WN 502 (DB).

[c] Inserted by the Code of Civil Procedure (Amendment) Act, 1948 (6 of 1948), S. 2 [21-2-1948].

[d] Added as clause (aa), ibid.

[e] Clause (aa) was re-lettered as clause (b) by A. C. A. O., 1948 [23-3-1948] which also omitted the original clause (b).

[f] Substituted for the words "a State Government" by Act 26 of 1963, S. 3 (c) [5-6-64].

[g] The word "and" was omitted by A. C. A. O., 1948 [23-3-1948].

[h] Original clause (b) and the last clause (d) were omitted by A. C. A. O., 1948 [23-3-1948].

[i] Inserted by the Code of Civil Procedure (Amendment) Act, 1963 (26 of 1963), S. 3 (b) [5-6-1964].

[j] Bill No. 34 of 1968 introduced in the Parliament proposes to amend the Code extensively. Amongst the proposals is one proposing deletion of S. 80. For the said Bill, see Gaz. of Ind. 18-11-1968, Pt. II, S. 2, Ext., P. 1259.

[k] Section does not apply to any suit against the Administrator-General in which no relief is claimed against him personally — See Act 45 of 1963, S. 40 [1-3-1964].

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**Section 80 — Note 1 (contd.)**

(AIR 1955 NUC (Cal) 783, Overruled.) ° AIR 1960 Mad 58 (60): (1959) 2 Mad LJ 479 (DB) * AIR 1959 Cal 273 (276): ILR (1960) 1 Cal 74 ° AIR 1959 Punj 413 (414): 61 Pun LR 455.

(6) Section is intended to afford defendant opportunity to reconsider position and make amends or settle claim, if so advised without recourse to litigation. AIR 1956 Pat 478 (480) ° AIR 1959 Andh Pra 192 (198) (DB) * AIR 1958 Punj 351 (353): ILR (1958) Punj 244 ° AIR 1955 Mys 123 (125): ILR (1955) Mys 444 (DB) ° AIR 1955 Vindh Pra 1 (2) * Madh B LJ 1954 HCR 1748 (1749) ° 1954 BLJR 373 (374) ° AIR 1951 Bom 72 (74) (DB) * AIR 1950 Pat 366 (369) (DB) ° AIR 1943 Bom 138 (139): ILR (1943) Bom 128 (DB) ° AIR 1943 Bom 160 (164): ILR (1943) Bom 186 ° AIR 1932 Lah 374 (376): 13 Lah 672 (DB) * AIR 1916 Bom 296 (297): 40 Bom 392 (DB) ° (1898) 25 Cal 239 (244) (SB) ° (1907) 34 Cal 257 (282) (DB) * AIR 1931 Cal 503 (504): 58 Cal 850 (DB) ° AIR 1965 SC 11 (15): (1964) 4 SCR 945 ° (1968) 2 SC WR 270: (1969) 1 SCA 429 * AIR 1960 SC 1309 (1310) ° AIR 1967 Delhi 65 (66) (DB) ° 1966 Maha LJ 1102 (FB) ° AIR 1964 All 471 (472): 1964 All LJ 969 * ILR (1962) Madh Pra 566 ° AIR 1961 All 14 (16): 1960 All LJ 770 (DB) ° AIR 1961 Cal 626 (635): 65 Cal WN 607 * AIR 1961 J and K 58 (60). (The notice does not impose any duty on the defendant to reply to the allegations of the plaintiff prior to the filing of suit.) * AIR 1961 Madh Pra 339 (340): 1961 Jab LJ 540 ° AIR 1961 Orissa 31 (33): (1960) 2 Orissa JD 157 * AIR 1961 Pat 334 (337): 1961 BLJR 223 (DB) ° AIR 1961 Pat 200 (201) (DB) ° AIR 1961 Punj 329 (331) * AIR 1961 Punj 150 (151): ILR (1960) 1 Punj 999 ° AIR 1960 All 420 (425, 426): 1960 All LJ 193 (DB) ° AIR 1960 Mad 58 (60): 1959-2 Mad LJ 479 (DB) * AIR 1959 Punj 413 (414): 61 Punj LR 455.

[See (1881) 6 Cal 8 (10) (FB). (Decision under S. 87 of Bengal Act 3 of 1864.)]

(7) Section admits of no-exceptions or implications. AIR 1956 Ajmer 17 (18) ° AIR 1958 Cal 183 (185) * AIR 1956 Pat 478 (480) ° Madh B LJ 1954 HCR 900 (900). (AIR 1927 PC 176: 54 Ind App 338: 51 Bom 775, Foll.; AIR 1927 Mad 166: 50 Mad 239 (DB), held not good law) * AIR 1957 Mys 94 (96): ILR (1954) Mys 465 * AIR 1931 Cal 503 (504): 58 Cal 850 (DB) * AIR 1941 Pat 517 (519): 20 Pat 394 (DB) ° AIR 1927 PC 176 (183): 54 Ind App 338: 51 Bom 725 * AIR 1938 Pat 127 (128) * AIR 1965 SC 11 (15): (1964) 4 SCR 945 * AIR 1960 SC 1309 (1310) * (1968) 1 Andh LT 269 (274) ° AIR 1967 Orissa 160 (162): ILR (1967) Cut 521 (DB) * AIR 1964 Andh Pra 172 (183) (DB) ° (1960) 64 Cal WN 60 ° 31 Cut LT 154: ILR (1964) Cut 86 * 1962 Ker LT 341 ° AIR 1962 Pat 64 (65): 1961 BLJR 752 * AIR 1962 Pat 303 (304, 305): 1962 BLJR 374 * AIR 1961 Guj 85 (87): (1961) 2 Guj LR 181 (DB) ° AIR 1961 Pat 200 (201) (DB) * AIR 1960 Pat 530 (531): 1960 BLJR 432 ° AIR 1959 Punj 413 (414): 61 Pun LR 455.

(8) Suit, instituted without complying with provisions of section, must be rejected under O. 7, R. 11. AIR 1956 Him Pra 9 (13) ° AIR 1958 Andh Pra 102 (103) * AIR 1958 J and K 18 (19) ° AIR 1955 Vindh Pra 1 (2) ° AIR 1957 Mys 94 (95): ILR (1954) Mys 465 * AIR 1953 Bhopal 28 (29) ° AIR 1953 Him Pra 123 (124) ° AIR 1947 Cal 221 (224): ILR (1944) 2 Cal 513 (DB) ° (1903) 25 All 187 (190, 193) (DB) * AIR 1935 Mad 389 (390) (DB). (Affirming, on Letters Patent Appeal, AIR 1931 Mad 175: 54 Mad 416.) ° (1968) 1 Andh LT 269 ° AIR 1967 Orissa 160 (162): ILR (1967) Cut 521 (DB) * AIR 1964 Andh Pra 172 (183) (DB) * 1962 Ker LJ 360 ° AIR 1962 Pat 64 (65): 1961 BLJR 752 ° AIR 1961 Andh Pra 488 (488, 489): 1961 Andh LT 117 * AIR 1961 Pat 200 (201) (DB) * AIR 1960 Ker

**Section 80 — Note 1** (contd.)
135 (137): 1959 Ker LT 933 (DB) ° AIR 1960 Pat 530 (531): 1960 BLJR 432.

[See however (1948) 52 Cal WN 808 (809). (AIR 1947 Cal 221: ILR (1944) 2 Cal 513, Ref.) ° AIR 1947 Mad 64 (65): ILR (1947) Mad 258 (DB). (AIR 1928 Mad 599, Overruled on another point.) ]

(9) Rejection of plaint in limine would be proper only when on admitted facts appearing from plaint suit is prima facie barred under Section. AIR 1953 Cal 222 (223): ILR (1954) 2 Cal 126 (DB).

(10) Provisions of section cannot be relaxed merely because Government or public officer happens to be only one of several defendants. AIR 1939 Pat 32 (33) * AIR 1938 Pat 127 (129).

(11) Even where Government or public officer is only pro forma defendant, notice under section is necessary. AIR 1953 Bhopal 28 (29) ° AIR 1943 Mad 284 (286) ° AIR 1936 Pat 339 (339, 340): 15 Pat 353 (DB) * AIR 1964 Andh Pra 172 (183) (DB).

[See however AIR 1962 Cal 625 (629): 66 Cal WN 774. (Suit for recovery of sum insured against insurance company and Union of India — No cause of action alleged and no relief claimed against Union of India — Union of India not a necessary party — Notice under S. 80 not necessary. AIR 1936 Pat 339, Dissented from.) ° 1954 BLJR 414 (420). (AIR 1945 Mad 224. Rel. on.) * AIR 1945 Mad 224 (225) (DB).]

(12) Suit instituted without notice under section is bad only so far as it is against Government or public officer but not against all other defendants. AIR 1953 Bhopal 28 (30) ° AIR 1940 Cal 1 (4) (DB) ° AIR 1936 Pat 339 (340): 15 Pat 353 * AIR 1964 Pat 275 (281, 282, 283): 1964 BLJR 291 (DB) * AIR 1963 Pat 11 (16): 1963 BLJR 11 (DB).

[But see AIR 1941 Pat 461 (463).]

(13) Suit would be maintainable against private individual without impleading Government or the official — Failure to serve notice on Government or official would not involve dismissal of entire suit. AIR 1953 Bhopal 28 (30) ° AIR 1950 Orissa 257 (260) * AIR 1948 Pat 117 (118, 119).

(14) Addition of public officer as unnecessary party to a suit instituted against Government after notice to it does not affect decree passed against Government. AIR 1952 Mad 510 (513): ILR (1951) Mad 932 (DB).

(15) Notice under section must be given in all cases of suits against Government. AIR 1947 Cal 26 (27): ILR (1946) 2 Cal 316 ° AIR 1914 Mad 502 (504): 37 Mad 113 (DB) ° AIR 1938 Mad 583 (584) (DB) * (1898) 25 Cal 239 (242) (SB) ° AIR 1916 Bom 296 (297): 40 Bom 392 (DB) * (1911) 35 Bom 362 (366) (DB).

(16) In case of public officers notice under section is necessary only where suit is in respect of act purporting to be done by such public officer in his official capacity. AIR 1941 Cal 643 (651) (DB) ° AIR 1940 Pat 516 (531): 19 Pat 433 (DB) * AIR 1968 J and K 98 (103): 1968 Kash LJ 374.

(17) Liquidator appointed by Registrar of Co-operative Societies is not a public servant. AIR 1940 Mad 831 (833): ILR (1940) Mad 929 (DB). (AIR 1934 Nag 291: 30 Nag LR 240 and AIR 1939 Nag 232, Not approved.) ° AIR 1957 All 492 (494).

(18) Section refers to the individual who occupies the post and not the office as such. AIR 1957 Andh Pra 714 (723): ILR (1957) Andh Pra 837.

(19) Section does not apply to application to file arbitration agreement in Court under S. 20 of the Arbitration Act, 1940 AIR 1947 Sind 147 (148): ILR (1946) Kar 463 ° AIR 1966 Cal 259 (266) ° AIR 1964 All 477 (480): 1964 All LJ 15 (DB). (Section 80 is not applicable to proceedings on application under S. 8, Arbitration Act. AIR 1950 EP 352 and AIR 1932 Lah 374, Rel on.)

(20) Section does not apply to suits instituted under S. 7, Madhya Bharat Sthan Niyantran Vidhan. ILR (1955) Madh B 413 (416) (DB).

(21) Section cannot be circumvented by filing petition under S. 151 Civil P. C., instead of suit. AIR 1945 Bom 370 (373): ILR (1945) Bom 665.

(22) That Advocate-General gets notice under O. 27A and can apply to make State a party to suit does not cure failure to comply with this section. AIR 1950 Pat 527 (529) (DB).

(23) Section does not offend Art. 14 of Constitution of India. AIR 1957 Andh Pra 675 (679): ILR (1956) Andh 114 (DB).

(24) Failure to reply on the part of Government to the notice does not amount to waiver of any defence that the Government may have to the plaintiff's suit, or to an admission of liability on the part of Government. AIR 1962 Cal 510 (512) ° AIR 1961 J and K 58 (60).

(25) Section cannot be used as a cloak or screen for insulting or vilifying a Judge while acting in judicial capacity. AIR 1967 Cal 153 (158): 1967 Cri LJ 350 (DB). (AIR 1941 Bom 228: 42 Cri LJ 723, Rel. on.) * AIR 1962 All 137 (140): 1962 (1) Cri LJ 234: 1961 All LJ 665.

**2. Applicability.**— (1) Section applies to following suits.

(a) Suit under S. 14 Madras Survey and Boundaries Act, 4 of 1897, now Act 8 of 1923. AIR 1943 Mad 284 (285).

(b) Suit in which claim is against property taken under S. 57 (2), C. P. and Berar Municipalities Act, 2 of 1922. ILR (1955) Nag 276 (280).

(c) Suit filed under O. 21 R. 63, CPC. AIR 1966 SC 1068 (1072): (1966) 1 SCR 986. (1961) Lab LJ 935, Reversed: Note:— AIR 1943 Mad 341 and AIR 1965 All 154 and AIR 1959 Punj 413, are no more good laws.)

**Section 80 — Note 2 (contd.)**

(2) Section does not apply to following suits:

(a) Suit brought pursuant to undertaking given under S. 14, Bombay City Land Revenue Act, 2 of 1876. AIR 1934 Bom 162 (163) (DB).

(b) Suit under S. 77, Registration Act. AIR 1940 All 108 (111) (DB).

(c) Suit filed against State Government under S. 6 of the Hyderabad Government Demands Act (4 of 1308-F). AIR 1963 Andh Pra 164 (166, 167): (1962) 2 Andh WR 234 (DB). (AIR 1928 Mad 1201; AIR 1943 Mad 284, Foll.)

(d) Suit filed in Federal Court. AIR 1951 SC 253 (266): 1951 SCR 474.

(e) Suit challenging the order of Executive Committee of Gram Panchayat under Bihar Panchayat Raj Act (7 of 1948). AIR 1964 Pat 90 (92): 1963 BLJR 192 (DB).

(f) Suit brought against member of I. C. S. in his capacity as chairman of Dock Labour Board. (1967) 14 FLR 14: (1968) 1 Lab LJ 234 (DB) (Cal).

(g) Suit under S. 43 (3) of Bihar and Orissa Public Demands Recovery Act (4 of 1914). AIR 1969 Orissa 58 (59): ILR (1968) Cut 432 (DB). (AIR 1965 Pat 404 and AIR 1963 AP 164, Held impliedly overruled by AIR 1966 SC 1068.)

(3) Section has nothing to do with question of addition of public servant in execution proceedings. ILR (1956) 1 Cal 171 (173).

(4) Where a suit can be regarded as continuation of the previous suit, fresh notice is not necessary. AIR 1960 Cal 403 (407): 64 Cal WN 381 ° AIR 1960 Andh Pra 535 (539) (DB).

**3. Act purported to be done in official capacity.** — (1) In suit against public officer, notice under section is necessary only when act in respect of which suit is brought is purported to have been done by public officer in his official capacity. ILR (1954) 4 Raj 812 (817) (DB) ° (1948) 52 Cal WN 494 (501) (DB) * AIR 1943 Bom 138 (139, 140): ILR (1943) Bom 128 (DB) ° AIR 1942 Lah 287 (288): ILR (1943) Lah 389 (DB) ° AIR 1934 PC 96 (97): 61 Ind App 171: 61 Cal 470 * AIR 1930 All 742 (744): 53 All 44 (DB) ° AIR 1969 SC 227 (231): (1969) 1 SCJ 358. (The expression "at" also includes illegal omissions.) ° AIR 1960 Pat 530 (531): 1960 BLJR 432.

(2) Official capacity has reference to the officers' substantive appointment and that appointment again must be referable to the status contemplated in S. 2 (17). (1967) 14 FLR 14: (1968) 1 Lab LJ 234 (DB) (Cal).

(3) Where various public officers are intended to be made party defendants along with the Government, each of them must be served separately with notice under S. 80. (1968) 1 Andh LT 269 (275).

(4) Where suit is not in respect of act done by public officer, no notice is necessary, though he is impleaded as defendant in suit. (1950) 54 Cal WN 960 (972) (DB) * (1956) ILR (1956) 1 Cal 171 (173, 174) ° AIR 1943 Bom 138 (140): ILR (1943) Bom 128 (DB) * AIR 1934 PC 96 (97): 61 Ind App 171: 61 Cal 470. (AIR 1932 Cal 275: 59 Cal 961, Reversed.) ° (1889) 13 Bom 343 (347) (DB) ° AIR 1932 All 657 (658, 659) (DB) * AIR 1930 Bom 11 (15) (DB) ° AIR 1964 Pat 446 (449): 1964 (2) Cri LJ 439: 1964 BLJR 370.

(5) Where suit against Court of Wards is in respect of act done by Collector as agent of Court of Wards, and Collector is also made party notice under section is necessary. (1881) 3 All 20 (22, 23, 24) (FB).

(6) The Commissioner of Madras Hindu Religious and Charitable Endowments while functioning under the Act (Madras Act 22 of 1959) functions only as a public officer and hence provisions of S. 80, C. P. C. apply to him. (1968) 2 Mad LJ 41. (1952 (1) MLJ 678 held no longer good law in view of AIR 1965 SC 1570. Note:— ILR (1962) AP 865 and AIR 1966 AP 123 is no longer good law in view of AIR 1965 SC 1570.) ° ILR (1966) 1 Ker 679.

(7) In a suit in which an act of Official Assignee or Official Receiver done in Official capacity is in question and that officer is made a party notice under section is necessary. AIR 1952 All 402 (405): ILR (1953) 2 All 480 (DB) * AIR 1930 Mad 458 (463, 464) (DB) ° AIR 1920 Bom 50 (50): 44 Bom 895 (DB) ° AIR 1931 Cal 61 (63): 57 Cal 1127 (DB).

(8) A representative of the Central Government nominated on a recognised Stock Exchange under S. 4 (2) (iii) of the Securities Contracts (Regulation) Act (1956) is a public officer, and therefore, notice under S. 80 is necessary before, filing suit against him in respect of any act done by him in official capacity. ILR (1967) 1 Punj 448.

(9) Where Official Trustee is impleaded in suit relating to rights of cestui que trust and not to any act done by him, no notice is necessary under section. (1881) 7 Cal 499 (504).

(10) Where when act is done, person doing the act is not a public officer within meaning of S. 2, cl. (17), this section has no application. AIR 1935 All 106 (109) (DB).

(11) Deputy Magistrate in charge of municipality under S. 386, Bihar and Orissa Municipal Act (7 of 1922), is not a public officer within meaning of this section. 1954 BLJR 499 (500) (DB).

(12) Where at time of institution of suit defendant has ceased to be public officer, section does not apply. AIR 1942 Mad 288 (288).

(13) Section applies to all acts of public officer whether done bona fide or mala fide. AIR 1950 Pat 32 (32) (DB) ° AIR 1941 Pat 385 (387, 388): 20 Pat 417 (DB) * AIR 1927 PC 176 (183): 51 Bom 725: 54 Ind App 338 ° AIR 1918 Mad 62 (70): 41 Mad 792 (FB) * (1897) 24 Cal 584 (588) (DB) ° (1906) 9 Oudh Cas 275 (280) (DB) * AIR

**Section 80 — Note 3 (contd.)**
1924 All 851 (852): 46 All 884 (DB) ° (1881) 3 All 20 (23) (FB) ° AIR 1924 Cal 145 (148): 50 Cal 992 (DB) ° (1897) 21 Bom 754 (772) (FB) ° AIR 1968 J and K 98 (102): 1968 Kash LJ 374 * AIR 1961 Orissa 31 (33): (1960) 2 Orissa JD 157.

(14) "Any act purporting to be done by such public officer in his official capacity" mean any act intended to seem to be done by him in his official capacity. AIR 1918 Mad 62 (70): 41 Mad 792 (FB) ° AIR 1924 All 851 (852): 46 All 884 (DB).

(15) "Act purporting to be done by such public officer in his official capacity" will not cover acts which are outside the sphere of his duties. (1909) 36 Cal 28 (39) ° AIR 1961 Orissa 31 (33): (1960) 2 Orissa JD 157. (Though he pretends to do the act in his official capacity.)

(16) Following acts cannot be considered as acts purported to be done in official capacity:

(a) Insult or use of defamatory language or assault on subordinate by pblic officer. (1910) 5 Ind Cas 467 (468) (DB) (All).

(b) Assault on witness by invesigating officer. AIR 1928 Bom 352 (362): 52 Bom 832 (FB).

(c) Unauthorised seizure of property. (1909) 36 Cal 28 (39).

(17) Section does not apply where no relief is sought against public officer personally. AIR 1950 Pat 527 (531) (DB) * AIR 1942 Cal 394 (399) (DB) ° AIR 1940 Cal 1 (4, 5) (DB).

(18) The act of convening Court martial and act holding the Court when ordered by a competent authority are acts purported to be done in official capacity. AIR 1946 Lah 247 (254): ILR (1947) Lah 22 (FB).

**4. Suits against Municipalities.** — (1) Supersession of Municipality and vesting of its property in Government do not render the service of notice necessary under the section on Government in suits instituted as it ought to be against Municipality. AIR 1958 Madh Pra 355 (361). (ILR (1955) Nag 276, Overruled.) ° (1961) 2 Guj LR 153. (Reversed on another point in AIR 1965 Guj 293.)

(2) As to whether or not notice to Municipal Corporation is sufficient is a matter of construction of the notice itself. (1965) 67 Bom LR 903: 1966 Mah LJ 334 (DB). (Notice under S. 527 of Bombay Municipal Corporation Act (1888), addressed to Municipal Commissioner in his official capacity held to be proper.)

(3) Suit against Commissioner of Calcutta Corporation — Service of notice under S. 586, Calcutta Municipal Act (33 of 1951) does not dispense with notice required under S. 80. (1960) 64 Cal WN 60.

(4) S. 447 of Hyderabad Municipal Corporation Act (36 of 1950) being in pari materia with S. 80, C. P. Code, it applies as much to suits for injunction as to other kinds of suits. (1968) 2 Andh WR 174 (DB) (AIR 1957 AP 675; AIR 1958 AP 102 and (1966) 2 ALT 21, Foll.)

**5. Suits against Railway administration.** — (1) Where railway is administered by Government, notice under Railways Act alone is not enough and will not be a substitute for notice required under this section. AIR 1947 Cal 26 (27): ILR (1946) 2 Cal 316 * AIR 1928 Bom 421 (424): 52 Bom 548 (DB) ° AIR 1930 All 476 (477): 52 All 837 (DB) ° AIR 1931 Pat 326 (328): 10 Pat 466 (DB).

(2) In case of railway administered by Government notices both under this section and under Railways Act are necessary. AIR 1956 Hyd 62 (63): ILR (1956) Hyd 274 * AIR 1955 Mys 123 (125): ILR (1955) Mys 444 (DB) ° AIR 1935 All 900 (902) (DB) ° AIR 1966 Cal 540 (544) * AIR 1959 All 732 (733): 1950 All LJ 41. (Overruled on another point in AIR 1952 All 891 (FB).) * AIR 1959 Andh Pra 594 (595, 596): 1959-2 Andh WR 403 (DB). (AIR 1952 Mad 795 Dissented from.)

(3) Objects of S. 80, Civil P. C. and S. 77 (old), Railways Act (1890) are quite distinct and separate. 1968 BLJR 301.

(4) In suit against Central Government relating to railway, notice under section must be given to General Manager of the railway. AIR 1957 Mys 94 (95): ILR (1954) Mys 465 (466) * AIR 1952 Assam 88 (90): ILR (1952) 4 Assam 199 (DB) ° (1967) 8 Guj LR 436: ILR (1967) Guj 519. (S. 80 nowhere specifies that notice must be addressed "to the Union of India through the General Manager".) ° (1969) 71 Bom LR 214: 1968 Mah LJ 797 (DB) * AIR 1960 Ker 135 (136): 1959 Ker LT 933 (DB).

(5) Notice addressed to Secretary, Railway Board, Delhi instead of General Manager of Railway concerned is not good notice in law. AIR 1950 Cal 426 (427).

[But see AIR 1962 All 461 (466): 1962 All LJ 309.]

(6) Notice sent to Member-in charge of Railway Board but forwarded by Railway Board to General Manager of Railway concerned was held a proper notice. AIR 1953 Mad 838 (840) ° 1956 All L Jour 730 (731) ° ILR (1965) 17 Assam 115 (FB). (Per Mehrotra, C. J. and Dutta, J., (Nayudu, J. contra) — Absence of evidence to show that notice was forwarded by Railway Board to General Manager concerned — Held, there was no compliance of provisions of section 80.)

[But see AIR 1962 Pat 180 (181, 182): ILR 41 Pat 684 (DB). (AIR 1958 Pat 575, Affirmed; ILR 26 Bom 669 and 53 Mad LJ 81 and AIR 1927 PC 176, Rel. on.)]

(7) Notice addressed to Deputy Chief Commercial Superintendent sent by post — Reply received from that Officer — Held, notice was proper. AIR 1963 Assam 179 (180, 181): ILR (1963) 15 Assam 309 (DB).

**Section 80 — Note 5 (contd.)**

(8) Plaintiff can give combined notice under Railways Act and this section within six months from date of delivery and institute suit two months after such notice. AIR 1954 Pat 424 (425): 33 Pat 214 (DB) ° AIR 1952 Cal 439 (440): ILR (1952) 2 Cal 205 * AIR 1952 Nag 22 (23): ILR (1952) Nag 821 ° AIR 1964 Raj 41 (44): 1964 Raj LW 536 (DB). (Notice given under S. 80 invalid — Notice under S. 77, Railways Act fulfilling requirements of both sections — Suit cannot be thrown out.) ° AIR 1961 All 433 (434) ° AIR 1959 Madh Pra 222 (223): 1959 MPLJ 327 (DB).

(9) Section contemplates that for the purpose of a suit the different railways in India must be treated as separate legal entities and hence notice to one railway cannot be regarded notice to another. AIR 1958 Punj 149 (152): ILR (1958) Punj 467 * AIR 1957 Cal 202 (203) ° AIR 1960 Orissa 154 (156): (1960) 2 Orissa JD 49. (AIR 1960 Mad 58. Diss. from.)

[But see 68 Bom LR 877: 1966 Mah LJ 555 ° AIR 1963 Punj 224 (224): 64 Pun LR 425 (DB). (AIR 1962 Punj 262 (FB), Foll.) ° AIR 1961 Manipur 45 (49) ° AIR 1960 Ker 257 (258): 1960 Ker LT 352 ° AIR 1960 Mad 58 (62, 63): 1959-2 Mad LJ 479 (DB). (AIR 1949 Pat 329, Dissented, AIR 1955 Mad 151, Overruled.)]

(10) Section 80 Railways Act, gives the consignor the choice of claiming his remedy either against the railway administration to which the goods were consigned or against the railway administration on which the loss occurred and bars his right of action, if any, over all other railway administrations over which the goods might have been carried. 1962 Ker LT 341: 1962 Ker LJ 530.

(11) Suit against Government for non-delivery as owner of a particular railway after notice to management of that railway does not fail by non-service of notice upon the despatching railway. AIR 1958 Pat 489 (492): 37 Pat 442.

(12) Where in the case of a railway owned by State Government notice was properly served on the owning State but the railway subsequently became transferred to Central Government a fresh notice on Central Government was held not necessary. AIR 1957 Madh B 108 (109).

**6. Notice condition precedent to suit.** — (1) Court cannot entertain suit instituted without compliance with requirements of section. AIR 1956 Him Pra 9 (13) * AIR 1957 Mys 94 (95): ILR (1954) Mys 465 ° ILR (1955) Madh B 222 (227) ° AIR 1953 Him Pra 123 (124) ° AIR 1927 PC 176 (184, 185): 54 Ind App 338: 51 Bom 725 * AIR 1931 Mad 175 (177): 54 Mad 416 ° ILR (1968) Cuttack 432 (DB) ° (1960) 64 Cal WN 60.

(2) Burden of proving satisfaction of requirements of S. 80 lies on plaintiff. AIR 1960 Cal 264 (266): 64 Cal WN 272. (Overruled on another point in AIR 1964 SC 600.)

(3) When the receipt of notice is not denied but an objection is taken that the notice as served was not a valid and sufficient notice, it is necessary for the Court to look into the notice to come to a conclusion as regards the validity or sufficiency. Where the notice has not been produced nor has any explanation been given for its non-production, the defendant cannot say that notice is not sufficient or invalid. In the circumstances it is proper to hold that the notice under S. 80 is valid and sufficient. AIR 1960 Cal 264 (266, 267): 64 Cal WN 272 (DB). (Overruled on another point in AIR 1964 SC 600.)

(4) If defendant fails to produce notice, Court can draw presumption against him and hold that there was a valid and sufficient notice. AIR 1960 Cal 264 (267): 64 Cal WN 272 (DB). (Overruled on another point in AIR 1964 SC 600.) ° AIR 1959 Raj 231 (231): 1959 Raj LW 301. (Production of copy of Notice by plaintiff permissible.)

(5) Suit may be remanded to give opportunity to plaintiff to adduce evidence where he is prejudiced by defendant's vague plea of illegality of notice under section. AIR 1956 Ajmer 68 (2) (69).

**7. Suits on contracts and suits for injunctions.**— (1) Section has no application to suits founded on contracts. (1901) 25 Bom 387 (394) (DB).

(2) Section is applicable to all forms of action including those in which the whole or part of relief claimed is an injunction. AIR 1927 PC 176 (184, 185): 54 Ind App 338: 51 Bom 725 * AIR 1957 Andh Pra 675 (677): ILR (1956) Andhra 114 (DB) * 1962 Ker LJ 360 ° 1961 Jab LJ 905 ° AIR 1959 All 675 (681): 1959 All LJ 704 (DB).

See the following cases also:

AIR 1934 PC 96 (97): 61 Cal 470 * AIR 1932 Cal 275 (281): 59 Cal 961.

(3) Suit merely for injunction, not based upon any past act of public officer, is not within scope of section and no notice is necessary in such case. (1931) 34 Mad LW 993 (994). (Wherein AIR 1927 PC 176: 54 Ind App 338: 51 Bom 725, was sought to be explained.) ° AIR 1927 Mad 166 (168, 170): 50 Mad 239 (DB) ° AIR 1961 Guj 85 (87): (1961) 2 Guj LR 181 (DB) * AIR 1960 Pat 530 (533): 1960 BLJR 432.

[But see (1967) 2 Mad LJ 131: 79 Mad LW 654. (AIR 1927 Mad 166 and 34 Mad LW 993, Not foll.) ° 1966 Raj LW 541. (Notice under this section is necessary regardless of the fact that the suit is for "act done" or "threatened to be done". AIR 1960 Pat 530 and AIR 1961 Guj 85, Dissented from.) ° (1962) 1 Ker LR 322: 1962 Ker LJ 360. (AIR 1927 PC 176; AIR 1946 Lah 247 and AIR 1957 AP 675, Rel. on; AIR 1927 Mad 166, Diss. from.) * AIR 1946 Lah 247 (254, 255): ILR (1947) Lah 22 (FB) ° AIR 1957 Andh Pra 675 (677): ILR (1956)

**Section 80 — Note 7 (contd.)**
Andhra 114 * AIR 1955 Madh B 75 (75) ° Madh B LJ 1954 HCR 1748 (1749).]

(4) If suit is laid on past act of public officer, fact that injunction is also prayed for will not take case out of operation of section. AIR 1927 PC 176 (184): 54 Ind App 338: 51 Bom 725 ° AIR 1961 Guj 85 (87): (1961) 2 Guj LR 181 (DB).

**8. Form and sufficiency of notice.** — (1) Notice under section need not be in any particular or technical form. ILR (1954) Mys 465 (467) ° AIR 1958 Raj 23 (26): ILR (1957) 7 Raj 686 ° AIR 1934 Pat 346 (348) * AIR 1963 SC 424 (428): (1963) 1 SCR 657 ° AIR 1961 Pat 200 (201).

(2) Although strict compliance with terms of section is necessary it is not necessary to scrutinise the notice in a pedantic manner or in a manner devoid of commonsense. AIR 1958 SC 274 (281): 1958 SCR 781 * AIR 1963 SC 424 (426): (1963) 1 SCR 657 ° AIR 1960 SC 1309 (1311) * (1968) 1 Andh LT 269 (275) ° AIR 1967 Delhi 65 (66) (DB) ° AIR 1967 Madh Pra 239 (243): 1967 MPLJ 506 (DB) * AIR 1961 Cal 626 (634, 635): 65 Cal WN 607 (DB) ° AIR 1961 Pat 200 (201) ° AIR 1961 Punj 358 (360) * AIR 1960 Cal 673 (676) (DB) ° (1960) 64 Cal WN 60 * AIR 1959 Madh Pra 305 (308): 1959 MPLJ 605.

(3) Notice under S. 80 must be reasonably construed. Every venial error or defect cannot be permitted to be treated as a peg to hang a defence to defeat a just claim. AIR 1965 SC 11 (15): (1964) 4 SCR 945.

(4) Notice under section need not set out all details and facts of case. AIR 1955 Bom 98 (98): ILR (1954) Bom 1202 (DB) ° AIR 1959 Andh Pra 192 (194) (DB) ° AIR 1958 Punj 149 (151): ILR (1958) Punj 467 ° AIR 1934 Pat 701 (704): 14 Pat 283 (DB) * (1903) 27 Bom 189 (220) ° AIR 1933 Mad 105 (107, 108) ° AIR 1966 All 333 (337): ILR (1965) 2 All 127 * AIR 1962 All 461 (467, 468): 1962 All LJ 309. ("Cause of action" required to be stated in the notice is not synonymous with "facts constituting cause of action".) * ILR (1962) Madh Pra 566 ° AIR 1961 Madh Pra 339 (340): 1961 Jab LJ 540. (Omission to mention intention to claim declaration of title and damages in addition to possession not fatal.) * AIR 1961 Pat 200 (201) ° AIR 1961 Punj 329 (331) ° (1960) 64 Cal WN 60 * AIR 1959 Madh Pra 305 (308): 1959 MPLJ 605. (Notice should not be construed as if it were a pleading.)

(5) Notice under section must substantially fulfil its object in informing parties concerned generally of nature of suit intended to be filed. AIR 1956 Ajmer 49 (50). (AIR 1949 Pat 93, Dissented from.) ° AIR 1958 Andh Pra 670 (673) * AIR 1958 Punj 351 (353): ILR (1958) Punj 244 ° AIR 1934 Pat 701 (704): 14 Pat 283 (DB) ° AIR 1949 Pat 268 (269) (DB) * AIR 1942 Cal 343 (345): ILR (1942) 1 Cal 211 (DB) * (1878) 3 CPD 423 (428) ° (1845) 13 M and W 361 * AIR 1938 Pat 556 (557): 17 Pat 345 (DB) ° AIR 1965 SC 11 (15): (1964) 4 SCR 945 ° AIR 1963 SC 424: (1963) 1 SCR 657 * AIR 1966 All 333 (337, 338): ILR (1965) 2 All 127. (Particulars in sufficient details of negligence, carelessness or misconduct on the part of the railway administration or its servants must be stated in notice.) ° AIR 1964 Andh Pra 172 (183) (DB) ° ILR (1962) Madh Pra 566 * AIR 1961 Pat 200 (201) ° AIR 1961 Punj 358 (359) (DB) ° AIR 1961 Punj 329 (331) ° AIR 1960 Cal 400 (402, 403): ILR (1960) 2 Cal 366 (DB) * (1960) 62 Pun LR 807 ° AIR 1959 Madh Pra 305 (308): 1959 MPLJ 605 (DB).

(6) Notice under section should state cause of action and relief claimed. AIR 1958 Raj 23 (26): ILR (1957) 7 Raj 686 ° 1955 AMLJ 55 (57) * AIR 1950 Pat 557 (561) (DB) ° AIR 1934 Pat 701 (704): 14 Pat 283 (DB) ° AIR 1943 Bom 138 (139): ILR (1943) Bom 128 (DB) ° (1809) 170 ER 1127 (1128): 2 Camp 196 * AIR 1960 SC 1309 (1312) ° (1968) 1 Andh LT 269 (275) * 1966 Mah LJ 1102 (1106) (FB) ° 1964 All WR (HC) 54 * AIR 1964 Manipur 61 (62) ° AIR 1964 Raj 205 (209): 1964 Raj LW 313 (DB) ° AIR 1959 All 168 (169). (Error regarding essential fact constituting cause of action would vitiate the notice. 1950 All LJ 595 and (1945) 2 Mad LJ 387, Rel. on.)

[See also 1956 Ker L Tim 230 (234) (FB).]

[But see AIR 1938 Nag 415 (417): ILR (1939) Nag 206 ° AIR 1965 Cal 191 (196) * AIR 1963 Mad 362 (365): (1963) 2 Mad LJ 145 (DB) ° AIR 1959 Bom 134 (140): 60 Bom LR 342 (DB). (Reversed on another point in AIR 1962 SC 630.)]

(7) Phrase "cause of action" in section need not be narrowly construed, so as to render notice which informs defendant substantially of ground of complaint insufficient. AIR 1954 Nag 342 (345, 346): ILR (1955) Nag 62 (DB) * AIR 1951 Bom 72 (75) (DB) ° AIR 1950 Pat 366 (368, 369) (DB) ° (1937) 41 Cal WN 92 (96) (DB) * AIR 1938 Pat 556 (557): 17 Pat 345 ° AIR 1967 Andh Pra 338 (349): (1967) 2 Andh LT 141 (DB). (AIR 1927 PC 176 and AIR 1958 Andh Pra 670 and AIR 1960 SC 1409, Rel. on.) ° (1966) 7 Guj LR 589: ILR (1966) Guj 660 ° AIR 1962 All 461 (468): 1962 All LJ 309 ° ILR (1962) Madh Pra 566 ° AIR 1959 Madh Pra 305 (308): 1959 MPLJ 605.

(8) Sufficiency or otherwise of notice is always a question of fact to be determined in view of circumstances of each particular case. AIR 1960 All 530 (530).

(9) Fact that in suit claim made in notice is reduced to a smaller amount does not change cause of action for suit or make notice invalid. AIR 1958 Punj 351 (353): ILR (1958) Punj 244 * (1937) 41 Cal WN 92 (96) (DB) ° AIR 1960 Cal 513 (514, 515): 64 Cal WN 744. (Point conceded.) * AIR 1959 Madh Pra 305 (308): 1959 MPLJ 605 ° AIR 1965 Andh Pra 288 (294) (DB).

Section 80 — Note 8 (contd.)

(Hyderabad suits against Govt. Act (5 of 1320F) was not law corresponding to S. 80 Civil P. C.)

(10) Superfluous matter mentioned in notice but omitted from plaint does not render notice invalid. AIR 1934 Pat 701 (704): 14 Pat 283 (DB).

(11) Where cause of action has not arisen at all, notice under section is not valid. AIR 1953 Assam 162 (167, 168): ILR (1953) 5 Assam 471 (DB) ° AIR 1958 Andh Pra 670 (674) ° AIR 1958 Punj 351 (353): ILR (1958) Punj 444 * ILR (1951) 2 Cal 340 (346, 347) (DB) ° AIR 1943 Bom 138 (139): ILR (1943) Bom 128 (DB) ° AIR 1960 Cal 458 (460): ILR (1960) 2 Cal 597. (AIR 1959 Cal 273 Foll.) * AIR 1960 Cal 673 (676). (Continuing cause of action, arising of — Notice thereafter not premature, though limitation may be computed from a later date.) ° (1960) 64 Cal WN 60. (Resolution by Markets Committee — Corporation approving of resolution — Plaintiff challenging resolution and its approval — Letter by plaintiff to Commissioner of Corporation before approval is not notice.)

(12) Order of assessment to sales tax gives cause of action to assessee to file suit to assail it and to give notice under section and the fact that an appeal has been filed against order does not affect position. AIR 1959 Andh Pra 192 (198) (DB).

(13) Notices in following cases were held not valid notices:

(a) Non-mention of cause of action or intention to file suit. (1912) 16 Ind Cas 445 (446) (DB) (Bom).

(b) Notice merely objecting to or asking for reconsideration of order. (1867) 7 Suth WR 92 (92) (DB).

(c) Notice containing mere report to public officer. AIR 1923 Rang 250 (251).

(14) In a suit against Railway Administration, mere mention of wrong number of railway receipt in notice does not invalidate notice. AIR 1962 All 307 (309): 1962 All LJ 252 ° AIR 1966 All 16 (17) * ILR (1959) 1 Cal 450 ° 1966 All LJ 760 * 1964 All WR (HC) 54. (AIR 1962 All 307, Foll; 1950 All LJ 595, held, no longer good law)

[See also AIR 1961 Pat 200 (202). (Receipt bearing two numbers — Accidental and bona fide error in giving second descriptive and identifying number of receipt in notice — Notice not invalid.) ]

(15) Mistake in stating the station of despatch invalidates the notice. AIR 1961 Pat 334 (337): 1961 BLJR 223 (DB) ° AIR 1959 All 168 (169) * AIR 1964 Pat 373 (374).

[But see AIR 1960 All 530 (530) ° AIR 1961 Madh Pra 220 (223).]

(16) Date of the railway receipt in notice in suit based on it is as important as its number. AIR 1956 Ajmer 49 (50). (AIR 1949 Pat 93, Dissented from.)

(17) Joint claim in notice advanced by two people cannot be deemed to be improper especially when both claims put together do not exceed the amount mentioned in notice. AIR 1957 Mys 94 (95): ILR (1954) Mys 465.

(18) Notice should state names, descriptions and places of residence of all plaintiffs. AIR 1942 Bom 161 (165): ILR (1942) Bom 357 (DB) ° (1912) 40 Cal 503 (509) (DB) * AIR 1969 Assam 84 (87) (DB) °AIR 1965 SC 11 (15): (1964) 4 SCR 945 ° (1968) 1 Andh LT 269 (275) ° AIR 1967 Punj 497 (500) (DB). (Mere fact that an incorrect statement of fact has inadvertently been made in body of notice relating to matter which would make no difference to real issue involved in controversy, cannot render notice invalid.) * AIR 1964 Andh Pra 172 (183) (DB).

[See (1968) 2 SCWR 270: (1960) 1 SCA 429. (S. 80 is not intended to be used as booby traps.) ]

(19) Section 80 requires that there should be identity of the person who issues the notice with the person who brings the suit. AIR 1961 SC 1449 (1452): (1962) 1 SCR 560 * (1967) 69 Punj LR (D) 375 ° AIR 1961 All 176 (177, 178).

(20) Notice stating plaintiff is a partnership firm is not invalid because it omits to state that it is a registered partnership. AIR 1954 Nag 342 (345): ILR (1955) Nag 62 (DB).

(21) Non-registration of firm is only a bar to institution of suit in firm's name but not for giving notice under section. AIR 1957 Assam 159 (160): ILR (1956) 8 Assam 1.

(22) Notice given on behalf of trust without specifying names and addresses of all trustees is not insufficient compliance with section. AIR 1949 PC 143 (146): 76 Ind App 85: ILR (1949) Bom 110.

(23) Notice issued by person in his own name will not be sufficient for suit instituted by him as manager of Hindu joint family. AIR 1949 Mad 416 (417).

(24) Notice issued in name of family firm cannot be construed as notice by managing member of family firm. AIR 1957 Mys 94 (96): ILR (1954) Mys 465 (468, 469) ° 1962 MPLJ 682.

(25) Where notice was given on behalf of firm and suit was brought by firm which was described as joint Hindu family firm through its manager held there was no material variance in description of person who brought suit and person who sent the notice. AIR 1953 Punj 43 (45) (DB).

(26) It is sufficient for plaintiff, a businessman to state in notice his business address. (1948) 52 Cal WN 808 (811, 812).

(27) Notice given by private firm is bad in suit brought by proprietor in his individual capacity. AIR 1956 Pat 478 (481) ° AIR 1961 SC 1449 (1452): (1962) 1 SCR 560. (1957 All LJ 299: 1957 All WR (HC) 384 and ILR 20 Pat 394; AIR 1941 Pat 517, Overruled.) ° AIR 1964 Orissa 198 (202): (1964) 6 OJD 124.

**Section 80 — Note 8 (contd.)**

(28) Notice not given by all plaintiffs is not sufficient. AIR 1947 PC 197 (199): 74 Ind App 223: ILR (1948) Mad 214: ILR (1947) Kar (PC) 362 ° AIR 1944 Mad 544 (545): ILR (1945) Mad 263 (DB) * AIR 1935 Sind 206 (207): 29 Sind LR 404 (DB) * (1912) 40 Cal 503 (510) (DB) ° AIR 1964 Andh Pra 172 (183, 184) (DB).

(29) Right shared by two persons cannot be claimed in Court by person who has not complied with statutory requirement of giving notice. Position is not different where right is claimed by two persons in alternative. 1958-1 Andh WR 76 (77).

(30) Notice given by pleader on behalf of client is sufficient for the section. AIR 1928 Bom 338 (340) (DB). (Obiter.) ° AIR 1958 Cal 183 (186).

(31) Where the notice contained all the particulars required by Section 80, the mere fact that it was signed by some person other than the plaintiff, under the authority of the plaintiff and on his behalf, would not invalidate it. AIR 1968 Pat 188 (190).

(32) Failure to mention exact style under which defendant is to be impleaded is immaterial when notice makes it clear against whom suit is to be filed. AIR 1955 Vindh Pra 1 (2) ° AIR 1958 Madh Pra 314 (316) * AIR 1952 Mad 502 (503) * AIR 1951 Mad 416 (417) * AIR 1947 Pat 81 (83).

(33) Notice which does not state intention to file suit will not constitute valid notice under section. AIR 1958 Punj 351 (354): ILR (1958) Punj 244.

(34) Question as to validity of notice can be allowed to be raised in appeal. AIR 1969 Assam 84 (88) (DB).

**9. Service of notice.** — (1) Notice given conforming to requirements of section as it stood before amendment by Adaptation of Indian Laws Order of 1937, when cause of action arose is valid though it is served after amendment came into force. AIR 1954 Assam 147 (152): ILR (1953) 5 Assam 305 (DB).

(2) Service of notice is not part of cause of action. ILR (1968) Cuttack 424 (DB).

(3) Notice under this section may be served personally or by post. 1891 Pun Re No. 71, p. 341 (349) ° AIR 1965 SC 11 (15): (1964) 4 SCR 945 * (1968) 1 Andh LT 269 (275) * AIR 1968 Orissa 234 (235): 34 Cut LT 823 (DB) • 1966 Him Pra 40 (45).

(4) Delivery of notice personally to the officer concerned is not necessary. Receipt of notice by his duly authorised person is valid. AIR 1964 Orissa 233 (234): 31 Cut LT 1082 * AIR 1967 Madh Pra 239 (242): 1967 MPLJ 506 (DB).

(5) Section does not prescribe any particular form of address. AIR 1954 Nag 342 (344): ILR (1955) Nag 62 (DB) ° AIR 1958 Cal 183 (185).

(6) When the notice was correctly delivered the fact that it was not correctly addressed is not fatal. AIR 1961 Punj 358 (360) * AIR 1967 Madh Pra 239 (242): 1967 MPLJ 506 (DB). (AIR 1961 All 14 and AIR 1955 Pepsu 51, Rel. on.) ° AIR 1964 Raj 41 (46, 47, 48): 1964 Raj LW 536.

[See also AIR 1963 Him Pra 37 (41).]

(7) Notice addressed to Union of India is not invalid though it is to be delivered to or left at office of Secretary to Central Government; such notice delivered in fact is to be taken as delivered to Secretary of Central Government. 1954 BLJR 373 (374).

[See also AIR 1959 Madh Pra 232 (233): 1959 MPLJ 749.]

(8) Notice required to be delivered to Secretary of Central Government may also be addressed to Secretary. AIR 1952 Mad 502 (503) ° AIR 1949 Pat 416 (417): 28 Pat 292 (DB). (AIR 1946 Mad 366: ILR (1947) Mad 36, Disting.)

[See also AIR 1963 Bom 13 (16, 17): 64 Bom LR 446. (Notice addressed to Secretary to Governmnet — No invalidity.)]

(9) Original letter addressed to Director of Consumer Goods — Copy forwarded to Secretary, Civil Supplies Department — Original letter containing endorsement that such copy was sent — Notice held was properly served. AIR 1963 Cal 79 (84): 66 Cal WN 861.

[See however (1967) 1 Andh WR 320 (321): (1967) 1 Andh LT 290 (DB) * AIR 1964 Raj 205 (209): 1964 Raj LW 313 (DB). (Notice under Section 80 served on State of Rajasthan — Copy of notice forwarded to Secretary of Government of India — Does not amount to service of proper notice on Union of India.)]

(10) Where in suit against Central Government notice was acknowledged on behalf of 'Secretary, Railway Board' but it was not shown that he was also 'Secretary to the Central Government', held provisions of section were not complied with. AIR 1953 Punj 120 (124, 125): ILR (1953) Punj 521 (DB) ° AIR 1949 Lah 165 (165)

[But see AIR 1955 Cal 360 (363, 364) (DB). (AIR 1953 Punj 120: ILR (1953) Punj 521; AIR 1949 Lah 165 and First Appeal No. 7 of 1950, D/- 22-4-1952 (Nag), Dissented from.) * AIR 1963 All 276 (277): 1963 All LJ 54 (DB). (AIR 1955 Cal 360, Foll.; AIR 1961 All 14, Disting.) • AIR 1961 All 14 (15, 16): 1960 All LJ 770 (DB). (AIR 1950 Cal 426 and AIR 1953 Punj 120, Dist.) • AIR 1959 Pat 39 (46): 1958 BLJR 504 (DB).]

(11) Service of notice on President of Railway Board who was also ex officio Secretary to Government of India in Railway Department was held proper. AIR 1952 Assam 141 (143): ILR (1951) 3 Assam 279 (DB).

(12) Where on supersession of municipality its property has vested in Government notice under section to Government is necessary to file suit to enforce claim against such property. Such notice addressed to

Section 80 — Note 9 (contd.)
officer-in-charge is not proper. ILR (1955) Nag 276 (280).

(13) The notice under Section 80 must be given to the Collector of the district where the cause of action in whole or in part had accrued. AIR 1966 All 159 (160): (1966) 2 Lab LJ 365.

**10. Waiver of notice and effect.**— (1) Validity of notice can be challenged by a separate application in the suit or in the written statement and not necessarily in reply notice. AIR 1953 Bhopal 28 (29) * AIR 1963 Ker 114 (114, 115): 1962 Ker LJ 1267.

(2) Defendant can waive notice under section. He will also be not estopped by conduct from pleading want of notice. AIR 1956 All 680 (681) (DB). (AIR 1944 Mad 544: ILR (1945) Mad 263 held no longer good law in view of AIR 1947 PC 197: 74 Ind App 223: ILR (1948) Mad 214: ILR (1947) Kar (PC) 362.) ° AIR 1958 Madh Pra 393 (395) ° AIR 1958 Pat 489 (492): 37 Pat 442 * 1954 BLJR 414 (420) ° AIR 1952 Nag 213 (215): ILR (1949) Nag 875 (881) (DB) ° AIR 1950 Pat 366 (370) (DB) ° AIR 1949 Nag 25 (28): ILR (1948) Nag 216 (DB) * AIR 1942 Bom 339 (340) (DB) ° (1907) 34 Cal 257 (282) (DB). (Per Mukherjee, J.) ° AIR 1917 Cal 614 (615) (DB) * AIR 1969 All 161 (162). (Failure of State Government to put in appearance — Notice must be deemed to have been waived.) ° AIR 1967 Cal 461 (468): (1969) 1 Lab LJ 290 (DB) ° ILR (1966) Cut 1 * AIR 1964 All 471 (472): 1964 All LJ 969. (Failure of Government to file any written statement at all — Amounts to waiver of notice.) ° (1964) 68 Cal WN 786: 1963 Cal LJ 75 ° AIR 1963 Pat 190 (194): 1963 BLJR 693.

(3) Government serving notice on plaintiff to make a certain payment by a certain date which was less than 2 months from notice — Suit by plaintiff for injunction restraining Government from realising payment — Shortness of time allowed by Government does not amount to waiver of notice. AIR 1962 Pat 303 (305): 1962 BLJR 374 (DB).

[See however AIR 1963 Pat 190 (194): 1963 BLJR 693.]

(4) Objection as to notice raised in written statement but not pressed at trial and regarding which no issue was raised must be treated as waived. (1907) 34 Cal 257 (282) (DB) ° AIR 1931 Cal 175 (178) (DB) ° (1962) 4 Orissa JD 13 * AIR 1960 Cal 270 (275) * (1959) 25 Cut LT 335: (1959) 1 Orissa JD 239.

[But see AIR 1938 Mad 583 (584) (DB).]

(5) Objection as to notice not raised in trial Court cannot be pleaded in appeal or special appeal. AIR 1952 Nag 213 (215): ILR (1949) Nag 875 (DB) ° (1878) 1 All 269 (271) (DB) * AIR 1934 Pat 354 (355) (DB) ° AIR 1962 All 233 (237) ° AIR 1959 Raj 126 (127): 1959 Raj LW 170 (FB).

(6) Mere failure to raise objection in written statements cannot per se be regarded as waiver, if it was raised before trial commenced and before any prejudice could have been caused to plaintiff. AIR 1925 All 241 (243): 47 All 291 (DB).

(7) Mere negligence in not raising plea as to notice at early stage will not amount to waiver or estoppel unless there is duty of care. AIR 1947 PC 197 (199): 74 Ind App 223: ILR (1948) Mad 214: ILR (1947) Kar (PC) 362 ° AIR 1964 Pat 275 (279, 281, 283): 1964 BLJR 291 (DB).

[See however AIR 1957 Madh B 108 (109).]

(8) The fact that no objections were raised by the Railway administration to the claim made in the notice under S. 77, Railways Act, served on the Chief Commercial Manager, does not amount to waiver of a notice under Section 80 on the General Manager, Railways. AIR 1960 Ker 135 (137): 1959 Ker LT 933 (DB).

(9) Where applicability of section depends on proof of certain facts and Secretary of State does not deny facts alleged in plaint, he would be held to have waived his objection as to proof of those facts. AIR 1941 Pat 517 (519): 20 Pat 394 (DB) ° 1958-2 Andh WR 409 (411).

[See also AIR 1962 Pat 64 (65): 1961 BLJR 752 (DB). (Averments in plaint showing suit as premature for non-compliance of Section 80 — Defendant simply denying service of notice — Does not amount to waiver of notice merely because defendant did not state in his written statement that suit is premature.)]

(10) Objection as to notice cannot be taken by defendant other than Government or public officer for whose benefit notice is intended, or by a transferee from Government. AIR 1942 Bom 339 (340) (DB) ° (1912) 40 Cal 503 (510) (DB) * (1905) 32 Cal 1130 (1134) (DB) ° (1907) 10 Oudh Cas 49 (54) (DB) * AIR 1969 All 161 (162) ° AIR 1964 All 471 (472): 1964 All LJ 969 ° 1964 All LJ 239.

(11) Where in proceedings for the issue of a writ of certiorari by one of several persons interested in the subject-matter, the Government have agreed to waive the requisite notice under Section 80, Civil P. C. and the parties were referred to a regular suit, such a waiver will enure to a subsequent suit filed by others interested in the same subject-matter even though they were not parties to the original application for the issue of a writ of certiorari. The waiver of notice would relate to the impugned subject-matter and not in respect of any particular party. AIR 1960 Mad 81 (82): 72 Mad LW 683.

**11. Notice, if necessary, for amendment of plaint.**—(1) For amendment of plaint which does not alter relief asked for no further notice under section is necessary. AIR 1956 Madh B 98 (99): ILR (1956) Madh

**Section 80 — Note 11** (contd.)
B 80 * (1951) 55 Cal WN (3 DR) 97 (101, 102) ° (1903) 30 Cal 36 (72) (DB). (Confirmed in 32 Cal 605: 32 Ind App 93 (PC).) ° (1966) 7 Guj LR 589: ILR (1966) Guj 660 * AIR 1961 J and K 6 (6, 7).

(2) Where plaintiff adds relief in plaint not covered by notice but later amends his plaint to omit that relief fresh notice will not be necessary. AIR 1934 Pat 701 (704): 14 Pat 283 (DB) ° AIR 1960 Cal 270 (275).

(3) Where amendment introduces a new cause of action not specified in original notice further notice is necessary. AIR 1949 Mad 214 (216) ° (1950) 35 Cal L Jour 364 (369) * (1907) 34 Cal 257 (281) ° (1912) 38 Cal 797 (804) ° 1963 Ker LT 70 ° AIR 1961 J and K 6 (7) * AIR 1960 Cal 270 (275) ° AIR 1959 Cal 585 (594): ILR (1960) 1 Cal 776 (DB). (The introduction of a cause of action or a ground of claim based on Section 65 of the Contract Act, in place of the cause of action based on a valid subsisting contract is an amendment which requires the service of a further notice under Section 80.)

(4) When a new relief is sought, a further notice is necessary. AIR 1961 J. and K. 6 (7).

(5) Where plaint against a person is amended by substituting Government in place of original defendant notice under section is necessary. (1901) 4 Oudh Cas 133 (138) (DB).

(6) For amendment of plaint by adding Government as additional defendant, when such addition would raise question for decision as between plaintiff and Government notice under section is necessary. 1890 Bom PJ 156 reprint p. 386 (386).

(7) Application to add Government as party should state that required notice has been given. 1896 All WN 22 (22) (DB) * AIR 1965 Cal 442 (443): 69 Cal WN 584 (DB).

(8) Where Railway is taken over by Government subsequent to notice given under Section 77, Railways Act, a fresh notice to Government under this section is necessary before filing suit. AIR 1947 Cal 26 (27): ILR (1946) 2 Cal 316. (AIR 1928 Mad 599, Dissent.) ° AIR 1947 Mad 64 (65): ILR (1947) Mad 258 (DB). (AIR 1928 Mad 599, Overruled.)

(9) Notice is not necessary where defendant's interest devolves on Government during suit. AIR 1952 Mad 783 (784): ILR (1952) Mad 446 (DB) ° AIR 1926 All 585 (586) * AIR 1931 Sind 158 (159): 25 Sind LR 200 (DB) ° AIR 1960 Madh Pra 136 (138): 1960 MPLJ 46. (Suit property declared as evacuee property after institution of suit and vesting in custodian during pendency of suit.)

(10) Where Government though not necessary party is added as party during pendency of suit this section will not apply. AIR 1945 Mad 224 (225) (DB).

[See however AIR 1953 Him Pra 123 (124).]

**12. Plaint must aver delivery of notice.**— (1) This section requires that the plaint must contain a statement that such notice has been delivered or left as required. AIR 1965 SC 11 (15): (1964) 4 SCR 945 ° AIR 1967 Tripura 19 (21). (Averment as to service of notice in the schedule portion instead of in the body of the plaint is sufficient compliance with section 80.) * AIR 1959 Cal 273 (274, 276): ILR (1960) 1 Cal 74.

(2) Non-mention of fact of delivery of notice will not necessarily entail dismissal of suit but suit may be proceeded with after amending plaint by adding the statement. AIR 1949 Pat 268 (269) (DB) ° (1904) 8 Cal WN 913 (916) ° AIR 1935 Pat 86 (87). (Distinguishing AIR 1931 Cal 503: 58 Cal 850.) ° (1968) 1 Andh LT 269 (275) ° AIR 1968 Orissa 234 (236): 34 Cut LT 823 (DB) ° ILR (1966) 1 Ker 679 * AIR 1963 Tripura 48 (49, 50) ° 1958 MPLJ 27.

(3) Actual use of word 'deliver' in the averment is not necessary so long as plaint contains statement indicating that notice had been delivered. AIR 1949 Pat 93 (95, 96) * 1958 MPC 127 (130) (DB) ° AIR 1954 All 495 (496) (DB) ° AIR 1952 Mad 502 (503) ° ILR (1962) Madh Pra 566.

[See however AIR 1937 Sind 291 (292): 32 Sind LR 67 (DB).]

(4) Plaint not mentioning that notice under Section 80 was served on defendants — It must be held that they were not served with any notice under Section 80. AIR 1968 J and K 98 (102): 1968 Kash LJ 374.

**13. Suit during currency of notice.** — (1) Suit cannot be instituted before expiry of two months of notice. AIR 1943 Bom 138 (139): ILR (1943) Bom 128 (DB) * AIR 1941 Pat 517 (519): 20 Pat 394 (DB) ° (1897) 24 Cal 584 (588) (DB) ° AIR 1965 SC 11 (15): (1961) 4 SCR 945 * 1968 BLJR 301 ° AIR 1962 All 461 (464): 1962 All LJ 309 ° AIR 1962 Pat 64 (65): 1961 BLJR 752 (DB) * AIR 1961 Punj 150 (151, 152): ILR (1960) Punj 999 (DB). (Period of notice cannot be curtailed on ground that suit will otherwise be barred by limitation.)

(2) Suit instituted before expiry of two months' period but withdrawn with liberty to bring fresh suit can be brought on basis of same notice. AIR 1935 Bom 21 (22, 23): 59 Bom 149 (DB) ° AIR 1963 SC 424 (426): (1963) 1 SCR 657. (Note:— AIR 1961 AP 488 is no longer good law.)

(3) Where two notices have been issued successively, suit brought after expiry of two months from first notice but within two months from second notice, would not be premature if second notice does not cancel or annul first one but merely amplifies it. AIR 1939 Cal 758 (760).

**14. Computation of period of notice.**— (1) Day of delivery of notice must be excluded from two months provided by sec-

**81. Exemption from arrest and personal appearance.**—In a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity

(a) the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree, and,

(b) where the Court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person.

[1882, Ss. 427, 428; 1877, Ss. 425, 428; 1859, S. 72. See O. 27, R. 8.]

**OBJECTS AND REASONS**

"Clause 81.—The Committee thinks that the same measure of protection should be afforded to defendant where the Government undertakes the defence as where Government makes no application for the purpose and it appears to the Committee that the proper protection should be exempt from mesne arrest and his property from mesne attachment."—S. O. R.

**82. Execution of decree.**—(1) [a][Where in a suit by or against the Government, or by or against a public officer in respect of any such act as aforesaid, a decree is passed against the [b][Union] of India or a [c][State] or, as the case may be, the public officer], a time shall be specified in the decree within which it shall be satisfied; and, if the decree is not satisfied within the time so specified [d][or within three months from the date of the decree, where no time is so specified], the Court shall report the case for the orders of the [e][[f][State] Government.]

(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such report.

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**Section 80 — Note 14** (contd.)

tion. AIR 1945 Cal 341 (345) (DB) ° AIR 1943 Mad 284 (286).

(2) Section 10 of General Clauses Act does not apply to computation of time under section. AIR 1943 Mad 284 (286).

(3) Where demanded payment of claim within 30 days from receipt thereof but suit is actually filed long after expiry of statutory period of two months the notice cannot be held to be defective. AIR 1955 Cal 360 (361, 362) (DB) * AIR 1952 Assam 141 (143): ILR (1951) 3 Assam 279 (DB).

[See also 1968 BLJR 568 (DB). (Suit under S. 80, Railways Act, 1890.)]

**15. Variance between notice and plaint.**—(1) Where there is no substantial variation between notice and plaint, maintainability of suit will not be affected. AIR 1917 Cal 614 (614) (DB) ° AIR 1958 SC 905 (909) ° AIR 1959 Andh Pra 192 (194) (DB) * AIR 1958 Andh Pra 670 (674) ° AIR 1938 Nag 415 (417): ILR (1939) Nag 206 * AIR 1967 Andh Pra 338 (349): (1967) 2 Andh LT 141 (DB) ° AIR 1960 Andh Pra 535 (539) (DB) ° AIR 1960 Cal 673 (675). (Disparity between date stated in notice and in plaint is not material.) * AIR 1959 Madh Pra 232 (233).

(2) Where case set up in plaint is different from case stated in notice suit is not maintainable. AIR 1956 Him Pra 9 (13) ° AIR 1955 Ajmer 57 (2) (58) ° 1950 All L Jour 595 (596) * AIR 1916 Cal 66 (67) (DB) ° (1872) 8 Beng LR 265 (275) ° AIR 1963 SC 424 (430): (1963) 1 SCR 657 * AIR 1966 All 333 (338): ILR (1965) 2 All 127. (Allegation of different kind of misconduct and negligence on the part of railway staft in plaint than what is stated in notice — Suit not maintainable. AIR 1938 Pat 556, Not foll.) ° AIR 1960 All 420 (426, 427): 1960 All LJ 193 (DB).

[See also 1956 Ker L Tim 230 (234) (FB).]

(3) Addition in plaint of relief which was not covered by notice will not entail dismissal of suit if plaintiff amend their plaint and proceed with suit without that relief. AIR 1934 Pat 701 (704): 14 Pat 283 (DB).

(4) Where suit is based on railway receipt, recital of wrong number of railway receipt in notice will vitiate suit. 1950 All L Jour 595 (596).

**16. Death of intending plaintiff after notice.**—(1) Legal representative of the intending plaintiff cannot institute the suit on notice given by deceased, who died before instituting suit, but should give fresh notice. AIR 1950 Orissa 257 (260) ° AIR 1930 Bom 367 (1) (367) (DB) * (1903) 25 All 187 (191) (DB).

**17. Exclusion of period of notice for purposes of limitation.**—See Notes on S. 15, Limitation Act (1963).

**SECTION 82 — NOTE 1**

(1) The object of the section is to allow time and opportunity to the Government or public officer to satisfy the decree amicably before execution proceedings are started against them. AIR 1942 Cal 569 (570): ILR (1942) 2 Cal 528 (DB).

(2) Before amendment of S. 82 by the Amendment Act 1956, it was necessary to

g[(3) The provisions of sub-sections (1) and (2) shall apply in relation to an order or award as they apply in relation to a decree, if the order or award—

(a) is passed or made against the b[Union] of India or a c[State] or a public officer in respect of any such act as aforesaid, whether by a Court or by any other authority, and

(b) is capable of being executed under the provisions of this Code or of any other law for the time being in force as if it were a decree.]

[1882, S. 429; See Ss. 80 and 81.]

[a] These words were substituted for the words "where the decree is against the Dominion of India or a Province or against a public officer in respect of any such act as aforesaid" by the Code of Civil Procedure (Amendment) Act, 1949 (32 of 1949), S. 2 [28-4-1949]. The words "Dominion of India or a Province" had been substituted by the A. C. A. O. for "Crown" which word itself had been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "the Secretary of State for India in Council."

[b] Substituted for "Dominion" by A. L. O., 1950 [26-1-1950].

[c] Substituted for "Province," ibid.

[d] These words were added by the Code of Civil Procedure (Amendment) Act, 1956 (66 of 1956), S. 7 [1-1-1957].

[e] Substituted for "Local Government" by the Government of India (Adaptation of Indian Laws) Order, 1937 [1-4-1937].

[f] Substituted by A. L. O. for "Provincial".

[g] Sub-section (3) was added by the Code of Civil Procedure (Amendment) Act, 1949.

**Section 82 — Note 1 (contd.)**

specify the time within which the decree was to be satisfied by the defendant. If this provision was not satisfied the decree was not complete and incapable of execution. AIR 1959 Andh Pra 165 (166) : (1958) 2 Andh WR 513 (DB). (AIR 1950 Cal 247; AIR 1948 Pat 179 and AIR 1953 All 96, Foll.)

[See also AIR 1957 Madh B 50 (52) : 1957 Jab LJ 86 (DB).)]

(3) After the amendment of S. 82(1), by Act 66 of 1956, a time limit may be specified. If it is not so specified, the time limit for the satisfaction is three months from the date of the decree. In either event, if the decree is not satisfied either within the time so specified or within three months of the decree, the Court has got to report the case for the orders of the State Government. There is no change in law in so far as the obligation on the Court to report the case for the orders of the State Government is concerned. AIR 1961 Pat 271 (271, 272) : 1961 BLJR 204. (AIR 1948 Pat 179 and AIR 1950 Cal 247 and AIR 1953 All 96 in so far they hold that the decree is inexecutable in such a case are good law even after the amendment.)

(4) A decree-holder who files an execution petition before the expiry of the period specified for the satisfaction of the decree or before having necessary alterations made in a case where no time is specified would not be entitled to execution costs. AIR 1959 Andh Pra 165 (166): (1958) 2 Andh WR 513 (DB). (Case before amendment of 1956.)

(5) Before amendment by Act (LXVI of 1956) — Decree against State not specifying time for satisfaction of execution is not immediately capable of execution. The right to execute it can arise after expiry of three months from the date of report of non-satisfaction by the Court to the State Government. AIR 1966 Ker 104 (105, 106) : 1966 Ker LT 9 (DB).

(6) A duty is cast on the Court to report the case for orders of the State Government, in case the decree is not satisfied within the stipulated period or within three months from the date of the decree. If the Court had failed to report the case for orders to the State Government, the decree-holder could not be deprived of the costs to which he was entitled. (1964) 1 Andh WR 34 (35): (1964) 1 Andh LT 57.

(7) Where a decree directed the General Manager of the Eastern Railway to withdraw forthwith the order of suspension passed against the plaintiff, the disobedience of the mandatory injunction will not ipso facto constitute contempt of Court if the time prescribed by S. 82(2), Civil P. C. has not expired. There can be no question of any contempt until the procedure laid down in that section has been exhausted. AIR 1960 Cal 454 (455): 1960 Cri LJ 903 (DB).

(8) The provision of S. 82 Civil P. C. as it exists in the State of Jammu and Kashmir applies only to decrees passed in suits referred to in the immediately preceding sections, namely, in Ss. 79, 80 and 81 of the Code and not also to the awards, as proceedings before the District Judge under the Land Acquisition Act which

## [a][SUITS BY ALIENS AND BY OR AGAINST FOREIGN RULERS, AMBASSADORS AND ENVOYS

**83. When aliens may sue.**—Alien enemies residing in India with the permission of the Central Government, and alien friends, may sue in any Court otherwise competent to try the suit, as if they were citizens of India, but alien enemies residing in India without such permission, or residing in a foreign country, shall not sue in any such Court.

Explanation.—Every person residing in a foreign country, the Government of which is at war with India and carrying on business in that country without a licence in that behalf granted by the Central Government, shall, for the purpose of this section, be deemed to be an alien enemy residing in a foreign country.]

[1882; 1877, S. 430.]

[a] The heading and S. 83 were substituted by the Code of Civil Procedure (Amendment) Act (2 of 1951), S. 12 [1-4-1951].

The old heading and Sec. 83 were as follows:

"SUITS BY ALIENS AND BY OR AGAINST FOREIGN RULERS AND RULERS OF PART B STATES

83. (1) Alien enemies residing in India with the permission of the Central Government, and alien friends, may sue in the Courts in the States, as if they were citizens of India.

(2) No alien enemy residing in India without such permission, or residing in a foreign country, shall sue in any of such Courts.

Explanation.—Every person residing in a foreign country the Government of which is at war with India, and carrying on business in that country without a license in that behalf under the hand of a Secretary to the Central Government shall, for the purpose of sub-section (2), be deemed to be an alien enemy residing in a foreign country."

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**Section 82 — Note 1 (contd.)**

culminate in an award are not in the nature of suits referred to in these sections.

(Note.—Sub-section (2) which is added in S. 82 of the Indian Code is not found in S. 82 as it exists in the Code in the State of Jammu and Kashmir). AIR 1960 J & K 59 (61) (DB).

(9) Assuming award under Land Acquisition Act is controlled by S. 82, it will not be nullity for the mere reason that no time is specified in it for its satisfaction. Such award will only be incomplete and some further steps have to be taken to make it executable. AIR 1960 J & K 59 (62) (DB).

(10) Specification of a certain time for payment of decree, is not a part of definition of a decree as per S. 2 (2). Provisions of S. 82 cannot be imported within that definition. AIR 1960 J & K 59 (61) (DB).

### SECTION 83 — SYNOPSIS

**1. Scope.**

**2. Alien enemy.**

**3. Suits by alien enemies.**

### TOPIC INDICATOR

"Alien enemies residing in India with the permission of the Central Government" — See Notes 1 and 3.

"Permission" — Express or implied — See Note 3.

"Person" includes "corporation." — See Note 1 and also Notes on Order 29.

Suits against alien enemies not prohibited — See Note 1.

**1. Scope.** — (1) A foreign corporation can, in its corporate character, sue in the Courts in India even if it is not registered under the Indian Companies Act. (1903) 30 Cal 103 (105, 106).

(2) The section does not preclude suits against aliens not residing in India or affect their right of defence in such suits. AIR 1944 All 97 (101) : ILR (1944) All 118 (DB) * AIR 1917 Cal 838 (841): 43 Cal 1140 (DB).

(3) A citizen of Pakistan who visits India on a category B Visa can file and maintain a suit for damages for breach of a contract against an Indian citizen in an Indian Court in respect of transactions connected with his trade that he carries on in India. AIR 1958 Tripura 25 (25).

**2. Olien enemy.**—(1) The test to determine whether person is an alien enemy, is his place of residence or the place where he carries on business and not his nationality. AIR 1920 Lah 4 (5) : 1 Lah 276 (DB) * AIR 1920 Bom 285 (286, 291, 292) : 44 Bom 61.

(2) The mere fact that a person has been interned by the Government of India does not make that person an alien enemy. AIR 1944 All 97 (100): ILR (1944) All 118 (DB).

(3) A Government based on military force is not the Government contemplated

[a][84. When foreign States may sue.—A foreign State may sue in any competent Court :

Provided that the object of the suit is to enforce a private right vested in the Ruler of such State or in any officer of such State in his public capacity.]

[1882, S. 431, Cl. (b); 1877, S. 431.]

[a] Substituted by the Code of Civil Procedure (Amendment) Act (2 of 1951), S. 12 [1-4-1951].

The old S. 84 was as follows :

"84. (1) A foreign State may sue in any Court in the States :

Provided that such foreign State has been recognized by the Central Government :

Provided, also, that the object of the suit is to enforce a private right vested in the head of such foreign State or in any officer of such foreign State in his public capacity.

(2) Every Court shall take judicial notice of the fact that a foreign State has or has not been recognized by the Central Government."

[a][85. Persons specially appointed by Government to prosecute or defend on behalf of foreign Rulers.—(1) The Central Government may, at the request of the Ruler[b] of a foreign State or at the request of any person competent in the opinion of the Central Government to act on behalf of such Ruler, by order, appoint any persons to prosecute or defend any suit on behalf of such Ruler, and any persons so appointed shall be deemed to be the recognised agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Ruler.

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**Section 83 — Note 2 (contd.)**

by the section. AIR 1946 Mad 328 (329): ILR (1946) Mad 768.

(4) A resident of Pakistan cannot be said to be an alien enemy as Pakistan Government is not at war with India. Such a person can maintain a suit for restitution of conjugal right in an Indian Court even though he may have come to India casually. AIR 1960 Madh Pra 212 (213) : 1961 MPLJ 270.

**3. Suits by alien enemies.**—(1) An alien enemy residing in a foreign country cannot sue in Indian Courts. AIR 1920 Lah 4 (6): 1 Lah 276 (DB).

[See however 1919 App Cas 59 (64, 77, 133.) ]

(2) Where the alien enemy had resided in India from before the outbreak of war and continued to remain after such outbreak without being ordered to remove himself, permission to reside in India was presumed. AIR 1918 Mad 1294 (1295) * AIR 1917 All 374 (375) : 39 All 377.

## SECTION 84 — SYNOPSIS

**1. Foreign State.**

**2. Application of International Law.**

**3. Private rights.**

**1. Foreign State.** — (1) Sikkim is not a fully foreign State. It is India's protectorate enjoying autonomy in regard to its internal affairs. AIR 1958 Cal 203 (207).

(2) A suit would be in the name of the State whether it is a suit filed by a foreign State under S. 84 or is a suit against the Ruler of a foreign State. As a matter of procedure it would not be permissible to draw a sharp distinction between the ruler of a foreign State and a foreign State of which he is the ruler. AIR 1966 SC 230 (234): (1966) 1 SCR 319. (AIR 1962 Cal 387 (DB), Reversed.)

**2. Application of International Law.** — (1) Section 84 and the sections following cannot be construed as overriding principles of International Law. AIR 1962 Cal 387 (396, 397) (DB). (On appeal their Lordships of the Supreme Court in AIR 1966 SC 230 did not express any opinion on this point.)

**3. Private rights.**—(1) The private rights spoken of in this section are rights which may be enforced by a foreign State against private individuals as distinguished from rights which one State in its political capacity may have as against another State in its political capacity. (1885) 11 Cal 17 (24) (DB) * 1888 Pun Re No. 191, p. 491 (500) * AIR 1966 SC 230 (235) : (1966) 1 SCR 319. (AIR 1960 Cal 768 and AIR 1962 Cal 387, Reversed on another point.)

(2) Private right to which the proviso refers is the right vesting in the State; it may yest in the Ruler or in any officer of such a State in his public capacity; but it is a right which really and in substance vests in the State. AIR 1966 SC 230 (235): (1966) 1 SCR 319. (AIR 1960 Cal 768 and AIR 1962 Cal 387, Reversed on another point.)

### Section 85 — Note 1

(1) A recognized agent under this section can validly sign and verify the pleadings on behalf of principal even before

(2) An appointment under this section may be made for the purpose of a specified suit or of several specified suits, or for the purpose of all such suits as it may from time to time be necessary to prosecute or defend on behalf of such Ruler.

(3) A person appointed under this section may authorise or appoint any other persons to make appearances and applications and do acts in any such suit or suits as if he were himself a party thereto.]

[1882, S. 432; 1877, Ss. 37, 38, 417 and 432; 1859, S. 17 — See O. 3.]

[a] Substituted by the Code of Civil Procedure (Amendment) Act (2 of 1951), S. 12 [1-4-1951]. The old S. 85 was as follows :

"85. (1) Persons specially appointed by order of the Central Government at the request of any Sovereign Prince or Ruling Chief whether in subordinate alliance with the Government of India or otherwise and whether residing within or without the State, or at the request of any person competent, in the opinion of the Central Government, to act on behalf of such Prince or Chief, to prosecute or defend any suit on his behalf, shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Prince or Chief.

(2) An appointment under this section may be made for the purpose of a specified suit or of several specified suits, or for the purpose of all such suits as it may from time to time be necessary to prosecute or defend on behalf of the Prince or Chief.

(3) A person appointed under this section may authorise or appoint persons to make appearances and applications and do acts in any such suit or suits as if he were himself a party thereto."

[b] For definition of a Ruler, see Art. 363 (2) of the Constitution and Ss. 87A and 87B, of this Code.

[a][86. **Suits against foreign Rulers, Ambassadors, and Envoys.**—(1) No Ruler of a foreign State may be sued in any Court otherwise competent to try the suit except with the consent of the Central Government certified in writing by a Secretary to that Government :

Provided that a person may, as a tenant of immovable property, sue without such consent as aforesaid a Ruler from whom he holds or claims to hold the property.

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**Section 85 — Note 1 (contd.)**

his appointment, under this section, provided that the appointment is made before the period of limitation for the suit has expired. 1902 Pun Re No. 41 p. 152 (153)* (1903) 25 All 635 (638) (DB) * AIR 1933 Lah 456 (458) (DB).

[See however AIR 1940 Bom 172 (179): ILR (1940) Bom 225 (DB). (25 All 635, Distinguished.)]

(2) The agent appointed under this section can act for his principal even when the latter has not attained majority under the Majority Act, without being appointed as guardian ad litem by the Court. AIR 1925 Cal 513 (515) (DB).

(3) Though sub-section (3) does not require that the appointment should be in writing, there must be some proof that the agent has authorised or appointed another to do the things mentioned in the section. AIR 1940 Bom 172 (179, 180): ILR (1940) Bom 225 (DB).

(4) On a certificate of consent being given to sue a Ruler, the latter can apply to the Central Government under S. 85 for permission to be represented by an Agent in the Court in a specified suit or suits. Such Agent is to be appointed by the Central Government only at the request of the Ruler. AIR 1961 Manipur 40 (43).

**SECTION 86 — SYNOPSIS**

1. **Scope.**
2. **Suits against Rulers of foreign States.**
3. **Consent when to be obtained.**
4. **Suit by tenant of immovable property — Proviso to sub-section (1).**
5. **Waiver of objection to want of consent.**
6. **Inquiry into the validity of consent.**
7. **Effect of non-compliance with the section.**
8. **Sub-section (3).**

**TOPIC INDICATOR**

Defendant becoming Ruler after suit — See Note 3.
Grounds of consent, section, exhaustive of — See Note 1.
Ruler of foreign State — See Section 85.

(2) Such consent may be given with respect to a specified suit or to several specified suits or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the Ruler may be sued, but it shall not be given, unless it appears to the Central Government that the Ruler—

(a) has instituted a suit in the Court against the person desiring to sue him, or

(b) by himself or another, trades within the local limits of the jurisdiction of the Court, or

(c) is in possession of immovable property situate within those limits and is to be sued with reference to such property or for money charged thereon, or

(d) has expressly or impliedly waived the privilege accorded to him by this section.

(3) No Ruler of a foreign State shall be arrested under this Code and, except with the consent of the Central Government certified in writing by a Secretary to that Government, no decree shall be executed against the property of any such Ruler.

(4) The preceding provisions of this section shall apply in relation to—

(a) any Ambassador or Envoy of a foreign State;

(b) any High Commissioner of a Commonwealth country; and

(c) any such member of the staff[b] or retinue of the Ruler, Ambassador or Envoy of a foreign State or of the High Commissioner of a Commonwealth country as the Central Government may, by general or special order, specify in this behalf,

as they apply in relation to the Ruler of a foreign State.]

[1882, 1877, S. 433.]

[a] Substituted by the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951),

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**Section 86 — Topic Indicator (contd.)**

Ruling Chief in private capacity, suit against — See Note 4.

Suit against ruler of State who is also a Governor — See Note 3.

**1. Scope.**— (1) The section relates to an important matter of public policy in India and the express provisions contained therein are imperative and must be observed. AIR 1938 PC 165 (167): 65 Ind App 182 : 32 Sind LR 531 : ILR (1938) All 601. (Reversing AIR 1934 All 740: 56 All 828.) * AIR 1958 Bom 30 (32): ILR (1957) Bom 786.

(2) The provision in S. 86(3) tends to show that what is exempted is the separate property of the Ruler himself and not the property of the Ruler as head of the State. AIR 1966 SC 230 (236): (1966) 1 SCR 319.

[But see AIR 1940 Cal 244 (248): ILR (1940) 1 Cal 344 (DB). (Must be deemed to be no longer good law.) ]

(3) The section as amended by Act 2 of 1951 cannot be held to be invalid on the ground that it creates two classes of persons, that is, those to whom sanction may be granted and those to whom it may not be granted. AIR 1953 Ajmer 56 (57, 58).

(4) The provisions of the section are somewhat supplementary to the provisions of Art. 361 (4) of the Constitution. AIR 1953 Ajmer 56 (58).

(5) The effect of the provisions of Section 86 (1) appears to be that it makes a statutory provision covering a field which would otherwise be covered by the doctrine of immunity under international Law. AIR 1966 SC 230 (236, 237) : (1966) 1 SCR 319.

(6) The section as it stood before 1951 Amendment did not apply to a foreign sovereign. It applied to a Sovereign Prince, Ruling Chief, or an ambassador. 1953 Raj LW 26 (35): ILR (1952) 2 Raj 386 (DB).

(7) While granting certificate under Section 86 no question of International law arises. International law would come in only when two Sovereign States are involved. The former Indian States after their merger with the Indian Union and after the promulgation of the Indian Constitution have ceased to be Sovereign States. AIR 1961 Manipur 40 (43).

(8) A proceeding under S. 14 read with S. 17 of the Arbitration Act, 1940 for the passing of a judgment and decree on an award is not a suit and the parties involved cannot be regarded as 'sued in any Court otherwise competent to try the

S. 12 [1-4-1951]. The old S. 86 was as follows :

"86. (1) Any such Prince or Chief, and any ambassador or envoy of a foreign State, may, with the consent of the Central oGvernment, certified by the signature of a Secretary to that Government but not without such consent be sued in any competent Court.

(2) Such consent may be given with respect to a specified suit or to several specified suits, or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the Prince, Chief, ambassador or envoy may be sued; but it shall not be given unless it appears to the consenting authority that the Prince, Chief, ambassador or envoy—

(a) has instituted a suit in the Court against the person desiring to sue him, or

(b) by himself or another trades within the local limits of the jurisdiction of the Court, or

(c) is in possession of immoveable property situate within those limits and is to be sued with reference to such property or for money charged thereon.

(3) No such Prince, Chief, ambassador or envoy shall be arrested under this Code, and, except with the consent of the Central Government certified as aforesaid, no decree shall be executed against the property of any such Prince, Chief, ambassador or envoy.

(4) The Central Government may by notification in the Gazette of India authorise a State Government and any Secretary to that Government to exercise with respect to any Prince, Chief, ambassador or envoy named in the notification the functions assigned by the foregoing sub-sections to the consenting authority and a certifying officer respectively.

(5) A person may, as a tenant of immoveable property, sue, without such consent as is mentioned in this section, a Prince, Chief, ambassador or envoy from whom he holds or claims to hold the property."

[b] Provisions of sub-sections (1) to (3) shall also apply to such members of the Staff or retinue of the Ruler, Ambassador or Envoy of a Foreign State or of the High Commissioner of a Commonwealth country, as may be included in the Diplomatic List published by the Ministry of External Affairs, from time to time, as they apply in relation to a Ruler of foreign State — S. O. 2016, Gaz. Ind., 17-6-1967, Pt. II, S. 3 (ii), p. 2006.

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**Section 86 — Note 1 (contd.)**

suit, within the meaning of S. 86 (1) read with S. 87B. Such proceeding is not therefore barred by S. 86(1) read with S. 87B. AIR 1965 SC 1798 (1801) : (1965) 3 SCR 201 * AIR 1962 Madh Pra 320 (328, 330): 1961 MPLJ 844 (DB). (Reversed on another point in AIR 1965 SC 1798.)

(9) Suit against Nepal Airlines Corporation for damages. Ambassador of King of Nepal though not a party, claimed immunity as a foreign sovereign on behalf of King of Nepal on the ground that the Corporation was a department of the State. Held Ss. 86 and 87 did not deal with this case, and the Ambassador though not a party could claim the immunity asked for and the suit must be dismissed or not proceeded with. AIR 1966 Cal 319 (324, 325, 333) : 69 Cal WN 767 (DB).

(10) A suit for partition is not a suit within the meaning of this section. AIR 1966 Andh Pra 361 (366) : (1966) 2 Andh WR 121.

(11) Vendee holding power of attorney from H. E. H. Nizam entitling him to enforce the sales. The vendee could implead himself in his own name and provisions of Ss. 86 and 87B did not apply. AIR 1966 Andh Pra 361 (365) : (1966) 2 Andh WR 121.

(12) A proceeding which does not commence with a plaint or petition in the nature of a plaint, or where the claim is not in respect of dispute ordinarily triable in a Civil Court would not be regarded as falling within S. 86. This section does not debar commencement of proceedings for adjudication of an Industrial Dispute for two reasons, neither party to the proceeding is sued by the initiation of the proceeding and the Tribunal is not a Court. AIR 1964 SC 444 (446) : (1964) 5 SCR 1 * AIR 1963 Raj 22 (24) : 1962 Raj LW 669 (DB). (Affirmed in AIR 1964 SC 444.)

(13) Section 86 (1) prescribes a limited liability against foreign States. First limitation is that such a suit cannot be instituted except with the consent of the Central Government. Second limitation is that the Central Government shall not give consent unless it appears that the case falls under one or the other of clauses (a) to (d) of S. 86 (2). AIR 1966 SC 230 (236) : (1966) 1 SCR 319.

**2. Suits against Rulers of foreign States.**— (1) The sanction required by the section is necessary for all suits against a Ruler of a foreign State whether in his private capacity or in his sovereign capacity. AIR 1952 Bom 335 (335) : ILR (1953)

**Section 86 — Note 2 (contd.)**
Bom 237 * AIR 1916 Mad 308 (309, 310): 38 Mad 627 * AIR 1916 Mad 445 (446) (DB) * AIR 1924 All 422 (423, 424): 46 All 355 (DB).

(2) Section 86 (1) applies to cases when suits are brought against rulers of foreign States. Foreign States fall within its scope whatever be their form of Government, whether monarchial or republican. AIR 1966 SC 230 (236): (1966) 1 SCR 319. (AIR 1960 Cal 768 and AIR 1962 Cal 387 Reversed.)

(3) A suit brought against a defendant described as "The Gaekwar Baroda State Railway through the Manager and Engineer-in-Chief" was held to be a suit in reality, though not in form, a suit against His Highness the Gaekwar of Baroda and the provisions of this section applied. AIR 1938 PC 165 (169): ILR (1938) All 601: 65 Ind App 182: 32 Sind LR 531.

(4) Where at the time of the suit filed in 1948, the State of the defendant had merged in the Dominion of India, the defendant could not claim protection under the section. AIR 1955 Bom 449 (449): ILR (1956) Bom 22.

(5) The permission under this section is necessary even for an application for leave to sue in forma pauperis. AIR 1951 All 603 (604, 605) (DB).

(6) The section does not apply to proceedings for letters of administration. AIR 1956 Bom 45 (49): ILR (1955) Bom 912 (DB).

(7) A suit instituted against the family deity of a Raja marfat the Raja as trustee is not maintainable without the permission of the Central Government under Section 86. AIR 1957 Him Pra 16 (20).

(8) When Section 86 (1) refers to a ruler of a foreign State, it refers to the Ruler in relation to the said State and means a person who is for the time being recognized by the Central Government to be the head of the State. AIR 1966 SC 230 (235): (1966) 1 SCR 319.

(9) As a matter of procedure it would not be permissible to draw a sharp distinction between the Ruler of a foreign State and a foreign State of which he is the Ruler. In every case the suit has to be in the name of the State. AIR 1966 SC 230 (234): (1966) 1 SCR 319.

**3. Consent when to be obtained.** — (1) A consent obtained after the institution of the suit will not validate the institution thereof. (1897) 21 Bom 351 (366) * 1909 Pun Re No. 21, p. 45 (50, 51) * AIR 1958 Bom 30 (31, 32): 59 Bom LR 655.

(2) The words "to sue" in the section include every step from the presentation of the plaint to the recovery of judgment. AIR 1953 Ajmer 56 (57) * AIR 1921 Pat 23 (24): 6 Pat L Jour 185 (DB).

(3) A person is 'sued' not only when the plaint is filed but also when the suit remains pending against him. The word 'sued' covers the entire proceeding in an action. It follows that consent of the Central Government is necessary not only for the filing of the suit against the ex-Ruler but also for its continuation from the time consent is required. The prohibition, in Section 87-B, therefore, affects not only a suit instituted after the enactment of Section 87-B but one which though instituted before its enactment, is pending. AIR 1962 SC 73 (76): (1962) 1 SCR 702 * 1966 All LJ 746 (748) (DB). (AIR 1962 SC 73, Foll. AIR 1953 Ajmer 56, Rel. on; AIR 1955 Bom 449, Dist.)

(4) It is not necessary in giving the certificate of consent under Section 86 for the Central Government to name any agent or other person to represent the ruler. AIR 1961 Manipur 40 (43).

(5) There is no provision in Section 86 for the issue of a notice before a certificate is granted. AIR 1961 Manipur 40 (43).

(6) Scope and applicability — Government's consent to sue a former Ruler is no consent to sue his successor — The plaintiff has to obtain the consent afresh — The successor recognised by the President under Article 366 (22) has in his own independent right, the personal immunity from civil action. AIR 1969 Andh Pra 106 (108): (1969) Andh WR 271 (DB).

[But see AIR 1961 Manipur 40 (43). (Separate sanction is not necessary when successor is impleaded as one of the legal representatives.)]

(7) In a suit against Ruler of former Indian State consent of Central Government is condition precedent and cannot be waived and as sub-cl. (2) of S. 86 is not made applicable, there are no limitations placed by law upon the powers of Central Government as regards the grant of consent and the fact that such a Ruler has waived the privileges by submitting to jurisdiction either expressly or by implication can be taken into account in granting its consent. The absence of consent is fatal to the proceeding against the Ruler. AIR 1962 Madh Pra 320 (326, 327): 1961 MPLJ 844 (DB). (Reversed in AIR 1965 SC 1798 on another point.)

(8) In a suit against a Ruler of a former Indian State who is also a Governor in respect of an act done by him in his personal capacity the plaintiff should not only deliver a notice to him under Article 361 (4) of the Constitution but should also obtain the consent of the Central Government before he can sue. AIR 1963 Mys 171 (172): 40 Mys LJ 895.

**4. Suit by tenant of immovable property — Proviso to sub-section (1).** — (1) A suit for a declaration of a heredi-

[a]**87. Style of foreign Rulers as parties to suits.**—The Ruler of a foreign State may sue, and shall be sued, in the name of his State:

Provided that in giving the consent referred to in Section 86, the Central Government may direct that the Ruler may be sued in the name of an agent or in any other name.

[1882, S. 434.]

[a] Substituted by the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), S. 12 [1-4-1951].

The old S. 87 was as follows:

"87. A Sovereign Prince or Ruling Chief may sue, and shall be sued, in the name of his State:

Provided that in giving the consent referred to in the foregoing section the Central Government, or the State Government, as the case may be, may direct that any such Prince or Chief shall be sued in the name of an agent or in any other name."

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**Section 86 — Note 4 (contd.)**

tary proprietary right to remain in possession of lands without payment of rent is not a suit by a tenant of immovable property. AIR 1920 Oudh 203 (204) (DB).

(2) A suit by the plaintiff as co-sharer against the Ruling Chief as a co-sharer for a share of the profits is not a suit brought "as a tenant of immovable property." AIR 1924 All 422 (424): 46 All 355 (DB).

**5. Waiver of objection to want of consent.** — (1) Clause (d) of sub-section (2) of the section makes it clear that the privilege accorded by the section can be waived by the Ruler of a foreign State either expressly or impliedly. ILR (1952) 2 Raj 386 (394) (DB) * AIR 1951 Mad 880 (881) (DB).

(2) The defendant's entering appearance and invoking the jurisdiction of the Court under Order 7, Rule 11 (d) and Section 86, is not sufficient to conclude that they waived their right of immunity by submitting to the jurisdiction of the Court. AIR 1962 Cal 387 (390).

(3) In the case of a Ruler of former Indian State, Section 86 (2) is not made applicable by Section 87-B and therefore the consent of the Central Government is imperative under Section 86 (1) and cannot be waived. AIR 1962 Madh Pra 320 (326, 327): 1961 MPLJ 844. (Reversed on another point in AIR 1965 SC 1798.) * AIR 1966 Andh Pra 361 (366): (1966) 2 Andh WR 121.

**6. Inquiry into the validity of consent.** — (1) The opinion of the Central Government is final on the question whether any of the Clauses (a) to (d) is satisfied in a given instance. AIR 1950 PC 99 (102): 77 Ind App 156 * AIR 1945 Bom 187 (193, 194) (DB) * AIR 1935 Oudh 164 (164) (DB).

**7. Effect of non-compliance with the section.** — (1) A suit against a Ruler of a foreign State instituted without the previous sanction of the Government should be either dismissed or allowed to be withdrawn with liberty to bring a fresh suit duly sanctioned. (1950) 3 Sau LR 95 (102) (DB) * (1897) 21 Bom 351 (366) * AIR 1935 Oudh 164 (164, 165) (DB).

[See also AIR 1962 Madh Pra 320 (327): 1961 MPLJ 844. (Suit against former Indian Ruler of a State — Absence of consent under Section 86 (1) is fatal.)]

(2) A suit against several defendants, one or some of whom alone are privileged, is not bad as against the others for want of sanction as against the privileged defendants. 1909 Pun Re No. 21, p. 45 (51).

(3) Where a suit was instituted against Ruler of a former Indian State without the consent of the Central Government as required by S. 86 read with Sec. 87-B no decree could be passed in the suit against him. But the suit against the firm other than the Ruler was competent, and a decree could be passed against the firm other than the Ruler and such a decree could be executed against the partnership property and against the other partners. AIR 1965 SC 1718 (1721): (1965) 3 SCR 421 * AIR 1959 Bom 529 (531): 61 Bom LR 651 (DB). (Affirmed in AIR 1965 SC 1718.)

(4) A decree passed by a Court without the requisite certificate under S. 86 would be a nullity and is incapable of execution. AIR 1958 Bom 30 (32): ILR (1957) Bom 786.

**8. Sub-section (3).** — (1) The consent required for executing the decree against the property is necessary even if the decree-holder happens to be a tenant of the judgment-debtor. AIR 1935 Cal 664 (665, 666) (DB).

**Section 87 — Note 1**

(1) The section is based on public policy and is imperative. AIR 1938 PC 165 (168, 169): ILR (1938) All 601: 65 Ind App 182: 32 Sind LR 531. (Reversing AIR 1934 All 740: 56 All 828.)

(2) Where the Ruler of a State has severed his connexion with the State, this section does not preclude a suit being filed on behalf of the State by the administrator of the State by virtue of the provisions of Section 85. AIR 1933 Lah 456 (458) (DB).

[a][87A. Definitions of "foreign State" and "Ruler".—(1) In this Part,—

(a) "foreign State" means any State outside India which has been recognised by the Central Government; and

(b) "Ruler", in relation to a foreign State, means the person who is for the time being recognised by the Central Government to be the head of that State.

(2) Every Court shall take judicial notice of the fact—

(a) that a State has or has not been recognised by the Central Government;

(b) that a person has or has not been recognised by the Central Government to be the head of a State.]

[a] Inserted by Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), S. 12 [1-4-1951].

## SUITS AGAINST RULERS OF FORMER INDIAN STATES

[a][87B. Application of Sections 85 and 86 to Rulers of former Indian States.—(1) The provisions of Section 85 and of sub-sections (1) and (3) of Section 86 shall apply in relation to the Rulers of any former Indian State as they apply in relation to the Ruler of a foreign State.

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**Section 87 — Note 1 (contd.)**

(3) This Section applies only to Rulers of Foreign States and is not made applicable to Rulers of former Indian States. AIR 1961 Manipur 40 (43).

(4) Sections 86 and 87 have no relation to the principles of private international law based on the independence of a foreign sovereign or of a foreign State but they afford an additional protection or privilege to a foreign sovereign providing immunity from being sued in the Municipal Courts of India without previous permission of the Central Government being obtained to the institution of such suit.

Where a suit was filed against Nepal Airlines Corporation for damages it was held that the defendant was a department of the Government of Nepal and as such was entitled to claim immunity from the processes of the Indian Courts. The Court had no jurisdiction to entertain the suit on the ground of sovereign immunity claimed by the defendant and the Ambassador of Nepal to the Government of India. The Ambassador of Nepal need not necessarily be a party to the suit for the purposes of claiming the immunity. AIR 1966 Cal 319 (328, 329, 333): 69 Cal WN 767 (DB).

(5) For the purpose of procedure every suit has to be in the name of the State. Not permissible to draw a sharp distinction between the Ruler of a foreign State and a foreign State of which he is the Ruler. AIR 1966 SC 230 (234): (1966) 1 SCR 319. (AIR 1960 Cal 768 and AIR 1962 Cal 387, Reversed.)

**Section 87-A — Note 1**

(1) Ruler of foreign State refers to rules of all foreign States whether monarchial or republican. AIR 1966 SC 230 (236): (1966) 1 SCR 319. (AIR 1962 Cal 387 and AIR 1960 Cal 768, Reversed.)

**Section 87-B — Note 1**

(1) Where at the time of the suit filed in 1948 the State of the defendant had merged in the Dominion of India the defendant was no longer a Sovereign Prince or Ruling Chief and could not claim protection under S. 86. AIR 1955 Bom 449 (449): ILR (1956) Bom 22.

(2) By virtue of this section the Rulers of former Indian States have been given exemption only against being sued and the Code makes no provision with regard to any rights or privileges of such Rulers when they file a suit in a Court in any State in India. AIR 1955 Bom 275 (275, 276): ILR (1955) Bom 581 (DB).

(3) Consent of Central Government is condition precedent for filing suit against Ruler of former Indian State and this cannot be waived. AIR 1962 Madh Pra 320 (326, 327): 1961 MPLJ 844 (DB).

(4) This section does not contravene the provisions of Article 14 of the Constitution. AIR 1955 Bom 195 (197, 198): ILR (1955) Bom 62 (DB) * AIR 1953 Ajmer 56 (57) * AIR 1963 Mys 171 (173): 40 Mys LJ 895. ((1962) 1 SCJ 104: AIR 1962 SC 73 Rel. on.) * AIR 1962 SC 73 (75, 76): (1962) 1 SCR 702.

(5) Section does not contravene Article 14 or Article 19 (1) (f) of the Constitution and is not invalid. AIR 1964 SC 1590 (1592, 1593): (1964) 7 SCR 55 * AIR 1964 SC 1663 (1665): (1965) 1 SCJ 273 * AIR 1969 Andh Pra 106 (107): (1969) 1 Andh WR 271 (DB).

(6) Certificate to sue Ruler of Indian State need not state name of agent to represent Ruler. AIR 1961 Manipur 40 (43).

(7) Commencement of procedings under Industrial Disputes Act for adjudication of industrial dispute between Ruler of former Indian State and his employees

(2) In this section—

(a) "former Indian State" means any such Indian State as the Central Government may, by notification[b] in the Official Gazette, specify for the purposes of this section; and

(b) "Ruler," in relation to a former Indian State, means the person who, for the time being, is recognised by the President as the Ruler of that State for the purposes of the Constitution.]

[a] Added by the Code of Civil Procedure (Amendment) Act (2 of 1951), S. 12 [1-4-1951].

[b] For notification specifying former Indian States, see Gazette of India, 1951, Pt. II-Sec. 3, Ext., p. 281.

## INTERPLEADER

**88. Where interpleader suit may be instituted.**—Where two or more persons claim adversely to one another the same debt, sum of money or other property, moveable or immoveable, from another person, who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made and of obtaining indemnity for himself:

Provided that where any suit is pending in which the rights of all parties can properly be decided, no such suit of interpleader shall be instituted.

[1882, 1877, S. 470. R. S. C., O. 57, Rr. 1 and 2. See O. 35]

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**Section 87-B — Note 1 (contd.)**

are not barred under Section 86 read with Section 87-B. AIR 1964 SC 444 (446): (1964) 5 SCR 1 * AIR 1963 Raj 22 (23, 24): 1962 Raj LW 669 (DB).

(8) On coming into force of Sec. 87-B a suit properly instituted become incompetent from 1-4-1951 for want of consent of the Government of India and ceased to be maintainable in Court thereafter. 1966 All LJ 746 (748) (DB) * AIR 1962 SC 73 (76): (1962) 1 SCR 702.

(9) Institution of proceedings under Section 14 read with Section 17, Arbitration Act, against Ruler of former Indian State — Not a suit — Proceedings not barred, in the absence of consent of Central Government under Sections 86 and 87-B. AIR 1965 SC 1798 (1801): (1965) 3 SCR 201.

(10) For a suit against Ruler of a former Indian State appointed Governor — Compliance with Section 86 read with Section 87-B, Civil P. C. as well as Article 361 (4), Constitution of India necessary. AIR 1963 Mys 171 (172): 40 Mys LJ 895.

(11) Successor of Ruler who has been recognised by the President as the successor of his deceased father, is 'ruler' within meaning of Section 87-B. AIR 1964 SC 1663: (1965) 1 SCJ 273.

(12) Suit may be brought against firm of which a partner is a Ruler of former Indian State without consent of Central Government — Decree can be validly passed against other partners. AIR 1965 SC 1718 (1721): (1965) 3 SCR 421.

(13) Suit against firm — Ruler of former State one of the partners — Want of requisite consent under Sections 86 and 87-B — Firm appearing through counsel and admitting decree — Decree is valid against other partners though a nullity against the ruler. AIR 1959 Bom 529 (531): 61 Bom LR 651 (DB).

(14) Normally, it is not the function of the Central Government to attempt to adjudicate upon the merits of the claim intended to be made by the litigants in their proposed suits; that is the function of civil Courts of competent jurisdiction. Section 87-B authorises the Central Government either to accord consent or to refuse to accord such consent; it is not open to the Central Government to impose any conditions on such consent, or to accord consent only in part, or to refuse it in part, particularly in cases where reliefs are claimed on one and the same cause of action. The further direction contained in the order that consent would not be accorded in respect of certain other properties is clearly invalid. AIR 1964 SC 1663 (1666, 1667): (1965) 1 SCJ 273.

### SECTION 88 — SYNOPSIS

**1. Scope.**

**2. Claims must be bona fide and adverse to one another.**

**3. Claims must be with reference to the same subject-matter.**

**4. Plaintiff should claim no interest in the subject-matter.**

**5. "Charges or costs," meaning of.**

### TOPIC INDICATOR

Appeal — See O. 35, Rr. 3 to 6.
Addition of parties in interpleader suits — See O. 1, R. 10.

## PART V

## SPECIAL PROCEEDINGS

### ARBITRATION

**89. Arbitration.**—[Repealed by Section 49 (1) of the Arbitration Act X of 1940.]

The repealed Section 89 ran as follows.

"(1) Save in so far as is otherwise provided by the Indian Arbitration Act. 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder shall be governed by the provisions contained in the Second Schedule.

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Section 88 — Topic Indicator (contd.)

Adverse claim need not extend to the whole property — See Note 3.
Claim may be legal or equitable — See Note 2.
"Interpleader suit" meaning of — See Note 1.
Plaintiff must be ready to pay and deliver property to rightful owner — See O. 35, R. 2.
Procedure in such suits — See O. 35, R. 4.
Procedure where the debtor is sued — See Note 1.
Protection afforded by the Section — See Note 1.
Receiver in interpleader suit — See O. 40, R. 1.
Suits not really interpleader — See Notes 1, 2 and 4.

**1. Scope.** — (1) Each of the defendants interpleading is virtually in the position of a plaintiff and his claim will be governed by the rules of the Limitation Act. AIR 1925 Mad 497 (562): 48 Mad 1 (DB).

(2) The Court of Wards under Punjab Court of Wards Act can institute interpleader suit against several claimants, when, on the death of any person of whose property the Court of Wards has assumed jurisdiction, the succession to his property is disputed. Such a suit falls prima facie within this section and is not barred by Section 48 of the Punjab Court of Wards Act. AIR 1954 Punj 103 (104): ILR (1954) Punj 769 (DB).

(3) If the pleadings placed by the several claimants to the property, the subject matter of the interpleader suit, should claim that there is some further property which is part of the estate but has somehow or other been omitted from it and should also be brought within the suit, it can be done by allowing an application or amendment to that effect. Neither Section 88 nor Order 35 has required to the contrary. Similarly under Order 1, Rule 10, hte Court below can implead certain persons as defendants. The order of the Court allowing the amendment of the plaint by inclusion of certain property and by addition of some persons as parties, does not, therefore violate any rule of law such as will entitle interference under the extraordinary powers belonging to the High Court under Article 227 of the Constitution. AIR 1961 All 559 (561).

**2. Claims must be bona fide and adverse to one another.** — (1) The defendants must claim the money or property adversely to one another from the plaintiff. AIR 1922 Cal 138 (139) (DB).

(2) A decision given on the claims of the co-defendants in an interpleader suit will operate as res judicata between them. AIR 1928 Oudh 155 (179).

**3. Claims must be with reference to the same subject-matter.** — (1) The rival claims must be with reference to the same debt, sum of money, or other property. (1910) 37 Cal 552 (557) (DB).

(2) It is not necessary that each of the defendants should claim the whole of the subject-matter of the suit. (1863) 1 Mad HCR 360 (361) (DB).

**4. Plaintiff should claim no interest in the subject-matter.** — (1) If the plaintiff has, in some way identified himself with one of the parties in the sense that it will make a difference to him which of the two succeeds, an interpleader suit will not lie. AIR 1952 Mad 564 (564) * AIR 1927 Rang 91 (93): 4 Rang 465 (DB) * (1910) 37 Cal 552 (557) (DB) * (1894) 18 Bom 231 (235).

(2) Section 88, Civil Procedure Code does not indicate that the plaintiff in an interpleader suit shall admit in its entirety the claim against him. To the extent the plaintiff admits his liability, he may ask that the rival claimants interplead where the amount is in dispute, the Court may declare that the plaintiff is discharged from liability only to the extent of the amounts admitted and leave the parties to settle their disputes for the balance otherwise or in other proceedings. The interpleader suit is therefore maintainable. AIR 1966 Andh Pra 92 (95, 96): (1965) 2 Andh WR 403 (DB).

**5. "Charges or costs," meaning of.** — (1) The words "charges or costs" include costs of suit, freight, warehouse rent, dock rent, wharfage, demurrage and other charges. (1894) 18 Bom 231 (236).

(2) A lien can be declared for charges in an interpleader suit. (1863) 1 Mad HCR 360 (361) (DB). (Lien for costs.) * (1894) 18 Bom 231 (235).

(2) The provisions of the Second Schedule shall not affect any arbitration pending at the commencement of this Code, but shall apply to any arbitration after that date under any agreement or reference made before the commencement of this Code."

[1882, Cf. S. 506; 1877, S. 506; 1859, Ss. 312 and 313.]

## SPECIAL CASE

**90. Power to state case for opinion of Court.**—Where any persons agree in writing to state a case for the opinion of the Court, then the Court shall try and determine the same in the manner prescribed.

[1882, S. 527; 1877, Ss. 527, 528; 1859, S. 328. See O. 36, C. P. C. and S. 36, Bombay Court of Wards Act, I of 1905.]

## SUITS RELATING TO PUBLIC MATTERS

**91. [New.] Public nuisances.**—(1) In the case of a public nuisance the Advocate-General, or two or more persons having obtained the consent in writing of the Advocate-General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.

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### SECTION 90 — SYNOPSIS

1. "In the manner prescribed."
2. Re-opening of case.

**1. "In the manner prescribed."** — (1) Parties may enter into an agreement and avail themselves of the provisions of Order 36 for the purpose of obtaining the opinion of the Court on a case stated by them. AIR 1930 Bom 232 (233): 54 Bom 825 (DB).

(2) The special provisions of S. 90 or of Order 36 cannot in view of their express terms, be made applicable to the proceedings under Section 153 of the Companies Act of 1913. AIR 1950 East Punj 111 (118, 124, 125): ILR (1949) East Punj 421 (FB) * AIR 1964 Mys 185 (187): (1963) 2 Mys LJ 137.

**2. Re-opening of case.** — (1) Where a special case is settled by consent it can only be re-opened by mutual consent. AIR 1918 Bom 88 (90): 43 Bom 281.

### SECTION 91 — SYNOPSIS

1. Scope and object.
2. "Public nuisance," meaning of.
3. Obstruction to public highway.
4. Remedies for a public nuisance.
5. Injunction.
6. Saving of rights, existing independently of this section — Sub-section (2).

### TOPIC INDICATOR

Acts offending sentiments — See Note 2.
Effect of adding relator with the Advocate General — See Note 4.
Instances of nuisance — See Note 2.
Nature and form of consent — See Section 92.
Public thoroughfare vesting in panchayat — See Note 1.
Religious processions — See Note 3.
Rights of private individual — See Note 6.
Section does not control Order 1, Rule 8 — See Note 6.
Special damage — See Note 4.

**1. Scope and object.** — (1) Under this section a suit can be maintained even without proof of special damage provided the consent of the Advocate-General is obtained and the other conditions of the section are satisfied. AIR 1958 Andh Pra 586 (591) (DB) * AIR 1957 Andh Pra 44 (47).

(2) The section does not deprive any person of any right which he may have independently of its provisions. AIR 1949 Nag 314 (318): ILR (1949) Nag 94 * AIR 1958 Andh Pra 586 (591) (DB) * AIR 1957 Andh Pra 44 (47) * AIR 1940 Pat 449 (462, 465): 19 Pat 208 (DB) * AIR 1924 All 599 (602, 603): 46 All 470 (DB).

(3) The section has no application to the infringement of the special right of a particular class of the public. AIR 1946 Nag 228 (230): ILR (1946) Nag 246 * AIR 1940 Pat 449 (463, 465): 19 Pat 208 (DB).

(4) Public thoroughfare vesting in Panchayat — Suit by individual entitled to use thoroughfare, for removal of obstruction is maintainable — Plaintiff must prove special damage. ILR (1964) 1 Punj 330 (337, 338).

(5) Suit for removal of encroachment on public street — Section has no application if private individual rights are violated — Individual has no right to use particular portion of street — His right is to make lawful and reasonable user. (1964) 5 Guj LR 1026 (1029, 1030, 1031): ILR (1964) Guj 1102. (AIR 1939

**Section 91 — Note 1 (contd.)**
Mad 691: (1939) 1 Mad LJ 392, Dissent, from.)

(6) In order to attract the provisions of Section 91, C. P. Code, it is not enough to prove that the obstruction caused is to a public road; it should also be proved that the obstruction caused by the defendant constituted a public nuisance. It is, therefore, open to an individual member of the public to bring a suit for removal of obstruction to a public road if it constitutes a nuisance, without establishing special damage to the plaintiff. Even where the obstruction constitutes public nuisance the plaintiff can maintain a suit for its removal without the consent of the Advocate-General as required by Section 91 if the plaintiff proves special damage. 1958 Andh LT 801 (803).

**2. "Public nuisance," meaning of.** — (1) Causing of annoyance to the public in any way is a public nuisance. AIR 1915 Nag 79 (80, 89): 11 Nag LR 132 * (1902) 25 Mad 118 (129) (DB).

(2) Acts, which offend the sentiments of merely a particular class of persons, or annoyance caused to particular persons only, do not constitute public nuisances. AIR 1942 Cal 360 (366): ILR (1940) 1 Cal 533 (DB) * AIR 1916 Nag 81 (82): 12 Nag LR 130 * AIR 1939 All 586 (588): ILR (1939) All 754.

(3) The infringement of the rights of the residents of a village or a section of a community in pathways, wells and banks of rivers, etc., cannot be deemed to constitute a public nuisance. AIR 1956 Andhra 235 (237) * ('49) AIR 1949 Mad 634 (637).

(4) Where a suit is brought on behalf of the members of one community to vindicate their right to take out processions along a certain route, the suit is not one for the removal of a public nuisance. AIR 1934 All 941 (943).

(5) Section 91 is restricted in terms to public nuisances in fact and a constructive public nuisance can be no ground for a suit under that section. (1910) 5 Ind Cas 213 (224) (Bom).

(6) A private nuisance is a Civil wrong but a public nuisance is a criminal offence an act not warranted by law or an omission to discharge legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all the subjects. AIR 1960 All 632 (633).

(7) Public road vested in Panchayat Board — Encroachment by way of necessary construction — Dose not constitute a public nuisance within meaning of Section 91 (1) — Suit for removal — No sanction of Advocate-General necessary. AIR 1962 Mad 431 (432): (1962) 2 Mad LJ 201.

**3. Obstruction to public highway.** — (1) An obstruction to a public thoroughfare is a public nuisance. AIR 1942 Cal 360 (366): ILR (1942) 1 Cal 533 (DB) * AIR 1958 Andh Pra 586 (591) (DB) * AIR 1957 Andh Pra 44 (46, 47) * AIR 1916 Nag 81 (82): 12 Nag LR 130 * AIR 1941 Pat 249 (250) (DB).

(2) A village pathway is not a public highway and a suit for relief in respect thereof is not governed by this section. AIR 1956 Andh 235 (237) * AIR 1949 All 467 (470, 471) * AIR 1949 Mad 634 (637) * AIR 1948 Pat 183 (184) (DB) * AIR 1929 All 790 (790) * 1968 Ker LT 626: ILR (1968) 2 Ker 471 * 1963 Raj LW 481: ILR (1963) 13 Raj 984 (988).

[But see AIR 1940 Pat 449 (465): 19 Pat 208 (DB) * AIR 1937 Pat 54 (54, 55) * AIR 1968 Pat 422 (432): 1968 Pat LJR 449.]

(3) A village pathway is not a public highway and no special damage need be proved in a suit for removal of an obstruction to it. AIR 1968 All 18 (19).

(4) Every class or community has a right to conduct a religious procession with its appropriate observances along a highway so that the procession does not interfere with the ordinary use of such streets by the public and subject to such directions as the Magistrates may lawfully give to prevent obstructions of the thoroughfare or breaches of the public peace. AIR 1925 PC 36 (37, 38): 47 All 151: 52 Ind App 61. (2 Bom 457 and 18 Bom 693, Overruled.) * AIR 1954 Mad 179 (181) * (1883) 6 Mad 203 (216, 219, 226) (FB) * (1903) 26 Mad 554 (570, 577, 581) (FB).

(5) The right to conduct processions does not originate in custom, but is an inherent right, and it is not confined to religious processions. AIR 1944 PC 33 (34): ILR (1944) All 191: ILR (1944) Kar (PC) 181 * AIR 1954 Mad 179 (181) * AIR 1950 Bom 192 (195) (FB).

(6) A suit in respect of an obstruction to a right to conduct processions is one respecting the infringement of a civil right of an individual. No special damage need be proved to maintain such a suit. AIR 1950 Bom 192 (195) (FB) * AIR 1954 Mad 179 (182) * AIR 1946 Nag 228 (230): ILR (1946) Nag 246 * AIR 1925 PC 36 (37, 38): 47 All 151: 52 Ind App 61 * (1910) 34 Bom 571 (574) (DB). (Dissenting from 2 Bom 457 and 18 Bom 693.) * AIR 1917 Mad 122 (124) (DB) * (1883) 6 Mad 203 (225, 226, 227) (FB) * AIR 1916 Nag 81 (83, 84): 12 Nag LR 130 * AIR 1931 All 341 (346): 53 All 484 (DB).

(7) A suit for the removal of obstruction on a highway may be brought by a plaintiff without proof of special damage even where the procedure under this section is not followed. AIR 1949 Mad 634 (635) * AIR 1939 Mad 691 (692): ILR (1939) Mad 870 * AIR 1933 Cal 884 (885): 60 Cal 1003 (DB).

(8) A person in the immediate neighbourhood and entitled to use a public

**92. Public charities.**[c]—(1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the [a][b][State] Government] within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree—

(a) removing any trustee;

(b) appointing a new trustee;

(c) vesting any property in a trustee;

[c][(cc) directing a trustee who has been removed or a person who has ceased to be a trustee, to deliver possession of any trust property in his possession to the person entitled to the possession of such property;]

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**Section 91 — Note 3 (contd.)**

thoroughfare has a special cause of action where it is obstructed and he can sue without proof of special damage. AIR 1942 Pesh 1 (3) * AIR 1941 Pat 249 (250) (DB) * AIR 1937 Pat 620 (621) (DB) * 1967 Raj LW 255: ILR (1966) 16 Raj 1229.

**4. Remedies for a public nuisance.** — (1) Where A obstructs a public highway by occupying and enclosing a portion thereof he may be prosecuted under Section 268 of the Indian Penal Code. This will not preclude a suit under this section by the Advocate-General or by two or more persons with his consent. Nor will the institution of the said two proceedings bar a suit by a private individual whose house abuts on that highway and the access to whose house is cut off by such enclosure by A causing him special damage. AIR 1929 Bom 94 (95): 53 Bom 187 (DB).

**5. Injunction.** — (1) Where the act committed causes damage to private individuals, an injunction will be granted. (1878) 2 Bom 457 (468) (DB) * (1884) 8 Bom 35 (38) (DB) * (1877) 3 Cal 20 (22) (FB) * (1888) 15 Cal 460 (467) (FB).

(2) No mandatory injunction will be granted if the nuisance is only constructive. (1910) 5 Ind Cas 213 (229) (Bom).

(3) In the case of village pathways it is open to a permanent resident entitled to use the pathway to sue for an injunction without proving special damage. The fact that others might have joined the plaintiff under Order 1, Rule 8 does not stand in the way of the plaintiff. AIR 1957 Andh Pra 975 (976).

**6. Saving of rights, existing independently of this section — Sub-section (2).** — (1) The section does not control or restrict the provisions of Order 1, R, 8 under which a person may sue on behalf of others. AIR 1940 Pat 449 (465): 19 Pat 208 (DB) * AIR 1925 Cal 1233 (1233) (DB) * AIR 1934 All 941 (943).

(2) If there is no right of action without proof of special damage, the mere adoption of the procedure laid down in Order 1, R. 8 cannot obviate the necessity of such proof. AIR 1942 Cal 360 (364): ILR (1942) 1 Cal 533 (DB).

(3) Though the residents of a particular locality are commonly interested in the removal of an obstruction to a village path, each has a special right which is protected by Section 91 (2) irrespective of the class of cases covered by Section 91 (1). AIR 1968 All 18 (19).

(4) Section 91 (2) does not confer any special right on a private individual to maintain a suit in respect of a public nuisance. That right exists independently of the section. 1967 Raj LW 255: ILR (1966) 16 Raj 1229.

(5) If the case is not merely a case of public nuisance but is in addition a case of private nuisance then the plaintiff in such a case would be within his rights to bring a suit by himself, and this is exactly what sub-section (2) of Section 91 provides and the plaintiff in such a case need neither allege nor prove special damage.

Where in respect of a public thoroughfare the plaintiffs claimed not only a general right of way, but they also claimed rights of light, air and drainage, it was held, that the suit was competent without the consent of the Advocate-General as it clearly fell under Section 91 (2), Civil P. C. AIR 1963 Raj 25 (32, 33): ILR (1961) 11 Raj 836.

## SECTION 92 — SYNOPSIS

1. APPLICABILITY, OBJECT AND SCOPE.
2. RETROSPECTIVE OPERATION.
3. TRUST, WHETHER EXPRESS OR CONSTRUCTIVE, FOR PUBLIC PURPOSES OF A RELIGIOUS OR CHARITABLE NATURE, NECESSARY.
4. IN CASE OF ALLEGED BREACH OF TRUST OR WHERE THE DIRECTION OF THE COURT IS DEEMED NECESSARY FOR ADMINISTRATION.

(d) directing accounts and inquiries;

(e) declaring what proportion of the trust-property or of the interest therein shall be allocated to any particular object of the trust;

(f) authorizing the whole or any part of the trust-property to be let, sold, mortgaged or exchanged,

(g) settling a scheme; or

(h) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act, 1863, [d][or by any corresponding law in force in the territories which immediately before the 1st November, 1956, were comprised in Part B States], no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.

[1882, 1877, S. 539.]

[a] Substituted for "Local Government" by A.O., 1937 (1-4-1937).

[b] Substituted for "Provincial" by A.L.O., 1950 (26-1-1950).

[c] Inserted by the Code of Civil Procedure (Amendment) Act, 1956 (66 of 1956), S. 9 (1-1-1957).

[d] Inserted by the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), S. 13 (1-4-1951) as adapted by A.L.O. (No. 2), 1956. Prior to 1-11-1956, the following were the Part B States:—

(1) Hyderabad; (2) Jammu and Kashmir; (3) Madhya Bharat; (4) Mysore; (5) Patiala and East Punjab States Union; (6) Rajasthan; (7) Saurashtra; and (8) Travan

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**Section 92 — Synopsis (contd.)**

**5. SUIT MUST BE IN A REPRESENTATIVE CAPACITY ON BEHALF OF THE PUBLIC.**

**6. Who can sue — "Two or more persons having an interest in the trust."**

**7. THE SUIT MUST BE FOR ONE OF THE RELIEFS SPECIFIED IN THE SECTION.**

**8. Effect of adding other reliefs.**

**9. "Such further or other relief as the nature of the case may require."**

10. Declarations.

**11. Removing a trustee — Cl. (a).**

**12. Appointment of a new trustee — Clause (b).**

**13. Vesting any property in a trustee — Clause (c).**

**14. Directing accounts and inquiries — Clause (d).**

**15. Declaring what proportion, etc. — Clause (e).**

**16. Authorising alienation of trust property — Clause (f).**

**17. Settling a scheme— Clause (g).**

**18. Court's power to apply the cy pres doctrine.**

**19. Sanction of the Advocate General.**

20. Nature and form of consent.

21. Consent, when necessary — Effect of consent.

22. Consent not necessary for appeal.

23. Function of the Advocate General.

**24. PARTIES TO A SUIT UNDER THE SECTION.**

**25. COMPROMISE OF SUIT.**

**26. ABATEMENT OF SUIT.**

**27. SUIT, IF CAN BE BROUGHT IN FORMA PAUPERIS.**

**28. SECTION IS MANDATORY — SUB-SECTION (2).**

**29. EXECUTION OF SCHEME DECREE.**

**30. ARBITRATION.**

**31. APPEAL.**

**32. REVISION.**

**33. JURISDICTION TO ENTERTAIN SUIT UNDER THE SECTION.**

**34. DECISION UNDER THE SECTION, WHETHER OPERATES AS RES JUDICATA.**

**TOPIC INDICATOR**

Court not competent to take action under the section unless a regular suit is filed — See Notes 1 and 6.

Court-fee — See Note 1.

Court's power to add parties — See Notes 21 and 24.

Devolution of trust property — See Note 3.

Dispossession of manager of temple on State land by executive order — See Note 1.

Jurisdiction after scheme — See Note 17.

Mutts — See Note 3.

No relief against some of defendants — See Note 9.

core-Cochin. Of these Jammu and Kashmir, Mysore, Rajasthan and Travancore-Cochin (Kerala) are full-fledged States now. Hyderabad is a part of Andhra Pradesh, Madhya Bharat that of Madhya Pradesh State; Pepsu of Punjab and Saurashtra that of Gujarat State.

[e] Ss. 92 and 93 cease to apply to Hindu Religious Institutions and Endowments in Tamil Nadu—see Madras Act 22 of 1959, S. 5 (e) (w.e.f. 1-1-1960). Said sections cease to apply to charitable institutions and Hindu religious institutions and endowments in Andhra Pradesh—see Andhra Pradesh Act 17 of 1966, S. 110 (e) (w.e.f. 28-1-1967).

For institution of suits for relief under S. 92 without obtaining prior consent by the Wakf Board, in U.P., see U.P. Muslim Wakfs Act, 1960, S. 64 and U.P. Gaz., Ext., dated 3-9-1960.

Section 92 does not apply to public trusts in Maharashtra and Gujarat—see Bombay Act 29 of 1950, S. 52.

Section 92 ceases to apply to public trusts in Rajasthan—see Rajasthan Act 42 of 1959, S. 44 (w.e.f. 1-7-1962).

## STATE AMENDMENT

**Uttar Pradesh**

In S. 92, in sub-sec. (1), after clause (b), the following shall be added as a new clause (bb):—

"(bb) for delivery of possession of any trust property against a person who has ceased to be trustee or has been removed."—U.P. Act 24 of 1954, S. 2 and Schedule, item 5, entry 5 (30-11-1954).

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**Section 92 — Topic Indicator (contd.)**

Power to trustee to deal with endowed property — See Note 16.

Relators — If can appeal — See Note 31.

Romilly's Act — See Note 6.

Scheme for Mahomedan Mosque — See Note 17.

Suit against strangers to trust for declaration and possession of trust property — See Notes 1, 7 and 24.

Suit against trespassers — See Notes 1 and 24.

Suit for administration of public charitable trust registered under Companies Act — See Note 1.

Suit to enforce private rights — See Notes 1 and 5.

Suit to remedy infringement of individual right in public trust — See Note 5.

Suit to remove trustee for illegal alienation impleading alienee — See Notes 8 and 24.

Trustee de son tort — See Notes 3 and 24.

Trust denied — Whether section applies — See Notes 3, 4 and 10.

Trust not carried out — See Note 7.

Vague trust — See Note 3.

Validity of section — See Note 1.

**1. Applicability, object and scope.** — (1) The main purpose of Section 92 (1) is to give protection to public trusts of a charitable or religious nature from being subjected to harassment by suits being filed against them. AIR 1966 SC 878 (881): (1966) 2 SCR 151.

(2) This section is intended to be an exhaustive statement of the law applicable to cases in which there has been a breach of trust in relation to a public trust (whether express or constructive) of a charitable or religious nature. AIR 1955 Bom 55 (58) * AIR 1922 All 349 (351, 352): 44 All 622 (DB).

(3) The real test for the applicability of the section is to see whether the suit is fundamentally on behalf of the public for the vindication of a public right and in order to apply the test the Court must look to the substance and not to the form of the suit. AIR 1927 Mad 338 (339) * AIR 1935 Mad 855 (856) * AIR 1940 Pat 425 (428, 429) (DB) * AIR 1926 Mad 1029 (1030).

(4) The allegations in the plaint as originally laid must be looked into to find out whether the suit would come within the mischief of Section 92. Where all the three elements necessary to bring the suit within the mischief of Section 92 were there in the plaint as originally laid, the withdrawal of the offending prayer, namely the prayer coming within one of the sub-clauses (a) to (h) of Section 92 at a later date will not save the suit from the mischief of Section 92. AIR 1963 Ker 191 (193): 1962 Ker LT 662. (AIR 1933 Pat 246. Distinguished.) AIR 1936 Bom 412 and AIR 1939 Sind 13 and AIR 1940 Bom 242, Rel. on.) * AIR 1966 J and K 31 (34): 1966 Kash LJ 105. (Averments in the plaint as a whole and not in written statement to be considered.)

(5) A suit which satisfies all the conditions of the section cannot be taken out

**Section 92 — Note 1 (contd.)**

of the scope of the section merely by the fact that claims for reliefs other than those described in the section are also added therein. AIR 1953 Bom 153 (157) : ILR (1953) Bom 271 (DB) * (1894) 27 Cal 418 (426) (DB) * AIR 1921 Mad 563 (565, 566) (DB).

(6) Where persons in management of a Dharmashala temple and shops on land belonging to State are dispossessed of the said properties by an executive order, such an executive action is destructive of basic principles of rule of law. The proper course is by a suit under S. 92 Civil P. C., even if those persons claim adversely to the trust. AIR 1961 SC 1570 (1574, 1575) : (1962) 2 SCR 69.

(7) Where an order under Section 5 of The Charitable and Religious Trusts Act is not complied with, by virtue of S. 6 of the Act a suit for any of the reliefs mentioned in this section, may be instituted without the previous sanction of the Advocate-General. AIR 1933 Mad 854 (854) : 57 Mad 153 (DB).

(8) When there is no dispute which normally calls for adjudication by way of suit, S. 7 of The Charitable and Religious Trusts Act is the more appropriate provision of law. (1957) 99 Cal L Jour 161 (164).

(9) This section applies to all Courts including the Chartered High Courts. AIR 1955 Bom 55 (58).

(10) The section is not hit by Art. 14 of the Constitution of India. AIR 1955 Raj 166 (167): ILR (1955) 5 Raj 324 (DB).

(11) Amendment of Scheme of trust — Application maintainable under S. 151 — Relief for removal of trustee can also be included provided prior sanction of Advocate General under S. 92 has been obtained. AIR 1966 All 509 (510).

(11-A) As the very basis of a suit under S. 92 is the existence of a public charitable trust, it cannot be said that an issue as to whether there is a public charitable trust or whether the property is private property is merely an incidental issue or a mere argument leading up to the final decision. Unless the Court decides that there is a public charitable trust, it would have no jurisdiction under S. 92 and the plaintiff cannot obtain any of the reliefs which he seeks. Therefore, an issue tried in a suit under S. 92 with regard to the nature of property would operate as res judicata in a subsequent suit filed between the same parties. AIR 1959 Bom 396 (399) : 60 Bom LR 1273.

(12) Consent under Sec. 399, Companies Act (1956) — Has no analogy with consent of Advocate General under S. 92. Civil P. C. (1965) 69 Cal WN 137: (1965) 35 Com Cas 187.

(13) For S. 92 to apply all the three conditions enumerated under S. 92(1) must co-exist, i.e., there must be an express or constructive trust for public purposes of a charitable or religious nature; there must be an allegation of breach of trust or the direction of the Court should be deemed necessary for the administration of such trust: and the suit should have a prayer for any one of the reliefs mentioned in sub-cls. (a) to (h) in Cl. (1) of S. 92. If any one of these conditions is not existing then the suit will not come within the mischief of S. 92. AIR 1963 Ker 191 (192): 1962 Ker LT 662 ** 1968 All LJ 1079 (DB). (Section applies to defence.)

(14) Suit under S. 92, C. P. Code — Some reliefs outside scope of S. 92—Court-fee chargeable on those reliefs have to be paid — Suit against trustees and legal representatives of a deceased trustee for damages to trust property and rendition of account — Damage claimed and balance after accounts valued by plaintiffs themselves — No allegation of dishonesty and malversation — Held the plaintiff must pay ad valorem court-fees. AIR 1964 Madh Pra 259: 1964 MPLJ 758.

(15) Suit for due administration of public charitable trust registered under Companies Act — Jurisdiction of Civil Court to entertain suit not ousted. AIR 1963 Mad 387 (389) : (1966) 2 Mad LJ 56 (DB).

(16) Orissa Hindu Religious Endowments Act (2 of 1952), Ss. 73, 25 and 19 — Alienation of immovable properties of public deities by Marfatdars — Suit by members of public to set aside alienation — Direct approach to civil Court ignoring provisions of S. 25 is barred by Section 73. AIR 1965 Orissa 76: 30 Cut LT 112.

(17) Proceedings under Sec. 142 of the Sikh Gurudwaras Act — Are analogous to those under S. 92, C. P. Code. AIR 1967 Punj 272 (277): ILR (1967) 2 Punj 494.

(18) Bihar Hindu Religious Trusts Act (1 of 1951) is not bad on ground of extra-territorial operation because it takes trusts in Bihar out of purview of S. 92, Civil P. C. AIR 1959 SC 1073 (1079 to 1081) : (1959) Supp (2) SCR 624. (AIR 1954 Pat 262, Reversed.)

(19) In effect, S. 55(1) of Wakf Act (1954) engrafts an exception to S. 92 of Civil P. C. and S. 14 of Religious Endowments Act. AIR 1964 Mad 247 (250, 251); (1963) 1 Mad LJ 281 (DB).

**2. Retrospective operation.** — (1) This section deals with the right of suit (which is a substantive right) as well as with procedure. (1910) 5 Ind Cas 515 (517) (DB) (Mad.)

(2) In so far as the section affects rights of suit it will not have a retrospective operation, but will have such operation so far as it affects procedure. AIR 1942 Cal 343 (348) : ILR (1942) 1 Cal 211 (DB) * AIR 1914 Mad 593 (594) : 37 Mad 184 (DB) * AIR 1928 All 660 (662) : 51 All 30 (DB).

**3. Trust whether express or constructive, for public purposes of a religious or charitable nature, necessary.** — (1) This section deals with completed trusts. AIR

**Section 92 — Note 3 (contd.)**

1917 Mad 1008 (1008) (DB) * AIR 1926 Pat 321 (326) : 5 Pat 539 (DB) * (1904) 1 All L Jour 26 (28) * AIR 1938 Bom 471 (476) (DB).

(2) The section does not apply where there is no trust, express or constructive, for public purposes of a charitable or religious nature. AIR 1922 PC 253 (256) : 49 Cal 459 : 49 And App 100 * AIR 1929 PC 27 (29) * AIR 1957 Mad 735 (736) * AIR 1923 All 247 (248) (DB) * AIR 1916 Bom 281 (282) : 40 Bom 439 (DB) * AIR 1927 Oudh 604 (604) (DB).

(3) A suit for deciding solely whether a trust exists or not is outside the scope of the section. AIR 1941 Cal 68 (72) (DB) * AIR 1926 Pat 321 (326) : 5 Pat 539 (DB) * AIR 1930 Cal 787 (795) : 58 Cal 474 (DB) * AIR 1925 All 683 (685, 686) : 47 All 770 (DB).

(4) In order that the section may apply, the trust must be a public one. AIR 1951 Pat 340 (347) : 28 Pat 890 (DB) * AIR 1957 Andh Pra 10 (11) * AIR 1942 Cal 343 (346) : ILR (1942) 1 Cal 211 (DB) * AIR 1923 Mad 376 (383) : 46 Mad 303 (DB) * AIR 1934 All 315 (317) (DB) * AIR 1934 PC 230 (234) : 61 Ind App 405 : 58 Mad 91 * AIR 1936 Mad 449 (460) (DB).

(5) In the case of public trust the beneficial interest is vested in an uncertain and fluctuating body and the trust itself is of a permanent character. AIR 1952 Trav-Co 323 (325) : ILR (1951) Trav-Co 543 (DB) * AIR 1957 SC 133 (136): 1956 SCR 756 : ILR (1957) 1 All 171 * AIR 1950 All 62 (66) (DB) * AIR 1942 Cal 343 (349) : ILR (1942) 1 Cal 211 (DB) * AIR 1922 All 519 (520) (DB).

(6) Section 92 relates to those charities only in which the public are interested. The endowment must be for a public purpose of a charitable nature and the beneficial interest must be vested in the public in general or a considerable section thereof. The distinction between a private and public trust is that whereas in the former the beneficiaries are specific individuals in the latter they are the general public or a class thereof. While in the former the beneficiaries are persons who are ascertained or capable of being ascertained, in the latter they constitute a body which is incapable of ascertainment. AIR 1967 Andh Pra 181 (182) * AIR 1960 Cal 558 (560). (Public trust — Will creating private religious trust as well as public charitable trust — Substantial income of trust property to be spent on public charity — Case is not outside S. 92.)

(7) The fact that the uncertain and fluctuating body is only a section of the public or caste will not detract from the public character of the trust. AIR 1957 SC 133 (137) : 1956 SCR 756 : ILR (1957) 1 All 171 * 1954 Ker L Tim 666 (668, 669) (DB) * AIR 1953 Mad 220 (221) * AIR 1942 Cal 343 (349) : ILR (1942) 1 Cal 211 (DB) * AIR 1932 Pat 33 (51) : 11 Pat 988 (DB) * AIR 1931 All 212 (214) : 53 All 422 (DB) * AIR 1938 Bom 471 (473) (DB).

(8) In order to determine whether a particular trust is a public trust within the meaning of S. 92 one has to see whether the beneficial interest is vested in an uncertain and fluctuating body of individuals and whether the trust is of a permanent character. Even though the properties were to be used for the benefit of a particular institution. if there was a public user, the trust would become a public trust. Other well-recognized tests to determine a public trust are:

(i) The nature of the object and purpose of endowment, that is, whether it is open to the public generally or not.

(ii) The authority of the donor to derive funds.

(iii) The existence of any reversionary right in the donor, and

(iv) The user by the public. AIR 1961 J. & K 42 (43, 44) * AIR 1952 Orissa 203 and AIR 1938 Bom 471 and AIR 1919 Lah 190 and AIR 1915 All 69 and AIR 1942 Cal 343 and AIR 1948 PC 214, Relied on. *AIR 1963 Ker 191 (192): 1962 Ker LT 662. (Paragraph 1 of the plaint alleged that the Kadeesa Church at Kayamkulam belonged to the Jacobite Syrian Community at Kayamkulam. There was the further allegation in the same paragraph that the Church was bound by a trust in favour of the Jacobite Syrian Community subject to the spiritual supremacy of the Patriarch of Antioch:

Held, that these allegations prima facie showed that the Church was a public trust, because the beneficiaries of the trust formed a section of the general public.)

(9) In order to create a trust there must be a dedication for the purposes of the trust. Whether in any particular case a property has been validly dedicated to a public, religious or charitable trust is a question of fact to be determined by a reference to the terms of the document of dedication where there is one, or, where there is no document or the terms thereof are ambiguous, to the user, treatment, surrounding circumstances and also the feelings and sentiments of the religious community to which the parties belong. AIR 1957 SC 133 (142): 1956 SCR 756: ILR (1957) 1 All 171 * AIR 1957 Bom 168 (169): ILR (1957) Bom 525 (DB) * AIR 1957 Cal 11 (15) (DB) * AIR 1956 Nag 257 (259): ILR (1956) Nag 659 (DB) * AIR 1947 PC 88 (90) * (1905) 32 Cal 129 (141): 31 Ind App 203 (PC) * AIR 1951 Pat 340 (344): 28 Pat 890 (DB). (Terms of the document.) * AIR 1940 PC 7 (10): 67 Ind App 1: ILR (1940) Kar PC 25: 15 Luck 1. (Do.) * AIR 1918 Oudh 207 (208) (DB). (Deed of endowment silent as to nature of trust.) * AIR 1953 Bom 153 (160): ILR (1953) Bom 271 (DB). (User.) * AIR 1953 Cal 716 (716). (Do.) * AIR 1950 Nag 215 (221): ILR (1950) Nag 1 (DB). (Treat

**Section 92 — Note 3 (contd.)**

ment.) * AIR 1920 Mad 42 (43, 52, 53) (FB). (Do.) * AIR 1952 Orissa 203 (206): ILR (1952) Cut 81 (DB). (Surrounding circumstances.) * (1913) 20 Ind Cas 295 (296): 1913 Pun Re No. 38. (Feelings and sentiments.) * AIR 1967 Andh Pra 181 (183). (Dedication — Cattle drinking water at tank during summer or at other times — Inference cannot be drawn that tank was dedicated for use of cattle.) * AIR 1968 Raj 314 (319): 1968 Raj LW 347. (Dedication of garden for public purposes — Within such garden a chatri of an idol, a public well, a dharmshala for use of sadhus and a kitchen — User of entire area for a long time for common good — Presumption that entire area is a public trust.)

(10) In order that the dedication might be a valid one, it is essential that its objects and purposes should not be vague or opposed to law. AIR 1948 East Punj 49 (54) (DB) * AIR 1942 Bom 291 (295) (DB) * (1899) 23 Bom 725 (735): 26 Ind App 71 (PC).

(11) The mere fact that some provision is made for the maintenance of the grantor's kindred and descendants will not render the waqf invalid. AIR 1938 PC 184 (187): 65 Ind App 198: ILR (1938) Lah 383: 32 Sind LR 749.

(12) In cases of dedication of the completest character to a Hindu idol, the idol is regarded as a juridical person capable of holding property, but in dedications of every kind the possession and management still belong to the trustees or shebait in whom is vested the right to sue for the protection of the property. (1905) 32 Cal 129 (140, 141): 31 Ind App 203 (PC).

(13) A "constructive trustee" would include a trustee de son tort who has without title taken upon himself the character of a trustee. AIR 1946 Nag 401 (415) :ILR (1946) Nag 518 (DB) * AIR 1942 Cal 343 (346): ILR (1942) 1 Cal 211 (DB) * AIR 1940 Pat 425 (429) (DB) * AIR 1925 Mad 212 (213) (DB) * (1906) 33 Cal 789 (806, 807).

(14) A constructive trustee would include a person, who, though not a trustee de son tort, holds a fiduciary position whose obligation in such capacity can be enforced in a Court of law. AIR 1953 Cal 716 (716) * AIR 1924 Bom 193 (201, 204) (DB) * AIR 1921 Mad 479 (479) (DB) * (1906) 33 Cal 789 (805, 806) * AIR 1965 Andh Pra 143 (156, 157): (1964) 2 Andh WR 197. (The expression 'trustee' used in Section 92 of the Code is comprehensive enough to include not only trustees but also those who are liable as if they are trustees. In a suit under Section 92 of the Code, the trust property is the subject-matter of the suit. The Court may, for the purpose of enabling the Receiver to take possession and administer the property, by order, remove any person from possession or custody of the property.)

(15) Suit for removal of trustee and appointment of new trustees — Public trust — Appointment of interim receiver — Court is required to consider whether there has been occasion for it to appoint a receiver during pendency of the suit — Receiver can be appointed when the Court finds that the affairs of the Trust have come to a standstill by virtue of no constituted Managing Committee to undertake affairs of the trust. AIR 1959 Bom 275 (279): 60 Bom LR 660.

(16) The question whether the head of a mutt holds the mutt properties as a life tenant or as a trustee must depend upon the conditions on which they were given or which may be inferred from usage and treatment. AIR 1941 PC 130 (132): 68 Ind App 130: ILR (1941) Kar PC 176: 21 Pat 96 * (1910) 33 Mad 265 (272, 277) (FB).

(17) The head of a mutt is not a "trustee" but is answerable as a trustee for its administration. AIR 1941 PC 130 (132): ILR (1941) Kar PC 176: 21 Pat 96: 68 Ind App 130 * AIR 1941 PC 1 (3): ILR (1941) Mad 175: ILR (1941) Kar PC 1: 67 Ind App 448 * AIR 1922 PC 123 (126): 48 Ind App 302: 44 Mad 831 * AIR 1927 Mad 614 (617): 50 Mad 567.

(18) 'Political purpose' in the sense of propaganda for achievement of political objective, whether a charitable purpose, as being one for advancement of an object of general public utility within Section 9 (4) — Trust deed to carry out wishes of Lokmanya Tilak as expressed in his will relating to Kesari Printing Press Newspaper trust for spreading political education through newspapers Kesari and Maharatta) to make people alive to their political rights and to arouse them to demand changes in structure of administration — Construction — Kesari and Maharatta Trust held as 'public' trust as defined in the Act. AIR 1962 SC 1589 (1602, 1603): (1963) 2 SCR 625.

(19) Public Trust — Construction — Trust for Samaradhanai — Powers of Court — Relief can be granted even in case of private trusts. AIR 1960 Mad 467 (474) (DB).

(20) Public trust — Cosmopolitan institution — Sri Mathrubhutheswara Shrine in Sri Ramanasramam is not temple within Section 6 (17) of Madras Hindu Religious & Charitable Endowments Act— Fit case for framing scheme under Section 92, C. P. Code. AIR 1961 Mad 265 (274): (1960) 2 Mad LJ 121 (DB).

**4. In case of alleged breach of trust or where the direction of the Court is deemed necessary for administration. —** (1) A suit under Section 92 can only be instituted on the ground either that

**Section 92 — Note 4 (contd.)**

there has been a breach of trust or that the direction of the Court is deemed necessary for the administration of the trust. AIR 1952 SC 143 (144): 1952 SCR 513 * AIR 1942 Bom 125 (128): ILR (1942) Bom 293 * AIR 1937 Cal 67 (80): ILR (1937) 1 Cal 515 (DB) * AIR 1938 Mad 999 (1004): ILR (1939) Mad 121 (DB) * (1900) 24 Bom 170 (181) (DB) * AIR 1932 Bom 65 (65) (DB) * AIR 1919 Cal 179 (180) (DB) * AIR 1939 Mad 757 (760, 762) (DB) * AIR 1968 Punj 463 (466): 1968 Cur LJ 480 (DB). (To invoke jurisdiction of Court plaint must allege either breach of trust or necessity of direction of Court — Allegations in plaint give jurisdiction to Court — Once Court has jurisdiction proof of allegation of breach of trust is not necessary as condition precedent for grant of any relief contemplated by Section 92.) * (1967) 11 Law Rep 313 (DB). (Where in a suit under Section 92 of the C. P. Code brought against some of the defendants who were not trustees on the allegations that some of them had committed a theft of the idol and the trial Court dismissed the suit on the ground that the theft was not proved.

Held, that the finding regarding the theft could not be properly recorded in the suit. However as the evidence disclosed a sorry spectacle in regard to the administration of the temple and its management a direction of the Court for proper administration of the temple had to be issued, irrespective of the truth of the allegation of plaintiffs regarding theft of idol by some of the defendants. Thus there ought to be a decree in the suit for the preparation of a scheme for the proper administration of the trust.) * AIR 1961 Cal 411 (419). (When the material allegation in the plaint on which the cause of action is based, is that the appointment of the trustee is invalid, suit for removal of the trustee is outside S. 92.)

(2) A trustee setting up an adverse title of his own in the trust properties is guilty of a breach of trust, within the meaning of the section. AIR 1922 PC 325 (332): 45 Mad 565: 49 Ind App 237 * (1912) 17 Ind Cas 779 (780) (DB) (Bom).

(3) Where a trust is partly public and partly private and a breach of trust is alleged in regard to the purposes of the trust which are of a private character, this section does not apply. AIR 1933 Rang 254 (258): 1939 Rang LR 140 (150).

(4) The mere appointment of a mutwalli is not such a "direction" as is contemplated by the section. AIR 1947 Nag 31 (33): ILR (1946) Nag 646.

(5) The section contemplates cases where the direction of the Court may be necessary even though there has been no breach of express or constructive trust. (1950) 28 Mys L Jour 171 (176) (DB) * AIR 1934 Bom 26 (27, 28) (DB).

(6) Applicability and scope — Suits by Temple against several parties challenging alienations effected by previous trustees — Maintainability — Question of jurisdiction not pleaded by defendants — Power of trial Court to decide. ILR (1958) Mys 736.

**5. Suit must be in a representative capacity on behalf of the public.** — (1) Section 92 applies only where the suit brought is representative in its nature. ILR (1954) 6 Assam 361 (364) (DB) * AIR 1940 Cal 376 (377) (DB) * AIR 1917 Mad 389 (390): 40 Mad 110 (DB) * ILR (1964) 2 All 191. (Reversed on another point in AIR 1969 SC 135.)

(2) Where a person sues to remedy a particular infringement of his individual right in a public trust, the suit is not within the section. AIR 1945 All 69 (70): ILR (1944) All 561 (DB) * (1906) 33 Cal 789 (807) * AIR 1922 Mad 17 (21): 45 Mad 113 (FB) * AIR 1931 Lah 727 (728) (DB) * AIR 1931 Nag 198 (199, 200): 27 Nag LR 299 * AIR 1939 Mad 757 (759): 1939 Mad WN 418 (420) (DB).

(3) Object of the section is not to determine the conflicting rights of private individuals but to devise the method for fully carrying out the purposes of the trust. AIR 1916 PC 132 (136): 43 Cal 1085: 43 Ind App 127.

(8) The right of the plaintiff to be himself a trustee or to share in the management of the trust or to see that certain trusts are managed by persons entitled to manage them, are all individual rights, the enforcement of which falls outside the scope of the section. AIR 1922 All 499 (500): 44 All 721 (DB) * AIR 1931 Mad 801 (802): 54 Mad 1011 (DB) * AIR 1931 Rang 322 (324): 9 Rang 459 * AIR 1938 Lah 869 (874) (DB) * AIR 1947 Oudh 17 (22): 21 Luck 539 (DB) * AIR 1940 Cal 376 (377) (DB) * (1906) 33 Cal 789 (808) * AIR 1919 All 335 (336) (DB) * AIR 1939 Mad 594 (594).

(5) Where a person whose individual rights are affected sues a trustee for reliefs specified in the section, the suit is nevertheless one which is not governed by the section. AIR 1943 Mad 466 (469): ILR (1943) Mad 619 (FB) * AIR 1958 Mys 28 (31): ILR (1957) Mys 130 (DB) * AIR 1957 Andh Pra 964 (965) * AIR 1954 Trav-Co 51 (52): ILR (1953) Trav-Co 112 (DB) * ILR (1954) 6 Assam 361 (364) (DB).

(6) One trustee suing his co-trustee for accounts sues only in his individual capacity and the suit will, consequently, be outside the scope of the section. AIR 1943 Mad 466 (469): ILR (1943) Mad 619 (FB) * AIR 1922 Mad 17 (18, 19, 20): 45 Mad 113 (FB) * AIR 1938 Mad 92 (94): ILR (1938) Mad 39 (DB) * AIR 1969 Delhi 75 (79) * AIR 1963 Punj 187 (192): 65 Punj LR 236 (DB).

**Section 92 — Note 5 (contd.)**

[But see AIR 1949 Bom 351 (356) * (1892) 16 Bom 626 (628, 629) * AIR 1918 Bom 134 (136): 42 Bom 742 (DB) * AIR 1924 Bom 518 (519) (DB).]

(7) The mere fact that the plaintiffs in a suit are trustees will not necessarily preclude the application of the section if the reliefs sought relate not to the personal rights of the trustees but to the advancement of the interests of the institution itself by securing more efficient management. AIR 1935 Mad 855 (856) * AIR 1952 Trav-Co 323 (326): ILR (1951) Trav-Co 543 (DB).

(8) Scope — Suit by an idol for declaration of title and possession of property from a person in illegal possession — Section 92 is no bar — Even worshipper can sue when cause of action is due to shebait acting adversely. AIR 1967 SC 1044 (1046, 1047): (1967) 2 SCR 618 * AIR 1965 Madh Pra 3 (3): 1964 MPLJ 843. (Suit by an idol for possession of its property or property it claims as its own — Section does not apply.)

(9) Suit by trustee against stranger to recover trust property — Section does not apply — Suit is maintainable even without the consent of the Advocate-General. AIR 1964 Punj 426 (426): 1964 Cur LJ 222. (AIR 1941 PC 1 and AIR 1944 Cal 163, Rel. on.)

(10) Property dedicated to Mosque — Property in possession of wife of deceased executant of wakf — Wife has no right to occupy the property and she is only a stranger — Suit by plaintiff-mosque to recover possession — Section 92 has no application and consequently consent of Advocate-General for filing of suit not necessary. AIR 1969 Mys 103 (111): 16 Law Rep 271.

**6. Who can sue — "Two or more persons having an interest in the trust." —** (1) Unless a person, other than the Advocate-General, desiring to institute a suit under this section, has an interest in the trust even the written consent of the Advocate-General will not be of any avail. AIR 1948 East Punj 49 (57) (DB) * AIR 1957 Mad 597 (599) * AIR 1924 PC 221 (223): 47 Mad 884: 51 Ind App 282.

(2) The interest required under this section must be a clear interest in the particular trust over and above that which men may be said to have by virtue of their religion. It must be a real, substantive and an existing interest and not merely a remote, fictitious or a contingent one, though it need not be a direct interest in the sense that only a beneficiary can institute a suit. AIR 1950 All 62 (65) (DB) * AIR 1942 All 315 (317, 318) (DB) * AIR 1919 Mad 384 (396): 42 Mad 360 (SB) * AIR 1924 PC 221 (224): 51 Ind App 282: 47 Mad 884 * AIR 1923 Lah 518 (519) (DB) * (1897) 24 Cal 385 (390) (DB) * AIR 1927 Mad 462 (464): 50 Mad 726 (DB).

(3) It is not necessary that the plaintiffs should prove that they have interest in every part of the property comprised in the trust. If any item of property is not subject to the trust it would be excluded from the operation of the decree. AIR 1952 Trav-Co 134 (135): ILR (1952) Trav-Co 83 (DB).

(4) Whether a person has an interest in a particular trust has to be determined on the facts bearing on the relation of the person to the trust with reference to which the suit is brought. AIR 1953 Trav-Co 390 (391): ILR (1952) Trav-Co 781 * AIR 1942 All 315 (317) (DB) * AIR 1921 Mad 563 (564) (DB) * AIR 1968 Raj 314 (320): 1968 Raj LW 347. (Persons who, not only made contribution or offerings but devoted their time and energy for the preservation of trust property, are persons interested in the trust within the meaning of Section 92.)

(5) The founder and his representatives or persons of same sect and form of religious worship as that of the founder of the religious endowment for carrying on the sectional worship, so also persons who have contributed to the funds of a trust, or who have devoted time and energy to the affairs of the trust are persons having interest in the trust. AIR 1944 All 1 (3): ILR (1944) All 20 (DB) * AIR 1921 Mad 563 (564) (DB) * AIR 1924 PC 221 (224): 51 Ind App 282: 47 Mad 884 * AIR 1935 Pat 111 (115): 14 Pat 379 (DB) * AIR 1925 Mad 1011 (1012) (DB) * AIR 1932 All 701 (709) (DB) * AIR 1920 Mad 238 (240) (DB).

(6) Trustees of the trust are within the section. AIR 1925 Mad 820 (821) (DB) * AIR 1935 Mad 855 (856).

(7) Actual worshippers at a temple or mosque have an interest in the trust. AIR 1956 All 207 (210) * (1948) 53 Mys HCR 133 (137) (DB) * AIR 1921 PC 84 (86): 48 Ind App 1: 44 Mad 283 * (1897) 24 Cal 418 (427) (DB).

(8) A suit under this section must be instituted by two or more persons having an interest in the trust. AIR 1942 Bom 125 (128): ILR (1942) Bom 293 * (1908) 10 Bom LR 87 (88) (DB).

(9) The fact that two persons are father and son and members of a joint Hindu family would not convert them into one person for the purposes of this section. AIR 1944 All 1 (3): ILR (1944) All 20 (DB).

(10) Nature of interest — Institution running a free kitchen serving free food to visitors — Residents of the village where such food is served do not have any interest entitling them to file suit under Section 92 — Institution proved to be meant for Nirmala Sadhus— Plaintiffs as lambardars and followers of Sikh religion cannot be said to have interest entitling them to file the suit, as Nirmala Sadhus are not Sikhs — Even in their capacity as lambardars they cannot be

**Section 92 — Note 6 (contd.)**
said to have such interest. AIR 1967 SC 1415 (1417, 1418): (1967) 2 SCR 739.

**7. The suit must be for one of the reliefs specified in the section.** — (1) The section is limited in its application to suits for reliefs specified in the section. AIR 1952 SC 143 (144): 1952 SCR 513 * AIR 1947 Nag 233 (235): ILR (1947) Nag 819 * AIR 1935 Mad 825 (826): 58 Mad 988 (FB).

(2) Unless a suit prays for a relief specified in the section the section will not apply. (1955) 8 Sau LR 204 (207) * AIR 1958 Mys 28 (31): ILR (1957) Mys 130 (DB) * AIR 1957 Andh Pra 964 (965) * AIR 1952 Punj 386 (386) * AIR 1942 Cal 343 (347): ILR (1942) 1 Cal 211 (DB) * 1941 Nag L Jour 587 (588) (DB) * AIR 1933 Pat 246 (247): 13 Pat 65 * AIR 1929 Bom 153 (156) (DB).

(3) If in substance a relief specified in the section is even impliedly asked for, the section will apply. AIR 1927 Mad 886 (886) (DB) * (1906) 33 Cal 789 (809, 810) * AIR 1939 Mad 102 (105).

(4) Each of the three conditions specified in Section 92 must be satisfied in order that the suit may be filed in the manner provided by the section, one cannot evade the section simply by adding certain inconsequential reliefs not allowed by the section when the suit is clearly within the scope of the section. AIR 1960 Cal 558 (559).

(5) Suit claiming a declaration that appointment of defendant trustees was not in accordance with will and as such void — Court invited to adjudicate lease granted by defendant trustees as void and make an order directing its cancellation and delivery — Injunction also claimed against executor and lessees — Held, that reliefs claimed were not proper reliefs which could be claimed under Section 92. AIR 1960 Cal 558 (561).

(6) Private trust — Breach of trust or mismanagement on part of trustee — Suit can be brought in Civil Court. AIR 1968 SC 915 (917): (1968) 2 SCR 897.

(7) If a party intending to institute a suit under Section 92 of the Code, improperly introduces in the plaint of the intended suit reliefs that are not permitted by the section, he can hardly complain that sanction, though applied for, has been refused but the fact that some of the reliefs cannot be granted because of the non-compliance with the provisions of Section 92 of the Code cannot disentitle the plaintiff to get other reliefs which can well be claimed in an ordinary suit. AIR 1960 Cal 558 (561).

(8) It is no doubt true that where the reliefs sought for in a suit fall within the ambit of Section 92 of the Civil Procedure Code, it will have to be struck off the file if the sanction of the Advocate-General has not been obtained as required by the law. But it is equally settled that where such a suit also includes other reliefs which do not fall within the scope of Section 92 of the Code, it need not be struck off the file as a whole. Where the reliefs are inextricably mingled the problem is certainly difficult in permitting the plaintiff to elect the relief not vitiated by the lack of sanction as required by Section 92. Where there are averments to justify the grant of an independent relief the Court may even permit amendment of the plaint in suitable cases. AIR 1965 Mad 531 (531, 532): (1965) 2 Mad LJ 231.

**8. Effect of adding other reliefs.**— (1) A suit for a relief specified in the section will not be taken out of the scope of the section merely because a subordinate or consequential relief, not specified in the section, is asked for in addition to a relief so specified. AIR 1942 Bom 291 (293) (DB) * AIR 1925 All 683 (684): 47 All 770 (DB) * AIR 1918 Bom 134 (136): 42 Bom 742 (DB).

(2) In a suit to enforce private rights the mere addition of a relief which is specified in the section and which cannot be claimed by reason of the bar created by this section cannot vitiate the entire proceedings, it being open to the Court to permit the plaintiff to amend the plaint or to refuse such relief to him. ILR (1954) 6 Assam 361 (366, 367) (DB).

[But see AIR 1953 Bom 153 (157): ILR (1953) Bom 271 (DB).]

**9. "Such further or other relief as the nature of the case may require."** — (1) The words "such further or other relief as the nature of the case may require" must, on general principles of construction, be taken to mean relief ejusdem generis with those described in Cls. (a) to (g) of the section and not one wholly outside thereof. AIR 1942 Cal 343 (347): ILR (1942) 1 Cal 211 (DB) * AIR 1957 Andh Pra 964 (965) * AIR 1932 Bom 65 (66, 67) (DB) * AIR 1928 PC 16 (18): 55 Ind App 96: 55 Cal 519.

(2) Though the other relief must be ejusdem generis with the reliefs specifically enumerated, it need not be one in addition to a relief which falls under any of the preceding clauses and which is claimed in the suit. AIR 1942 Cal 343 (347): ILR (1942) 1 Cal 211 (DB).

(3) Where in a suit filed under the provisions of Section 92, C. P. Code, the plaintiffs do not ask for any relief against some of the defendants the Court cannot pass any decree as against those defendants. AIR 1963 SC 309 (313): (1963) 3 SCR 623.

(4) Suit by trustees for eviction of archakas from temple lands on basis of title and not for framing scheme — Decree for possession on proof of title — High Court can compel trustee to put archakas in possession of portion of temple lands towards their remuneration

**Section 92 — Note 9 (contd.)**
only in a scheme suit — This relief cannot be granted in a suit for eviction. AIR 1965 SC 516 (524): (1964) 8 SCR 347.

**10. Declarations.** — (1) Suits for declaration that certain properties are trust properties, are not within the section. AIR 1952 SC 143 (144): 1952 SCR 513 * AIR 1928 PC 13 (19): 55 Ind App 96: 55 Cal 519 * AIR 1954 Orissa 11 (14): ILR (1953) Cut 578 (DB) * AIR 1953 Bom 153 (157): ILR (1953) Bom 271 (DB) * AIR 1942 Cal 1 (13): ILR (1941) 2 Cal 434 (DB) * (1903) 25 All 631 (634) * AIR 1933 Pat 246 (247): 13 Pat 65 * (1899) 21 All 187 (188) (DB).

(2) Although a suit for declaration that a certain property appertains to a religious trust lies outside the scope of Section 92, still when the defendant denies the existence of a trust, a declaration that the trust does exist might be made as ancillary to the main relief claimed under the section if the plaintiff is held entitled to it. AIR 1959 Bom 396 (398): 60 Bom LR 1273 (DB).

(3) A declaration may be granted where it is ancillary to the relief claimed in the section. AIR 1952 SC 143 (144): 1952 SCR 513 * AIR 1951 Mad 406 (406): ILR (1951) Mad 228 (DB) * AIR 1968 Guj 257 (262): 9 Guj LR 1002. (Suit under — Defendant denying that property in dispute was a public trust property — Question has to be gone into — Declaration as to character of property can be given only if reliefs contemplated under the section are found to be available to plaintiff — Where such reliefs cannot be granted and if the decision on the issue in the suit was that it is a public trust property, such declaration cannot be given.)

(4) A declaration may be granted when the relief claimed in the section cannot be granted without granting the declaration. AIR 1948 Oudh 31 (36): 22 Luck 151 (DB) * AIR 1941 Cal 68 (72) (DB).

(5) It is wrong to call shebaits as mere pujaris or archakas. A shebait is a human ministrant of the deity while a pujari is appointed by the founder or the shebait to conduct worship. Pujari thus is a servant of the Shebait. Shebaitship is not mere office, it is property as well. AIR 1962 SC 1329 (1333).

(6) A suit against the transferees from the head of a math belonging to the Vaishnava Bairagi community for declaration that property in their hands is trust property and for possession is outside the scope of Section 92. All such suits must be instituted in the ordinary manner and not under Section 92. AIR 1959 Bom 491 (494, 495): 59 Bom LR 1144. (Where the plaintiffs sue as representatives of the Bairagi community and in effect seek that the property should be restored to the Bairagi community, the suit is maintainable under Order 1, Rule 8.)

(7) Scope of Section 50 — Suit for declaration that suit property belongs to public trust and for recovery of possession from alienees to whom it is sold in breach of trust — Alienees impleaded as party defendants — Suit maintainable under Section 50 — Not barred by Section 80. (1962) 3 Guj LR 843.

**11. Removing a trustee — Clause (a).** — (1) The section applies to a suit for the removal of a trustee de son tort or a person who is a de facto and not de jure trustee. AIR 1940 Pat 425 (428, 429) (DB) * AIR 1960 Cal 558 (560).

[But see AIR 1958 Mad 307 (308).]

(2) A suit by some trustees, for a declaration that the appointment of the defendant as a co-trustee is invalid and for an injunction restraining him from interfering with their management, is a suit for the removal of a trustee falling within this section. AIR 1919 Mad 159 (160): 42 Mad 668 (DB) * AIR 1917 Mad 214 (215, 217) (DB) * AIR 1925 Pat 544 (546): 4 Pat 741 (DB).

[But see AIR 1923 Bom 67 (68): 46 Bom 101 (DB).]

(3) The guiding principle in granting or refusing a prayer for the removal of a trustee under this section is to see whether in the particular case, it is for the welfare of the trust to do so, having regard to the original purposes of the trust. AIR 1944 PC 39 (41): 71 Ind App 47: ILR (1944) Kar (PC) 193 * AIR 1925 Mad 1011 (1012) (DB) * AIR 1935 Pat 111 (115): 14 Pat 379 (DB) * (1899) 1 Bom LR 743 (753) (DB) * (1961) 63 Punj LR 117. (Religious institutions should be allowed to retain their impartial and sacred atmosphere and they should not be permitted to be desecrated or profaned by being dragged into narrow, fractional and selfishly personal controversies influenced by power politics.)

(4) The primary duty of the Court is to consider the interests of the public or that part of the public for whose benefit the trust was created. AIR 1934 PC 53 (54) * AIR 1952 Mys 14 (20): ILR (1952) Mys 102 (DB).

(5) Every mistake, neglect of duty or inaccuracy of conduct is not necessarily a ground for removal. AIR 1950 All 62 (68, 69): ILR (1950) All 985 (DB) * AIR 1944 PC 39 (41): 71 Ind App 47: ILR (1944) Kar (PC) 193 * AIR 1928 Cal 225 (226) (DB) * (1961) 63 Punj LR 117. (Suit for removal of Mahant of Gurdwara — Allegation that he is not maintaining Langar — His explanation that he could not maintain it because he was put to considerable expenses on litigation initiated by plaintiffs — Explanation held fairly plausible and reasonable — Plaintiffs held could not avail of that circumstance for order of his removal.) * (1959)

**Section 92 — Note 11 (contd.)**

72 Mad LW 80. (Religious Institution — Member of Advisory Board appointed under Scheme — Absence from meetings — Order of removal by District Court without notice — Legality.)

(6) Trustee asserting hostile title in himself to the trust properties or alienating the same or claiming a right to utilise the income for his own purposes is sufficient ground for ordering his removal. AIR 1945 Nag 64 (66): ILR (1944) Nag 788 (DB) * AIR 1927 Mad 1033 (1034) (DB) * AIR 1922 PC 325 (332): 45 Mad 565: 49 Ind App 237 * AIR 1968 Raj 314 (320): 1968 Raj LW 347. (Gift of trust property by trustee and not allowing passengers to stay in trust property is a breach of trust — Death of trustee — After his death his legal representatives unable to defend trust properties — They ought to be removed.) * AIR 1965 Punj 260 (262, 263): 66 Punj LR 1050 (DB). (Shebait asserting adverse title to and making unauthorized alienation of trust property—Accounts also not maintained — Court can remove him from office — Court need not prove that tenets of the very institution were violated by Shebait.) * (1961) 63 Pun LR 117. (Suit for removal of Mahant — Rule that denial of title of trust property by manager must entail his removal — For application of rule, denial must be actual, conscious and deliberate — Mere denial by the defendant of the right of plaintiffs to interfere with management of trust property by the defendant will not attract its applicability.)

(7) A mere assertion, that the trust properties are his private properties is not sufficient ground for removal of the trustee unless his attitude is unreasonable or mala fide, and amounting to a breach of trust. AIR 1956 Nag 257 (260): ILR (1956) Nag 659 (DB) * AIR 1941 Cal 68 (74) (DB).

(8) Falsification of accounts is a ground for removal of trustee. AIR 1922 PC 325 (332): 45 Mad 565: 49 Ind App 237 * (1899) 22 Mad 481 (483) (DB).

(9) Bad character of the trustee is a ground for his removal. AIR 1940 PC 24 (27): 67 Ind App 32: ILR (1940) 1 Cal 266: ILR (1940) Kar PC 47.

(10) Where the Court frames a scheme in a suit under this section, it is not necessary to provide therein for the removal of the trustees for breaches of trust. AIR 1926 Mad 559 (561): 49 Mad 580 (DB) * AIR 1931 Nag 82 (82) * AIR 1925 PC 155 (156).

[But see (1900) 24 Bom 45 (49) (DB).]

(11) Where a scheme does not provide for the removal of trustee, an application for the removal of the trustee is not the proper procedure but a suit under this section is necessary. AIR 1952 Assam 176 (177) (DB) * AIR 1935 All 273 (275) (DB) * AIR 1935 Sind 210 (210): 29 Sind LR 308.

[See also 1961 BLJR 206 (DB). (Bihar Hindu Religious Trusts Act (1 of 1951), S. 48 — Application under — Mismanagement of property and contravention of terms of endowment deed — Shebait of public trust removed.)]

(12) A Court has power under this section to remove a trustee not only from his temporal position as manager of the trust properties but also from his position as spiritual head where the two offices are inseparable or closely connected together. AIR 1940 PC 24 (29): 67 Ind App 32: ILR (1940) 1 Cal 266: ILR (1940) Kar PC 47 * AIR 1956 Mad 491 (498) (DB).

(13) Removal of trustees — Removal includes dispossession of removed trustee from trust property — Even before insertion of Clause (cc), Court could direct removed trustee to deliver possession of trust property to person entitled thereto. AIR 1966 All 163 (165): 1965 All LJ 588 (DB).

**12. Appointment of a new trustee — Clause (b).** — (1) Under this section, the Court has complete discretion in appointing any person as a trustee and in arranging for the management of the trust. AIR 1952 Mys 14 (20): ILR (1952) Mys 102 (DB) * AIR 1950 All 109 (117): ILR (1950) All 1001 (DB) * AIR 1916 PC 132 (135): 43 Cal 1045: 8 Low Bur Rul 517: 43 Ind App 127.

(2) The duty of the Court is to appoint the most suitable persons available as trustees whether originally impleaded in the suit or not and, in doing so, it should take into consideration the wishes and rights of the founder, the past history of the institution and the way in which the management was carried out in the past. AIR 1948 PC 214 (216) * AIR 1941 Bom 317 (322): ILR (1941) Bom 556 (DB) * AIR 1928 Mad 955 (957) (DB).

(3) It is competent for the Court to appoint new or additional trustees though not in conformity with the original constitution of the trust, if the interests of the trust demand it. AIR 1928 Mad 955 (957) (DB) * (1912) 16 Ind Cas 225 (234) (DB) (Mad) * (1937) 41 Cal WN 298 (304) (DB).

(4) Even if a juristic or artificial person was not recognised by pure Muhammadan law, a Court acting under this section has power to appoint a corporation as a mutawalli, it being a matter of procedure. AIR 1950 All 109 (117): ILR (1950) All 1001 (DB).

(5) Scheme for management of temple — Plaintiffs, present shebaits, though not de jure shebaits acting as de facto shebaits for a very long period and their rights in that regard not called in question ever before — They cannot be completely excluded from the management of temple — Fact that the shebaits or

**Section 92 — Note 12 (contd.)**
their predecessors had alienated debuttar property cannot be a ground for not including their names in managing committee as the question of title to alienated properties cannot be decided in such suit. AIR 1962 SC 1329 (1332).

(6) In a scheme for management of public trusts the function of appointing and removing trustees is a judicial function properly exercisable by a Court of Law. AIR 1965 Guj 181 (190): (1965) 6 Guj LR 49.

**13. Vesting any property in a trustee— Clause (c).** — (1) Clause (c) is not intended to cover cases in which it is sought to recover possession of the trust property by ejecting trespassers who are wrongfully in possession of it. AIR 1932 Rang 132 (136): 10 Rang 342 (DB).

(2) Clause (c) does not apply to a case where a claim is made for possession of trust properties which are in the hands of the alienees of the trustee and the possession is asked to be delivered to the trustee. AIR 1953 Bom 153 (157): ILR (1953) Bom 271 (DB).

**14. Directing accounts and inquiries — Clause (d).** — (1) A suit for accounts of the trust property will clearly fall within the section. AIR 1953 Mad 220 (221) * AIR 1924 Bom 518 (519, 520) (DB) * AIR 1921 Mad 479 (479) (DB) * AIR 1924 Mad 882 (883) * AIR 1919 All 203 (205) (DB).

(2) An order for the payment of the amount found to be due on the taking of accounts will be within the section. AIR 1927 Mad 416 (417) (DB) * AIR 1935 Mad 825 (826): 58 Mad 988 (FB).
[But see AIR 1934 Nag 48 (50).]

(3) Where a trustee is removed under Clause (a), it is not obligatory on the Court to make an order for accounts in every case. (1937) 41 Cal WN 298 (306) (DB) * AIR 1940 PC 24 (30): 67 Ind App 32: ILR (1940) 1 Cal 266: ILR (1940) Kar PC 47.

(4) In proceedings under this section, the trustee cannot be made liable to account for moneys which do not belong to the trust. AIR 1946 PC 100 (103): ILR (1946) Kar (PC) 87.

(5) As a general principle back accounting cannot be decreed except on proof of dishonesty and malversation. A mere spending for other religious or charitable purposes cannot always amount to a diversion of trust funds. Charities or the performance of the religious services cannot by themselves amount to a diversion of funds and in absence of evidence to show what was the amount so spent in relation to the amount spent for the main trust it cannot be said that there has been such a diversion of funds as to be termed a misappropriation or malversation of the trust funds or even a breach of trust. (1960) 1 Mad LJ 364: 1959 Mad WN 627. (AIR 1928 Mad 879. Foll.)

(6) In a suit under Section 92 of the Civil Procedure Code where there has been no diversion of funds as to be termed a misappropriation or malversation of the trust funds or even a breach of trust the persons who were in management of the trust properties should not be asked to account for the period of their management.

A mere spending for other religious or charitable purposes cannot always amount to diversion of the trust funds. (1960) 1 Mad LJ 364: 1959 Mad WN 627.

(7) Where the trustees who were managers of a public temple have used the funds of the temple in their business or have so mixed it with their own funds that it is impossible to say that they have no so used it, they are liable to be charged with compound interest with half yearly rests. AIR 1960 Bom 438 (441, 442): 62 Bom LR 308 (DB). (AIR 1937 Bom 374 and AIR 1916 Mad 692, Foll. Reversed on facts in AIR 1965 SC 1692.)

(8) Relief for rendering and explaining accounts falls under Section 92 Civil P. C. and is a different relief than that claimed by way of damages under Section 14, Religious Endowments Act. AIR 1961 All 125 (128): 1960 All LJ 486 (DB).

**15. Declaring what proportion, etc. — Clause (e).** — (1) A suit for a declaration as to whether the offerings made to a deity belong to the pujaris exclusively or should be divided between the pujaris and the temple servants and if so what proportion of the offerings should be allocated to the pujaris and the temple servants respectively, is one coming under this clause. AIR 1921 Bom 297 (299): 45 Bom 683 (DB).

(2) Clause (e) contemplates one of two cases, (a) where the creator of the trust had allotted a sum of money to several objects and the Court is asked to apportion such sum among them and (b) where on account of changed circumtances, the Court is asked to make new allotments to the several objects of the trust. AIR 1942 Cal 343 (350): ILR (1942) 1 Cal 211 (DB).

**16. Authorising alienation of trust property — Clause (f).** — (1) Where a mutawalli claims permission to execute a lease, it is only where all the essentials for the applicability of the section are present, that such a permission must be sought for by way of a suit. AIR 1920 Cal 129 (130): 47 Cal 592 (DB).

(2) Clause (f) of Section 92 (1) does not have the effect of circumscribing the powers of trustees to carry on ordinary administration of trust property for the benefit of the trust and if necessary to let, sell, mortgage or exchange it. AIR 1966 SC 878 (881, 882): (1966) 2 SCR 151. (Provision in scheme for direction

**Section 92 — Note 16 (contd.)**
by Court to trustees with respect to disposal of trust property is valid.)

**17. Setting a scheme — Clause (g).**— (1) In giving effect to the provisions of this section and in appointing new trustees and settling a scheme the Court is entitled to take into consideration, not merely the wishes of the founder so far as they can be ascertained, but also the past history of the institution and the way in which the management has been carried out heretofore, in conjunction with other existing conditions that may have grown up since its foundation. AIR 1916 PC 132 (135): 43 Cal 1085: 43 Ind App. 127: 8 Low Bur Rul 517 * AIR 1922 Mad 409 (411) (DB) * (1912) 17 Ind Cas 441 (442) (PC) * (1912) 16 Ind Cas 225 (233) (Mad).

(2) The Court has discretion under Section 92 of the Code of Civil Procedure to frame a scheme in such a manner as commends itself to the Court so long as the scheme fulfils the objects sought to be achieved by the institution. AIR 1958 Mys 93 (100): ILR (1957) Mys 291 (DB).

(3) The main thing to be remembered in settling a scheme is the welfare and interests of the trust. AIR 1946 PC 34 (35): ILR (1946) Kar (PC) 17 * AIR 1957 Mad 583 (586) (DB) * AIR 1942 Cal 343 (350): ILR (1942) 1 Cal 211 (DB) * AIR 1926 Mad 1150 (1153).

(4) The jurisdiction of the Court to frame a scheme is not excluded by the fact that the temple, for which the scheme is to be framed, is subject to a temple committee or is managed by a caste or section of the public. (1948) 53 Mys HCR 167 (175) (DB) * AIR 1917 Mad 551 (554, 560): 39 Mad 700 (DB) * AIR 1917 Mad 426 (427, 428) (DB).

(5) The scheme should be framed in such a way as to meet the exigencies of the case without unduly interfering with the powers of the temple committee, or impairing the authority of the mahant or the duly constituted manager of the institution. AIR 1917 Mad 551 (560): 39 Mad 700 (DB) * (1907) 30 Mad 138 (141): 34 Ind App 78 (PC) * AIR 1930 Mad 466 (469) (DB).

(6) The ground on which the relief for the settlement of a scheme should be granted does not depend upon any charges against the trustees at all, but upon its being necessary for the welfare of the trust and upon its being conducive to the better management of the trust property. (1948) 53 Mys HCR 167 (177) (DB) * AIR 1916 Mad 318 (319, 320) (DB).

(7) In framing a scheme the Court may provide that any person interested in addition to the trustee, shall be at liberty to ask the Court by way of application for directions to carry out the scheme. AIR 1932 Mad 41 (42, 44): 54 Mad 345 (DB) * AIR 1930 Mad 918 (920): 54 Mad 315 (DB) * AIR 1939 Mad 605 (607).

(8) A reservation of a right to a person or persons to ask the Court by way of application for a relief coming within the section is not valid. AIR 1952 Trav-Co 35 (36) (DB) * AIR 1927 Mad 1073 (1078): 51 Mad 31 (FB) * AIR 1926 Mad 557 (558) (DB) * AIR 1925 Mad 411 (414) (DB) * AIR 1929 Mad 322 (322) * AIR 1931 Nag 82 (82) (FB).

[But see AIR 1918 Cal 530 (531) (DB) * AIR 1923 Pat 420 (421, 422) (DB).]

(9) It is open in a suit under S. 92, where a scheme is to be settled, to provide in the scheme for modifying it as and when necessity arises, by inserting a clause to that effect. Such a suit for the settlement of a scheme is analogous to an administration suit and so long as the modification in the scheme is for the purposes of administration, such modification can be made by application under the relevant clause of the scheme, without the necessity of a suit under Section 92 of the Code of Civil Procedure. Such a procedure does not violate any provision of Section 92. If the scheme is amended in pursuance of such a clause in the scheme it will not amount to amending the decree. The decree stands as it was, and all that happens is that a part of the decree which provides for management under the scheme is being given effect to. AIR 1961 SC 1206 (1211): (1961) 3 SCR 930. (AIR 1927 Mad 1073 (FB), Overruled. AIR 1931 Bom 391 and AIR 1936 All 97 and 17 Ind Cas 969 (Cal) and AIR 1924 Cal 330 and AIR 1941 Cal 618 and AIR 1923 Pat 420, Approved.) * AIR 1941 Cal 618 (622) (DB) * AIR 1931 Bom 391 (395): 55 Bom 414 (DB) * AIR 1937 Bom 124 (131) (DB).

(10) A scheme once framed by the Court can be altered by the Court, though only on substantial grounds. AIR 1953 Bom 393 (396) * AIR 1948 Bom 146 (148): ILR (1947) Bom 466 (DB) * AIR 1924 Cal 330 (331, 332) (DB) * (1905) 28 Mad 319 (325) (DB) * AIR 1936 All 97 (101): 58 All 538 (DB) * (1959) 37 Mys LJ 234 (DB). (Scheme framed, can be altered if occasion and circumstances demand — Lacuna in scheme — Fresh scheme can be framed.)

(11) A suit to establish the private rights of the plaintiff which would, if established, alter the scheme framed, is not maintainable. AIR 1948 Mad 134 (135): ILR (1948) Mad 257 (DB) * (1911) 36 Mad 364 (369) (DB).

(12) Where in pursuance of a scheme framed by the Court, an application is made for the appointment of a trustee, the Court cannot refuse the same. If, however, the person suggested is not satisfactory, the Court may require another person to be suggested or appoint a person purely in its own discretion. AIR 1942 Rang 75 (75) (DB).

**Section 92 — Note 17 (contd.)**

(13) A scheme can be framed only if the trust was a public trust. AIR 1922 PC 253 (256): 49 Cal 459: 49 Ind App 100 * AIR 1934 All 315 (317) (DB).

(14) The Court has jurisdiction to frame a scheme for the management of a private trust. AIR 1937 Cal 338 (341): ILR (1937) 2 Cal 105 (DB) * AIR 1957 Mad 583 (585) (DB) * AIR 1925 PC 139 (145): 52 Ind App 245: 52 Cal 809 * AIR 1953 Mad 750 (754) (DB) * AIR 1953 Trav-Co 198 (202): ILR (1953) Trav-Co 610 (DB) * AIR 1945 Nag 64 (66): ILR (1944) Nag 788 (DB) * AIR 1953 Trav-Co 198 (201, 202): 1953 Ker LT 117 (DB). (Private trust — Court has jurisdiction to frame scheme.)

(15) Where a public trust has been constituted under a will, it is not necessary that a suit for administration of the estate should first be brought before a scheme could be framed under this section, except in a case where it is doubtful whether there would be funds sufficient for the charitable bequest. AIR 1953 Mad 906 (907): ILR (1953) Mad 1154 (DB) * AIR 1923 Mad 376 (381, 382): 46 Mad 300 (DB).

(16) Although a scheme for management may not be called for yet it is open to the Court to give directions for the better management of the trust. (1948) 53 Mys HCR 133 (135) (DB).

(17) Where in a suit under Section 92 the defendants admit that the properties in suit are a public trust and that they are merely the managers, they cannot plead adverse possession in respect of such properties or of such management and deny the right of the public to ask the Court to frame a scheme for a change in that management or for calling them to account in respect of such management. AIR 1952 Mys 14 (17): ILR (1952) Mys 102 (DB).

(18) Provision in scheme decree for removal of trustees — Application for removal of trustee is competent — Separate suit under Section 92 not necessary. AIR 1965 Mad 404 (405, 406): 77 Mad LW 685 * ILR (1959) 9 Raj 1191. (Scheme providing for removal of trustee — Application for removal — Competency — Separate suit not necessary.)

(19) In a suit for the settlement of the scheme for the management of a temple, it is not appropriate for the Court to investigate questions of title to property about which there is dispute. AIR 1962 SC 1329 (1331).

(20) Scheme for administration of mosque — Scheme based on erroneous assumptions of facts — No collusion — Error in assumption discovered— Scheme can be modified. AIR 1964 SC 107 (115, 116): (1964) 2 SCR 647.

(21) Madras Hindu Religious and Charitable Endowments Act (1951), Section 58 — Scheme settled by Court for administration of temple — Scheme can be modified by Commissioner under Madras Act XIX of 1951 — Yet Court is competent to scrutinise modifying provisions. AIR 1965 SC 1683 (1688): (1965) 2 SCR 934 * AIR 1959 Andh Pra 471 (474): (1959) 2 Andh WR 53 (DB). (Madras Hindu Religious and Charitable Endowments Act (1951), Section 5 — Applicability — Scheme — Mahant appointed under Sanad — Claim of Mahant to hereditary trusteeship untenable — Scheme under Section 92, Civil P. C. can be modified or changed.)

(22) Where a compromise decree in a suit for framing a scheme for the management of a school committee, which was a registered society, provided that the managing board should thereafter consist of a fixed number of members and further provided for the appointment of a sub-committee with powers to draw up the constitution and to make recommendation for any additional changes in the constitution but that power to make recommendations was subject to an important qualification, viz., that it should be 'without prejudice to the strength and power of the managing board';

Held, on a construction of the decree, that the words 'without prejudice to the strength and power of the managing board' were absolute and they did not empower the sub-committee to make any changes either with regard to the strength or the power of the managing board. (1958) 1 Andh WR 244: 1958 Andh LT 285.

(23) When in an administration suit under Section 92, Civil P. C., the Court frames a scheme in the final decree and liberty to apply is reserved the suit is not altogether dead. The Court while laying down the scheme having felt that it might be necessary to give directions and orders to work out the scheme, gave the parties liberty to apply in the suit itself, even after the final decree is passed. For the limited purpose of giving effect to the scheme the suit is pending, even though it has come to an end by the passing of a final decree. The Court is competent even to amend the scheme by adding a clause found to be necessary subsequently. The Court has no further power under the 'liberty to apply' clause to scrap the old scheme altogether and substitute it by a new scheme and pass an entirely new final decree containing the new scheme. This can only be done by filing a new suit under Section 92 of the Code, only after the sanction of the Advocate General is obtained. What the party is not entitled to do directly should not be allowed to be done indirectly. AIR 1960 Cal 631 (636, 637).

**18. Court's power to apply the cy pres doctrine.** — (1) The cy pres doctrine should receive as extended an application

**Section 92 — Note 18 (contd.)**
as possible, so as to give effect to the true intent and aim of the donor or founder. AIR 1919 Mad 659 (668) (DB).

(2) Equity treats trust for charitable purposes as an exception to this rule of resulting trusteeship. AIR 1960 Andh Pra 35 (38): (1959) 1 Andh WR 357 * ILR (1963) Andh Pra 517 (DB).

(3) In order to apply the doctrine, the Court should be satisfied that the original object cannot be carried out in the manner and form intended by the donor. (1908) 32 Bom 214 (224, 228, 231, 243).

(4) Where the objects of the trust are not suited to modern conditions and there is a general charitable intention in the terms of the endowment, the Court is competent to apply the funds of the charity cy pres. AIR 1919 Mad 659 (663, 664) (DB).

(5) Where grants are made to religious institutions as a general thanks-offering it is proper and legitimate to apply them cy pres to the promotion of knowledge. AIR 1919 Mad 659 (667) (DB).

(6) Disposition in wakf made in favour of person falling outside the class of persons mentioned in S. 3 of Mussalman Wakf Validating Act — Effect — Applicability of Cy pres doctrine. AIR 1969 All 35 (36) : 1967 All WR (HC) 625.

(7) Cy pres — Doctrine of — Applicability — Contrary intention expressed by testator — Doctrine does not apply — Suit for recovery of trust-property by settlor's descendant — Question of applicability of doctrine cannot arise. AIR 1967 Mad 175 (179) : (1965) 2 Mad LJ 173 (DB).

**19. Sanction of the Advocate-General.**— (1) A sanction under the section obviates, in respect of the classes of suits described in the section, the necessity of following the procedure for a suit brought in a representative capacity under O. 1, R. 8, Civil Procedure Code. AIR 1941 Bom 317 (319) : ILR (1941) Bom 556 (DB) * AIR 1925 Mad 1070 (1071, 1072) (DB).

(2) A suit of the nature specified in the section cannot be instituted except in conformity with the requirements of the section. AIR 1925 Pat 544 (547) : 4 Pat 741 (DB) * AIR 1935 Mad 825 (826) : 58 Mad 988 (FB) * AIR 1936 Mad 449 (453) (DB).

(3) Where the representatives of the founders of a trust pass a resolution appointing certain persons as trustees and authorising them to institute a suit on behalf of the trust such authorisation cannot be substituted for the sanction contemplated by this section. AIR 1952 Trav-Co 323 (327) : ILR (1951) Trav-Co 543 (DB).

(4) Sanction of Advocate-General — Procedure to be followed — Notice to trustee or institution affected is not necessary. AIR 1965 Andh Pra 143 (156) : (1964) 2 Andh WR 197 (DB).

(5) Recovery of trust property in possession of trespassers — Suit for — Absence of allegation or plea of defendants being trustees — Sanction of Advocate-General — Not necessary. (1962) 1 Mad LJ 278.

(6) Suit under — Sanction of Advocate-General — Amendment of suit by addition of a formal party — Fresh sanction not required. AIR 1967 Mad 303 (304, 305) : (1967) 1 Mad LJ 29.

**20. Nature and form of consent.** — (1) In granting the "consent in writing" required by the section, the Advocate-General or the Collector has to exercise his judgment and see whether the petitioners have an interest in the trust, whether the trust is one contemplated by the section, and whether there is a prima facie case of a breach of trust. AIR 1955 All 372 (376) : ILR (1956) 1 All 609 (DB) * AIR 1950 Mad 596 (597) * AIR 1944 All 231 (231) (DB) * (1897) 24 Cal 418 (428) (DB) * AIR 1915 Bom 38 (39, 40) : 39 Bom 580 (DB).

(2) When consent has been recently given to a certain number of persons after due enquiry and investigation and shortly afterwards a smaller number of those very persons ask for a fresh consent because some one of them has dropped out and is not prepared to join as plaintiff in the proposed suit and nothing new has happened in the interval, it would be a sheer waste of time and energy if a fresh enquiry were held. AIR 1955 All 372 (377) : ILR (1956) 1 All 609 (DB).

(3) Where there is a consent the Court cannot go behind the sanction and enquire whether the sanctioning authority had heard the parties or changed its mind, though it can enquire into the competency of the authority to act under Ss. 92 and 93. AIR 1951 Nag 394 (395, 396): ILR (1950) Nag 50 (DB).

[See also AIR 1964 Mad 247 (250, 251): (1963) 1 Mad LJ 281 (DB). (Unreasonable refusal on part of Wakf Board to consent to a suit under S. 92 sanctioned by Advocate General will amount to breach of its public duty.) ]

(4) The fact that the Advocate-General or the Collector originally refused to grant sanction under this section will not preclude him from subsequently changing his mind on further consideration and granting the sanction. AIR 1951 Nag 317 (320) : ILR (1950) Nag 898 * AIR 1934 Bom 257 (259) (DB).

(5) Consent validly given and suit instituted on basis of such consent — Consent cannot subsequently be revoked — Mandamus can issue restraining Collector or Advocate-General from revoking consent. AIR 1962 J & K 86 (89).

(5) The act of the Advocate-General in giving his consent is not quasi judicial but is merely administrative or executive. AIR 1955 All 372 (375) : ILR (1956) 1 All 609 (DB) * AIR 1955 Raj 166 (167) : ILR (1955) 5 Raj 324 (DB) * AIR 1951 Nag

**Section 92 — Note 20 (contd.)**
394 (395): ILR (1950) Nag 50 (DB) * 1910 Pun Re (Civ) No. 104 p. 364 (365) * AIR 1950 Mad 596 (598) * AIR 1964 Mad 247 (250, 251): (1963) 1 Mad LJ 281 (DB) * AIR 1962 J & K 86 (87, 88) * AIR 1962 Ker 90 (93): 1961 Ker LT 986 (FB). (AIR 1954 Trav-Co 331, Overruled.)

[But see AIR 1956 Pepsu 65 (68): ILR (1956) Patiala 162.]

(6) The jurisdiction to act under S. 92 having been vested in the Advocate-General, the High Court, acting under Art. 226 or Art. 227 of the Constitution has no power either to order him to give consent for the institution of the suit or itself give such consent. AIR 1956 Pepsu 65 (69) : ILR (1956) Patiala 162 * AIR 1954 Trav-Co 331 (345) : ILR (1954) Trav-Co 369 (DB).

(7) An application by any person other than the Board to the District Collector for sanction to institute a suit under S. 92 against the trustees of a Muslim wakf governed by Wakf Act 1954 is maintainable. The necessity to obtain consent under S. 92 is dispensed with by S. 55(1) Wakf Act only in the case of suit instituted by Board. AIR 1962 Ker 343 (343) : 1962 Ker LT 544 (FB) * AIR 1964 Mad 247 (250, 251) : (1963) 1 Mad LJ 281 (DB).

(8) A permission to one person named 'and another' is not sufficient, AIR 1942 Bom 291 (292) (DB) * ('04) 26 All 162 (165) (DB).

**21. Consent when necessary — Effect of consent.**—(1) Where consent in writing of the Advocate-General has not been obtained, the suit must be dismissed, and cannot be rectified by any subsequent amendment. AIR 1942 Bom 125 (128) : ILR (1942) Bom 293 * 1941 Nag LJ 587 (587) (DB) * AIR 1916 Cal 49 (50) (DB).

(2) The question whether this section applies to a suit depends on the prayers in the plaint at the date when the suit is instituted and the section cannot be evaded by an amendment of the plaint at a later date. AIR 1940 Bom 242 (246) (DB) * AIR 1936 Bom 412 (416) (DB).

(3) Where in a suit instituted with the required sanction the Court adds a new defendant under O. 1, R. 10 in order to effectually and completely adjudicate upon all the questions involved in the suit, but such addition does not alter the nature of the suit, no new sanction need be obtained. AIR 1953 Mad 816 (817) (DB) * AIR 1925 Cal 187 (190) (DB) * AIR 1930 Mad 129 (131) : 53 Mad 223 (DB) * AIR 1929 Mad 635 (638).

(4) Where addition or amendment alters the nature of the suit, a fresh sanction is necessary. AIR 1947 Bom 487 (487) * AIR 1957 Punj 106 (107) : ILR (1957) Punj 1019 * AIR 1944 Cal 163 (172) : ILR (1944) 1 Cal 329 (DB) * 1930 Mad WN 456 (466, 469) (DB).

(5) Where sanction is granted to several persons, the suit cannot be validly instituted by some of them only. AIR 1967 SC 1540 (1541) * AIR 1943 All 74 (76, 77) : ILR (1943) All 112 (DB) * AIR 1938 PC 184 (186) : 65 Ind App 198 : ILR (1938) Lah 383 : 32 Sind LR 749 * 1962 Raj LW 188 : ILR (1961) 11 Raj 898. (Death of some after institution of suit — Others can continue suit.) * 1964 Raj LW 147 : ILR (1964) 14 Raj 359. (Suit against trustee — Consent of Advocate-General obtained — Only one of the plaintiffs having interest in trust — Held, the suit was not in conformity with provisions of section.)

(6) When once a suit has been validly instituted with the consent of the Advocate-General, it is a representive suit subject to all the incidents affecting suits in general and representative suits in particular. AIR 1948 Pat 97 (100) : 26 Pat 83 (DB) * AIR 1938 PC 184 (186) : 65 Ind App 198 : ILR (1938) Lah 383 : 32 Sind LR 749 * AIR 1968 Raj 314 (318) : 1968 Raj LW 347.

(7) On the death of one of the plaintiffs the leave obtained for institution of the suit enures for the benefit of the new plaintiff, who is brought on record. AIR 1945 Bom 74 (76).

(8) The motives actuating the persons who have obtained sanction do not affect the validity of the sanction. AIR 1950 All 62 (68) : ILR (1950) All 985 (DB) * (1888) 12 Bom 247 (259) (DB).

**22. Consent not necessary for appeal.**—(1) When sanction has been given by the Advocate-General to two or more persons to institute a suit under this section, an appeal from the decision in such suit need not be filed by all of them. AIR 1938 PC 184 (186) : 65 Ind App 198 : ILR (1938) Lah 383 : 32 Sind LR 749. (Reversing AIR 1935 Lah 251: 16 Lah 782.)

**23. Function of the Advocate-General.**—(1) The Advocate-General can himself initiate proceedings as well as grant sanction to others. (1894) 17 Mad 462 (465) (FB).

(2) The functions of the Advocate-General under this section cannot be delegated to, or exercised by others. (1911) 35 Bom 243 (245) (DB).

**24. Parties to a suit under the section**—(1) Grant of reliefs against third parties is outside the scope of the section. AIR 1947 Nag 233 (235) : ILR (1947) Nag 815 * AIR 1944 Cal 163 (173, 174) : ILR (1944) 1 Cal 329 * AIR 1917 Mad 112 (119, 120): 40 Mad 212 (FB) * AIR 1932 Rang 132 (135) : 10 Rang 342 (DB) * AIR 1928 PC 16 (19) : 55 Ind App 96: 55 Cal 519.

[See however AIR 1944 All 1 (4) : ILR (1944) All 20.]

(2) In a suit under Section 92, no relief such as the recovery of possession or ejectment or rendition of accounts can be granted against third parties such as trespassers or alienees of the trust properties. AIR 1944 Cal 163 (173, 174) : ILR (1944) 1 Cal 329 (DB) * AIR 1928 All 33 (33) : 50 All 165 (DB) * (1900) 24 Bom 170 (181) (DB) * (1905) 2 Cal L Jour 431

**Section 92 — Note 24 (contd.)**
(436, 438) (DB) * AIR 1918 Cal 5 (7) (SB) * (1906) 33 Cal 789 (805).

(3) A suit for reliefs against third persons can be brought in the ordinary manner without following the procedure under S. 92. AIR 1954 SC 526 (540) : 1955 SCR 520 : ILR (1954) Trav-Co 867 * AIR 1941 PC 1 (6) : ILR (1941) Mad 175 : ILR (1941) Kar PC 1 : 67 Ind App 448 * AIR 1941 All 1 (7) : ILR (1940) All 815 (DB).

(4) A mere worshipper cannot sue for possession of the trust properties from an alienee thereof or from a trespasser. It is only a trustee or a manager of the trust that can bring such a suit. AIR 1956 All 207 (210) * AIR 1925 Rang 294 (294) : 3 Rang 213 (DB) * AIR 1926 Mad 280 (280) (DB) * AIR 1919 Lah 56 (57) (DB) * AIR 1954 Orissa 11 (13) : ILR (1953) Cut 578 (DB) * AIR 1941 All 1 (7) : ILR (1940) All 815 (DB) * (1899) 24 Bom 170 (DB) * AIR 1938 Pat 394 (395).

[But see AIR 1919 Lah 190 (191) * AIR 1932 Lah 394 (395).]

(5) A person who has been in de facto possession and management of a public trust and its properties for a long time claiming to be its trustee under a decree of a Court, valid or invalid, has sufficient interest to maintain proceedings for the warding off of a cloud cast by the defendant's action against the interests of the trust. AIR 1956 SC 382 (390) : ILR (1956) 2 All 103 * AIR 1954 SC 5 (8).

(6) A member of the community may bring a suit under O. 1, R. 8 as representing the whole community for a decree for possession in favour of the trustee. AIR 1954 Orissa 11 (14) : ILR (1953) Cut 578 (DB) * AIR 1919 Cal 179 (180, 181) (DB) * AIR 1918 Mad 464 (464) : 41 Mad 124 (DB) * AIR 1917 Mad 112 (113) : 40 Mad 212 (FB).

(7) A suit for a scheme or for the appointment of a new trustee or for directions, can and sometimes can only be brought against persons in possession of trust property, who either claim the same as their own, or who deny the validity of the trust. AIR 1953 Mad 906 (907) : ILR (1953) Mad 1154 (DB) * AIR 1923 Mad 376 (377) : 46 Mad 300 (DB) * AIR 1924 Bom 518 (520) (DB).

(8) Where in a suit under S. 92 a person who is the descendant of the founder of the trust applies for being impleaded as a party on the ground that the trust is not a public trust and the proposed scheme is defective, the applicant is a person whose presence before the Court is necessary in the suit to enable it to frame a proper scheme for the management of the temple and its properties. AIR 1958 Raj 161 (163) : ILR (1958) 8 Raj 547 (DB).

(9) Though no relief should be granted against third parties in a suit under S. 92, creditors of the trustees or transferees of the alleged trust property who claim the property in their own rights or deny the validity of the trust can be impleaded and a declaration that the property is trust property can be granted against them. S. 92 imposes no bar to the joinder of parties or causes of action and does not create any exception to the general rules on the subject. AIR 1963 All 187 (189) * 1966 BLJR 1016 : ILR 46 Pat 660 (DB). (Questions of title of third parties who do not possess the properties as trust properties cannot be gone into in a preceedings under S. 48 — Transferee of trust property from a trustee cannot be impleaded in such proceeding.)

**25. Compromise of suit.** — (1) As long as the question whether the endowment is a public one or not is still in dispute, or if it is proved that the endowment, is a public one a suit under S. 92 cannot be compromised. AIR 1915 Cal 193 (194) (DB).

[See however AIR 1949 Cal 214 (214, 215) : ILR (1945) 1 Cal 500 * AIR 1925 Cal 187 (189) (DB).]

(2) A compromise under which any portion of the trust properties is given to a stranger ought not to be sanctioned by the Court. AIR 1919 Mad 659 (661) (DB).

(3) Suit under S. 92 — Court can record compromise but with caution — O. 32, R. 7 contains special rule for cases where minors are parties. 1968 Jab LJ 443: 1968 MPLJ 420.

(4) Suit under S. 92 can be compromised under O. 23, R. 3 — Consent of Advocate-General is not necessary for such compromise — Public trust — Court must exercise its plenary powers and scrutinise terms of compromise and reject compromise which sacrifices interest of trust. AIR 1966 Mad 475 (479) : 79 Mad LW 168.

**26. Abatement of suit.**— (1) A suit under S. 92 is not prosecuted by individuals for their own interests but as representatives of the general public, and such a suit does not fail on the death of the parties who originally filed the suit. AIR 1921 PC 123 (124) : 48 Cal 493 : 17 Nag LR 37 : 48 Ind App 12 * AIR 1953 Trav-Co 390 (390) : ILR (1952) Trav-Co 781 * AIR 1933 Mad 854 (854, 855) : 57 Mad 153 (DB) * AIR 1938 PC 184 (186): 65 Ind App 198 : ILR (1938) Lah 383 : 32 Sind LR 749 * AIR 1961 Mys 102 (104) : 39 Mys LJ 48 (DB).

(2) Where the suit has been allowed to abate by the plaintiffs, a subsequent suit either by the idol or the present trustees against the legal representative of the deceased defendant is not barred. AIR 1946 All 254 (256): ILR (1946) All 305 (DB).

**27. Suit, if can be brought in forma pauperis.**—(1) A suit under S. 92 cannot be instituted in forma pauperis especially when the plaintiff's intention to sue as paupers was not brought to the notice of the Advocate-General before granting sanction. (1912) 15 Oudh Cas 202 (206) (DB).

[But see 1951 Ker LT 342 (344) (DB).]

**Section 92 — Note 27 (contd.)**

(2) Joint plaint in suit under S. 92 — Petition for leave to sue as pauper presented by one of plaintiffs on behalf of himself and other plaintiffs — No defect. AIR 1961 Raj 15 (16) : 1960 Raj LW 455.

**28. Section is mandatory — Sub-section (2).** — (1) In considering if the section is applicable, it is not merely the right of the plaintiff that must be looked to but also the nature of relief claimed and if that is one specified in the section the direction laid down in sub-section (2) must be obeyed. AIR 1919 All 203 (205) (DB) * AIR 1917 Cal 678 (678) (DB) * AIR 1915 Bom 38 (40) : 39 Bom 580 (DB) * AIR 1918 Mad 1179 (1181) (DB).

(2) A District Judge cannot order the suspension or removal of a mahant on a mere report instead of in a suit as required by this section. AIR 1918 All 218 (219) (DB).

(3) A suit does not cease to be one under S. 92 and subject to its mandatory provisions simply because reliefs not within the section are claimed in addition to reliefs within the section. AIR 1918 Mad 1179 (1181) (DB).

(4) The fact that some of the reliefs asked for in the plaint cannot be granted on account of the absence of the consent in writing of the Advocate-General, would not disentitle the plaintiff to the other reliefs. AIR 1933 Pat 246 (248) : 13 Pat 65.

(5) The expression "reliefs specified" in sub-section (1) includes not only the reliefs which are particularised and specially described in cls. (a) to (g) but also those coming under the residuary clause (h). AIR 1942 Cal 343 (347) : ILR (1942) 1 Cal 211 (DB).

(6) An application made without the consent of the Advocate-General cannot be treated as permissible under the section. AIR 1937 Oudh 381 (384) : 13 Luck 523 (DB).

(7) Where a suit comes under both Section 92 and under the Religious Endowments Act, the plaintiffs have the choice of proceeding under either provision though they may not proceed under both. AIR 1914 Mad 593 (593, 594) : 37 Mad 184 (DB) * AIR 1918 Mad 1179 (1181) (DB).

**29. Execution of scheme decree.**—(1) A decree under S. 92 is of a merely declaratory nature and where that is so, there is nothing to enforce in execution. AIR 1941 Cal 618 (621) (DB) * AIR 1931 All 765 (765) (DB) * AIR 1927 Mad 1110 (1110) (DB) * AIR 1925 PC 155 (156).

(2) A provision in a scheme for removal of trustee is ultra vires and cannot be enforced in execution. AIR 1926 Mad 559 (560, 561) : 49 Mad 580 (DB) * AIR 1926 Mad 130 (130) (DB).

[But see AIR 1944 Oudh 289 (290, 291): 20 Luck 32 (DB).]

(3) Once a scheme is asked for and framed, no further remedy provided in the scheme can be enforced in execution. AIR 1924 Mad 369 (370, 371) : 47 Mad 139 (DB) * AIR 1951 Mad 736 (737) (DB)* AIR 1936 Mad 581 (582, 583) : 59 Mad 751 (DB) * AIR 1942 Mad 748 (750, 751) (DB) * AIR 1949 Cal 215 (216) (DB).

(4) The question whether a scheme decree is executable or not depends upon the intention of the decree and where the directions in the scheme are intended to be enforced in execution, they can be so executed. AIR 1928 Mad 61 (64) (DB)* AIR 1932 Mad 41 (44) : 54 Mad 345 (DB)* (1931) 60 Mad L Jour 178 (178) (DB) * AIR 1926 Nag 326 (327) * AIR 1927 Bom 422 (423) (DB).

(5) The District Judge acting under a scheme of management framed by a Court acts as a persona designata and not as a Court, and so his orders are not capable of execution. AIR 1942 Bom 97 (98) (DB).

(6) A Judge carrying out the provisions of a scheme decree passed under this section acts as a Court and not as a persona designata. AIR 1939 Mad 969 (970, 971).

(7) Scheme decree — Execution — Scheme decree falls within O. 21. R. 32. AIR 1960 Andh Pra 312 (313) : (1960) 1 Andh WR 31.

(8) A direction in a decree made under S. 92 may be directive and executable by a Civil Court and should the executing Court find the decree to be such, insistence on a fresh suit under S. 92 is not necessary. If a provision in a scheme decree is inexecutable, the execution application should, in such a case, be allowed to be converted into a suit on condition that proper court-fee is paid within the time fixed. The Hyderabad Endowment Regulation does not affect the Civil Court's jurisdiction to execute the decree under S. 92. AIR 1960 Andh Pra 423 (423) : 1960 Andh LT 174 (DB).

(9) Scheme decree only declaring rights of Shebaits is not executable. AIR 1960 Cal 718 (721) : 1959 Cal LJ 237 (DB).

(10) Decree appointing trustees failing to provide machinery for their appointment — Lacuna cannot be filled in execution. (1966) 68 Pun LR 650 : 1966 Cur LJ 575.

**30. Arbitration.**— (1) The Court has no jurisdiction, in a suit under this section, to entertain an application for filing an award or for referring the matter to arbitration. (1910) 32 All 503 (517) (DB) * AIR 1937 Sind 174 (176) : 30 Sind LR 478 (DB) * AIR 1923 Nag 112 (114) (DB).

[See however AIR 1944 Pat 115 (116, 117).]

(2) Where the reliefs sought do not fall within the purview of S. 92, the subject-matter of the suit can be validly referred to arbitration. AIR 1947 Sind 74 (78) : ILR (1946) Kar 358.

**31. Appeal.**—(1) An order of a District Judge on an application made under a scheme decreed by the Court, is not appealable unless it is appealable as being one in execution of a decree under S. 47.

**Section 92 — Note 31 (contd.)**
AIR 1941 Cal 618 (621) (DB) * AIR 1925 PC 155 (156) * AIR 1927 Mad 427 (429) (DB).

(2) Where the Court reserves to itself the right to confirm elections held under a scheme passed by it, an order regarding the same is a decree and is appealable as such. AIR 1942 Rang 75 (75) (DB) * AIR 1928 Rang 168 (171) : 6 Rang 97 (DB).

(3) A person interested, though not on record, can prefer an appeal against an adverse decree which is not sought to be set right by the parties on record. AIR 1952 Trav-Co 134 (136) : ILR (1952) Trav-Co 83 (DB).

**32. Revision.**—(1) Where the District Judge has misdirected himself in a manner which will show that the order cannot be accepted as satisfactory, a revision will lie. AIR 1927 Mad 427 (427) (DB) * AIR 1957 Mad 597 (599) * AIR 1931 All 332 (332) (DB).

(2) A revision petition can be entertained from a decision on an issue as to whether the suit was maintainable under this section. AIR 1935 Mad 282 (283) : 58 Mad 771 (DB).

(3) There can be no interference in revision merely because the lower Court's order proceeds on a mistake of law. AIR 1937 Oudh 193 (194) : 13 Luck 81 (DB).

**33. Jurisdiction to entertain suit under the section.**—(1) A suit under S. 92 must be brought in the special tribunal constituted by the section. AIR 1955 Bom 55 (57) * AIR 1957 Andh Pra 10 (11) * AIR 1924 PC 95 (102) : 20 Nag LR 33 : 51 Ind App 72 : 51 Cal 361 * AIR 1932 Cal 444 (445, 446) : 59 Cal 357 * 1966 BLJR 1016: ILR 46 Pat 660 (DB). (Application under S. 48, Bihar Hindu Religious Trusts Act, 1951, entertained by District Judge — Transfer to Additional District Judge — Latter competent to dispose of the application as he exercises all the powers of the District Judge under S. 8, Bengal, Agra and Assam Civil Courts Act.)

(2) Where the trust funds or properties are situated within the jurisdiction of the Court but the charity is to be conducted in a place outside the jurisdiction, the Court has jurisdiction to pass a decree for protecting and preserving the funds or the properties. But the Court will not pass orders for the proper conduct of the charity or give necessary directions for that purpose. AIR 1955 Bom 55 (59, 60) * AIR 1946 Mad 416 (419) (DB) * AIR 1944 PC 39 (42) : 71 Ind App 47 : ILR (1944) Kar (PC) 193.

(3) Where a suit is brought in a District Court for a declaration that a compromise decree passed under this section was obtained by fraud and the suit is transferred to a Munsif for disposal, if the Munsif finds that the facts are as alleged, he has no jurisdiction himself to make a fresh decree under this section — The Munsif can only declare the previous decree as vacated and it will then be for the parties to approach the District Court again for reliefs under this section. AIR 1942 Pat 79 (80) (DB).

(4) Where a notification was issued empowering a certain Judge by name to hear suits under this section, the notification did not empower the Judge as a persona designata but duly empowered the Court over which he presided to entertain suits under this section. AIR 1937 Bom 275 (278, 279): ILR (1937) Bom 655 (FB).

(5) The District Court has no power to transfer to a Subordinate Court a suit under this section instituted before itself. AIR 1935 Bom 172 (173) : 59 Bom 412 (DB).

(6) In the event of a conflict between the terms of Cl. 12 of the Letters Patent (Bom) and this section the section will prevail. AIR 1955 Bom 55 (58).

(7) Scheme for management of temple — District Judge empowered to appoint trustee — High Court in appeal substituing District Court for District Judge — Order does not result in enlargement of Court's jurisdiction. AIR 1965 Guj 181 (189) : (1965) 6 Guj LR 49.

(8) Suit under S. 92 instituted in Court lacking inherent jurisdiction — Withdrawal of suit by District Court under S. 24 is void and without jurisdiction — Subsequent proceedings although by the District Court, are void especially in view of the express bar in sub-section (2) of S. 92. AIR 1962 Ker 28 (29) : 1961 Ker LT 1.

(9) Principal Civil Court of original civil jurisdiction — Suit under S. 92 instituted in Court of District Judge — District Judge transferring it to Additional Disrict Judge — Latter has jurisdiction to dispose it. AIR 1965 Punj 472 : 67 Pun LR 592 (FB).

(10) On the coming into force of the Rajasthan Civil Courts Ordinance, 1950, the Court of the District Judge became the principal Court of the original civil jurisdiction. It alone therefore had jurisdiction to entertain suits under S. 92 C. P. C. and to exercise other powers under that section and not the Civil Judge. ILR (1959) 9 Raj 1191.

(11) Order of District Judge as to whether an application relates to a religious trust within the meaning of Bihar Religious Trusts Act, 1951 — Decision on the jurisdictional fact as to whether the trust is a public trust is not final and can be challenged under Arts. 226 and 227 of the Constitution. 1967 BLJR 172 : ILR 46 Pat 595 (DB).

**34. Decision under the section, whether operates as res judicata.** — (1) A decree passed in a suit under S. 92 is binding not only on the trust and the trustee but also on all worshippers of the temple. AIR 1954 All 88 (92, 93) (DB) * AIR 1925 Mad 1070 (1071) (SB) * AIR 1961 SC 1206 (1211, 1212, 1213, 1214) : (1961) 3 SCR 930.

(2) A suit under S. 92 is a representative one, the plaintiffs representing all persons

[a][93. Exercise of powers of Advocate-General outside Presidency-towns.— The powers conferred by Sections 91 and 92 on the Advocate-General may, outside the Presidency-towns, be, with the previous sanction of the [b][c][State] Government], exercised also by the Collector or by such officer as the [b][c][State] Government] may appoint in this behalf.

[1882, 1877, S. 539, last para.]

[a] Section 93 will not apply to public trusts in Maharashtra and Gujarat under S. 52 of the Bombay Public Trusts Act, 1950 (Bom. 29 of 1950). It also does not apply to Hindu religious institutions and endowments governed by the Madras Hindu Religious and Charitable Endowments Act, 1959 (Mad. 22 of 1959) — See S. 5 [1-1-1960] of that Act; nor to charitable institutions and Hindu religious endowments and institutions in Andhra Pradesh — See Andhra Pradesh Act 17 of 1966, S. 110 (e), (26-1-1967).

Section also ceases to apply to public trusts in Rajasthan — See Rajasthan Act 42 of 1959, Sec. 44 (w.e.f. 1-7-1962).

[b] Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937 (1-4-1937), for "Local Government".

[c] Substituted for "Provincial" by A.L.O., 1950 (26-1-1950).

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**Section 92 — Note 34 (contd.)**

interested in the trust. AIR 1952 Trav-Co 134 (136) : ILR (1952) Trav-Co 83 (DB) * AIR 1921 PC 123 (124) : 48 Cal 493 (497, 498): 17 Nag LR 37 : 48 Ind App 12.

(3) When a suit under S. 92 ceases to be a representative one, it ceases also to be binding except on the actual parties thereto. AIR 1947 All 375 (381) : ILR (1947) All 263 (DB) * AIR 1928 PC 16 (20) : 55 Ind App 96 : 55 Cal 519.

(4) Where the order of the Court has not been passed after hearing and finally deciding the matter there is no res judicata. (1937) 41 Cal WN 298 (303) (DB) * AIR 1940 PC 7 (9) : 15 Luck 1 : 67 Ind App 1 : ILR (1940) Kar (PC) 25.

(5) A decree in a scheme suit cannot be altered except by a fresh suit to carry out the desired alterations in it. 1957 Andh LT 285 (289).

(6) Scope of suit under S. 92 — Decision in such suit does not bind interests not represented therein. AIR 1964 SC 107 (116) : (1964) 2 SCR 647.

(7) Suit under — Declaration that certain property was not public 'wakf' — Decision does not bar question whether such property was 'public trust' after Bombay Public Trusts Act, 1950 came into force. AIR 1968 Guj 257 (265) : 9 Guj LR 1002.

**Section 93 — Note 1**

(1) Where the Collector refuses to give the sanction it may be granted by the Advocate-General. AIR 1949 Nag 183 (184):ILR (1948) Nag 846 (DB) ° AIR 1928 Mad 401 (401) (DB).

(2) The section does not make it compulsory for the State Government to appoint another officer in case the Advocate-General is there to perform the functions assigned to him under S. 92. AIR 1955 Raj 166 (167): ILR (1955) 5 Raj 324 (DB).

(3) Suit for removal of obstruction on village pathway — Application to Collector for sanction for filing a suit — Endorsement by Collector on application that case may be registered held did not amount to sanction. 1963 Raj LW 481: ILR (1963) 13 Raj 984.

"Previous sanction of the State Government."— (4) Both the appointment and the previous sanction must exist before S. 93 can be applied and a suit instituted without such previous sanction is liable to be dismissed. AIR 1932 PC 51 (54): 59 Ind App 121: 53 All 990.

[See also AIR 1931 PC 121 (124): 53 All 910: 58 Ind App 460.]

(5) The fact that the State Government has appointed an officer under this section generally is no bar to its appointing the Collector or any other person to exercise such powers in any particular case. AIR 1931 PC 121 (124): 53 All 910: 58 Ind App 460.

(6) A previous sanction for the exercise of the powers must be obtained by the Collector or other officer appointed, for each particular case. A general sanction by the State Government is not enough. AIR 1932 PC 51 (54): 59 Ind App 121: 53 All 990 * AIR 1955 Cal 155 (156) (DB) ° AIR 1951 Nag 394 (396): ILR (1950) Nag 50 (DB) ° AIR 1949 Nag 183 (183, 184): ILR (1948) Nag 846 (DB) * (1948) 52 Cal WN 831 (834) (DB).

(7) The obtaining of sanction must be strictly proved and the Court will not draw a presumption that all due formalities of law must have been complied with. AIR 1955 Cal 155 (156) (DB) ° AIR 1948 Nag 357 (357): ILR (1948) Nag 281 (DB).

## PART VI

## SUPPLEMENTAL PROCEEDINGS

94. [New] **Supplemental proceedings.**—In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,—

(a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison;

(b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property;

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold;

(d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;

(e) make such other interlocutory orders as may appear to the Court to be just and convenient.

[See Orders 38, 39, 40.]

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### SECTION 94 — SYNOPSIS

1. Scope.
2. "If it is so prescribed."

1. Scope:— (1) Supplemental proceedings are a means to an end and not an end in themselves. Thus, a suit only for the appointment of a receiver is not maintainable. Madh B LJ 1955 HCR 1117 (1119).

(2) The provisions relating to O. 40 are subject to the controlling S. 94 and in taking any action under O. 40 or passing any interlocutory order, it is the duty of the Court of law to keep in view that the rights of the parties are not jeopardised and the ends of justice not defeated. AIR 1960 Raj 192 (194, 195): 1960 Raj LW 334 (DB).

(3) By virtue of S. 7, clauses (c) and (e) of the section do not extend to Provincial Small Couse Courts. AIR 1919 Cal 6 (6): 46 Cal 717 (DB).

(4) Any error in the manner of exercise of jurisdiction conferred by S. 94 would not affect the validity of the Court's act if the Court's jurisdiction is derived from a source independent of the provisions which merely prescribe the manner of its exercise. AIR 1945 Nag 97 (100, 101): ILR (1945) Nag 121 (DB).

(5) The Courts have power to pass orders referred to in cls. (a) to (e) of the section only if it is so prescribed by the rules and this would exclude the inherent power of the Court under S. 151 to pass such orders where they are not prescribed by rules. AIR 1928 Mad 491 (492) (DB) ° AIR 1933 Mad 500 (501): 56 Mad 563 * AIR 1932 Mad 180 (181) ° AIR 1953 Assam 104 (104): ILR (1952) 4 Assam 160 ° AIR 1953 Madh B 154 (155) * ILR (1954) Madh B 284 (287) ° AIR 1952 Mys 76 (77): ILR (1952) Mys 354 ° AIR 1945 Pat 483 (484, 485): 24 Pat 496 (DB).

[See AIR 1945 Nag 97 (100): ILR (1945) Nag 121 (DB).]

[But see AIR 1920 Lah 436 (437) (DB) * AIR 1933 Lah 437 (439): 14 Lah 68 • AIR 1954 All 113 (114): ILR (1954) 1 All 136 (DB) ° AIR 1940 All 185 (186): ILR (1940) All 201 (DB) ° AIR 1952 Cal 560 (561): ILR (1953) 2 Cal 11 (DB) * AIR 1918 Pat 214 (215): 3 Pat L Jour 456 (DB).]

(6) The applicant for an injunction must make out a prima facie case therefor. AIR 1928 Cal 464 (465): 55 Cal 978 (DB).

(7) Whether it is a fit case in which an injunction should be issued has to be determined on its own merits. Interest of the opposite party is as important as the interest of the party asking for interim injunction. AIR 1968 J and K 86: 1968 Kash LJ 134.

(8) The grant of interim reliefs is always in the discretion of the trial Court which has to exercise such discretion in accordance with well-established judicial principles and not in a capricious or arbitrary manner. However, it is for the person aggrieved with the order made by the trial Court to show in a convincing manner that the discretion had not been properly exercised by that Court, and unless that burden is discharged the order must be upheld by the appellate Court. AIR 1967 Goa 149 (151) (FB).

(9) A mere apprehension of interference with the plaintiff's collection of rent and of the breach of the peace does not justify the grant of an injunction. AIR 1926 Cal 604 (605) (DB).

(10) It is not proper exercise of discretion to grant an injunction restraining the opposite party from the bona fide exercise of his statutory rights. AIR 1920 Pat 423 (423): 5 Pat L Jour 76 (DB).

(11) Order 39, R. 2 (3), applies to disobedience generally of an injunction granted by the Court whether under O. 39 or under Section 94. AIR 1918 Mad 340 (341) ° AIR

**Section 94 — Note 1 (contd.)**
1926 Mad 574 (575) (DB) ° AIR 1969 Guj 28 (32) (DB) * AIR 1967 Andh Pra 48: (1965) 2 Andh WR 224 (DB) ° AIR 1963 Andh Pra 136 (137): (1962) 2 Andh WR 25 (DB).

(12) The facts in each case have to be closely scanned and carefully considered by the Court before the issue of an injunction. AIR 1955 Assam 174 (176).

(13) When a witness summoned to produce a document under O. 16, R. 6 fails to comply with the summons, he may be punished by arrest and imprisonment or attachment under O. 16, R. 10. AIR 1928 Mad 299 (305): 51 Mad 1 (SB).

(14) An order directing the furnishing of security and submission of accounts is an order of the kind contemplated by Section 94 clause (e). (1912) 17 Ind Cas 361 (362) (DB) (Cal).

(15) A Court has power under clause (e) to stay an execution sale pending the disposal of a suit under O. 21, R. 63 of the Code. AIR 1951 Mad 321 (322).

(16) A Civil Court though a court of special jurisdiction by virtue of S. 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 does not lose its qualities of a civil nature. As there is nothing in the Bombay Act which is contrary to the exercise of powers to grant temporary injunctions or which prohibits the exercise of such powers the Rent Court as a Civil Court will have power to deal with civil matters and all matters incidental thereto unless the provision in the Bombay Act indicated to the contrary. The Court constituted under S. 28 of the Bombay Act would therefore have jurisdiction to grant a temporary injunction. (1966) 7 Guj LR 147 (156): ILR (1966) Guj 167 (DB) ° AIR 1966 Orissa 96 (98): ILR (1965) Cut 794.

(17) Court has jurisdiction to pass the order in the nature of an interim injunction even when the proceedings are before the Arbitration. AIR 1968 J and K 86 (89): 1968 Kash LJ 134.

(18) An arbitrator under the Co-operative Societies Act is not a Court or a Judge. He has the incidental or consequential powers necessary to achieve the object of deciding the dispute by implication. The power of a Civil Court to grant stay or injunction is a supplemental power and not an incidental power. He has therefore no power to grant an injunction. AIR 1968 All 22 (28): 1967 All LJ 454.

(19) An interim order is as much an order of the Court as a final order and is capable of being enforced. AIR 1968 Bom 35 (39): 69 Bom LR 250 (DB). (Interim order was about payment of interest.)

(20) Attachment before judgment — Two conditions are necessary, viz., Court has to issue order directing security to be furnished for the sum specified and in the same order it may make attachment of property — No attachment comes into existence unless whole procedure prescribed by law for making attachment is gone through—Though a Court has jurisdiction to attach property in order to achieve that object it is bound to follow procedure provided by law; for, a thing for which provision has been made must be done in that way or not at all — If no attachment comes into effect according to procedure prescribed any step taken towards achievement of that object is mere nullity and has no effect on property. AIR 1967 All 136 (138, 140): 1966 All LJ 990 (DB).

**2. "If it is so prescribed." —** (1) (Majority-view: J. C. Shah J., dissenting). — The effect of the expression 'if it is so prescribed' in S. 94 is only this that when the rules in O. 39, Civil P. C., prescribe the circumstances in which temporary injunction can be issued, ordinarily the Court is not to use its inherent powers to make the necessary orders in the interests of justice It is in the incidence of the exercise of the power of the Court to issue temporary injunction that the provisions of S. 94 of the Code have their effect and not in taking away the right of the Court to exercise its inherent power. AIR 1962 SC 527 (532, 534, 537): 1962 Supp (1) SCR 450 * AIR 1961 J & K 29 (30) ° AIR 1959 Ker 45 (46): 1958 Ker LT 385 (DB) ° ILR (1966) Cut 400: 32 Cut LT 999.

(2) Whatever be the inherent powers of a High Court apart from the provisions of O. 39 those powers cannot be exercised by the High Court when dealing with an appeal or revision from an order made by a subordinate Court. If the Subordinate Court had not such power and jurisdiction, the High Court will have to set aside the order of that Court. AIR 1961 J & K 29 (30).

(3) Election petition before S. D. O. by sitting pradhan against opponent who was declared duly elected — S. D. O. cannot give interim relief — He cannot withhold transfer of charge of office of Pradhan to opponent, till the disposal of election petition. Because neither U. P. Panchayat Raj Act nor the rules thereunder authorise the S. D. O. hearing election petition to grant interim relief. He has therefore not the powers conferred upon Civil Courts by S. 94 and S. 151 and Orders 39 and 41 CPC. AIR 1963 All 518 (520, 522): ILR (1961) 2 All 298 (DB).

(4) Clause "if it is so prescribed" in S. 94 means that Interlocutory order can be made only if rules under the Code prescribe for such order. AIR 1966 Cal 603 (604).

(5) Courts have also inherent powers to issue temporary injunction in circumstances which are not covered by the provisions of O. 39 CPC if the Court is of opinion that the interests of justice require the issue of such interim injunction. AIR 1962 SC 527 (532, 534, 537): 1962 Supp (1) SCR 450.

**95. Compensation for obtaining arrest, attachment or injunction on insufficient grounds.**—(1) Where, in any suit in which an arrest or attachment has been effected or a temporary injunction granted under the last preceding section,—

(a) it appears to the Court that such arrest, attachment or injunction was applied for on insufficient grounds, or

(b) the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable ground for instituting the same,

the defendant may apply to the Court, and the Court may, upon such application, award against the plaintiff by its order such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him:

Provided that a Court shall not award, under this section, an amount exceeding the limits of its pecuniary jurisdiction.

(2) An order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction.

[1882, 1877, Ss. 491 and 497; 1859, Ss. 88, 96.]

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**SECTION 95 — SYNOPSIS**

1. SCOPE.
2. ARREST OR ATTACHMENT BEFORE JUDGMENT.
3. ATTACHMENT OR ARREST MUST HAVE BEEN APPLIED FOR ON INSUFFICIENT GROUNDS.
4. "OR THE SUIT OF THE PLAINTIFF FAILS."
5. PROCEDURE FOR OBTAINING COMPENSATION.
6. AMOUNT AND BASIS OF COMPENSATION.
7. Court which can grant compensation.
8. Provincial Small Cause Court.
9. CHARTERED HIGH COURT, POWER OF.
10. REGULAR SUIT, IF AND WHEN BARRED.

**TOPIC INDICATOR**

Appeal — See Section 104, Cl. (g).
Applicability to conditional and ex parte attachment. — See Note 2.
Compensation for excessive attachment even if suit be decreed — See Note 10.
Compensation not only for "special damages" but also for "general damages" — See Note 6.
Formal application — A counter petition is sufficient — See Note 5.
Formal application — Claim in a counter-statement of an applicant — See Note 10.
Formal application — Necessity of — See Note 5.
Order under this section, when to be passed — See Notes 2 and 5.
Right of defendant to apply even prior to service of suit summons — See Note 2.
Undertaking, effect of — Note 7.

**1. Scope.**—(1) The section applies also to cases in which the plaintiff is a minor represented by a next friend. AIR 1935 Mad 886 (887): 59 Mad 415.

(2) The section authorises an order for compensation only against the plaintiff but not against his next friend. But a separate suit for compensation against the next friend is not barred. AIR 1941 Mad 719 (720): ILR (1941) Mad 985 (DB).

(3) The section applies to arrest or attachment before judgment. AIR 1939 Pat 13 (16, 17).

(4) The jurisdiction exercised by the Court must be considered in terms of the clear language of Section 95, C. P. Code, and the said section does not, in any way, place any restriction. Therefore, the fact that the order of attachment has been made absolute in the presence of the defendant or that it has not been set aside is not a bar for the defendant applying under Section 95. AIR 1959 Ker 18 (20, 21): 1958 Ker LT 565.

(5) The application of any penal provision of the nature of Section 95 has to be considered by the Court with very great care and anxiety. AIR 1959 Cal 668 (669): 63 Cal WN 197 (DB).

**2. Arrest or attachment before judgment.**—(1) No compensation is awardable under this section unless the attachment or arrest has been actually effected. 1956 Madh-B LJ 927 (928) ° 1958 Raj LW 367 (369) * AIR 1952 Bhopal 14 (14) ° AIR 1917 Mad 145 (147): 39 Mad 952 (DB) * AIR 1925 Bom 357 (358, 359): 49 Bom 629.

(2) A defendant who has been arrested can be granted compensation though he did not receive the summons. (1891) 15 Bom 160 (163).

(3) The section applies also to temporary attachments under Order 38, Rule 5. AIR 1919 Mad 20 (20) (DB) ° AIR 1932 Cal 92 (93) ° 1932 Mad WN 956 (957).

**3. Attachment or arrest must have been applied for on insufficient grounds.**—(1) The words "on insufficient grounds" must be taken to mean "without reasonable or probable cause." AIR 1953 Madh B 90 (91):

**Section 95 — Note 3 (contd.)**
ILR (1953) Madh B 29 (DB) * AIR 1951 Raj 26 (28) (DB) ° (1894) 18 Bom 717 (720) ° AIR 1960 Bom 326 (327): 61 Bom LR 1254 (DB). (It is for the plaintiff who applied for attachment before judgment to prove that the attachment was applied for and got effected on reasonable and probable grounds.)

(2) That on the finding that R the plaintiff in a suit on a promissory note was only a benamidar for Kanthammal the defendant No. 2 and that it was for her benefit that the suit was instituted, it might follow that the attachment was applied for on insufficient grounds as R had no real claim against Kanthammal though the attachment was confirmed, and Section 95 (1) (a) would be attracted because, to bring the case under that provision, it would be sufficient to show that the attachment was effected and that it was applied for on insufficient grounds. AIR 1961 Mad 352 (353, 354): (1960) 2 Mad LJ 484. (Reversed on another point in AIR 1963 Mad 412.)

(3) An application for attachment on the ground that the plaintiff would have difficulty in realizing the decretal amount is made on insufficient grounds. AIR 1934 Oudh 429 (430): 10 Luck 199 (DB).

(4) The mere fact that the grounds have not been mentioned in the application for attachment or arrest before judgment will not make the plaintiff liable for compensation. AIR 1953 Madh B 90 (91): ILR (1953) Madh B 29 (DB) * ILR (1954) Madh B 134 (136, 137) ° AIR 1937 Nag 126 (127): ILR (1938) Nag 361.

(5) Application for removal of attachment before judgment on deposit of amount — No plea that attachment was obtained on insufficient grounds — Attachment terminated — Subsequent application for compensation under Section 96 not maintainable. AIR 1942 All 261 (263): ILR (1942) All 360.

(6) Where on the defendant's furnishing security his property is released from attachment, but before the release he protests that the attachment was on insufficient ground, he is entitled to claim compensation. AIR 1953 Madh B 247 (249): ILR (1954) Madh B 62.

(7) No compensation can be granted on the defendant's showing that at the time of attachment he had property of greater value than the amount claimed in the suit. ILR (1954) Madh B 134 (136).

(8) The fact that the order for attachment was not made absolute is, by itself, not sufficient to entitle the defendant to compensation. Madh B LJ 1954 HCR 1284 (1286).

(9) The setting of the order of attachment which is alleged to have been obtained on insufficient grounds is not an essential preliminary to the grant of compensation under Section 95 of the C. P. C. AIR 1961 Mad 220 (222, 223): (1960) 2 Mad LJ 479.

**4. "Or the suit of the plaintiff fails."**— (1) Where there was no want of reasonable and probable cause for instituting the suit, but the same was dismissed on the ground of plaintiff's fraudulent conduct, the defendant, will not be entitled to claim compensation. (1903) 13 Mad L Jour 70 (71) (DB).

(2) Mere evidence of malice will not prove the absence of reasonable or probable ground for instituting the suit. AIR 1915 Cal 173 (174, 175): 42 Cal 550 (DB).

(3) Clause (b) of Section 95 (1), C. P. Code, contemplates compensation being granted in a case of attachment being effected in respect of a suit which ultimately fails and it appears to the Court that there was no reasonable or probable ground for instituting the same. Where the applicant herself in conspiracy with the plaintiff allows him to file a suit for recovery of money under a promissory note executed by her jointly with another and the plaintiff succeeds in that suit in levying an attachment before judgment on the property of the applicant, the applicant cannot succeed in her application under Section 95 on the suit being dismissed as against her. To such a case Section 95 (1) (b) will not apply. AIR 1963 Mad 412 (413): (1963) 2 Mad LJ 168 (DB). (AIR 1961 Mad 352, Reversed.)

(4) The disposal of a suit in which an application for compensation under Sec. 95 has been made cannot divest the Court its power to deal with that application which it is clear, the duty of the Court. AIR 1964 Mys 4 (6): (1963) 1 Mys LJ 238.

**5. Procedure for obtaining compensation.** —(1) Beyond an application for compensation there is no particular procedure or formality to be followed. AIR 1917 Mad 885 (885).

(2) An application under Section 95 is necessary for the purpose, which may form even part of a counter, but the Court has to become seized of the matter before it can proceed. The Court cannot provide for grant of compensation under S. 95, as part of the suit, and embody its decision while passing the decree in the suit. After the Court has been seized of this application a formal notice should be given to the aggrieved party, his objection heard, and then an order passed. (1961) 2 Mad LJ 454: 74 Mad LW 810.

(3) Section 95, C. P. Code alone governs the procedure in a summary application for compensation for wrongful arrest or attachment and there is no justification for hedging this remedy round with restrictions which the section itself does not import. AIR 1963 Raj 177 (177): 1963 Raj LW 163.

(4) An application is to be made only after the suit is heard and not before. AIR 1923 Mad 352 (353) ° 1931 Mad WN 956 (957).

**Section 95 — Note 5 (contd.)**

(5) An application for compensation for wrongful attachment of property cannot be entertained by the Court unless the order of attachment has been set aside as having been obtained on insufficient grounds. AIR 1934 Mad 638 (639) * AIR 1942 All 261 (262, 263): ILR (1942) All 360.

[But see AIR 1940 Mad 77 (78).]

(6) Court has power under this section to permit the conversion of an application for compensation into a suit for compensation upon payment of the necessary court. (1912) 16 Ind Cas 443 (444) (DB) (Cal).

**6. Amount and basis of compensation.**— (1) The discretion to grant compensation has to be exercised in a judicial manner. Where a Court gives no reasons for refusing an application under this section, the order is not one according to law AIR 1955 Mad 552 (553) ° AIR 1934 Oudh 429 (431): 10 Luck 199 (DB).

(2) By the very terms of Section 95, the Court has a wide discretion in deciding whether any compensation should be allowed and, if so, to what extent. The discretion is a judicial discretion and the Court to which such an application is made must take into consideration all the circumstances of the case including the question whether or not the grounds are so clearly insufficient that the applicant himself could not but have known that they were insufficient. The Court should not merely look at the question from the point of view of the ultimate decision by which the applicaion was disallowed but also consider the question whether the applicant for injunction had reason to believe that they were insufficient. AIR 1959 Cal 668 (669): 63 Cal WN 197 (DB).

(3) The word "injury" is not confined only to some tangible injury that can be measured directly in money but humiliation or injury to reputation will be included in the term "injury" and general damages can be awarded. AIR 1955 Mad 552 (554) ° AIR 1940 Mad 77 (79) * AIR 1926 Mad 962 (962) ° AIR 1953 Madh B 247 (249): ILR (1954) Madh B 62 * Madh BLJ 1954 HCR 1230 (1232) ° AIR 1960 Bom 326 (328): 61 Bom LR 1254. (39 Cal WN 915, Dissented from.)

[But see AIR 1958 Mys 136 (137): ILR (1957) Mys 339 ° (1936) 164 Ind Cas 73 (73, 74) (Cal) * AIR 1932 Cal 695 (696): 59 Cal 1082.]

(4) An attachment before judgment effected on insufficient grounds is itself an injury, actionable per se, as it interferes with the common law rights of the defendant and entitles the defendant, without proving special damage, to obtain compensation by way of general damages. AIR 1960 Bom 326 (328): 61 Bom LR 1254 (DB).

(5) In the case of a suit by a third party for damages for wrongful attachment of his property in execution of a decree passed against another person, it was held that the wrong was actionable per se and that the plaintiff was entitled to general damages although he did not prove any special damage. (1866) 10 Moo Ind App 563 (575) (PC).

(6) The defendant is not bound to prove special damages in an application under Sec. 95. AIR 1959 Ker 18 (21): 1958 Ker LT 565 (DB). ((1940) 1 MLJ 782 and AIR 1940 Mad 77 and 21 MLJ 1052 and AIR 1922 Mad 206 and ILR (1956) Trav-Co 324, Foll.; 39 Cal WN 915, Dissent. from.)

(7) An order under Section 95 awarding compensation for improper attachment before judgment has to be passed as an order collateral to the decree or decision in the suit; and it is appealable under Sec. 104. Such appeals are treated as appeals from orders and not appeals from decrees. (1961) 2 Mad LJ 454: 74 Mad LW 810.

(8) In an action for wrongful arrest damages are at large. In other words general damages in addition to special damages, if any, alleged and proved are recoverable. Where no special damage is alleged the applicant is entitled to general damages. AIR 1963 Raj 177 (177). 1963 Raj LW 163.

(9) When an order of attachment so obtained has been made absolute after hearing the parties, it would mean that according to the Court the application for attachment was made on sufficient grounds and if that order has become final, it will not be open the same Court on a subsequent application under Section 95 of the Civil P. C., to hold the contrary. So long as the prior binding order or attachment, is not set aside either by appeal or review or otherwise, an applicaion under Sec. 95 of the C. P. Code cannot be allowed on the ground that the order has been procured on insufficient grounds. AIR 1961 Mad 220 (222, 223): (1960) 2 Mad LJ 479 ° AIR 1963 Mad 412 (413): (1963) 2 Mad LJ 168 (DB).

(10) Where an order of attachment that has become final is only ex parte and there is no final order on merits and after considering the objections of the defendant, then an application under Section 95 can be allowed on the ground that the order has been procured on insufficient grounds and it will not be equitable to apply the principle of the rule of res judicata in such a case. AIR 1961 Mad 220 (222, 223): (1960) 2 Mad LJ 479.

(11) Under Section 95 the presentation of an application for cancellation of the injunction or attachment complained against is not a condition precedent for sustaining an application for the payment of compensation. Section 95 containing as it does an exhaustive statutory provision providing for the payment of compensation in certain cases, an application made under it has to be disposed of without resort to any extra-

**Sesction 95 — Note 6 (contd.)**
neous principles which might have been followed in other cases or by Courts of other countries. AIR 1964 Mys 4 (5, 6): (1963) 1 Mys LJ 238. (AIR 1934 Mad 638 and AIR 1932 Cal 821, Dissented from; 1931 Mad WN 956 and AIR 1940 Mad 77, Rel. on.)

**7. Court which can grant compensation.**— (1) Compensation can be awarded only by the Court by which the arrest, etc., was ordered and the application for compensation has to be made only to that Court. (1898) 22 Bom 42 (46) (DB) ° (1865) 3 Suth WR (Misc) 28 (28) (DB).

(2) Where a temporary injunction restraining the defendant from executing a decree obtained by him in another suit is granted on an undertaking by the plaintiff to compensate the defendant for the loss that he may suffer on account of such injunction, and the suit of the plaintiff is dismissed, the undertaking is to be enforced by application not to the Court executing the defendant's decree but to the Court which granted the injunction. (1898) 22 Bom 42 (46) (DB).

**8. Provincial Small Cause Court.**—(1) A Provincial Small Cause Court can order the attachment of moveables and also award compensation for a wrongful attachment thereof under this section though it cannot do so with respect to immoveable property. 1907 Pun Re No. 77, p. 397 (398) ° AIR 1915 Mad 1072 (1072).

(2) In Small Cause suits an independent inquiry, regarding claim for compensation for wrongful attachment before judgment, is not necessary and the evidence on the point can be taken in the course of the suit proceedings. AIR 1951 Madh B 79 (79).

(3) A suit for damages for illegal attachment is not cognizable by a Small Cause Court. (1913) 18 Ind Cas 695 (695) (All).

**9. Chartered High Court, power of.**— (1) Section does not apply to suits entertained by High Court on its original side and hence the High Court can on an application by the defendant award under Rule 329 of the Bombay High Court Original Side Rules, compensation exceeding Rs. 1000 for wrongful attachment before judgment. AIR 1926 Bom 523 (524).

[But see (1908) 10 Bom LR 1002 (1002, 1003).]

(2) The Original Side Rules of the Madras High Court do not contain rules similar to those of the Bombay High Court. Hence the provisions of Section 95 will apply with necessary changes in that High Court. AIR 1955 Mad 552 (553).

**10. Regular suit, if and when barred.**— (1) Remedy by way of claiming compensation under Section 95 (1) is optional — Regular suit for claiming compensation not barred by Section 95 (2) unless an order for compensation has been passed under S. 95 (1). AIR 1963 Punj 158 (162): 65 Punj LR 33.

(2) A regular suit for compensation is not barred by the omission to proceed under the summary procedure provided for by this section. (1866) 1 Agra 104 (105) ° (1869) 11 Suth WR 143 (143) (DB).

(3) If an application is made and disposed of under this section such disposal would operate as a bar to a regular suit, whatever may be the result of the application. (1874) 21 Suth WR 375 (376) (DB) ° (1911) 11 Ind Cas 917 (918) (DB) (Low Bur).

(4) A claim for compensation made in a counter affidavit against a petition for attachment before judgment cannot bar a regular suit. AIR 1920 Mad 397 (399) (DB).

(5) An application under this section is no bar to a subsequent suit for damages caused by reaping and removal of crop from the land, which the plaintiff was prevented from entering by the Court's injunction. 1932 Mad WN 536 (536, 537) (DB).

(6) In a suit for compensation the plaintiff must not only prove want of reasonable or probable cause for obtaining the arrest, attachment or injunction but also that the defendant was actuated by malice: AIR 1951 Raj 26 (30) (DB) * AIR 1944 Cal 289 (296): ILR (1944) 2 Cal 358 (DB) ° (1911) 35 Mad 598 (602) (DB).

[But see (1910) 13 Oudh Cas 357 (362) (DB).]

(7) Malice is not necessarily hatred or enmity, but any improper motive. A plaintiff acts improperly in making use, for putting undue pressure on his debtor, of a process intended to prevent fraudulent conduct on the part of the debtor. (1911) 35 Mad 598 (602) (DB).

(8) A suit lies for maliciously and wrongfully obtaining a temporary injunction or an excessive attachment of property. AIR 1927 Cal 247 (249): 53 Cal 1008 (DB) ° AIR 1926 Cal 757 (760) * AIR 1922 Lah 303 (304) (DB).

(9) When a decree for a perpetual injunction is made by the first Court but is set aside in appeal, the defendant cannot maintain a suit for damages caused by the said suit having been brought. AIR 1915 Cal 173 (175): 42 Cal 550 (DB).

(10) Apart from proving want of reasonable and probable cause, it is necessary for the plaintiff also to establish that the proceedings in the previous suit had terminated in his favour. AIR 1951 Raj 26 (29) (DB).

(11) It is only in cases where the plaintiff in the suit for damages for wrongful attachment was a party to the suit in which the goods were wrongfully attached that malice and want of reasonable or probable cause is to be proved by the plaintiff. AIR 1924 Rang 302 (307): 2 Rang 181.

## PART VII

## APPEALS

### APPEALS FROM ORIGINAL DECREES

**96. Appeal from original decrees.**—(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed ex parte.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

[1882, S. 540; 1877, Ss. 540, 575; 1861, S. 23; See Order 41.]

### OBJECTS AND REASONS

See paragraph 11 of the Statement of Objects and Reasons given at the beginning of this Code.

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**Section 95 — Note 10 (contd.)**

(12) Where the plaintiff is a minor suing by a next friend, compensation cannot be awarded against the next friend under this section. But a separate suit can be brought against the next friend for compensation. AIR 1941 Mad 719 (720): ILR (1941) Mad 985 (DB).

(13) A Court may in a proper case allow a suit for compensation to be converted into an application under this section. AIR 1944 Cal 289 (296): ILR (1944) 2 Cal 358 (DB).

### SECTION 96 — SYNOPSIS

1. SCOPE AND OBJECT.
2. "APPEAL," MEANING OF.
2A. "FROM EVERY DECREE".
3. "COURT AUTHORIZED TO HEAR APPEALS."
4. WHO CAN APPEAL.
5. Co-plaintiffs.
6. Co-defendants.
7. Appeal by minor.
8. RIGHT OF APPEAL, WHEN LOST.
9. EXECUTION PROCEEDINGS.
10. APPEAL AGAINST EX PARTE DECREE.
11. APPEAL AGAINST AMENDED DECREE.
12. DECREE PASSED WITHOUT JURISDICTION — APPEAL.
13. APPEAL AGAINST CONSENT DECREE.
14. COURT-FEE.
15. APPEALS UNDER OTHER LAWS.

### TOPIC INDICATOR

Abatement of appeal by subsequent supersession of decree by amendment in trial Court — See Note 1.
Advocate-General and relators — Appeal by, under Section 92 — See Note 4.
Appeal against decree wrongly passed on merits in absence of plaintiff — See O. 17, R. 3.
Appeal against fresh decree on remand where no appeal from original decree — See Note 8.
Appeal as to costs — See Section 35.
Appeal by a party with no subsisting interest — See Note 4.
Appeal by agent — See Note 4.
Appeal by benamidar — See Note 4.
Appeal by party exonerated or struck out — See Note 4.
Appeal by persons not parties to the suit or decree — See Note 4.
Appeal by representative of parties to the suit — See Note 4.
Appeal by transferee after decree — See Note 4.
Appeal fruitless owing to subsequent events — Dismissal — See Note 2.
Appeal in Small cause suit as ordinary suit — See Section 102.
Appeal is continuation of suit — See Note 2.
Burden of proving right of appeal — See Note 4.
Clause (3) and orders by consent — See Note 13.
Compromise decree — Matters outside suit — Appealability — See Note 13.
Decree — Definition — See Note 4 and Section 2 (2).
Decree on disputed compromise — Appealability of — See Note 13.
Decree on oath — Appeal by non-consenting party. — See Note 13.
Ex parte decree not set aside — No bar to appeal — See Note 10.
Failure to draw up a formal decree — No appeal — See Note 4.
Hindu reversionner — Appeal by — See Note 4.
Inapplicability of the section to Letters Patent Appeals — See Note 1.
Inapplicability of the section to "Orders". See Note 1 and Section 2 (2).
Judgment or finding — No appeal from —See Note 4.
Nature of grounds — See O. 41, R. 1.
Nature of right of appeal — See Note 1.

**Section 96 (contd.)**

Orders under Hindu Marriage Act — Appeal against — See Note 2A.

Power of lower Appellate Court to re-hear, pending second appeal — See Note 10.

Powers of appellate Court — See Section 107.

Powers of original Court in respect of ex parte decrees on appeal — See Notes 1 and 10.

Remedies against ex parte decrees — See Note 10.

Second appeal against ex parte decree in first appeal — See Note 10.

Second appeal by parties, not impleaded in first appeal — See Note 4.

Second appeal without appealing from the order refusing to re-hear the appeal — See Note 10.

Successful party — Appeal by — See Note 4.

Valuation for jurisdiction different from that for court-fee — See Note 14.

**1. Scope and object.**— (1) Right of appeal is not a natural or inherent right attaching to litigation. (1912) 39 Ind App 197 (200): 40 Cal 21 (PC) ° AIR 1958 Pat 430 (431): 36 Pat 1123 (FB) * AIR 1957 Mad 333 (337): ILR (1957) Mad 571 * (1936) 62 Cal 701 (705) (DB) ° (1896) 18 All 375 (378) (SB) ° 1908 All WN 211 (214). (Overruled on another point in AIR 1923 All 490: 45 All 506 (FB).)

(2) Right of appeal does not exist and cannot be assumed unless expressly given by statute or by rules having force of statute. AIR 1954 Raj 138 (140): ILR (1954) 4 Raj 597 (FB) * AIR 1958 All 105 (106) ° AIR 1957 Andh Pra 11 (13) ° AIR 1957 Mad 333 (337): ILR (1957) Mad 571 ° (1956) 1956-2 All ER 872 (873): 1956-1 WLR 906 * ILR (1955) Patiala 95 (100) (DB) ° ILR (1954) Hyd 620 (626) (DB) ° AIR 1950 Mad 124 (128): ILR (1950) Mad 381 (DB) ° AIR 1941 Oudh 590 (591) (DB) * AIR 1941 Pat 225 (225): 20 Pat 561 (SB) ° (1888) 11 Mad 309 (312) (FB) ° AIR 1935 PC 5 (6) * AIR 1935 Rang 264 (270): 13 Rang 457 (FB) ° AIR 1936 Cal 683 (690): ILR (1937) 1 Cal 699 (SB) * AIR 1934 Mad 103 (104, 110, 111): 57 Mad 271 (FB) ° (1888) 11 Mad 26 (34): 14 Ind App 160 (PC) ° AIR 1922 Lah 369 (376, 377): 3 Lah 296 (DB) * AIR 1925 All 380 (382): 47 All 513 (FB) ° (1912) 40 Cal 21 (27): 39 Ind App 197 (PC) ° (1913) 20 Ind Cas 763 (765) (PC) * AIR 1916 Cal 361 (364): 43 Cal 857 (SB) ° (1901) 23 All 227 (232): 28 Ind App 11 (PC) * (1906) 28 All 545 (550) (FB) ° 1891 App Cas 210 (213) ° AIR 1967 Andh Pra 265 (271): (1966) 1 Andh WR 254 ° (1967) 66 ITR 319 (321) (Delhi) (DB) ° ILR (1965) Andh Pra 482 (DB) ° AIR 1964 Punj 455 (455):1964 Cur LJ 311. (The party aggrieved cannot say that the denial constitutes violation of any fundamental right per se.) * AIR 1963 Cal 214 (215, 216, 217) * AIR 1962 All 439 (441) ° AIR 1961 Ker 96 (98): 1960 Ker LT 1091 (FB) ° 1959 All WR (HC) 166 (171) ° AIR 1959 Pat 121 (124): 1958 BLJR 783 (FB). (Can neither be conferred nor taken away on a consideration of the question whether the remedy will or will not be convenient or adequate.) ° AIR 1959 Punj 398 (400): ILR (1958) Punj 393 (DB) * 58 Bom LR 107: ILR (1956) Bom 171. (It would not be possible to recognise or carve out any such right on grounds of justice, equity or fairness.) ° AIR 1955 Mad 159 (160): 1954-2 Mad LJ 192 ° (1967) 1 Mys LJ 13.

(3) Right of appeal created after commencement of proceeding will not apply retrospectively to make orders therein appealable, unless expressly so provided. ILR (1955) Patiala 95 (100) (DB) ° AIR 1954 Nag 348 (350): ILR (1954) Nag 493 (DB) ° AIR 1943 Nag 36 (60, 66): ILR (1943) Nag 73 (DB) ° AIR 1943 Mad 208 (208): ILR (1943) Mad 501 (DB). (AIR 1929 Mad 381: 52 Mad 361, Followed.) ° AIR 1960 SC 980 (984, 985): (1960) 3 SCR 640. (AIR 1955 Bom 332, Affirmed.)

[But see AIR 1945 Oudh 1 (2) (DB).]

(4) Act which abolishes right of appeal unless expressly made retrospective does not affect vested right of appeal of litigant in pending action. AIR 1956 Assam 66 (73) (DB) * ILR (1955) Patiala 95 (100) (DB) ° AIR 1954 Mys 152 (154): ILR (1954) Mys 125 (DB) ° ILR (1954) Hyd 694 (701, 702) (DB) * ILR (1954) 4 Raj 591 (596) (DB). (1950 Raj LW 344, Overruled.) ° AIR 1953 Bom 189 (190): ILR (1953) Bom 323 (DB) ° AIR 1953 Hyd 258 (261, 262): ILR (1953) Hyd 423 (DB) * AIR 1953 Pat 380 (381) (DB) ° AIR 1950 Madh B 85 (86) (DB) ° AIR 1943 Nag 36 (60, 66): ILR (1943) Nag 73 (DB) * AIR 1967 SC 344 (345): (1961) 12 STC 219 ° AIR 1965 Andh Pra 235 (239): (1965) 2 Andh WR 5 (DB) ° (1960) 1 Guj HCR 189: (1960) 1 Guj LR 208. (Overruled on another point in AIR 1961 Guj 144 (FB). The legislature can restrict the right of appeal only by express words or by necessary intendment.) * AIR 1969 Guj 96 ° AIR 1967 All 231 (236) (DB).

(5) Parties cannot confer right of appeal upon themselves by agreement or mutual consent. AIR 1941 Rang 199 (200) (DB) ° (1911) 38 Cal 639 (669) (DB) * (1912) 13 Ind Cas 170 (171) (DB) (Cal) ° (1889) 13 Bom 650 (652) (DB) * 1902 Pun Re No. 36, p. 135 (137) (FB) * (1878) 3 QBD 1 (4) ° (1867) 7 Suth WR 222 (223) ° (1905) 2 Cal L Jour 384 (387) (DB).

(6) Appeal lies only from decree and not from a finding in a judgment. AIR 1942 Bom 279 (280) (DB) ° AIR 1941 Oudh 590 (592) (DB) ° (1936) 62 Cal 701 (704) ° AIR 1963 Mad 30 (30): (1962) 2 Mad LJ 270.

(7) The language of the present S. 96 is clear that an appeal shall lie from every decree and a single appeal against the decree in two suits based on different causes of action and having different scopes is not at all contemplated. AIR 1960 Mad 57 (57).

Section 96 — Note 1 (contd.)

(8) Section does not confer right of appeal from all adjudications which are decrees, but only where it is not expressly otherwise provided in Code or by any other law in force. (1890) 12 All 129 (155) (FB) * (1884) 8 Bom 269 (270) (DB) ° AIR 1939 All 233 (234) ° AIR 1939 All 552 (554): ILR (1939) All 557 (DB) ° AIR 1960 Puni 639 (641): 62 Pun LR 559 (DB).

(9) Direction in decree allowing parties to bear their own costs — No question of principle involved — No appeal or cross-objection lies on question of costs. AIR 1965 All 228 (231): 1964 All LJ 1057.

[See also AIR 1946 Cal 530 (534): ILR (1946) 2 Cal 527 (FB).]

(10) Order coming under S. 104, is appealable notwithstanding decree passed subsequently is not appealed against. AIR 1933 Pat 634 (635) (DB).

(11) "Court authorised to hear appeals" means either Court authorised to hear appeals from the Courts in question generally or else the Court authorised to hear such appeals as the appeal in question. (1886) 13 Cal 232 (235) (DB).

(12) Though right of appeal is a substantive right, but that cannot be extended to claim a right of being heard by a specific Bench of the High Court. AIR 1959 Mys 253 (254): 37 Mys LJ 397. (AIR 1958 Andh Pra 60, Rel. on.)

(13) Appeals from Single Judge of High Court to a Bench are regulated by Letters Patent issued to respective High Courts and not by this section. AIR 1940 Nag 39 (39): ILR (1940) Nag 141 (FB) * AIR 1916 Cal 973 (973): 43 Cal 90 (DB) ° AIR 1923 Bom 218 (224, 225) (DB) ° AIR 1937 Rang 268 (269): 1937 Rang LR 97 (DB) * AIR 1919 Bom 1 (7, 9): 43 Bom 433 (FB) ° (1918) 18 Ind Cas 253 (253, 254) (SB) (Cal) ° AIR 1916 Mad 1220 (1221): 39 Mad 235 (FB) * AIR 1915 Cal 771 (771): 42 Cal 735 (DB) ° AIR 1917 Bom 62 (78) (SB) ° (1907) 34 Cal 619 (624) (SB) * (1906) 33 Cal 1323 (1341, 1343) (SB).

(14) As regards procedure in L. P. appeals, Code and the rules apply unless the Code specially provides to the contrary. AIR 1921 PC 80 (82, 83): 48 Cal 481: 48 Ind App 76.

(15) By settled practice procedure in Vice-Admiralty cases is governed by Civil P. C. (1890) 17 Cal 66 (83) (DB).

(16) Special jurisdiction conferred on existing or established Court without more, will attract all incidents of ordinary jurisdiction of such Court including right of appeal from its decisions, if provided by statute. AIR 1948 PC 12 (14): 74 Ind App 264: ILR (1948) Mad 505 ° AIR 1956 Ajmer 53 (54) ° AIR 1955 Trav-Co 183 (183) * (1954) 58 Cal WN 740 (742) (DB) ° (1954) ILR (1954) Madh B 454 (458) ° 1954 Raj LW 483 (485) * AIR 1953 Cal 524 (525, 526) (DB) ° AIR 1952 Punj 159 (161) (DB). (AIR 1951 Punj 346, Overruled.) ° ILR (1949) 1 Cal 487 (491) (DB) * AIR 1944 Cal 401 (405): ILR (1945) 1 Cal 506 (DB) ° AIR 1944 Sind 220 (221): ILR (1944) Kar 216 (DB) * AIR 1959 Mad 191 (193): (1959) 1 Mad LJ 181.

(17) Decision of Court under a special jurisdiction conferred on it if it amounts to decree will be appealable under section although the proceedings originated in Court not on plaint but on application. ILR (1949) 1 Cal 487 (491, 492) (DB).

[But see AIR 1955 Mad 159 (160).]

(18) Order or decision of District Judge made or given in the winding up to be appealable under S. 202, Companies Act, 1913 (now S. 483 of 1956 Act) must either amount to a decree from which appeals lie under S. 96 or to such an order as falls within S. 104 read with O. 43, R. 1. AIR 1956 All 222 (223): 1956 Cri L Jour 369 (DB).

[But see AIR 1955 Bom 355 (356): ILR (1955) Bom 550 (DB).]

(19) Orders passed by the District Court or by a single judge of the Calcutta High Court in the matter of winding up petitions are appealable under S. 202 of the Indian Companies Act independently of provisions of S. 96 and S. 10 or that of Letters Patent Cl. 15. AIR 1965 SC 507 (514): (1964) 1 SCR 717. (AIR 1928 Cal 295, Overruled. AIR 1959 Cal 324 so far as it proceeds on the basis that Cl. 15 of Letters Patent is attracted, must be treated as reversed.)

(20) Right of appeal to High Court — Does not mean right to be heard by specific number of Judges. AIR 1966 SC 430 (432): (1966) 1 SCR 574 ° AIR 1962 Mad 304 (306, 307): (1962) 1 Mad LJ 376 * AIR 1961 Ker 226 (233): 1961 Ker LT 275 (FB).

(21) The appellate Court has jurisdiction to construe the terms of S. 96, C. P. Code and even if the construction placed by the said Court be erroneous the appellate judgment is not a nullity and cannot be disregarded or attacked collaterally as passed by a Court not competent to entertain the appeal. AIR 1965 SC 948 (951): (1966) 1 SCJ 475.

(22) Where an order is made on an application under the provisions of C. P. C. and not on an application under the provisions of the Hindu Marriage Act the question as to whether the order is appealable or not has to be answered by reference to the provisions of C. P. C. AIR 1967 Punj 148 (152): ILR (1967) 1 Punj 695 (DB). (Order on an application under S. 10 C. P. C. refusing to stay proceedings held not appealable.) ° 1962 All LJ 678 ° 1963 BLJR 175.

(23) A decree falling under S. 17 of the Arbitration Act can be challenged in first appeal under S. 96 C. P. C. by virtue of S. 41 Arbitration Act. AIR 1963 All 252 (254): 1962 All LJ 999 (DB).

**2. "Appeal," meaning of.** — (1) 'Appeal' means "the removal of a cause from an in-

**Section 96 — Note 2 (contd.)**

ferior to a superior Court for the purpose of testing the soundness of the decision of the inferior Court." (1899) 22 Mad 68 (80) (FB) * AIR 1953 Nag 56 (57): ILR (1952) Nag 564 (DB) ° 1908 All WN 211 (213). (Overruled on another point in AIR 1923 All 490: 45 All 506 (FB).)

(2) There is no definition of appeal in the Code of Civil Procedure but there is no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a subordinate court is an appeal within the ordinary acceptance of the term and that it is no less an appeal because it is irregular or incompetent. ILR (1966) Andh Pra 729 (737, 738) (DB).

(3) Appeal is a remedy provided by law for getting decree of lower Court cancelled. (1899) 22 Mad 68 (85) (FB) * AIR 1933 Bom 255 (257, 260): 57 Bom 338 (DB) * AIR 1932 PC 165 (167): 59 Ind App 283: 60 Cal 1.

(4) Appeal is, in fact, a complaint made to higher Court that decree of lower Court is unsound and wrong. (1873) 6 NWP HCR 19 (21) (FB) ° AIR 1915 Mad 548 (549) (DB).

(5) Appeal must be against whole decree and not against any item or items in it. AIR 1941 Pat 269 (276): 20 Pat 459 (SB).

(6) Appeal is only a continuation of original proceedings and a stage in suit itself. AIR 1944 Lah 29 (31): ILR (1943) Lah 666 (DB) ° AIR 1957 Punj 310 (312): ILR (1957) Punj 656 ° ILR (1957) Punj 1443 (1447) ° (1903) 26 Mad 91 (95, 96) (FB) ° AIR 1915 Mad 1223 (1229, 1233): 39 Mad 195 (FB) * AIR 1914 Cal 614 (615) (DB) ° AIR 1918 Mad 998 (1002, 1006): 40 Mad 1 (FB) ° AIR 1919 Lah 180 (181): 1919 Pun Re No. 79 (DB) ° AIR 1967 All 214 (217): 1963 All LJ 185 (FB) * AIR 1968 Mani 42 (43).

(7) Legislature can provide for an exception to normal rule that appeal is continuation of suit. AIR 1967 Bom 514 (520): 69 Bom LR 153. (Overruled on another point in AIR 1968 Bom 100.)

(8) Decree passed by Appellate Court is decree in suit. AIR 1917 Mad 597 (598) (DB) ° (1888) 15 Cal 94 (99) (DB) ° (1901) 28 Cal 23 (27) (DB) * (1903) 26 Mad 91 (95) (FB) ° AIR 1915 Mad 1223 (1230, 1231): 39 Mad 195 (FB) ° (1894) 18 Bom 203 (205) (DB).

(9) Appellate judgment stands in place of original judgment for all legal purposes. AIR 1915 Mad 1133 (1134) (DB) * AIR 1957 All 527 (532).

[See AIR 1958 SC 86 (95): 1958 SCR 595: ILR (1957) 2 All 422.]

(10) Appeal is not confined to judgment or any particular proceedings of case but enables party to open up the entire basis of decree comprising all stages of case. It can cover not only, acts done or orders passed by Court but also acts not done or omissions made by it. Thus omission to frame certain issue may also be agitated in appeal. AIR 1957 All 527 (532).

(11) That appeal in continuation of original proceedings does not mean that party could as of right urge therein rights which he could have pleaded and enforced before suit was finally decided by trial Court but he did not. AIR 1957 Madh Pra 98 (103) (DB).

(12) Appeal differs from a review. In review reconsideration of subject is by same Judge under certain conditions, while in appeal rehearing is by another tribunal. (1859) 7 Moo Ind App 283 (304) (PC).

(13) While in an appeal points to be decided are those on which parties are at variance, in revision powers may, in certain cases, be exercised even when parties have not moved. AIR 1932 All 651 (653): 54 All 891 ° AIR 1933 Sind 200 (202): 28 Sind LR 167 (DB).

(14) Per Subba Rao, J.: There is an essential distinction between an appeal and a revision. An appeal is a continuation of the proceedings, in effect the entire proceedings are before the appellate authority and it has power to review the evidence subject to the statutory limitation prescribed. But in the case of a revision, whatever powers the revisional authority may or may not have, it has not the power to review the evidence unless the statute expressly confers on it that power. AIR 1965 SC 1585 (1587): (1965) 1 SCR 601.

(15) "Appeal under the Civil Procedure Code" means appeal procedure in regard to which is governed by Code and not merely appeal right to prefer which is conferred by Code. AIR 1920 Mad 407 (408): 43 Mad 51 (DB).

(16) Appeal dismissed for default will not bar fresh appeal brought within period of limitation. AIR 1923 Pat 514 (516): 2 Pat 739 (DB) ° AIR 1921 Cal 455 (456): 48 Cal 157 (DB).

(17) Appeal which even if successful, would be entirely fruitless should be dismissed as being incompetent. (1912) 15 Ind Cas 529 (529) (DB) (Cal) * AIR 1916 Cal 272 (274) (SB).

[See also AIR 1932 Nag 121 (126, 127): 28 Nag LR 233 (FB).]

(18) Nothing prevents party from filing appeal which may ultimately be found incompetent. AIR 1954 SC 73 (74): 1954 SCR 384: 1954 Cri L Jour 351.

(19) Words "appeal shall lie" used in section relate to the right of appeal. AIR 1958 Bom 345 (346): ILR (1958) Bom 419.

**2A. "From every decree". —** (1) Appeal can lie only if subject-matter is "decree." AIR 1956 Bom 569 (572) * AIR 1957 Cal 21 (22) (DB). (Application for instalments filed before passing of decree on award — Decision of Court is a part of decree and therefore is appealable.) ° AIR 1956 Raj 164 (165): ILR (1956) 6 Raj 736 * AIR 1955 Hyd 156 (157): ILR (1955) Hyd

Section 96 — Note 2-A (contd.)
56 (DB) ° Madh B LJ 1955 HCR 714 (717) (DB) ° AIR 1954 All 63 (64) * AIR 1954 Cal 220 (221) (DB) ° AIR 1953 Kutch 42 (43) * AIR 1951 Nag 269 (270) ° AIR 1951 Punj 444 (445) ° AIR 1950 All 57 (60): ILR (1950) All 975 ° AIR 1950 Assam 169 (174) (DB) * AIR 1950 Mad 296 (296) ° AIR 1950 Pat 443 (444) (DB) ° 1950 All WR 280 (281) * AIR 1943 Cal 177 (179) (DB). (Contra AIR 1939 Cal 717 (717).) ° AIR 1942 Mad 406 (406) (DB) ° AIR 1941 Cal 530 (532): ILR (1941) 2 Cal 402 (DB) * AIR 1941 Mad 817 (819): ILR (1942) Mad 60 (DB) ° AIR 1935 Lah 302 (303): 16 Lah 990 (DB) ° (1873) 6 NWP HCR 19 (21, 23) (FB) ° AIR 1934 Oudh 307 (309). 9 Luck 701 (DB) ° AIR 1935 Mad 373 (377) (DB) ° (1936) 62 Cal 701 (704) (DB) * AIR 1936 Sind 166 (167): 30 Sind LR 170 (DB) ° AIR 1937 Oudh 381 (383): 13 Luck 523 (DB) ° AIR 1939 All 552 (554): ILR (1939) All 557 (DB) * AIR 1939 Bom 182 (183): ILR (1939) Bom 389 (DB) ° (1912) 8 Nag LR 92 (96) ° AIR 1925 Cal 932 (932): 52 Cal 662 (DB) * (1868) 9 Suth WR 309 (311) (SB) * 32 Cut LT 393: ILR (1965) Cut 943. (Refusal to entertain application for restitution is decree — Order is appealable.) ° (1964) 1 Andh WR 349: (1964) 1 Andh LT 378. (Mere finding on preliminary issue relating to jurisdiction does not tantamount to a decree.) * 1963 All LJ 59.

[See also 1965 Raj LW 520: ILR (1966) 16 Raj 213 (DB). (Case of no subsisting decree.) ]

[See however AIR 1929 Mad 223 (225) (DB).]

(2) "Decree" is a conclusive determination of "the rights of the parties with regard to all or any of the matters in controversy in the suit." 1956-2 Mad L Jour 174 (175) ° AIR 1957 Bom 59 (60): ILR (1957) Bom 175 (DB) ° AIR 1953 Trav-Co 122 (122) (DB) * AIR 1945 Nag 289 (290): ILR (1945) Nag 643 (DB) ° AIR 1945 Oudh 312 (313): 20 Luck 557 (DB) ° AIR 1943 Nag 204 (209): ILR (1943) Nag 241 (FB) * AIR 1941 Oudh 590 (592) (DB) ° AIR 1941 Pat 1 (2): 19 Pat 862 (DB) ° AIR 1941 Pat 385 (387): 20 Pat 417 (DB) ° AIR 1934 Mad 103 (107): 57 Mad 271 (FB) * AIR 1930 Lah 187 (188 to 190): 11 Lah 402 (DB) ° (1911) 12 Ind Cas 745 (750) (DB) (Cal) ° AIR 1926 Pat 457 (459): 6 Pat 160 (DB) * AIR 1931 Mad 471 (473, 474): 54 Mad 337 (DB) ° AIR 1927 Rang 148 (149): 5 Rang 838 (DB) ° 1966 All LJ 765: 1966 All WR (HC) 470.

(3) "Matters in controversy in the suit" mean matters which, from pleadings, appear to be in dispute between parties ranged as plaintiffs and defendants. (1913) 16 Oudh Cas 350 (353) (FB) * 1965 All LJ 575.

(4) A party can appeal only in such matters as have adversely affected him and not from every part of decree. (1938) 42 Cal WN 492 (494) ° AIR 1934 All 677 (679) ° AIR 1965 SC 1874 (1883): 1965-3 SCR 550 ° AIR 1969 J and K 25 (26) (FB). (In some cases it has been held that an appeal will lie even against a finding which is necessary and will operate as res judicata as against the party by implication.)

(5) 'Decree' — Suit dismissed on ground of want of jurisdiction — Failure to draw decree — Party precluded from challenging the order by appealing from the decree — Remedy open to party is to file application under S. 115, C. P. C. (1957) 61 Cal WN 789.

(6) In no case, can a party come up in appeal unless a formal decree is drawn up and signed, and if the Court refuses to draw up a decree on an application made by the party aggrieved, it could be set right in revision. AIR 1959 Manipur 13 (14).

(7) The effect of a stay order is to put a bar to the jurisdiction of the lower Court to proceed with the case. Accordingly no proceedings taken from the time the order is passed can have any effect. The stay order is operative though it is not communicated. The logical effect thereof is that the judgment and decree passed by the lower Court after the stay are null and void. Such a decree which has no legal existence leaves no foundation for an appeal. AIR 1959 Madh Pra 34 (34): 1959 MPLJ 85.

(8) Munsif Court quashing decree of Nyaya Panchayat, in revision under S. 89 (2) (a) of U. P. Panchayat Raj Act (26 of 1947), and proceeding to try suit himself under cl. (d) of sub-s. (2) — Munsif Court tries the suit in his original jurisdiction and hence decree passed by him is appealable — Decree is governed by S. 96, C. P. Code. AIR 1964 All 347 (347): 1963 All WR (HC) 420.

(9) Decree directing that it will not be executed till disposal of another pending appeal — Appeal and not revision is the remedy against such direction as the direction cannot be construed as a mere order postponing execution. AIR 1960 Mad 349 (350): (1960) 1 Mad LJ 330.

(10) Hindu Marriage Act (XXV of 1955), Ss. 10, 21 — Proceeding on petition for judicial separation is suit and decree passed therein is appealable under S. 96 and second appeal under S. 100 is competent. AIR 1965 All 280.

(11) Where in a suit the plaintiff asks for a primary relief and if not found entitled to it, claims another relief in the alternative (in this case against a different person), and the plaintiff is granted the alternative relief, an appeal against the refusal of primary relief is competent. Such refusal amounts to a decree. AIR 1964 Ker 153 (153): (1963) 1 Ker LR 556.

(12) Order deemed to be decree within meaning of S. 2 (d) — Order subject to all incidents of Ss. 96 and 100— Decision of first appellate Court on order immaterial —

**Section 96 — Note 2-A (contd.)**

Second appeal maintainable. 1968 MPLJ 246: 1968 Jab LJ 640.

(13) Grant of permanent alimony and maintenance even though ordered after the passing of the decree, under S. 25 of the Hindu Marriage Act is a part of the decree and is subject to appeal. 1966 All WR (HC) 10 (11): 1966 All LJ 308.

(14) 'Decree' — Suit against firm through defendant — Decision absolving defendant from liaibility — The appellate Court affirming the finding of the Trial Court and remanding the case to be tried on merits against the firm — Held the order of the appellate Court dismissing the suit against deft. amounted to decree and as such was appealable under S. 96 C. P. C. AIR 1959 J & K 76 (77).

(15) A decision in the original proceedings under S. 13 of the Hindu Marriage Act is a decree under that Act and is appealable under S. 96 C. P. C. read with S. 28 of that Act. AIR 1962 Mys 172 (174): 40 Mys LJ 236.

[But see AIR 1962 Pat 489 (490): ILR 41 Pat 757.]

(16) The order of the Court under Partition Act directing a sale of property does not by itself amount to a decree and is not therefore appealable under S. 96 C. P. C. (1966) 7 Guj LR 121 (129): ILR (1966) Guj 143 * 1963 Jab LJ 52.

[But see AIR 1968 Ker 282 (283): 1968 Ker LT 70. ((1966) 7 Guj LR 121: ILR (1966) Guj 143, Dissented from.)]

(17) See also the undermentioned cases where decisions were held to amount to a decree. AIR 1967 SC 1470 (1473): (1967) 3 SCR 153. (The order of the Court deciding that dispute and making variation in shares specified in the preliminary decree already passed is a decree.) ° AIR 1965 SC 231 (237): (1964) 8 SCR 60. (Decision under Madras Hindu Religious Endowments Act, 1926 (II of 1927), Section 57 (9) amounts to a decree under S. 2 (2), Civil P. C. and is appealable.) * AIR 1966 Mad 308 (309): (1965) 2 Mad LJ 548. (Order under S. 47 (2).) ° AIR 1966 Mys 112 (115): (1965) 1 Mys LJ 786 ° AIR 1964 All 348 (348). (A decree passed by Munsif in a suit for recovery of rent under S. 7-B of the U. P. (Temporary) Control of Rent and Eviction Act 3 of 1947.) * AIR 1962 Him Pra 32 (35). (Order rejecting an application of judgment-debtor to amend the decree in accordance with the provisions of H. P. Act.) ° AIR 1962 Mad 16 (21): (1961) 2 Mad LJ 418. (Order fixing reasonable rent under Ss. 7 and 7-A, Madras City Tenants Protection Act amounts to a decree.) ° 1961 All LJ 669 ° 1961 BLJR 829 (830). (Order directing preparation of final decree is appealable.) ° AIR 1961 Raj 13 (15): 1961 Raj LW 126. (Order under S. 24 of the Bombay Money Lender's Act fixing instalments of a decree.) ° ILR (1960) 1 All 546 (565) (DB). (An order dismissing a suit under O. 17, R. 3 for default of plaintiff to produce evidence.) * AIR 1960 Mys 139 (139): 38 Mys LJ 102 (DB). (Decision under S. 30 of the Land Acquisition Act is a decree.) ° 1959 Ker LT 334 (335) (DB) ° AIR 1959 Manipur 13 (13). (An order rejecting appeal as time barred after refusal to extend time under S. 5 Limitation Act.) * AIR 1953 Cal 524 (526). 57 Cal WN 127 (DB). (Order rejecting an application made under S. 6 of the West Bengal Premises Rent Control (Temporary Provisions) (Amendment) Act, 1950 for rescission of an ejectment decree.)

(18) In the undermentioned cases the decisions were held not to amount to a decree. AIR 1963 SC 393 (395): (1963) 2 SCR 163. (Order of an Arbitrator rejecting claim and refusing to award any compensation under the Defence of India Act.) ° AIR 1969 Ker 78 (78): 1968 Ker LT 578. (Suit for accounts of dissolved partnership withdrawn by plaintiff — Dismissal of suit as withdrawn held was not a decree.) ° 1967 All LJ 379. (Order rejecting application under S. 4, Partition Act (1893) — Order is not decree under Section 8 and is not appealable.) ° AIR 1967 Pat 338 (339). (Order returning plaint for presentation to proper Court — Not a decree.) ° AIR 1964 Madh Pra 234 (236): 1964 Jab LJ 343 (DB) ° AIR 1963 Orissa 61 (64): 28 Cut LT 635. (Order of remand by lower appellate Court directing the trial Court to proceed with the final decree proceedings in suit for redemption — Not a decree.) ° AIR 1963 Pat 59 (59): 1963 BLJR 85. (Order dismissing application under S. 47 for default — Not appealable — Application for restoration under S. 151 lies.) * (1963) 65 Pun LR 1092. (Order rejecting objection of judgment-debtor objecting to form of sale proclamation on the ground that it does not clearly state certain incumbrances.) ° AIR 1962 Madh Pra 237 (238): 1961 Jab LJ 1267. (Rejection of memo of appeal for insufficient court-fee.) * AIR 1961 Andh Pra 359: (1960) 1 Andh WR 270. (Orders under Ss. 9, 10, 11 and 13 of Hindu Marriage Act are not decrees within the meaning of S. 2 (2) of C. P. C., so as to attract S. 96, C. P. C. AIR 1960 Andh Pra 66, Overruled.) ° AIR 1955 Mad 159 (160): 1954-2 Mad LJ 192. (Order rejecting petition on ground that Madras Act (IV of 1938) is not applicable does not amount to a decree and is not appealable.)

**3. "Court authorized to hear appeals."**— (1) Section does not deal with jurisdiction of Courts but only with right of appeal. ('86) 13 Cal 232 (235) (DB).

(2) It is only Court to which jurisdiction is given by an Act to entertain appeal in any particular matter that can hear appeal.

**Section 96 — Note 3 (contd.)**
(1896) 18 All 375 (378) (FB) * AIR 1918 Cal 435 (436): 45 Cal 926 (DB) ° (1897) 24 Cal 249 (251) (DB).

[See also AIR 1969 Punj 25 (26) (DB). (Appeal against order under Section 19, Hindu Marriage Act, lies to Single Judge — Letters Patent appeal under Clause 10 not barred.) ° AIR 1963 Punj 131 (133): ILR (1962) 1 All 76. (Merely because the plaintiff had a right to file cross-objections to re-agitate the claim of Rs. 5900/ was not ground for compelling the defendant to file an appeal in the High Court.)]

(3) Inherent want of jurisdiction to entertain appeal — Cannot be cured by consent, waiver or acquiescence of parties. AIR 1962 Cal 635 (637): 66 Cal WN 690 (SB). (Party held not precluded from questioning jurisdiction of appellate Court before High Court in revision.)

(3A) Forum of appeal has to be determined in accordance with provisions of this section read with S. 21. AIR 1958 Pat 430 (432): 36 Pat 1123 (FB).

[See AIR 1959 Punj 646 (648). (Suit for accounts — Dismissal of — Appeal — Original value is value for determination of forum of appeal.)]

(4) Suit for restitution of conjugal rights — Valued below Rs. 10,000 — Appeal from decree — Same value determines forum of appeal — Appeal lies to District Judge and not to High Court. AIR 1963 All 476: ILR (1964) 1 All 185. (Valuation put by appellant on memo of appeal is immaterial.)

(5) Munsiff disposing of suit originally instituted in District Court but subsequently transferred to him — Forum of appeal is District Court. 1960 Ker LT 1327.

(6) Following general rules have been adopted in the several Acts regarding appeal:

(a) Appeal lies to High Court against decrees or orders of District Judge, Additional District Judge or Sub-Judge in suits of value of over Rs. 5000. AIR 1955 Him Pra 50 (51) * (1892) 15 Mad 69 (70) (DB) ° AIR 1937 Oudh 12 (15): 12 Luck 586 (DB) ° (1879) 5 Cal 489 (493) (DB).

(b) Other decrees and orders of Sub-Judges and District Munsiff — District Judge. AIR 1958 Pat 430 (432): 36 Pat 1123 (DB) * AIR 1953 Sau 65 (66) ° AIR 1931 Cal 159 (160): 59 Cal 829 (DB) ° (1912) 36 Bom 360 (366) (DB) ° (1909) 33 Bom 371 (372) (DB) * AIR 1914 Bom 32 (32): 38 Bom 337 (DB) ° (1889) 12 Mad 472 (473) (DB) ° (1963) 1 Mys LJ 997 ° ILR (1968) Cuttack 326 (DB) * 1960 Raj LW 670.

(c) Assistant Judge or Sub-Judge when authorised by State Government can entertain appeals which otherwise would be heard by District Judge. (1913) 16 Oudh Cas 197 (198) (DB).

(7) Failure to raise plea of want of jurisdiction in Appellate Court does not clothe that Court with jurisdiction not given to it. AIR 1953 Kutch 28 (29) * (1889) 13 Bom 650 (653) (DB) ° (1912) 16 Ind Cas 940 (942) (DB) (Cal) ° (1909) 34 Bom 171 (175) (DB) * (1910) 35 Bom 24 (27) (DB).

(8) Court is not precluded from hearing appeal by mere fact that at one time plaint had been presented in that very Court. AIR 1915 All 5 (5) (DB).

(9) Where after trial and decree by Court A venue of suit is transferred to Court B on account of re-distribution of districts, appeal from decree lies to Court to which appeals would lie from Court B. AIR 1915 Mad 362 (363): 37 Mad 477 ° (1906) 28 All 93 (94, 95) (DB) ° (1907) 34 Cal 636 (640) (DB).

[But see AIR 1957 Trav-Co 43 (46): ILR (1956) Trav-Co 1094 (DB).]

(10) Vested right of appeal perishes on abolition of appellate Court without a forum substituted for disposal of pending matters or for lodgment of appeals. AIR 1956 SC 29 (30): (1955) 2 SCR 872 ° AIR 1958 Manipur 7 (10).

(11) Right to continue appeal properly filed in proper Court cannot be taken away except by clear indication by Legislature. AIR 1953 Punj 94 (96). (AIR 1943 FC 24; 1943-5 FCR 39: ILR (1943) Kar (FC) 21; (1850) 82 RR 436: 19 LJCP 297; AIR 1952 Punj 186: ILR (1951) Punj 231: 1952 Cri L Jour 775, Rel. on.) * AIR 1959 Raj 45 (46, 47): 1959 Raj LW 172. (Overruled on interpretation of S. 21, Raj. Civil Courts Ordinance (7 of 1950) in AIR 1959 Raj 246.

**4. Who can appeal.** — (1) Section does not refer to or enumerate persons who can file appeal. (1956) 58 Pun LR 222 (223) ° AIR 1949 Mad 91 (94) (DB).

(2) Party desirous of appealing must have right of appeal and Court to which he would prefer appeal must have right to entertain it. (1886) 13 Cal 232 (235) (DB) ° AIR 1959 Tripura 6 (7). (Party cannot come in appeal unless formal decree is drawn up.)

(3-4) A party to action or one who was treated as such or the legal representative of a party, or one whose privity in estate, title, or interest is apparent on face of record can alone appeal from decree. AIR 1949 Bom 141 (143): ILR (1949) Bom 591 (DB) * AIR 1958 Raj 181 (182): ILR (1958) 8 Raj 380 ° AIR 1919 Lah 180 (181): 1919 Pun Re No. 79 (DB) * AIR 1935 Pat 261 (263): 14 Pat 236 (DB) ° AIR 1934 Mad 360 (363): 57 Mad 670 (DB) ° (1899) 26 Cal 539 (541, 542) (DB) * (1905) 9 Cal WN 584 (588) ° (1910) 6 Ind Cas 244 (247) (DB) (Cal).

(5) In order that a party may maintain appeal he must have been adversely affected by determination which amounts to a "de-

**Section 96 — Note 4 (contd.)**

cree." AIR 1952 Trav-Co 100 (100): ILR (1951) Trav-Co 73 (DB) ° AIR 1951 Punj 444 (445) * AIR 1950 Him Pra 30 (32) ° AIR 1950 Assam 22 (23): ILR (1949) 1 Assam 191 (DB) ° AIR 1950 Madh B 19 (20, 21) (DB) ° AIR 1949 Orissa 73 (74): ILR (1949) 1 Cut 269 (DB) * (1905) 9 Cal WN 584 (588) ° AIR 1916 PC 14 (15, 16): 38 All 440 (446): 43 Ind App 170 ° AIR 1965 SC 1874 (1883, 1884): (1965) 3 SCR 550 ° AIR 1963 Cal 214 (215, 216, 217). (An erroneous admission by a counsel on a point of law is of no effect and does not preclude the party from claiming his legal rights in the Appellate Court.) ° AIR 1961 All 125 (127): 1960 All LJ 486 (DB). (Order under S. 14 Religious Endowments Act (1863) amounts to decree.) ° 1961 All LJ 473: 1961 All WR (HC) 352 ° AIR 1961 Punj 281 (284, 285) (DB). (A defendant has the right of appeal notwithstanding that the suit has been dismissed as against him, if he is aggrieved by the decree.)

(6) A person is said to be aggrieved by an order if that order directly affects or prejudices his interest. 1961 All LJ 473.

(7) 'Parties' are only those who are ranged on either side as plaintiffs or defendants and it is only they if they are adversely affected by decree, who have a right of appeal against it. (1913) 16 Oudh Cas 350 (352, 353) (FB) ° AIR 1937 Mad 843 (845): ILR (1937) Mad 970 (DB) * AIR 1956 Mad 72 (74): ILR (1956) Mad 867 (DB) ° AIR 1950 Assam 22 (24): ILR (1949) 1 Assam 191 (DB) * AIR 1939 PC 201 (205): ILR (1939) Kar 350 ° (1885) 7 All 606 (620) (FB) * AIR 1923 Cal 90 (91) (DB).

(8) As a general rule a decision cannot be said to adversely affect unless it will operate as res judicata in future suit. (1956) 58 Pun LR 222 (223) ° AIR 1957 Hyd 23 (23): ILR (1956) Hyd 760 (DB) * AIR 1954 J and K 32 (32): 10 J and K LR 59 ° AIR 1952 Pat 476 (477) * AIR 1951 Punj 444 (445) ° (1883) 7 Bom 464 (467) (DB) ° AIR 1937 All 368 (369) (DB).

[See however AIR 1942 Cal 1 (17): ILR (1941) 2 Cal 434 (DB).]

(9) Whether decision operates as res judicata and adversely affects party, depends on substance of decree and judgment, and not on the form. AIR 1951 Punj 444 (445) * AIR 1950 Assam 119 (125): ILR (1950) 2 Assam 225 (DB) ° AIR 1921 Mad 417 (418).

(10) Parties may go behind decree and see what the adjudication was to show whether it operates as res judicata or not. (1956) 58 Pun LR 222 (223) * (1913) 21 Ind Cas 15 (18) (DB) (Mad).

(11) That some findings are against him does not give right of appeal to party where decree is absolutely in his favour. 1955-3 WLR 145 (150): 1955-2 All ER 538 ° AIR 1954 J and K 32 (32): 10 J and K LR 59 * AIR 1951 Punj 444 (445) ° AIR 1950 Him Pra 30 (32) ° AIR 1943 Mad 297 (301): ILR (1943) Mad 357 (DB) ° (1885) 7 All 606 (611) (FB) * (1881) 3 All 152 (157) (SB) ° (1894) 18 Bom 597 (602) (DB) ° (1885) 11 Cal 301 (306): 12 Ind App 23 (PC) * AIR 1929 Pat 586 (587): 8 Pat 617 (DB) ° (1880) 6 Cal 319 (323) (FB) ° AIR 1915 Mad 294 (295): 37 Mad 25 (DB) * (1873) 6 NWPHCR 19 (24, 25) (FB).

[See also AIR 1961 Cal 39 (49) (FB).]

(12) Question who may appeal is determinable by commonsense consideration that there can be no appeal where there is nothing to appeal about. (1905) 9 Cal WN 584 (588).

(13) Decision apparently in favour of defendant but really negativing his rights against plaintiff does not deprive defendant of right of appeal. (1899) 21 All 117 (119) (DB) ° AIR 1950 Assam 119 (125): ILR (1950) 2 Assam 225 (DB) ° (1907) 30 Mad 447 (449) (DB) * (1878) 2 All 497 (499, 500, 501) (FB).

(14) As the compensation payable to landlord under West Bengal Estates Acquisition Act of 1953 will vary in amount according to whether land is tenanted or khas the landlord is entitled to appeal against the decision in execution case holding that he could not eject the tenant because of the provisions of the West Bengal Non-Agricultural Tenancy Act, 1949, although the land itself had vested in the Government under the Acquisition Act and therefore he had no right to it. (1957) 61 Cal WN 607 (609) (DB).

(15) Benamidar may appeal on behalf of real owner. (1906) 28 All 44 (46) ° AIR 1915 Cal 454 (455).

(16) Any individual member of firm against which decree for money has been passed can appeal against decree. AIR 1940 All 81 (82).

(17) Where on a resignation of Partners of a firm a new firm is constituted, by the remaining Partners taking other new partners the new reconstituted firm can have no right to prosecute the appeal against an order passed against the original firm. (1966) 1 Andh LT 33 (35): (1966) 1 Andh WR 173.

(18) Where there is challenge appellant has to establish his right to appeal. AIR 1916 Cal 361 (364): 43 Cal 857 ° (1936) 62 Cal 701 (705): 163 Ind Cas 75 (77).

[See however (1911) 12 Ind Cas 745 (747) (Cal.)]

(19) In cases of doubt as to existence of right of appeal appellant should get benefit of the doubt. AIR 1950 Assam 22 (23): ILR (1949) 1 Assam 191 (DB) * AIR 1926 Cal 1113 (1114).

(20) The alienee alone is entitled to prosecute an appeal to the Supreme Court to protect her rights under the alienation challenged. Her rights in no way depend on whether the alienor chooses to stand by the

Section 96 — Note 4 (contd.)

alienation or not. AIR 1958 SC 199 (201): 1958 SCR 948: ILR (1958) Punj 807.

(21) Under the provisions of the Land Acquisition Act a collector can file an appeal on behalf of the State Government. AIR 1964 Madh Pra 196 (199): 1964 MPLJ 220 (DB). (Reversed on another point in AIR 1969 SC 255.) ° 1959 Raj LW 571 (573): ILR (1959) 9 Raj 625. (Order of the tribunal holding that the appellant had no right of appeal set aside.)

A. — Persons not parties to the suit.

(22) Person not party to action may be allowed to appeal if adversely affected by order, in the discretion of appellate Court. AIR 1953 Mad 485 (490): ILR (1953) Mad 808 (DB) ° AIR 1958 Raj 181 (182): ILR (1958) 8 Raj 380 * AIR 1949 Bom 141 (143): ILR (1949) Bom 591 (DB) ° AIR 1964 Ker 235 (237): 1963 Ker LT 619 (DB). (One test in granting leave is whether he could properly have been made a party to the original proceeding.) * AIR 1962 Andh Pra 140 (145): (1961) 2 Andh WR 204 (FB) ° AIR 1961 Ker 114 (115): 1960 Ker LT 939 (DB).

(23) Leave to a person to appeal from a decree or order in a proceeding to which he was not a party should not be ordinarily granted unless he establishes that he has an interest which is affected by the order or decree from which he proposes to appeal. If he establishes that he has such interest, it is not necessary for him to further establish that if he does not institute an appeal with the leave of the Appellate Court, the consequence will be that the order or decree against which he proposes to appeal becomes conclusive without his being able to question such decree or order in other proceedings. AIR 1963 Mys 127 (128): 40 Mys LJ 990.

(24) The question whether leave should be granted or not should depend upon the facts of each case and it is for the appellate Court to decide whether the case before it is a fit case for the grant of such leave. AIR 1963 Mys 127 (128): 40 Mys LJ 990.

(25) Person not party to suit or his legal representative cannot be affected by decision in suit and hence cannot appeal. AIR 1956 Mad 585 (586) (DB) * AIR 1918 Pat 364 (365) (DB) ° AIR 1934 Mad 360 (362, 363): 57 Mad 670 (DB) ° (1910) 6 Ind Cas 244 (247) (DB) (Cal) * AIR 1937 Bom 63 (64): ILR (1937) Bom 425 (DB) ° AIR 1919 Lah 180 (181): 1919 Pun Re No. 79 (DB).

[See however AIR 1949 Bom 141 (143) (DB).]

(26) Following persons are not 'parties' for purpose of preferring appeal:

(a) Defendants exempted from operation of decree. (1903) 30 Cal 134 (141) (DB).

(b) Persons against whom suit is dismissed. in appeal and case is remanded. (1912) 16 Ind Cas 693 (694) (DB) (Mad) ° AIR 1921 Cal 156 (156) (DB).

(c) Persons who ought not to be impleaded, as pro forma defendants. AIR 1917 Pat 585 (587) (DB) * (1882) 4 All 237 (238). (Overruled on another point in 13 All 575.)

(d) Original plaintiffs substituted by Court of Wards for appeal against dismissal of suit. AIR 1935 Oudh 486 (488) (DB).

(e) Share-holder and creditors of a company in their own right when company has gone in liquidation and where an official liquidator is appointed. AIR 1965 Ker 14 (16): 1964 Ker LT 421 (DB).

(27) Where decree has become final against party appeal by person who has only derivative interest from party is incompetent. ILR (1955) Madh B 335 (338) ° AIR 1950 Madh B 19 (20, 21) (DB) ° (1883) 6 Mad 185 (186, 187) (DB) ° AIR 1964 Madh Pra 262 (263, 264): 1964 Jab LJ 495. (Tenant and sub-tenant both defendants — Decree for ejectment becoming final against them — Sub-tenant cannot appeal.)

[See however ILR (1955) Punj 539 (545).]

(28) Any member of joint Hindu family can appeal against decree passed against manager of that family, in his representative capacity. AIR 1937 Mad 843 (845): ILR (1937) Mad 970.

[But see AIR 1937 Sind 94 (95): 30 Sind LR 467.]

B. — Legal representative.

(29) Legal representative of deceased party affected by decree can appeal provided right of deceased survives to him and he gets impleaded as such. AIR 1918 All 309 (313) (DB) * (1866) 5 Suth WR 133 (134) (DB) ° (1900) 22 All 231 (232) (DB) * (1871) 15 Suth WR 485 (485) (DB) ° AIR 1918 Mad 409 (410) (DB).

[See also AIR 1965 Ker 303 (304): 1965 Ker LT 236. (Legal representative competent to file appeal against decree challenging propriety of order dismissing his application.)]

C. — Transferee of an interest.

(30) Transferee of interest of party pending suit, who so far as such interest is concerned; is bound by decree, can appeal after he gets himself placed on record. AIR 1951 Raj 108 (110) (DB) * (1871) 15 Suth WR 121 (123) ° AIR 1935 Lah 640 (640) ° (1885) 9 Bom 151 (155, 156, 157).

(31) Defendant transferring interest in suit property to co-defendant pending suit can appeal against decree irrespective of whether he had still subsisting interest in the result of the litigation. AIR 1947 Pat 477 (479).

(32) Person brought on record after decree as the real owner, cannot appeal. AIR 1920 Pat 142 (143): 5 Pat L Jour 256 (DB).

D. — Official Receiver in Insolvency proceedings.

(33) Where pending appeal appellant is declared insolvent, Official Receiver can continue appeal. AIR 1919 Cal 1006 (1006) * AIR 1918 Mad 294 (294) ° (1913) 18 Ind Cas 922 (922) (Mad).

**Section 96 — Note 4 (contd.)**

[See also AIR 1968 Ker 154 (155): 1967 Ker LT 1156 (DB). (Adjudication during pendency of suit — Official Receiver appointed — Receiver can file an appeal.)

(34) Suit filed before adjudication — Appeal filed after adjudication — Section 28(2) Prov. Ins. Act not contravened— Appeal, continuation of suit — It is not necessary to take the leave of the court or to make the receiver a party to the appeal filed in the suit after adjudication. AIR 1960 Cal 469 (473): 64 Cal WN 88 (DB).

(35) Where after annulment of order of adjudication decree-holder seeks to execute decree by arrest of insolvent as well as by attachment and sale of his property in hands of Official Receiver, insolvent whose objection to execution is dismissed has a right to file appeal. AIR 1956 All 94 (96): ILR (1956) 1 All 586 (DB) ° AIR 1949 Mad 91 (94) (DB).

**5. Co-plaintiffs.**—(1) Matters which form subject of dispute between plaintiffs inter se and not also between plaintiffs and defendants are not "matters in controversy in the suit." (1887) 9 All 447 (450, 451) ° (1913) 16 Oudh Cas 350 (353).

(2) One plaintiff cannot appeal against his co-plaintiff in respect of matters which are not in dispute between them and defendants. (1891) 15 Bom 145 (147) * (1913) 16 Oudh Cas 350 (353) (DB) ° (1880) 5 Bom 264 (266, 267) (DB).

[See also AIR 1967 Madh Pra 3 (4): 1966 Jab LJ 284. (Decree for possession jointly passed in favour of co-widows, A and B — Appeal by A — Appeal held was not competent, there being no conflict of interest and as such there was no right of appeal under Section 47.)]

**6. Co-defendants.** — (1) Where case is raised not only between plaintiffs and defendants, but between defendants themselves inter se and decision therein adversely affects a defendant, he is entitled to appeal against his co-defendants. (1894) 18 Bom 520 (521) (DB) * (1912) 16 Ind Cas 127 (128) (DB) (Lah)

(2) Where in substance decision will operate as res judicata between defendants it would be contrary to justice and equity to hold that a defendant cannot appeal against the co-defendants. AIR 1924 Mad 689 (690): 47 Mad 633 * AIR 1935 All 984 (985) ° (1904) 31 Cal 643 (646) (FB) ° AIR 1968 Ker 154 (155): 1967 Ker LT 1156.

(3) A defendant cannot appeal against co-defendant where decision on dispute in suit does not operate as res judicata against him. (1868) 10 Suth WR 326 (328) (DB) * (1881) 3 All 152 (157) (FB).

(4) No appeal lies from findings between co-defendants which are not embodied in decree dismissing suit not necessarily implied therein. (1911) 12 Ind Cas 167 (169) (DB) (Mad).

(5) Single Appeal by defendants with different defences to suit and with different grounds of appeal is irregular. (1901) 23 All 137 (142): 27 Ind App 168 (PC).

(6) In a suit for declaration of a title and possession A and his son B were impleaded as defendants. On B's death A was also brought on record as his legal representative. A did not elect one of the two defences put up by A and B separately. It was therefore contended that A must be bound by his own written statement where he did not clearly mention the property as his own, but asserted title in B and, that being so, A had no locus standi to go in appeal against the decree passed in the suit in favour of the plaintiff. Held, that it was not obligatory for A to inform the Court which of the two defences he would stick to; he could avail of both defences in the alternative and, therefore, A was competent to file the appeal. AIR 1960 Madh Pra 73 (74): 1960 Jab LJ 348: 1960 MPLJ 281.

**7. Appeal by minor.**—(1) Where guardian-ad-litem does not choose to appeal against decree, no other person even natural guardian, can assume guardianship and prefer appeal. AIR 1922 All 332 (333): 44 All 619 (DB) * AIR 1924 All 79 (80): 45 All 623 (DB) ° AIR 1923 Lah 271 (272): 3 Lah 417 (DB).

(2) Natural inference, when guardian-ad-litem does not prefer appeal is that he does not think it advisable in interests of minor to carry on litigation further. (1905) 2 All L Jour 489 (490, 491).

**8. Right of appeal, when lost.**—(1) Party may agree not to appeal or may waive or forgo his right of appeal, or may be estopped by conduct from asserting such right (1871) 14 Moo Ind App 203 (207) (PC) ° (1859) 8 Moo Ind App 91 (102) (PC) ° AIR 1961 Andh Pra 71 (75): (1960) 2 Andh WR 172 (FB).

(2) Party will be bound by his lawful agreement to abide by decision and not to appeal. (1875) 1 All 267 (269) (FB) ° AIR 1925 All 503 (506): 47 All 637 (FB) * (1882) 8 Cal 455 (456) (DB) ° AIR 1929 Oudh 451 (452, 453): 5 Luck 391 (DB) ° (1886) 12 Cal 511 (514) (FB).

(3) Agreement, by guardian of minor not to appeal being not to minors' benefit is not binding on minor in law. (1889) 22 QBD 577 (578).

(4) Agreement not to appeal must be a clear one. 1896 Bom PJ 424 (424) (DB).

(5) Failure to abide by terms of decree does not disentitle party to appeal. AIR 1934 All 531 (533).

(6) Where party waives or abandons his rights of appeal, Appellate Court will refuse to allow him to prosecute the appeal. (1902) 29 Cal 577 (580) (DB) * (1902) 29 Cal 306 (309) (DB).

(7) Whether party has waived his right to appeal is a question of fact. AIR 1949 Mad 267 (268) (DB) ° 1907 Pun Re No.

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31 p. 123 (124) (FB) ° AIR 1919 Cal 447 (448) (DB) * AIR 1923 PC 13 (20, 21) ° AIR 1917 Lah 28 (28): 1917 Pun Re (Cri) No. 17 (DB) ° AIR 1930 Oudh 434 (437) (DB).

(8) Party accepting order of Court and deriving its benefits will be estopped from questioning order later on. AIR 1952 Nag 317 (319): ILR (1953) Nag 413 (DB) ° AIR 1917 Cal 546 (547) (SB) * (1913) 18 Ind Cas 525 (526) (DB) (All) ° AIR 1936 Cal 424 (425, 426) (DB).

(9) It is only acceptance of benefit of a term or condition imposed upon opposite party at whose instance order was made which would estop party so accepting from appealing against order. AIR 1949 Cal 427 (429): ILR (1945) 1 Cal 474 ° AIR 1929 Cal 796 (798): 57 Cal 386 (DB).

(10) Plaintiff in partition suit taking possession of properties allotted under decree, is not precluded from appealing against decree to claim more. AIR 1935 Mad 465 (466).

(11) Withdrawal from Court of instalments paid by defendant does not preclude plaintiff from maintaining appeal against order granting instalments. AIR 1949 Cal 427 (429): ILR (1945) 1 Cal 474.

(12) Where vendee in pre-emption suit appeals and obtains stay of execution on making certain deposit but before appeal is heard withdraws deposit, he will lose his right of appeal. (1906) 1906 Pun LR No. 76, p. 227 (230) (DB).

(13) Right of appeal is a vested right which accrues to litigant and exists as on and from date lis commences and that right can be taken away only by subsequent enactment so providing expressly or by necessary intendment. AIR 1957 SC 540 (553). 1957 SCR 488 ° AIR 1958 Ker 251 (252): ILR (1957) Ker 1004 ° AIR 1958 Manipur 7 (10) ° AIR 1957 Raj 336 (338): ILR (1957) 7 Raj 858.

(14) Plaintiff's claim allowed in part against defendant no. 3 and dismissed against remaining six defendants. Held the plaintiff could waive his right of appeal against the third defendant to the extent the plaintiff's claim was disallowed. The plainiff's right to appeal against the dismissal of his claim so far as the six other defendants were concerned, could not be defeated merely on the ground that he had chosen to abandon his right of appeal against the third defendant. AIR 1962 Raj 99 (99): 1961 Raj LW 501 * AIR 1968 Punj 298 (301): ILR (1967) 2 Punj 352.

**9. Execution proceedings.**—(1) Section does not apply to orders passed in execution which are not decrees. AIR 1954 Nag 31 (32) ° AIR 1957 Mad 761 (761, 762) * AIR 1957 Punj 92 (94): ILR (1957) Punj 938 * AIR 1924 Pat 346 (347) (DB) ° AIR 1924 Pat 683 (685) (DB) ° AIR 1925 Cal 318 (319) (DB) ° AIR 1967 Ker 86 (86): 1966 Ker LT 160 ° 1960 Ker LT 729: 1960 Ker LJ 639. (Order of the court that certain person was entitled to represent the family of the defendants in the celebration of the annual festival could not be treated as decree under Section 47.)

(2) Where order in execution amounts to decree it is appealable under this section. AIR 1954 SC 409 (411): 1955 SCR 150 ° AIR 1951 Mad 56 (63): ILR (1951) Mad 393 (FB) ° AIR 1958 Mad 460 (461) * AIR 1958 Pat 228 (229) ° AIR 1957 All 558 (559) ° AIR 1957 Punj 92 (94, 95): ILR (1957) Punj 938 ° AIR 1955 Cal 295 (296) (DB) ° AIR 1954 Cal 105 (107, 108) (DB) ° AIR 1949 Mad 91 (94) (DB) ° AIR 1969 SC 575 (577, 578): (1968) 2 SCWR 489 * AIR 1967 Assam 27 (27): ILR (1966) 18 Assam 482 ° AIR 1965 Tripura 10 (12) ° AIR 1959 Mad 191 (194): (1959) 1 Mad LJ 181.

**10. Appeal against ex parte decree.**—(1) An ex parte decree can be questioned both by application under Order 9, Rule 13 and appeal under this section. Both remedies can be prosecuted concurrently as long as no decision is given in either of them. Mere fact that one remedy has been resorted to will not ipso facto bar the other. AIR 1946 Nag 393 (396, 397): ILR (1946) Nag 586 * (1909) 3 Ind Cas 468 (469) (DB) (Cal) ° 1966 Jab LJ 820 (822) (DB): 1966 MPLJ 507.

(2) Fact that no application has been filed under Order 9, Rule 13 will not affect maintainability of appeal against ex parte decree. (1886) 9 Mad 445 (446) (DB) * (1907) 30 Mad 54 (55) (FB). (See referring order.) ° (1882) 8 Cal 272 (274) (DB) ° AIR 1922 Bom 267 (267): 46 Bom 184 (DB).

[But see (1882) 4 All 387 (394) (FB).]

(3) After appellate Court gives decisions in appeal first Court cannot proceed with application to set aside the ex parte decree. AIR 1915 All 2 (3): 37 All 208 (DB) * AIR 1917 Nag 26 (28): 14 Nag LR 30.

(4) Application to set aside ex parte decree filed in first Court, after decision in appeal may be withdrawn and dealt with by appellate Court. (1912) 15 Ind Cas 565 (566) (Nag).

(5) Appeal against ex parte decree abates if first Court grants application under O. 9, R. 13 during pendency of appeal. AIR 1917 Nag 26 (28): 14 Nag LR 30.

(6) Neither rejection of application under Order 9, Rule 13, nor omission to file appeal against that order bars appeal from the decree itself. (1878) 2 All 567 (568) (DB) ° (1909) 1 Ind Cas 86 (88) (DB) (Cal) ° (1901) 28 Cal 475 (478) (PC) * (1902) 29 Cal 395 (399): 29 Ind App 90 (PC).

(7) Where application under Order 9, Rule 13 is refused on merits by first Court, Appellate Court cannot in appeal against ex parte decree discuss propriety of ex parte order itself apart from the merits of

**Section 96 — Note 10 (contd.)**
case on law and the evidence, because a special remedy by way of appeal against the order is provided for in the Code and where the law points out the remedy in particular way, it is, in general, that way. AIR 1953 Trav-Co 416 (417) ° AIR 1920 Mad 962 (963) (DB) * ('99) 23 Mad 445 (446) (DB) ° AIR 1917 All 475 (476): 39 All 143 (DB) ° ('09) 1 Ind Cas 86 (88) (DB) (Cal).

(8) Where application under Order 9, Rule 13 is dismissed in default of parties and there is no finding on merits, Appellate Court can go into question of propriety of ex parte order. AIR 1937 Nag 268 (269): ILR (1937) Nag 519.

(9) Where no application is filed under Order 9, R. 13 and only an appeal is preferred against ex parte decree Appellate Court can question propriety of ex parte order and remand case for fresh decision on sufficiency of cause for non-appearance. AIR 1919 Cal 727 (728) (DB) * ('07) 30 Mad 54 (60) (FB). (Dissenting from 23 Mad 260) ° AIR 1922 Bom 267 (270): 46 Bom 184 ° AIR 1925 Pat 534 (535) * AIR 1929 Pat 609 (612): 9 Pat 408 ° AIR 1920 Upp Bur 37 (37): 3 Upp Bur Rul 198 * (1962) 40 Mys LJ 350: ILR (1961) Mys 1096.

[See also AIR 1923 All 287 (290): 45 All 311 (DB) ° (1964) 68 Cal WN 1064. (Defendant in appeal against ex parte decree can urge that he was prevented from appearing by sufficient cause.)]

[But see ('53) ILR (1953) 3 Raj 179 (182) ° AIR 1917 All 475 (476): 39 All 143 * AIR 1934 Oudh 131 (131) ° ('01) 23 All 167 (171, 174) * AIR 1924 Rang 137 (138): 2 Rang 108 ° ('09) 12 Oudh Cas 25 (28) ° AIR 1925 Oudh 645 (646): 28 Oudh Cas 85.]

(10) If a suit is decided on merits under Order 17, Rule 2 there the remedy of the aggrieved party is by way of appeal under Section 96, C. P. C. and no application under Order 9, Rule 13 is maintainable. 1966 Raj LW 81: ILR (1966) 16 Raj 573.

**11. Appeal against amended decree.**—(1) Appeal lies against amended decree. AIR 1927 Cal 114 (116) (DB) * AIR 1958 Andh Pra 231 (232) ° AIR 1931 Cal 578 (579) (DB) ° (1901) 24 Mad 646 (650) (DB) * AIR 1915 Nag 37 (39): 11 Nag LR 92 ° (1893) 15 All 121 (122) (DB) * AIR 1928 All 194 (196) (DB) ° AIR 1961 Raj 13 (15): 1961 Raj LW 126 ° AIR 1962 Ker 6 (8): 1961 Ker LT 349. (Order amending decree without jurisdiction — Revision also lies.)

(2) Appeal against amended decree — Appellant applying for amendment of decree after his appeal against it was dismissed as time barred — Amendment allowed — Appellant then filing appeal against amended decree — Held though appellant had right of appeal against amended decree, scope of that appeal was confined only to matters covered by amendment and he was not entitled to reopen all matters including those in respect of which he had filed earlier appeal which was dismissed. AIR 1966 Punj 531 (532): 68 Punj LR (D) 247 * AIR 1966 Punj 518 (523): 67 Punj LR 1223. (ILR 6 Cal 22; 3 Cal LJ 188 and AIR 1923 Cal 323, Dissented from.) ° 1964 Cur LJ 72: ILR (1964) 1 Punj 858. (Correction of clerical and patent error in the decree — Appeal filed against the original decree and not against the corrected one, is not incompetent.)

**12. Decree passed without jurisdiction.—Appeal.**—(1) Appeal is competent even against decree made without jurisdiction where in suits of character in which it is passed appeal is statutorily provided for. 1956 Raj LW 195 (196) ° AIR 1917 Cal 320 (325) (DB).

(2) Appeal which would lie if order in question had been passed with jurisdiction, cannot be defeated because the order was made by Court usurping jurisdiction which it did not possess. AIR 1948 Mad 245 (245) (DB). (AIR 1947 Mad 382, Dissent.) * (1910) 8 Ind Cas 26 (27) (DB) (Cal) ° (1891) 13 All 575 (576) (DB) ° (1912) 16 Ind Cas 940 (942) (DB) (Cal).

**13. Appeal against consent decree.**—(1) Words "decree passed with consent of parties" in sub-section (3) imply and involve agreement between the parties. AIR 1952 All 29 (30): ILR (1953) 2 All 544 (DB) ° 1890 WN 116 (116) * AIR 1917 Cal 564 (565) (DB).

(2) Following are not consent decrees:—

(a) Decree granting a relief not opposed by party; AIR 1918 Nag 66 (67): 15 Nag LR 39.

(b) Order offered by Court which has been merely accepted by party: 1890 WN 116 (116) * (1893) 10 TR 139 ° AIR 1939 Cal 500 (502).

(c) Decree passed ex parte upon absence of defendant. AIR 1943 Mad 133 (133).

(d) Court refusing to admit secondary evidence — Both parties making a statement that suit be dismissed under the circumstances — Dismissal of suit on basis of above statements is not a consent decree. AIR 1964 Punj 443 (444): 66 Punj LR 535.

(3) Consideration for agreement in consent decree was that both sides give up their right of appeal. AIR 1921 Mad 696 (700).

(4) Judgment by consent operates as an estoppel. AIR 1941 Nag 271 (272): ILR (1942) Nag 498 ° (1895) 1 Ch 37 (49) * AIR 1933 Sind 29 (31): 26 Sind LR 395 ° AIR 1937 Sind 177 (178): 31 Sind LR 197 (DB).

(5) Decrees, once established to be by consent are made unappealable. AIR 1948 Pat 97 (99): 26 Pat 83 (DB) * AIR 1940 All 190 (192): ILR (1940) All 185 (DB) ° AIR 1932 PC 251 (251, 252) ° (1901) 5

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Cal WN 877 (878) (DB) * AIR 1929 Oudh 451 (452, 453): 5 Luck 391 (DB) ° (1838) 4 M and C 215 (228).

[See also AIR 1931 PC 107 (108): 27 Nag LR 139.]

(6) Consent decrees are valid and binding on parties, unless and until set aside by proper judicial proceeding. (1877) 6 Ch D 297 (302) ° AIR 1937 Sind 177 (178): 31 Sind LR 197 (DB) * (1896) 1 Ch 673 (676, 680) ° (1884) 10 Cal 612 (615) (DB) ° (1878) 9 Ch D 259 (268) * (1895) 2 Ch 273 (284) ° (1897) 2 Ch 534 (550, 552) ° AIR 1917 Mad 578 (580): 49 Mad 177 (DB) * AIR 1920 Cal 724 (724) (DB) ° AIR 1920 PC 139 (140): 47 Ind App 200.

(7) Some of plaintiffs absent — Decree in terms of compromise entered into by present plaintiffs on their own behalf — Absent plaintiffs cannot appeal — In respect of them there is dismissal for default — Their remedy is to apply for restoration. AIR 1963 All 412: 1963 All LJ 256.

(8) Decree passed under compulsion of Court cannot be called a decree passed with consent of parties. AIR 1923 Lah 129 (130) (DB).

(9) Compromise decree falls within the ambit of sub-section (3) of Section 96. (1960) 2 Andh WR 462.

(10) Where one party alleges and other denies or withdraws from a compromise entered into by the parties out of Court, and the Court finds in favour of compromise and passes decree, such a decree is "a decree passed with the consent of the parties." AIR 1952 Trav-Co 91 (92) (DB) ° AIR 1921 Mad 696 (699, 700) (DB) ° AIR 1935 Cal 239 (240): 62 Cal 229 * AIR 1922 Lah 309 (310, 311): 3 Lah 175 (DB) ° AIR 1933 Pat 306 (427): 12 Pat 359 (DB) ° AIR 1961 Mad 303 (304, 305): (1961) 1 Mad LJ 154.

[But see AIR 1918 Nag 129 (130) ° AIR 1929 Sind 32 (35) (DB).]

(11) If the Court adopts a special procedure, or if the matter is referred to the decision of the Court or to a certain person, then, in that event, the decision arrived at is a consent decree and no appeal would lie. But the question whether any special procedure had been adopted or not has to be considered in each individual case separately and no broad proposition of law can be laid down. AIR 1959 All 22 (23, 24): 1958 All LJ 526. (Held on facts that the decree was not a consent decree, but was one passed on merits after certain pleas had been given up and, therefore, the appeal from the decree to the lower appellate Court was a proper appeal.)

(12) Expression "a decree passed with the consent of parties" is not limited to decree passed with consent expressed at the moment decree is passed, but includes decrees based on consent proved to have been given out of Court, though subsequently withdrawn or repudiated before Court. AIR 1921 Mad 696 (699) (DB). (AIR 1915 Mad 322, Dissented from.)

(13) Where compromise effected outside Court is proved and Court passes, as it ought to, decree as a matter of course in accordance with Order 23, Rule 3 decree passed is only a formal expression of the agreement of parties and is to be deemed to be passed with consent of parties. AIR 1922 Lah 309 (311): 3 Lah 175 (DB).

[See also (1910) 6 Ind Cas 857 (859) (All).]

(14) Order 43, Rule (1) (m) construed with sub-section (3) of section 96, indicates clearly that Legislature intended to confer right of appeal only against "recording or refusing to record" alleged agreement and not a right to appeal from decree recording compromise. AIR 1954 J and K 54 (55, 56) (DB) * AIR 1957 Pat 143 (144) ° AIR 1948 Pat 97 (99): 26 Pat 83 (DB) ° AIR 1944 Bom 239 (242): ILR (1944) Bom 405 (DB) ° AIR 1914 Lah 112 (113): 1914 Pun Re No. 96 (DB) * AIR 1933 Bom 205 (207, 208): 57 Bom 206 (DB) ° AIR 1933 Cal 94 (95) (DB). (AIR 1926 Cal 412, held overruled by AIR 1929 Cal 639: 57 Cal 1013 (FB) ° AIR 1916 Mad 1083 (1084) (DB) * AIR 1929 Pat 318 (320): 8 Pat 528 (DB) ° AIR 1922 Mad 446 (446) (DB). (Doubted in AIR 1925 Mad 606.) ° AIR 1925 Mad 606 (607) (DB).

(15) Order 43, Rule (1) (m) provides for an appeal against an order recording or refusing to record a compromise. That clause conveys the idea that there should be a controversy regarding the existence of an agreement to adjust the suit. That is the significance of the words recording or refusing to record a compromise.' In the nature of things, a direct appeal will not be possible in such a case as there will be no material upon which an adjudication could be made. (1960) 2 Andh WR 462: 1961 Andh LT 8.

(16) An appeal against an order recording compromise is not competent where there was no contest between the parties regarding the recording of the compromise. 1966 Cur LJ 91 (94) (Punj).

(17) Proper method of questioning consent decree is by review or by regular suit and not by appeal. (1909) 2 Ind Cas 129 (136) (DB) (Cal) * AIR 1932 PC 251 (252) ° (1936) 62 Cal 642 ° (1896) 1 Ch 673 (680) * (1894) 2 Ch 273 (284) ° (1897) 2 Ch 534 (552) ° (1960) 2 Andh WR 462.

[See however AIR 1930 Bom 362 (363, 364): 55 Bom 372.]

(18) Consent decree can be set aside by suit on any ground which would invalidate an agreement. AIR 1939 Lah 439 (451): ILR (1939) Lah 433 (DB) ° AIR 1939 Sind 251 (252): ILR (1939) Kar 580 (DB).

(19) Where agreement relates merely to certain deviations in procedure of Court, and there is no clear agreement to be bound by conclusions arrived at by Court decree

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is not a "consent decree." AIR 1927 Lah 382 (382) (DB) * AIR 1957 Andh Pra 700 (704) ° AIR 1934 Lah 67 (67): 15 Lah 305 (DB) ° AIR 1923 Mad 444 (445, 446): 47 Mad 39 (DB) * AIR 1924 Sind 134 (136): 18 Sind LR 306 (DB).

(20) Whether agreement merely amounts to deviation from ordinary procedure or whether it constitutes Court an arbiter in the cause depriving parties their right of appeal is a question of fact. AIR 1953 Ajmer 36 (36) ° AIR 1953 Ajmer 31 (32) * AIR 1949 Mad 267 (268, 269).

(21) Agreement between parties not to adduce oral evidence and allow the Court to write a judgment so that the party on whom the onus lies would lose is not an agreement to abide by the decision of Court even if it is wrong on the question of onus. AIR 1958 Pat 249 (252).

(22) Court assuming jurisdiction extra cursum curiae as a result of clear agreement between parties to be bound by its conclusions is in position of arbitrator, and its decision will be consent decree not open to appeal. 1956-1 Mad L Jour 234 (235) ° AIR 1957 Mad 95 (97) (DB) * AIR 1957 Pat 16 (20, 21) (DB) ° AIR 1939 Pat 514 (516): 18 Pat 261 (DB) * AIR 1926 All 90 (92) ° AIR 1920 PC 139 (140): 47 Ind App 200 ° AIR 1923 Mad 444 (445, 446): 47 Mad 39 (DB) * AIR 1961 Andh Pra 71 (75) (FB) : (1960) 2 Andh WR 172.

[See also AIR 1965 Cal 3 (9-10).]

(23) Clear agreement between parties before decision to be bound by it and not to appeal bars appeal even if Court did not proceed extra cursum curiae. AIR 1954 All 789 (792) (DB) ° 1957-1 Andh WR 11 (12) ° AIR 1928 Mad 127 (128) (DB) * AIR 1929 Oudh 451 (452, 453): 5 Luck 391 (DB) ° AIR 1921 All 310 (310): 43 All 266 (DB).

(24) Decree passed on oath of third party by which party has agreed to abide is not consent decree. AIR 1934 Lah 67 (67): 15 Lah 305 * AIR 1938 Nag 64 (65): ILR (1949) Nag 310.

[See also AIR 1961 Madh Pra 108 (109): 1961 MPLJ 769. (Special oath by defendant.)]

(25) Under sub-section (3) of Section 96, there is no appeal from consent decree whether it related to subject-matter of suit or otherwise. But order recording compromise is appealable. AIR 1929 Sind 32 (36) (DB) ° (1910) 6 Ind Cas 857 (859) (DB) (All) ° 1889 Pun Re No. 105, p. 368. (See O. 43, R. 1 (m).) * AIR 1961 Mad 303 (304, 305): (1961) 1 Mad LJ 154 ° AIR 1960 Madh Pra 161 (162): 1960 MPLJ 419 (DB). (Decree in terms of compromise does not take away the right to prefer an appeal against the order recording it.)

(26) Following constitute exceptions to rule of non-appealability of consent decrees:

(a) Where dispute relates to nature of compromise. AIR 1928 Cal 108 (109) (DB).

(b) Decree passed without recording compromise. 1956 Raj LW 65 (67) ° AIR 1917 Cal 607 (607): 43 Cal 85.

(c) Appeal by person affected by decree although not party to it. AIR 1928 Mad 922 (922) (DB) * (1911) 9 Ind Cas 210 (211) (DB) (Cal) ° AIR 1916 Cal 783 (785) (DB) ° AIR 1918 Lah 126 (127): 1918 Pun Re No. 83 (DB) ° AIR 1925 Cal 421 (422) (DB) ° AIR 1927 PC 57 (59): 51 Bom 442: 54 Ind App 111.

(d) Where fact of consent is denied. AIR 1952 All 29 (30): ILR (1953) 2 All 544 (DB) ° AIR 1931 PC 107 (108, 109): 27 Nag LR 139 ° (1930) 125 Ind Cas 587 (589) (DB) (All) * AIR 1929 Oudh 385 (387, 388): 4 Luck 562 (FB).

[See AIR 1963 Raj 63 (67): 1962 Raj LW 651 (DB).]

[See however AIR 1933 Bom 205 (206, 207, 208): 57 Bom 206 (DB).]

(e) Decree passed on invalid consent. AIR 1952 All 97 (98, 99): ILR (1953) 2 All 807 (DB). (AIR 1946 PC 72, Rel. on.; AIR 1931 Cal 211, held no longer good law.) ° AIR 1953 Raj 153 (155): ILR (1952) 2 Raj 470.

(27) Decree purporting to be on merits and not passed in terms of statements of parties recorded is not consent decree and is appealable. AIR 1954 Bilaspur 4 (4).

(28) No appeal lies against consent decree passed by appellate Court. AIR 1956 All 94 (96): ILR (1956) 1 All 586 (DB). (AIR 1951 All 236, Overruled.)

(29) Section 96 (3) does not apply to orders passed by consent of parties. AIR 1940 Rang 153 (155) (DB) ° AIR 1916 Mad 795 (797) (DB).

(30) There need not be any written terms of agreement between the parties placed before the Court and it is enough if the judgment discloses that the decree or order that came to be passed in that case was on the basis of the consent of parties. AIR 1968 Guj 301 (303): 10 Guj LR 61. (Order of remand without making an order as regards costs passed on the oral request of the advocates of both parties.)

**14. Court-fee.**—(1) Valuation of suit for purposes of stamp duty is different from valuation of suit for fixing appellate forum. (1880) 5 Cal 489 (492, 493) (DB) * 1910 Pun Re No. 41, p. 119 (122) (DB).

(2) Appellate Court must see that proper court-fees are paid both in Appellate Court and in Court below. AIR 1918 Pat 623 (624): 3 Pat L Jour 101 (DB).

(3) When question arises as to sufficiency of court-fee paid by appellant in Court below, it is generally desirable in order to avoid any question of jurisdiction to

**97. [New] Appeal from final decree where no appeal from preliminary decree.—** Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

## OBJECTS AND REASONS

"Clause 97.— The Committee have inserted an express provision to compel litigants to appeal from preliminary decrees, and have estopped them, on their failure to do so, from raising objections to such decrees in appeals from final decrees. On this point they accept the unanimous opinion of the Calcutta High Court. They think it unreasonable that parties should allow proceedings to be carried on to their final stage and large costs be incurred if they intend to rely upon objections which could be taken at an earlier stage".

—S. O. R.

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**Section 96 — Note 14 (contd.)**

admit appeal before point is decided. AIR 1921 Pat 88 (89): 6 Pat L Jour 293 (FB).

(4) Question as to sufficiency of court-fee paid in lower Court must be dealt with by appellate Court at the earliest possible moment so that parties may not be kept in suspense upon the question. (1912) 16 Ind Cas 963 (965) (DB) (Cal) ° AIR 1921 Pat 88 (89): 6 Pat L Jour 293 (FB).

(5) Court in exceptional cases has discretion to postpone determination of question relating to sufficiency of court-fees paid in lower Court. 16 Ind Cas 963 (965) (DB) (Cal) ° AIR 1921 Pat 88 (89): 6 Pat L Jour 293 (FB).

(6) Question of sufficiency of stamp on memorandum of appeal must always be regarded as open until appeal is finally heard and disposed of. AIR 1933 Pat 234 (235): 12 Pat 694.

(7) Question of proper Court-fee to be paid on plaint is between plaintiff and State — Defendant has no right to move superior Court in appeal or in revision. AIR 1965 Orissa 108 (110): 31 Cut LT 61.

**15. Appeals under other laws.**—(1) Provisions of Code with regard to appeals will apply to appeals under other Acts in so far as they are made applicable by such Acts. But in so far as provisions of section are inconsistent with provisions of other Acts, they will not apply. AIR 1946 All 89 (94, 100): ILR (1946) All 413 (FB) * 1954 All L Jour 708 (709) ° AIR 1949 Kutch 9 (9) ° AIR 1949 All 201 (203): ILR (1949) All 406 (DB) * AIR 1967 All 156 (157): 1966 All LJ 833. (No provision of appeal under the Provincial Small Cause Courts Act. There can be no appeal from the decree of such court under Section 96, C. P. C.) ° AIR 1967 Punj 148 (151): ILR (1967) 1 Punj 695 (DB) • AIR 1964 Punj 455 (455): 1964 Cur LJ 311. (There is no provision of appeal in the Punjab Town Improvement Act.) * AIR 1963 Punj 32 (33): 64 Pun LR 860. (Appeal under Arbitration Act falls under Section 39 of that Act and not under Section 96, C. P. C.) ° AIR 1962 Andh Pra 492 (494): (1962) 2 Andh WR 469 (DB). (Appeal under Arbitration Act competent under Section 39 of that Act and not under Section 17 read with Section 96, C. P. C.) * (1962) 1 Andh LT 504 (508). (No provision of appeal under Sub-s. (3) of Section 47 of Hyderabad Jagirdars Debt Settlement Act.) * AIR 1959 Punj 398 (400): ILR (1958) Punj 393 (DB). (No appeal lies from an order refusing to make direction under Section 15 of the Payment of Wages Act.)

## SECTION 97 — SYNOPSIS

1. **Scope.**
2. **Preliminary decree.** See Section 2 (2).
3. **Effect of not drawing up a preliminary decree.**
4. **Final decree passed pending appeal against preliminary decree — Effect.**

## TOPIC INDICATOR

Interlocutory order between preliminary and final decree — See Note 1.

Finding recorded in form of decree — See Note 3.

Combined appeal against both preliminary and final decrees — See Note 4.

**1. Scope.**— (1) Under this section the failure to appeal against a preliminary decree is a bar to raising any objection to it in the appeal against the final decree. AIR 1954 Assam 33 (39) : ILR (1953) 5 Assam 415 (FB) * AIR 1958 Ker 158 (160) * AIR 1956 Hyd 161 (162, 163) : ILR (1956) Hyd 45 (DB) * AIR 1956 Madh B 151 (152) : ILR (1956) Madh B 171 (DB) * AIR 1933 Oudh 352 (354, 355) : 9 Luck 51 (FB) * AIR 1915 PC 116 (117): 42 Cal 914 : 42 Ind App 91 * AIR 1917 Cal 701 (704) (DB) * AIR 1961 SC 790 (794): (1961) 3 SCR 769, (58 Punj LR 170, Affirmed.) * AIR 1969 Ker 181 (183) : 1968 Ker LT 264. (The whole object which S. 97 intends to achieve would be frustrated if it is held that only the factual correctness of the decree cannot be challenged but its legal validity can be, even though an appeal against the preliminary decree has not been filed.) * ILR (1968) 1 Mad 582 * AIR 1959 Cal 76 (77) : 63 Cal WN 334 (DB) * AIR 1963 SC 992 (996) : (1963) Supp 2 SCR 616. (Preliminary decree for partition is 'final decision'. AIR 1956 Mad 413, Reversed.)

[See also AIR 1958 Pat 430 (432): 36 Pat 1123 (FB).]

(2) Bar under this section does not apply to an interlocutory order (between the preliminary decree and final decree) not

**98. Decision where appeal heard by two or more Judges.**—(1) Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed:

Provided that where the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, they may state the point of

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**Section 97 — Note 1 (contd.)**

amounting to a supplementary preliminary decree. AIR 1940 Pat 204 (207) : 19 Pat 1 (DB).

(3) A Court while passing a final decree cannot re-open questions determined by a preliminary decree. AIR 1929 All 252 (253) (DB) * AIR 1966 Andh Pra 269 (271) : (1966) 1 Andh WR 50 * AIR 1966 Andh Pra 210 (212) : (1964) 2 Andh WR 219 * AIR 1959 Ker 116 (118) : 1958 Ker LT 782 (DB).

(4) Under Art. 133 of the Constitution, an appeal will lie to the Supreme Court from a preliminay decree declaring the liability of a party and directing accounts to be taken. AIR 1956 Madh B 151 (152): ILR (1956) Madh B 171 (DB).

(5) Preliminary decree for possession directing enquiry into mesne profits from institution of suit till delivery of possession — Should be construed in accordance with O. 20, R. 12 (1) (c) — The direction regarding mesne profits does not make it such a part of preliminary decree against which alone appeal could be filed — Judgment-debtor not precluded from contending in appeal from final decree that mesne profits could not be awarded for period exceeding three years from date of decree — Neither S. 11, nor S. 97, applies. AIR 1965 SC 1325 (1332): (1965) 2 SCR 661.

(6) Suit for accounts between partners— Preliminary decree in favour of plaintiff not containing any direction which can be made the foundation of an appeal by the plaintiff — Adverse finding on one matter against plaintiff — Plaintiff can reagitate that matter in appeal from final decree. AIR 1960 Andh Pra 168 (171).

**2. Preliminary decree.**— See S. 2(2).

**3. Effect of not drawing up a preliminary decree**—(1) Section 97 does not apply unless a preliminary decree is actually drawn up. AIR 1924 Bom 33 (34) (DB) * AIR 1924 Cal 1006 (1007, 1008) (DB).

(2) No appeal will lie against a mere finding even if such finding is recorded in the form of a decree. AIR 1921 Bom 220 (223, 224) : 45 Bom 627 (DB).

**4. Final decree passed pending appeal against preliminary decree — Effect.**— (1) The passing of a final decree subsequent to the institution of the appeal against the preliminary decree will not affect the maintainability of the appeal. AIR 1956 Hyd 161 (162) : ILR (1956) Hyd 45 (DB) * AIR 1948 Nag 56 (58): ILR (1947) Nag 412 (DB) * AIR 1915 Mad 197 (199) : 37 Mad 29 (DB) * AIR 1914 All 380 (380, 381) : 36 All 532 (FB) * AIR 1919 Cal 893 (894) (DB).

[But see (1912) 16 Ind Cas 380 (381) (DB) (Mad).]

(2) An appeal can be preferred against the preliminary decree even after the final decree has been passed. AIR 1915 Mad 197 (199) : 37 Mad 29 (DB) * AIR 1914 All 380 (380) : 36 All 532 (FB) * AIR 1930 Pat 177 (177) (FB) * AIR 1956 Hyd 161 (163): ILR (1956) Hyd 45 (DB) * AIR 1934 Pesh 57 (60) (DB) * AIR 1935 Lah 482 (483) : 17 Lah 53 (DB) * AIR 1929 Nag 349 (350) : 27 Nag LR 197 * AIR 1938 Bom 222 (222) (DB) * AIR 1929 Cal 689 (697) : 57 Cal 1013 (FB).

[But see AIR 1921 Lah 265 (266) * AIR 1928 Lah 73 (74) (DB) * AIR 1916 Bom 228 (229) (DB) * AIR 1925 Sind 178 (180): 18 Sind LR 133 (DB) * AIR 1922 Nag 179 (180).]

(3) The final decree is dependent on the preliminary decree and if the latter is set aside on appeal, the former falls with it. AIR 1940 Pat 668 (669) (DB).

[See also AIR 1957 Andh Pra 330 (332). (Order refusing to extend time under O. 34, R. 2 and making final decree for foreclosure — Appellate Court setting aside order refusing to extend time — Effect is that the final decree based on such order also falls to ground).]

(4) This section does not prevent a party from filing a combined appeal against both the preliminary and final decrees if the dates permit him to do so. AIR 1916 Bom 202 (202) (DB).

(5) A final decree passed pending an appeal from the preliminary decree is not thereby rendered invalid, and if the appeal is dismissed, the final decree passed will not be affected in any way. AIR 1929 All 287 (289) : 51 All 640 (DB).

**SECTION 98 — SYNOPSIS**

1. Scope and applicability.
2. Difference as to preliminary objection.
3. Difference as to part of decree.
4. Point of law.
5. Decision according to opinion of majority.
6. Differing Judges not stating point of law — Effect.
7. Sub-section (3).

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Effect of clause 36 of Letters Patent — See Note 7.

law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it.

[a](3) Nothing in this section shall be deemed to alter or otherwise affect any provision of the Letters Patent of any High Court.

[1882, 1877, S. 575; See Letters Patent.]

[a] Inserted by the Repealing and Amending Act, 1928 (XVIII of 1928), Section 2 and Schedule I.

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**Section 98 (contd.)**

Income-tax Act reference — Section applicable to — See Note 1.

Land Acquisition Act—Appeals under—Applicability of the Section — See Note 1.

Question of fact—Difference of opinion on — See Notes 4 and 7.

Second appeals — Applicability of Letters Patent to — See Note 7.

Senior Judge — Opinion of — When to prevail — See Note 7.

Suits and references pending at time of introduction of Section 98 — See Note 1.

**1. Scope and applicability.**— (1) Section 98, which prescribes the procedure in regard to appeals, cannot be extended by S. 141 to miscellaneous proceedings such as revision applications. AIR 1915 Mad 1193 (1196) * AIR 1925 Mad 281 (285, 287).

(2) The provisions of S. 98 of the Code are expressly made applicable by S. 66A, Income-tax Act to reference under S. 66 of that Act. AIR 1931 Lah 578 (580) : 12 Lah 725 (FB).

(3) On a difference of opinion between two Judges in a reference under S. 21(3), Bihar Sales Tax Act, 6 of 1944, a reference to a third Judge under S. 98 is not competent, but there being no procedure provided by law in such a case, it is open to the Chief Justice to mould a convenient form of procedure and refer the case to a third Judge. AIR 1951 Pat 29 (31) : 30 Pat 174 (FB). (Per Reuben J., in order of Reference.)

(4) By virtue of S. 54 of the Land Acquisition Act, 1894, section 98 applies to appeals in land acquisition cases. AIR 1919 Mad 626 (628): 41 Mad 943.

(5) On a difference of opinion on a point of law, reference must be under S. 98, C. P. Code and not S. 10 (2) of the Punjab Courts Act, as that section applies only in the absence of any other provision. AIR 1916 Lah 113 (125) : 1917 Pun Re No. 71 (FB).

(6) It cannot be held that after the Constitution and the extension of the Central Act of the Code of Civil Procedure to Mysore, the provision in S. 15(3) of the Mysore High Court Act must be deemed to have been superseded as per Art. 254 (1) of the Constitution on the ground that this provision is repugnant to the provision in S. 98 (2). AIR 1955 Mys 65 (67) : ILR (1955) Mys 43 (FB).

(7) Mysore High Court Act (I of 1884), S. 15 (3) — Reference under, to Full Bench valid — Subsequent accession of State to Union of India — Constitution of Full Bench in accordance with S. 98(3), Mysore Civil P. C. held not invalid for not being in accordance with Indian Civil P. C. AIR 1952 Mys 94 (97) : ILR (1952) Mys 234 (DB).

(8) Applicability — Suit instituted long before extension of C. P. Code to Hyderabad State — Appeal in High Court should be disposed of under Sec. 8, Hyderabad High Court Act and not under Section 98. AIR 1962 Mys 10 (11. 12) : 39 Mys LJ 472 (DB).

**2. Difference as to preliminary objection.**—(1) The decision of a preliminary objection to the hearing of an appeal is not a "hearing" of the appeal. Section 98 does not apply to a difference of opinion in such a decision. (1889) 11 All 176 (181) (SB).

**3. Difference as to part of decree.** — (1) Where the Judges agree that a part of the decree should be reversed, but differ as to the rest, then the part as to which the Judges agree should be reversed, and rest of the decree confirmed. AIR 1916 Cal 582 (588) (SB) * AIR 1928 Mad 180 (188, 190) : 51 Mad 291 (DB) * AIR 1933 All 473 (474) : 55 All 564 * AIR 1926 Lah 65 (71): 7 Lah 179 (DB). (Whole decree should be confirmed.)

**4. Point of law.** — (1) Reference under S. 98 to other Judges must be only on a question of law and not on a question of fact. AIR 1932 Nag 88 (88, 89) : 28 Nag LR 80 (DB).

(2) Judges hearing the reference can only hear arguments on the specific point and not the whole appeal. (1913) 35 All 487 (498) : 40 Ind App 182 : 16 Oudh Cas 247 (PC) * AIR 1958 Pat 290 (291) (DB). (Third Judge not to adjudicate on point on which there is no difference of opinion.) * AIR 1933 All 861 (874, 875) (DB) * AIR 1914 Cal 592 (594).

**5. Decision according to opinion of majority.** — (1) Though the reference is, under the section, to be heard by a Judge or Judges other than those who heard the case originally, the decision upon the point must be according to the opinion of the majority of the Judges who heard the appeal including those who first heard it (1904) 6 Bom LR 131 (211).

(2) Where the Judges have disagreed as to the meaning of the words 'reasonable

**99. No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction.**—No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court.

[1882, S. 571; 1877, Ss. 577 and 578; 1859; S. 350; See O. 1, Rr. 1 and 3 and O. 2, R. 3.]

## OBJECTS AND REASONS

"Clause 99.— The Committee have extended this clause in order to give the Courts a large discretion in dealing with irregularities in proceedings, and they have inserted express words to meet the point decided in ILR 26 Bom 259 and ILR 27 Mad 80 and in recent decision of Calcutta High Court." —S. O. R.

**Section 98 — Note 5 (contd.)**

opportunity under Art. 311 of the Constitution and have referred to the third Judge the question of law whether in the circumstances of the case the plaintiff had sufficient opportunity within Article 311 of the Constitution, as a question of law has been stated by the Judges a duty devolves upon the third Judge to decide the said question in accordance with the provisions of the proviso to sub-section (2). AIR 1959 Punj 402 (411) : 61 Punj LR 167.

**6. Differing Judges not stating point of law—Effect.**—(1) Under the proviso, it is discretionary for the members of the Bench hearing the appeal to state the point of law on which they differ. AIR 1954 All 521 (522).

(2) Where differing Judges do not state the point for decision of other Judge or Judges, decree appealed from should be confirmed. AIR 1954 All 521 (522).

(3) Where the differing Judges have, without stating the point as required by the section, delivered their judgments without any reservation, they cannot subsequently state the point of law. (1887) 9 All 625 (643) (FB). (Such reference is ultra vires.)

(4) According to practice of Patna High Court Judges note down the point of law on which they differ, in the order sheet for reference to a third Judge. It is not necessary for them to state the same in their respective judgments. AIR 1943 Pat 433 (445) (DB).

(5) Under S. 15(3), Mysore High Court Act it is not necessary that a material question or questions about which there is a difference of opinion should always be formulated before a reference is made to the Full Bench though such question may be formulated. AIR 1950 Mys 55 (56): 55 Mys HCR 97 (FB).

(6) Practice in Mysore High Court to refer cases under S. 15(3) of Mysore High Court Regulation after delivering differing opinions including final orders to be passed on such opinions — Practice not strictly warranted by S. 15(3) — Held, decision of Full Bench on such reference could not be attacked as wanting incompetence. AIR 1963 SC 1 (19. 20, 50): (1963) 3 SCR 22. (ILR 9 All 625, Overruled.)

**7. Sub-section (3).**—(1) After the amendment of the Letters Patent in 1928, the procedure under clause 36 of the Letters Patent on a difference of opinion is the same as that under S. 98 except that a reference under clause 36 is obligatory, while it is optional under S. 98, and the reference under clause 36 may be on a point of fact as well as of law, while under S. 98 it can only be on a point of law. (1955) 59 Cal WN 320 (356) (DB).

(2) Sub-section (3) shows clearly that the applicability of clause 36 is not in any way controlled by this section. Clause 36 applies to all appeals to Chartered High Courts whether from subordinate Courts or under the Letters Patent and S. 98 applies only to High Courts other than Chartered High Courts, e.g., Chief Courts and Courts of Judicial Commissioners. AIR 1929 Mad 641 (659) : 52 Mad 563 (FB). (If, at any time, cl. 36 ceases to exist, S. 98 will come into operation.) * AIR 1938 All 641 (647, 649) : ILR (1938) All 972 (FB) * AIR 1934 Lah 371 (379) : 15 Lah 425 (FB) * (1948) 27 Pat 332 (390) (DB) * AIR 1933 Pat 67 (68, 69) : 11 Pat 772.

(3) Chartered High Court — Difference between two Judges hearing appeal — In such case Cl. 28 of Letters Patent (Pat.) applies and not S. 98 — Clause 28 being wider than S. 98, case can be referred to third Judge even when two Judges differ on question of fact. AIR 1966 Pat 154 (160) : ILR 45 Pat 1471.

## SECTION 99 — SYNOPSIS

**1. Scope and object.**
**2. Misjoinder and non-joinder.**
**3. Instances of error, defect or irregularity falling within section.**
**3A. Instances of error, defect or irregularity not falling within this section.**
**4. Objections to error, etc., when to be raised.**

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Affecting merits or jurisdiction — See Note 1.
"Any proceedings in the suit" — Proceedings subsequent to institution— See Note 1.
Appeals from appellate decrees and S. 99 — See Note 1.

**Section 99 (contd.)**

Error, etc., in court-fee, stamp or valuation — See Note 1.
"Jurisdiction." — See Note 1.
Wrong order of remand — See Note 4.

**1. Scope and object.**— (1) Section implies that the Court has inherent powers to remand a case. AIR 1960 All 655 (655): 1960 All LJ 586.

(2) Object of S. 99 is to prevent technicalities from overcoming the ends of justice, and from operating as a means of circuity of litigation. (1886) 8 All 365 (375) (DB) * AIR 1937 PC 233 (234): ILR (1937) All 655 : 64 Ind App 254 : 31 Sind LR 590.

(3) Contract Act (1872), S. 28 — Section not applicable to appeals from orders not amounting to decree. AIR 1964 Mys 147 (155) : (1963) 2 Mys LJ 513 (DB).

(4) Section 99 is based upon the principle that the rules of procedure are made to subserve the ends of justice and not to defeat them. ILR (1960) 10 Raj 94.

(5) A decision which is correct on the merits and is within the jurisdiction of the Court, should not be upset merely for technical and immaterial defects. AIR 1954 SC 340 (342): 1955 SCR 117 * AIR 1967 Punj 163 (165): (1966) 68 Pun LR (D) 214 (DB) * AIR 1965 Mys 110 (112): (1965) 1 Law Rep 51 (DB) * AIR 1959 Pepsu 7 (8) : 1 Pepsu LR 180.

(6) The law that an error or irregularity cannot be raised as a ground of appeal only refers to errors, defects or irregularities of procedue, not to rules of law or conditions which affect the substantive rights of the parties. (1861) 9 Moo Ind App 268 (282) (PC).

(7) A non-compliance with every rule of procedure does not ipso facto destroy the validity of the whole proceeding. The purpose of the rule violated must, in each case, be examined. AIR 1920 Cal 597 (598, 599): 46 Cal 978 (DB).

(8) The section clearly confers discretion upon an appellate Court. A trial Court cannot assume the role of an appellate Court and condone material faults in its own procedure with the help of this section. AIR 1954 Pepsu 115 (117): ILR (1953) Patiala 615.

(9) Administration of special oath — Record of statement of parties in order sheet is sufficient — Section 99 condones all irregularties of form and procedure unless merits of the case are affected. AIR 1961 Madh Pra 108 (109): 1961 MPLJ 769.

(10) An error, defect or irregularily of procedure must. in order to be a valid ground of appeal, be a material one, that is, should have either —

(a) affected the merits of the case. AIR 1928 Mad 919 (921) (DB) * AIR 1925 Cal 98 (100) (DB) * AIR 1923 Nag 58 (59, 60) (DB), or
(b) affected the jurisdiction of the Court. AIR 1942 Pat 1 (25): 21 Pat 1 (FB) * AIR 1955 Bhopal 6 (7) * AIR 1950 Assam 163 (164): ILR (1950) 2 Assam 351 (DB) * AIR 1926 All 650 (652) * AIR 1918 Cal 435 (436): 45 Cal 926 (DB) * AIR 1930 Mad 714 (718) (DB).

(11) The term "jurisdiction" in Section 99 is used in the sense of pecuniary or local jurisdiction or jurisdiction relating to subject-matter; it does not mean the legal authority of a Court to do certain things. (1901) 28 Cal 324 (330) (DB) * AIR 1964 Mys 147 (155): (1963) 2 Mys LJ 513 (DB).

(12) A mere irregularity, which does not affect merits of case or jurisdiction of Court, is no ground for reversing or varying a decision in appeal. AIR 1956 Vindh Pra 1 (5) * AIR 1945 Nag 244 (247): ILR (1945) Nag 587 * (1913) 19 Ind Cas 918 (919) (FB) (Cal) * AIR 1928 Pat 438 (439) (DB) * AIR 1930 Bom 225 (227) (DB) * ILR (1963) 13 Raj 1183 (1184) * 1963 Raj LW 653 (654) * AIR 1961 Punj 325 (326): 63 Pun LR 499. (No prejudice to defendants — Decree will not be set aside.)

[See also AIR 1955 All 4 (6): ILR (1955) 1 All 523 (FB).]

(13) Section 99 applies to all irregularities whether subsequent to the suit or not. But irregularities in prior suits and different proceedings are not within the section. AIR 1937 Pat 147 (148) (DB).

(14) Section 99 applies to objections raised in appeals against original decrees as well as in appeals from appellate decrees by virtue of Section 108. AIR 1918 Cal 435 (436): 45 Cal 926 (929) (DB).

(15) Principle underlying the section should be applied to interlocutory orders. AIR 1945 Nag 97 (100): ILR (1945) Nag 121 (DB).

(16) Section 99 does not apply to the procedure followed by arbitrators in giving awards. AIR 1953 Ajmer 49 (49).

(17) The rule embodied in this section proceeds upon a sound principle, and is calculated to promote justice: the rule should be followed by the Privy Council also. AIR 1937 PC 233 (234): ILR (1937) All 655: 64 Ind App 250: 31 Sind LR 590.

(18) Per Beg, J. — Section 99 is not in conflict with Section 105, as the latter relates to matters not affecting the merits of the case, and the former relates to matters affecting the merits of the case or jurisdiction of the Court. AIR 1957 All 527 (532) (DB).

(19) Defect in summons which does not prejudice defendant in his defence should not be ground for nullifying or rendering inoperative provisions of Section 17 West Bengal Premises Tenancy Act (12 of 1956) regarding deposit or payment of arrears of rent by defendant after service of summons. AIR 1959 Cal 231 (236, 237): 63 Cal WN 216 (DB).

**2. Misjoinder and non-joinder.** — (1) Under Section 99 the Appellate Court

**Section 99 — Note 2 (contd.)**

cannot dismiss a suit for misjoinder of parties or causes of action unless it affected the merits of the case or the jurisdiction of the Court. AIR 1955 All 4 (6): ILR (1955) 1 All 523 (FB) * AIR 1956 Pepsu 80 (83) (DB) * AIR 1953 Pat 326 (329) (DB) * AIR 1937 PC 42 (45): 16 Pat 149 * AIR 1926 Cal 416 (417) (DB) * AIR 1915 Mad 320 (320) (DB) * (1913) 21 Ind Cas 438 (441) (DB) (Cal).

(2) Appellate Court may in order to meet the ends of justice, allow a party to amend plaint or to withdraw suit against the misjoined defendants with liberty to bring a fresh suit. (1893) 15 All 380 (381) (DB) * AIR 1964 All 350 (352): 1963 All LJ 856. (Misjoinder of parties not affecting the merits of the case does not invalidate the decree passed in such a suit. ILR 18 All 131 no longer good law.)

[See also 1959 Raj LW 487; ILR (1959) 9 Raj 271.]

(3) Appellate Court may give a finding against each misjoined defendant separately. (1911) 34 Mad 55 (57) (DB).

(4) Section applies even in cases of multifariousness. AIR 1926 Lah 145 (146) (DB) * AIR 1937 PC 42 (45): 16 Pat 149.

(5) Misjoinder in Section 99 includes non-joinder. 1954 Raj LW 578 (579) * (1910) 33 Mad 436 (438) (DB) * AIR 1922 Mad 317 (320).

[But see AIR 1933 Mad 664 (667).]

**3. Instances of error, defect or irregularity, falling within section.** — (1) Court of higher grade trying suit triable by a Court of lower grade. (1885) 7 All 230 (243) (FB).

(2) Receiving a plaint presented on a Sunday or holiday. (1908) 30 All 136 (137) (DB).

(3) Application for substitution of legal representative of judgment-debtor entertained by Court to which decree is transferred for execution. AIR 1941 Pat 139 (140): 19 Pat 838 (DB) * AIR 1926 Lah 34 (35) (DB) * AIR 1965 Pat 52 (53): 1964 BLJR 212 (DB) * AIR 1959 Mys 99 (99, 100): 36 Mys LJ 865 (DB).

(4) Collector granting permission under Section 92 without adverting to the plaintiff's interest in the trust. (1897) 24 Cal 418 (428) (DB).

(5) Leave not obtained to try other causes of action in suit for immovable property. AIR 1941 Bom 247 (250, 259): ILR (1941) Bom 361 (DB) * AIR 1924 Pat 613 (616): 3 Pat 244 (DB).

(6) Institution of suit under a defective power of attorney, or vakalatnama. AIR 1949 All 499 (500): ILR (1950) All 136 (DB) * AIR 1957 Him Pra 16 (19) * AIR 1923 Bom 44 (44): 47 Bom 227 (DB) * AIR 1931 All 507 (512): 54 All 57 (SB) * AIR 1946 Bom 174 (179): ILR (1945) Bom 819 (DB).

(7) Defective frame or signature or verification of plaint or petition. AIR 1944 Oudh 37 (38) (DB). (Defective frame of suit.) * ('57) AIR 1957 Assam 22 (25): ILR (1957) 9 Assam 25 (DB) (Misdescription of parties.) * AIR 1948 Mad 369 (371) (DB). (Plaint filed with knowledge and consent of plaintiff but not signed by him.) * (1899) 22 All 55 (59) (DB) (Do.) * (1896) 18 All 396 (399, 400) (SB). (Defective verification.) * AIR 1967 All 487 (488). (Invalid verification.) * AIR 1962 Punj 467 (469) * AIR 1960 Cal 15 (20) (DB). (Suit before Panchayat — Plaint not signed by plaintiff himself but by wife — Mukhtarnama in favour of wife not on record — Suit decreed without any objection — Setting aside of decree by District Judge not proper — Defects could be cured by Section 99, Civil P. C.)

(8) Allowing amendment of plaint at a late stage. AIR 1928 Cal 57 (58) (DB).

(9) Enlarging time to file the documents. (1909) 2 Ind Cas 946 (948) (DB) (Cal).

(10) Issues not framed or wrongly framed. AIR 1942 Pat 366 (368) (DB) * AIR 1926 Bom 384 (385) (DB).

(11) Refusal to summon witnesses at a late stage. (1894) 16 All 218 (220) (DB).

(12) Delivery of judgment in the absence of parties and without notice to them. AIR 1933 Nag 12 (12, 13): 28 Nag LR 308 (DB).

(13) Omission to verify inventory of property in execution application. (1906) 28 All 244 (245, 246) (DB).

(14) Recognizing assignment of decree without a formal application. (1899) 26 Cal 250 (253) (DB).

(15) Execution sale without attachment. AIR 1918 Mad 1262 (1263, 1264) (DB).

(16) Appeal on behalf of minor decided without knowledge of the fact of the death of the next friend pending appeal. (1906) 28 All 328 (330) (DB).

(17) Refusal to issue a commission to examine a purdanashin lady. (1898) 25 Cal 807 (815, 816): 25 Ind App 117 (PC).

(18) The issue of a commission behind the back of the defendant. AIR 1938 Nag 530 (532).

(19) Service on partner without obtaining directions under O. 30, R. 3. AIR 1953 Trav-Co 209 (210): ILR (1953) Trav-Co 163 (DB).

(20) Absence of a formal order of appointment of a guardian ad litem for a minor party, when the minor was as a fact represented. (1910) 32 All 287: 37 Ind App 77: 13 Oudh Cas 123 (PC) * (1886) 14 Cal 204 (209) (FB) * (1903) 30 Cal 1021 (1032): 30 Ind App 182 (PC).

(21) Absence of notice to the guardian when he actually appears in the suit. AIR 1916 Pat 375 (378) (DB).

(22) Want of a proper description of the minor as required by O. 32, R. 1. (1886) 14 Cal 159 (163) (FB).

**Section 99 — Note 3 (contd.)**

(23) Where minor is not represented, absence of an order of appointment as guardian ad litem would be fatal to suit. AIR 1921 Cal 534 (535) (DB) * AIR 1964 Ker 244 (248): 1964 Ker LT 252 (DB).

(24) Major defendant represented as a minor but himself appearing and contesting case without objection. AIR 1924 All 94 (95): 45 All 608 (DB).

(25) Allowing execution of preliminary mortgage decree to proceed without a final decree being passed. AIR 1927 Bom 131 (133): 51 Bom 125 (DB).

(26) Improper admission or admission in an irregular manner of additional evidence in appeal. AIR 1915 Mad 762 (762) (DB) * AIR 1949 All 173 (174): ILR (1949) All 414.

(27) See also the undermentioned cases. AIR 1965 SC 1812 (1817): (1965) 3 SCR 283. (Transposition of defendant as co-plaintiff — Courts failing to do so — Defences raised by other defendants fully considered — This technical defect is cured by Section 99.) * 1965 All LJ 884 (886). (Ejectment suit dismissed on merits — On appeal case remanded for de novo trial after making landholder party to suit—Landlord not a necessary party to the suit — Further appeal summarily rejected — Mistake in not going into merits apparent on face of record.) * AIR 1965 Ker 95 (96): 1964 Ker LT 453. (Issue of second commission on same subject without setting aside report of first commissioner— No illegality but mere irregularity — Judgment not liable to be set aside in view of Section 99 C. P. C.) * 1963 Jab LJ 842 (846): ILR (1962) Madh Pra 305. (Non-compliance with provisions of O. 13, R. 4.) * ILR (1960) 10 Raj 94. (Provisions of Order 13, Rule 4 not complied strictly.) * AIR 1959 Punj 586 (589): 61 Pun LR 730. (Where although a Court has jurisdiction to entertain a lis, but the matter does not come before it in the proper way, then in such a case, if a party submits to its jurisdiction and does not raise an objection on that ground, the appellate or the revisional Court will not interfere.) * AIR 1959 Punj 565 (566): 61 Punj LR 810 (DB). (A failure on the part of the Court to follow strictly the language of the form of decree is not necessarily fatally defective.)

[See also AIR 1969 SC 255 (257): (1969) 1 SCJ 344 * 1963 Ker LJ 543 (546) :ILR (1963) 2 Ker 347. (Person impleaded as subsequent encumbrancer raising plea and obtaining finding adverse to him — Contention in second appeal that he was unnecessary party and his rights should not have been adjudicated upon — Not permissible.)

**3A. Instances of error, defect or irregularity not falling within this section.** — (1) Omission to obtain permission to file a suit in representative capacity and omission to issue notices under Order 1, R. 8 C. P. C. cannot be condoned under Section 99, C. P. C. at appellate stage. AIR 1962 Madh Pra 363 (365): 1962 MPLJ 596 (DB). (The omissions could be remedied by granting permission to plaintiffs and by issuing notice to creditors if nature of suit is not changed.)

(2) Provision of Order 21, Rule 46 (2) being mandatory, the failure to comply with any one of the requirements thereof nullifies the whole proceeding and the defect is not curable under S. 99. AIR 1960 Pat 132 (134).

(3) Failure to comply with the provisions of Order 1, Rule 8 amounts to an irregularity which vitiates the entire proceedings in the lower Court and cannot be condoned under S. 99, C. P. C. AIR 1960 Punj 26 (28).

(4) Where under the terms of a statutory provision certain parties have to be impleaded and they have not been so impleaded, the provisions of Order 1, Rule 9 or Section 99, Civil Procedure Code, cannot be pressed into service to cure the infirmity. Order 31, Rule 2 in express terms requires that all trustees should be impleaded in a suit and the terms of Order 1, Rule 9 should be read subject thereto. AIR 1964 Andh Pra 412 (415): (1963) 2 Andh WR 1.

**4. Objections to error, etc., when to be raised.** — (1) An objection as to error, defect or irregularity not raised at the earliest possible opportunity will be taken as waived. AIR 1949 Ajmer 23 (27) * (1886) 8 All 576 (580) (FB) * AIR 1920 Cal 597 (598, 599): 46 Cal 978 (DB) * (1883) 10 Cal 626 (634): 11 Ind App 26 (PC) * AIR 1960 All 584 (584, 585).

[See also AIR 1958 Punj 116 (121): ILR (1958) Punj 335 (DB). (Objection to production of secondary evidence.)]

(2) Parties who have accepted an irregularity cannot object to or go back upon it afterwards. ILR (1954) 4 Raj 617 (622) * AIR 1914 Lah 339 (341) (DB) * AIR 1924 All 94 (95): 45 All 608 (DB).

(3) There cannot be a waiver of a total want of jurisdiction. (1885) 7 All 230 (243) (FB). (Per Mahmood J.)

(4) The mere failure to appeal against an illegal order cannot be taken to operate as a consent to the passing of such an order. (1909) 32 Mad 83 (85) (DB).

(5) Under Order 1, Rule 13 objection as to non-joinder or misjoinder of parties should be taken at the earliest possible opportunity. If it is not so raised

## APPEALS FROM APPELLATE DECREES

**100. Second appeal.**—(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court, on any of the following grounds, namely:—

(a) the decision being contrary to law or to some usage having the force of law;

(b) the decision having failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

[1882, 1877, S. 584; 1859, S. 372]

### STATE AMENDMENT

**Kerala**[a]

In sub-section (1) of Section 100 of the Code of Civil Procedure, 1908 after Cl. (c), omit clause (d) as inserted by the Code of Civil Procedure (Travancore-Cochin Amendment) Act, 1951 (XVII of 1951), Sec. 2, and add the following as a new clause (d):—

"(d) the finding of the lower appellate Court on any question of fact material to the right decision of the case on the merits being in conflict with the finding of the Court of first instance on such question."

—Code of Civil Procedure (Kerala Amendment) Act, 1957 (XIII of 1957), Sec. 4. (1-10-1958).

[a] Jurisdiction of Kerala High Court has been extended to the Union Territory of Laccadive, Minicoy and Amindivi Islands—see Act 37 of 1956, S. 60 (1-11-1956).

**101. Second appeal on no other grounds.**—No second appeal shall lie except on the grounds mentioned in Section 100.

[1882, 1877, S. 585.]

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**Section 99 — Note 4 (contd.)**
it cannot be raised in appeal. AIR 1957 Madh B 113 (114) * AIR 1964 Gui 174 (177): (1964) 5 Gui LR 678 * AIR 1957 Madh Bha 113 (114): Madh BLR 1955 (Civ) 799.

**SECTIONS 100 & 101 — SYNOPSIS**


**1. SCOPE. OBJECT AND APPLICABILITY.**
**2. PROVISIONS OF CODE BARRING SECOND APPEAL.**
**3. OTHER LAW BARRING SECOND APPEAL.**
**4. APPEAL FROM APPELLATE DECREE.**
**5. Subordinate Court.**
**6. "Decree."**
**7. Execution cases.**
**8. Separate decrees.**
**8A. GROUNDS OF SECOND APPEAL.** SEE NOTES 9 TO 21.
**9. Contrary to law.**
10. Decision not on legal evidence.
11. Misconception of issue. See Note 9.
12. Appellate Court assuming jurisdiction.
13. Discretion by lower Court.
14. Disbelieving witnesses.
**15. Decision contrary to usage.**
**16. Failure to determine issue of law or usage.**
**17. Errors or defects in procedure.**
18. Errors or defects must be substantial..
19. Omission to frame or try issues of facts.
20. Defective judgment.
**21. Admission or rejection of evidence.**
**22. QUESTION OF LAW, QUESTION OF FACT AND MIXED QUESTIONS OF LAW AND FACT.**
**23. Construction of documents.**
**24. Legal effect of document or transaction.**
**25. Meaning of words.**
**26. Inference from proved facts.**
**27-28. Relevancy and sufficiency of evidence.**

Sections 100-101 — Synopsis (contd.)
29. Nature of tenancy.
30. Nature of possession.
31. Nature of property.
32. Nature of contract or transaction.
33. State of mind, acquiescence, good faith, consent, intention, negligence, wilful neglect, misconduct, reasonable care, reasonable and probable cause and waiver.
34. Existence of liability.
35. Existence of custom. — See Note 15.
36. Status.
37. Merger.
38. Limitation.
39. Existence of legal necessity for, and binding nature of, transaction.
40. Existence of nuisance.
41. Interpretation and applicability of the law.
42. Abandonment.
43. Foreign law.
44. Acquisition of easement and customary rights of privacy.
45. Miscellaneous.
46. FINDING OF FACT BINDING IN SECOND APPEAL.
47. FINDING OF FACTS, WHEN NOT BINDING IN SECOND APPEAL.
48. CONCURRENT FINDINGS OF FACT.
49. NEW CASE.
50. New point involving pure question of law.
51. New case of mixed questions of law and fact.
52. Plea going to the root of the case.
53. Plea of jurisdiction.
54. Plea of limitation, estoppel or res judicata.
55. Plea abandoned or waived is barred.
56. WHO MAY APPEAL AND WHO MAY NOT — SEE S. 96.
57. REMAND.
58. EX PARTE APPELLATE DECREE.

## TOPIC INDICATOR

Abatement of appeal — See Order 22.
Admission of additional evidence — See Note 13 and O. 41, R. 27.
Adverse possession — See Notes 22, 30 and 51
Allowing additional evidence in appeal — See Notes 10, 13, 20 and 46.
Amendment in second appeal — See Note 49.
Applicability of S. 103 — See Note 1.
Benami Transaction — See Note 32.
Change of law after decree — See Notes 41 and 50.
Conclusion based upon primary evidentiary fact — See Note 22.
Costs — See Note 13.
Decision based on irrelevant evidence — See Notes 10 and 15.
Decision under Hindu Marriage Act, 1955 — See Note 1.
Decree on award — See Note 1.
Dismissal of first appeal for default — See Note 6.
Erroneous or perverse finding of fact — See Notes 17 and 46.
Erroneous view of law — See Notes 9, 18, 41, 47 and 50.
Finding based on evidence — See Note 46.
Finding based on no reasons or bad reasons — See Notes 17 and 47.
First appeal incompetent — See Note 12.
Forum — See Note 1.
Granting declaration — See Note 13.
Inference of fact — See Notes 22 and 26.
Instalment decree — See Note 13.
Interpretation of leading cases — See Notes 41 and 49.
Legal conclusions from finding of facts — See Notes 22, 23, 26 and 39.
Legal effect of awards — See Note 23.
Misjoinder of parties or causes of action — See Notes 6, 18, 41 and 49.
Misreading of evidence — See Notes 10 and 23.
Mixed question of law and fact — Instances — See Note 41.
Mode of filing appeal — See Note 1.
Pleas which can be taken for the first time in second appeal — See Notes 49 to 54.
Question of bona fides — See Notes 33, 45.
Question of burden of proof — See Note 26.
Question of divorce — See Note 45.
Question of market value of property — See Note 45.
Question of quantum of damages — See Note 45.
Question regarding licenses — See Note 44.
Question of representation — See Note 45.
Refusal or award of costs — See Note 13.
Refusal to extend time for filing first appeal — See Notes 13 and 38.
Refusal to summon witness or party — See Notes 13, 21 and 55.
Second appeal where there is no first appeal — See Note 1.
Special appeal under Bengal Rents Act — See Notes 1 and 3.
Valuation and stamp — See Notes 6, 17, 18, 20 and 49.

**1. Scope, object and applicability. —** (1) Right of appeal is not a natural or in-

**Sections 100-101 — Note 1 (contd.)**

herent right attaching to litigation, and does not exist and cannot be assumed unless expressly given by statute or by rules having the force of statute. Parties cannot confer a right of appeal upon themselves in any matter by agreement or mutual consent. AIR 1965 All 228 (231): 1964 All LJ 1057. (Direction in decree allowing parties to bear their own costs — No question of principle involved — No appeal lies.) * AIR 1942 Mad 73 (75): ILR (1942) Mad 236 * (1935) 62 Cal 701 (705) (DB).

[See also (1888) 11 Mad 26 (34, 35, 36): 14 Ind App 160 (PC).]

(2) Section 100 is an express provision giving right of second appeal on grounds mentioned therein. AIR 1951 Nag 8 (11): ILR (1951) Nag 301 * AIR 1939 Rang 59 (63) (DB).

(3) When a second appeal is brought up for admission, the Judge has jurisdiction to see whether the grounds mentioned in the section exist and to reject the appeal if no such grounds exist. AIR 1960 Mad 341 (341).

(4) The right of appeal being a substantive right is to be regulated by the law in force at the time when the suit out of which it arises was commenced and nothing that happens later can take away such right except by express enactment or necessary intendment. ILR (1954) 4 Raj 1019 (1023) * AIR 1959 Punj 123 (126) (DB). (Pepsu Union Judicature Ordinance (20 of 2005 BK) Section 49 (2).)

(5) Where according to the law in force at the time of the institution of a suit right of second appeal exists on questions of fact, the subsequent coming into force of this section will not affect that right. ILR (1954) 4 Raj 591 (596) * AIR 1958 Mys 14 (16): ILR (1957) Mys 120. (Mysore Civil Procedure Code (3 of 1911), Section 100.) * AIR 1957 Him Pra 16 (18). (Section 100, C. P. Code cannot be deemed to have repealed paragraph 32, Himachal Pradesh (Courts) Order (1948).) * AIR 1954 Hyd 34 (35): ILR (1951) Hyd 621 (DB) * AIR 1952 Hyd 22 (22): ILR (1951) Hyd 570 * AIR 1950 Madh B 85 (86) (DB) * AIR 1965 SC 703 (704, 705): (1965) 2 SCJ 632. (Suit filed in Hyderabad before 1-4-1951 — Powers of High Court in second appeal — Section 602 of Hyderabad Code of Civil Procedure attracted and not Section 100 of Civil P. C. — Appeal on questions of fact as well as questions of law competent.) * ILR (1958) Andh Pra 106: (1958) 1 Andh WR 116 (119) (DB). (Hyderabad Civil Procedure Code S. 602.)

(6) Gwalior State Civil Procedure Code (Zabta Diwani), Section 525 — Mixed question of law and fact — Second appeal arising out of suit instituted on 2nd February 1944, when Gwalior State Civil Procedure Code was in force — Appellant entitled to be heard on questions of fact. 1961 Jab LJ 491.

(7) The appeal created by M. B. High Court of Judicature Act, 1949 being an appeal created by that special provision Section 100, C. P. C. has no applicability. AIR 1959 Madh Pra 151 (168): 1960 MPLJ 334 (FB).

(8) The provision restricting the grounds that may be taken in second appeal is based on the ground of public policy expressed in the maxim interest reipublicae ut sit finis litium — it concerns the State that there be an end to litigation. AIR 1921 Oudh 98 (99): 24 Oudh Cas 221.

[See also AIR 1918 PC 92 (94): 46 Cal 189: 45 Ind App 183.]

(9) The conditions mentioned in the section must be strictly fulfilled before a second appeal can be maintained and no Court in India or elsewhere has any power to add to or enlarge those grounds. (1891) 18 Cal 23 (30): 17 Ind App 122 (PC) * (1889) 16 Cal 753 (755): 16 Ind App 125 (PC) * AIR 1934 Cal 633 (635): 61 Cal 365.

(10) Where the High Court is called upon to decide a question of law in second appeal it has no discretion in the matter and cannot decide the case on merely equitable grounds if they come into conflict with or ignore the provisions of law. AIR 1945 Lah 175 (177).

(11) A second appeal will lie only on the ground of an error in law or procedure; it will not lie merely on the ground of an error on a question of fact. AIR 1939 Pat 402 (403): 18 Pat 204 (DB) * AIR 1958 Madh Pra 413 (414): 1958 Cri L Jour 1485.

[See AIR 1934 Lah 291 (292).]

(12) Only one memorandum of appeal against the decree is permissible even though the decree is a composite one giving distinct reliefs. Where there are distinct subject-matters in the appeal, it is open to the Court to admit a part and dismiss the rest after giving reasons. AIR 1953 Nag 56 (57): ILR (1952) Nag 564 (DB).

(13) Two appeals filed by two parties in litigation arising out of one suit — One second appeal alone need be filed against both the decisions. AIR 1968 Ker 154 (155) :1967 Ker LT 1156. (AIR 1966 SC 1332, Foll.)

(14) Although no second appeal can be preferred on questions of fact, when such an appeal is already before the High Court it may determine issues of fact when such issues (1) have not been determined by the lower appellate Court or (2) have been wrongly determined by reason of any illegality, omission, error or defect such as is referred to in sub-section (1) of Section 100, Civil P. C. provided the evidence on record is sufficient for such determination. This is in view of the express provisions of Section 103 of the Code. AIR 1958 All 699 (702) (DB).

**Sections 100-101 — Note 1 (contd.)**

(15) When both the lower Courts, namely the trial Court and the first appellate Court, have not considered all the evidence in the case, it becomes necessary for the second appellate Court to go into the evidence in detail. AIR 1963 Assam 117 (121) (DB)

(16) The rule that a finding of fact cannot be attacked in second appeal does not apply to second appeals to which the provisions of Sections 100 and 101 do not apply. 1956 Madh BLJ (Bhopal) 33 (35) * AIR 1952 Kutch 25 (27) * AIR 1953 Kutch 24 (25) * AIR 1927 Cal 802 (804, 805) : 55 Cal 228 (DB) * AIR 1963 Andh Pra 447. (Letters patent appeal — Finding of fact can be challenged as there is no prohibition like the one under S. 100.)

[See also (1891) 18 Cal 302 (310) : 17 Ind App 392 (PC) * ILR (1952) 2 Raj 681 (683).]

(17) The practice of filing second appeal and civil revision petition in the alternative by way of abundant caution is to be deprecated. AIR 1954 Mad 66 (66).

(18) An appeal is a continuation of the proceedings and the appellate Court has power to review the evidence subject to the statutory limitation prescribed. AIR 1965 SC 1585 (1587) : (1965) 2 SCJ 461 * AIR 1968 Manipur 42 (45). (Appeal is only a continuation of the suit.)

(19) Application for restitution of profits under Sections 144 and 151 — Appeal and second appeal held maintainable. 1960 Andh LT 303.

(20) Appeal against order terminating service of Government servant under Rule 5 of Central Civil Services (Temporary Service) Rules, 1949 — Motive behind order was alleged to have been false declaration made by servant about his caste — Even if government servant is proved not to have made such declaration, High Court cannot direct Government to reopen case and to review its decision. (1967) 1 Andh WR 85 : ILR (1967) Andh Pra 838.

(21) It is the nature of the suit and not the value of appeal that is material for purposes of Section 102. It is the character of the suit as it was originally framed and presented to the Court and not which it may assume in the course of or after the trial by virtue of the findings of the Court or in the appeal that may eventually be brought that determines the nature of the suit for the purposes of Section 102. Where neither the suit nor the grounds taken in appeal fall within the prohibited sphere of Sections 100 to 102 the plea as to non-maintainability of the appeal is wholly devoid of substance. AIR 1959 Andh Pra 92 (93) : (1959) 1 Andh WR 148 (DB).

(22) Question of fitness has no connection whatever with question of substantive question of law — Article 133 cannot be compared with Section 100, C. P. Code. (1964) 68 Cal WN 379.

(23) Decree on award with certain modifications held to be one under Section 17, Arbitration Act — Appeal and second appeal lay under Sections 96 and 100, C. P. Code, by virtue of Section 41, Arbitration Act — Section 17 only places limitations on right of appeal and does not confer any right of appeal — Chapter VI has no application to decrees — Appointment of Referee to make statement on validity of award — Jurisdiction of Court held remained unaffected — Statement of referee held binding on the parties. AIR 1963 All 252 (255) : 1962 All LJ 999.

(24) Appellate decree of Civil Court passed under Section 332 (4), U. P. Zamindari Abolition and Land Reforms Act (1951) — Second appeal lay to High Court. AIR 1966 All 196 (199) : 1965 All LJ 616.

(25) Question between decree-holder and judgment-debtor in which auction-purchaser is interested — Auction-purchasers in prior litigation between common judgment-debtor and third parties would not be parties to suit and no second appeal would lie from controversy raised by them. AIR 1968 Delhi 104 (107).

(26) Section 67 (2) of Madras Act XIV of 1955 providing for refund of Court-fee is applicable only to appeals under Section 100 of Code and under Cl. 15 of Letters Patent and not to appeal under Order 43, Rule 1 (u). (1969) 1 Mad LJ 127 : 81 Mad LW 292.

(27) Mysore C. P. C., Sections 100 (1) (d) and 103 — Second appeal — Finding of fact — Finding of fact given by trial Court but not by lower appellate Court — Question of fact material for decision on merits — Section 103, applies and not Section 100 (1) (d), Mysore Civil P. C. — Finding of trial Court not binding. AIR 1963 Mys 5 (10) : 1962 Mys LJ (Supp) 73 (DB).

(28) Karji under Madras Hereditary Village Offices Act prevented from discharging his functions by recalcitrant attitude of Tahsildar — Suit for arrears of salary amounting to Rs. 1,000 at the rate of Rs. 20 per month — Article 3 is applicable — Section 103, C. P. Codes does not apply — Second appeal and not revision is maintainable. (1969) 33 Cut LT 1091 : (1968) 2 Lab LJ 326.

(29) Judgment of affirmance need not repeat everything said by trial Court. It is enough that appellate Court has applied its mind, to the evidence and materials on record. If the evidence has been discussed in one context or another and conclusion has been recorded with reference to such evidence, the judgment is not defective. ILR (1965) 44 Pat 782 (DB).

(30) As to Letters Patent appeal see the following cases.

(a) Letters Patent appeal — Review of findings of fact — Appeal from first appeal heard by Single Judge — Letters Patent Bench can review findings of fact

**Sections 100 and 101 — Note 1 (contd.)**

AIR 1967 Delhi 128 (131) : 69 Pun LR 297 (DB).

(b) Section 101 is independent provision and wider in scope than S. 100 (Obiter). (Per Narasimham, C. J. and Chaudhary, J.) AIR 1965 Pat 472 (477) : 1965 BLJR 300 (FB) * AIR 1965 Pat 196 (199) : 1965 BLJR 24 (DB). (Overruled in AIR 1965 Pat 472.) * AIR 1965 Pat 141 (141).

(c) Original suit and appeal filed in Courts within jurisdiction of Bombay High Court prior to reorganization — Merger of area in Mysore State — Second appeal after merger in Mysore High Court — Right of appeal under cl. 15. Letters Patent (Bom) not lost. ILR (1961) Mys 706.

(31) As to appeals under Rent Control Acts see the following cases.

(a) Saurashtra Rent Control Act (XXII of 1951), S. 28 — Second Appeal — Appellate Court is bound by same restrictions as are laid down in S. 100 of C. P. Code — Reappraisal of the evidence on the ground of trial Courts error is not permissible. AIR 1967 SC 226 (228) : (1966) Supp SCR 180.

(b) Order of eviction under S. 13 of Punjab Urban Rent Restriction Act — Order under S. 47, C. P. Code relating to execution of such eviction order — Second appeal does not lie. AIR 1966 Him Pra 77 (78).

(c) Second appeal lies to High Court under S. 31, of M. P. Accommodation Control Act on grounds mentioned in Section 32 and not on grounds mentioned in Section 100, C. P. C. AIR 1965 Madh Pra 185 (187, 188) : 1965 MPLJ 211.

(d) Nature of suit to be determined on allegations in plaint — Suit for arrears of rent and eviction — Withdrawal of latter claim — Decree for arrears of rent only — Not a small cause decree — Appeal and second appeal lies. 1963 BLJR 175.

(e) Right to recover rent or to claim ejectment does not arise out of the Act but under other laws — Decree or order passed in such suit is not therefore appealable by virtue of Sec. 22 of the Act, but under general law — A second appeal to High Court is, therefore, competent. 1967 Raj LW 234.

(f) Tenant taking protection under S. 6 of Assam Urban Areas Rent Control Act — Rent deposited in Court after expiry of due date — Landlord refusing to accept Court's notice for withdrawal — Second Appeal against Court's order of withdrawal competent. ILR (1966) 18 Assam 25.

(32) As to cases under Hindu Marriage Act and Charitable Endowments, see the following cases.

(a) Second appeal under Section 28 of Hindu Marriage Act — Ambit of. AIR 1968 Guj 150 (151) : 8 Guj LR 888 (DB). * AIR 1966 Guj 139 (145) : (1965) 6 Guj LR 714 (DB). (Right of second appeal is given by S. 28, Hindu Marriage Act — But it is subject to S. 100, Civil P. C.) * (1966) 1 Mad LJ 102 : 78 Mad LW 698. (Second appeal lies against orders and decrees passed under Hindu Marriage Act, 1955.) * AIR 1965 All 280 (287) * AIR 1963 Mys 3 (5) : 40 Mys LJ 411. (Scope of appeal under Section 28 of Hindu Marriage Act, (1955) is the same as that under any law for the time being in force which means Civil P. C. — Thus, in a second appeal there can be no interference on findings of fact.) * AIR 1962 Mys 172 (173) : 40 Mys LJ 236. (Decision under Section 13 of Hindu Marriage Act (1955) — Second appeal — Maintainability — Right of appeal — Extent of — Decisions described as decrees under the Act — Second appeal lies.)

(b) Under Section 44 (2), Orissa Hindu Religious Endowments Act (2 of 1952), the second appeal to the High Court can be both on facts and on law — The appeal under the section is not subject to limitations placed on second appellate Court by Section 100, Civil P. C. ILR (1961) Cut 458.

(33) Section 54 of the Land Acquisition Act does not contain any prohibition against filing a second appeal — AIR 1963 Punj 221 (222, 223): 64 Punj LR 870 (DB).

(34) Punjab Town Improvement Act (4 of 1922), Section 59 — Acquisition of land for Trust — Award of Tribunal — Not open to appeal. AIR 1964 Punj 455 (456) : 1964 Cur LJ 311 (DB).

(35) Suit to set aside sale on ground of fraud — Both Courts decreeing suit — Held, Second appeal was competent — No revision lay. 1961 BLJR 973.

(36) Appellate and revisional jurisdiction — Distinctions — Appellate jurisdiction is exercised only at the instance of the aggrieved party — Appellate authority can as a rule set right at any mistakes of law or fact committed by a subordinate authority — Revisional jurisdiction is exercised either at the instance of a party or suo motu — The revisional Court cannot substitute its own conclusions for that of the subordinate authoriy — It can be exercised only where there is a clear abuse of justice. 1967 Raj LW 1: ILR (1966) 16 Raj 918.

(37) If a party wants to avail himself of the remedy provided by Art. 136 of Constitution in cases where the decree of the High Court under appeal has been passed under Section 100 Civil P. C. it is necessary that the party must apply for leave under the Letters Patent if the relevant clause of the Letters Patent provides for an appeal to a Division Bench against the decision of a Single Judge. AIR 1965 SC 195 (197).

(38) High Court in Letters Patent appeal can interfere with finding of fact of Single Judge but not lightly. AIR 1969 Mad 235 (240).

**Sections 100 and 101 (contd.)**

**2. Provisions of Code barring second appeal.**—(1) A second appeal will always lie to the High Court from an appellate decree of a Court subordinate to a High Court, unless precluded by some express provision of law. AIR 1945 Lah 127 (130): ILR (1945) Lah 335 (FB). (A right given by Section 100 cannot be taken away by implication on analogies drawn from other provisions.) * AIR 1914 PC 87 (89) : 37 Mad 443 : 41 Ind App 258.

(2) Where any section of the Code has declared that any decision shall be final, no second appeal will lie from such decision. The following are some of such provisions — (i) Section 96 (3) read with Section 108, (ii) Section 102. (iii) Section 104; (iv) Order 47, Rule 7. AIR 1956 All 94 (96) : ILR (1956) 1 All 586, (Section 96 (3) read with Section 108 — AIR 1951 All 236, Overruled.) * AIR 1943 Cal 464 (465) (DB). (S. 102.) * AIR 1933 Mad 838 (838) (S. 104.) * AIR 1926 Cal 229 (231) (DB). (Do.) * AIR 1935 Lah 962 (962). (Do.) * AIR 1935 Pat 109 (110) (Do.) * AIR 1936 All 763 (764) (DB). (Do.) * AIR 1946 Cal 530 (534): ILR (1946) 2 Cal 527 (FB). (O. 47, R. 7.)

**3. Other law barring second appeal.**—(1. The following are instances of other laws barring second appeal—

(a) Section 27 of the Provincial Small Cause Courts Act declaring that the decrees and orders of a Small Cause Court are final. See S. 27, Provincial Small Cause Courts Act.

(b) Section 388 of the Succession Act, 1925, corresponding to S. 26 of the Succession Certificate Act, 1889, now repealed. (1894) 17 Mad 167 (168) (DB) * ('39) 20 Cal 641 (642) .DB).

[See also (1875) 1 Cal 127 (130).]

(c) Section 153 of the Bengal Tenancy Act (8 of 1885). AIR 1941 Cal 58 (59) : ILR (1940) 2 Cal 334 * AIR 1936 Cal 323 (323) (DB).

(d) Section 39 (2) of the Arbitration Act, 1940. AIR 1955 Pat 277 (280) (DB) * AIR 1948 Pat 207 (207, 208) : 26 Pat 115 (DB) * AIR 1965 Pat 66 (72)). (But a second appeal is not prohibited in regard to matter falling with S. 17.)

(e) Section 22 of the Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950). AIR 1954 Raj 252 (256) : ILR (1954) 4 Raj 958 (DB).

(f) See also the following cases. AIR 1956 Bhopal 62 (63). (Bhopal and Vindhya Pradesh (Courts) Act (1950), Section 31.) * AIR 1958 Madh Pra 326 (330). (Sections 31 and 32 of Bhopal and Vindhya Pradesh (Courts) Act, 1950, do not curtail the right of appeal conferred under the Civil P. C. Section 31 of the Act only enlarges the grounds which can be taken in second appeal which arises out of a suit of the kind specified in the section.) * AIR 1952 Ajmer 46 (1) (46). (Rule under Delhi and Ajmer-Merwara Rent Control Act (19 of 1947), Section 14 (2).) * AIR 1952 Him Pra 51 (54). (Bilaspur Courts Order (1949), Para 32.) * AIR 1945 Lah 127 (127, 129, 130) : ILR (1945) Lah 335 (FB). (Section 41, Punjab Courts Act.) * AIR 1943 Mad 369 (370). (Section 75 (1) of the Provincial Insolvency Act.) * (1940) 44 Cal WN 753 (754) (DB). (Decision by the Collector under Section 38 of the Bengal Landlord and Tenant Procedure Act.) * AIR 1960 Punj 639 (641). (Delhi and Ajmer Merwara Rent Control Act (19 of 1947), Section 14 — Rules under Rule 5.)

**4. Appeal from appellate decree.** — (1) An appeal will lie to the High Court from every decree passed on appeal by any Court subordinate to the High Court, and the jurisdiction of the High Court in this respect cannot be limited without express words in any law to this effect. 1956 Raj LW 195 (196) * AIR 1954 Cal 163 (164) (DB) * (1883) 9 Cal 838 (839) (DB) * AIR 1914 Bom 30 (31) : 38 Bom 340 (DB) * AIR 1922 Mad 119 (121, 122) : 44 Mad 697 (DB) * (1888) 11 Mad 309 (314) (FB) * AIR 1916 PC 21 (23) : 39 Mad 617: 43 Ind App 192 * AIR 1914 PC 87 (89) : 37 Mad 443 : 41 Ind App 258.

[See AIR 1969 Mad 248 (249) : 81 Mad LW 565. (Lower Appellate Court substituting its own judgment and decree to that of trial Court and remanding case.)]

[See also AIR 1958 Bom 345 (346) : ILR (1958) Bom 419 (DB).]

(2) A second appeal will lie from the decree of an Appellate Court disallowing the cross-objections of the respondent. AIR 1933 Lah 400 (402) (DB).

(3) A party who does not prefer an appeal against the decree of the lower Court cannot have a right of second appeal by merely filing incompetent cross-objections in the first appeal by the other party. AIR 1943 Pesh 3 (4) (DB).

[See also AIR 1954 All 49 (49).]

(4) It does not matter in what character the appeal reaches the first Appellate Court; as long as it is on ordinary Court of the country, second appeal will lie, against its decision. AIR 1916 PC 21 (23): 39 Mad 617 : 43 Ind App 192.

(5) Section 9 of the Assam Urban Areas Rent Control Act (3 of 1946) gives a right of appeal to a landlord or tenant from certain decisions as if such decision or order were a decree in a suit for ejectment of the tenant from the house. A second appeal would lie from the decree in appeal if the case is covered by the provisions of this section. AIR 1954 Assam 177 (180) : ILR (1953) 5 Assam 489 (DB).

(6) Where the subject-matter of the appeal is not a decree at all, no second appeal will lie. AIR 1930 Lah 125 (125).

(7) A person who has obtained a decree in his favour cannot prefer an appeal on the ground that he is dissatisfied with some particular expressions or findings against him. AIR 1951 Punj 444 (445).

**Sections 100 and 101 — Note 4 (contd.)**

(8) A party must, if he wishes to appeal against the finding on a particular issue against him, apply for amendment of the decree by embodying therein the decision on the issue. (1881) 6 Cal 319 (323) (FB).

(9) Where a suit for pre-emption is brought against the purchaser of certain property and the vendor thereof and the suit is dismissed on the ground that there is no valid sale and that therefore the plaintiff has no cause of action, the purchaser of the property is entitled to appeal against the decree although it is one dismissing the suit against him. (1936) 62 Cal 701 (706).

(10) If a revision is rejected as incompetent by the High Court the party may subsequently file an appeal against the decision of the lower Court. But he cannot do so when revision is dismissed on merits and the decision of the lower Court becomes final. AIR 1951 Madh B 60 (60).

(11) Order under Order 21, Rule 90 — Order is not a decree — Second Appeal does not lie — At the most appeal lies as an appeal from an order. 1967 Ker LT 1061 : 1968 Ker LR 33.

(12) Refusal to extend time under Section 5 Limitation Act — Appeal dismissed as time-barred — Amounts to a decree and is appealable — Revision filed cannot be treated as appeal when no formal decree is drawn up and signed. AIR 1959 Tripura 6.

**5. Subordinate Court.**—(1) Appeals within the High Court not being appeals to the High Court from a subordinate Court, this section does not apply to such appeals. AIR 1940 Nag 39 (39) : ILR (1940) Nag 141 (FB).

**6. "Decree."**—(1) It is only where the decision of the lower Appellate Court amounts to a decree that an appeal lies therefrom to the High Court under this section otherwise not. AIR 1953 Ajmer 32 (32) * 1957 BLJR 534 (536). (Determination of question falling under S. 144 is a decree.) * Madh BLJ 1954 HCR 1045 (1046) * (1881) 6 Cal 319 (323) (FB) * AIR 1917 All 134 (135, 136) (DB) * AIR 1915 Mad 322 (322) (DB) * Madh BLJ 1955 HCR 1467 (1468) * AIR 1952 Pat 437 (438) * AIR 1914 Cal 795 (795) (DB) * AIR 1933 Mad 695 (696) : 56 Mad 984 * AIR 1928 Lah 352 (353) : 9 Lah 176 (DB).

[See (1882) 8 Cal 126 (129) (DB) * AIR 1942 Mad 73 (74) : ILR (1942) Mad 236.]

(2) Order deemed to be decree within meaning of Section 2 (d) — Order subject to all incidents of Sections 96 and 100 — Decision of first appellate Court on order immaterial — Second appeal maintainable. 1968 MPLJ 246 : 1968 Jab LJ 640.

(3) An order rejecting appeal as time barred after refusal to extend time under Section 5, Limitation Act is a decree appealable as such. AIR 1959 Manipur 13 (14).

(4) Decree for ejectment under the Delhi and Ajmer Rent Control Act — Declaratory suit challenging its validity — Dismissal of appeal — No revision lies against appellate order — Revision petition treated as second appeal. AIR 1961 Punj 574 (575) : 63 Pun LR 607.

(5) Where while passing an order of remand for fresh disposal, consequent on the direction for amendment of the plaint the appellate Court records a finding adverse to the plaintiff appellant there being no decree a second appeal against such order would not be maintainable. AIR 1961 Mad 262 (263).

**7. Execution cases.**—(1) Where an order in execution amounts to a decree under S. 2 (2) read with S. 47, a second appeal will lie therefrom. AIR 1947 Pat 454 (459) : 26 Pat 340 (FB) * AIR 1955 Cal 63 (64) * Madh BLJ 1955 HCR 1137 (1138) * AIR 1952 Pat 434 (434) * AIR 1952 Punj 159 (161) (DB) * AIR 1933 All 57 (59) : 54 All 1031 (DB) * AIR 1940 All 28 (28) * AIR 1962 Mad 489 (490).

[See also Section 104, cl. (2) and AIR 1954 All 63 (64).]

(2) Where a second appeal is barred in the suit itself, e.g. suits of a small cause nature, no second appeal will lie from an order in execution in such a suit though such order may fall under Section 47 and amount to a decree — See Section 102.

(3) From every decree passed in appeal — Joint decree in favour of number of decree-holders — Execution ordered by executing Court as per application by joint decree-holders for substitution of heirs of deceased decree-holder — Held order passed by executing Court fell within S. 47 and hence it amounted to decree against which first appeal is provided and if Section 100 applied, second appeal would also lie — Held further, suit not being of small cause nature, Section 102, would not be bar to second appeal. AIR 1967 Assam 27 (27) : ILR (1966) 18 Assam 482.

(4) Execution of decree for mokarari rent — Appeal by decree-holder from appellate order allowing objection of judgment-debtor — Executor of will substituted in place of deceased appellant without any objection — Objection with regard to this during hearing of appeal, not open. 1963 BLJR 779.

(5) Finding of fact — The finding that a certain plot of land was not advertised for sale in execution of a decree is purely a finding of fact. AIR 1963 Pat 60 (61): 1963 BLJR 20.

(6) Execution proceedings — Plea that objection to execution on ground of bar of limitation is barred by principle of constructive res judicata not raised before executing Court — In absence of material facts plea cannot be allowed in second appeal. AIR 1963 Pat 412 (425) : 1963 BLJR 802 (FB).

(7) Execution of eviction order — Nature of — Objection under S. 47 —

**Sections 100 and 101 — Note 7 (contd.)**
First and second appeal lies under C. P. Code. (1962) 64 Punj LR 392.

(8) Executing Court cannot go behind decree — Objection to the same can be raised even in second appeal. (1966) 68 Pun LR 288 : 1966 Cur LJ 110.

**8. Separate decrees.**—(1) Where, in appeals relating to the same matter between the same parties, the lower Appellate Court passes separate decrees, then separate appeals should be filed with respect to those decrees. (1888) 11 Mad 280 (282) (DB).

(2) Where separate appeals were preferred by parties to the suit in which the decree was passed and separate decrees were drawn up in the appeals it was held that only one decree should have been drawn up in the appeals and, therefore, only one second appeal would be maintainable from the decrees. AIR 1954 Trav-Co 28 (28) : ILR (1952) Trav-Co 1027 (DB).

**8-A. Grounds of second appeal.** See Notes 9 to 21.

**9. Contrary to Law.**—(1) A Court commits an error of law if it acts contrary to, or fails to apply the provisions of, any law or any legal principle. ILR (1949) 1 Cal 444 (452) (DB) * AIR 1944 Sind 209 (212): ILR (1944) Kar 223 * (1905) 27 All 688 (691) (SB) * AIR 1926 Lah 653 (654) (DB) * AIR 1932 Lah 56 (57).

[See (1936) 164 Ind Cas 315 (316) (Pat).]

(2) The word "law" is not limited to statute law alone but will also include general principles of law. (1893) 20 Cal 93 (99, 100) : 19 Ind App 228 (PC).

(3) A misconception of issue or of the true questions in controversy in the case is an error of law. AIR 1943 PC 208 (211): 70 Ind App 225 : ILR (1944) Kar (PC) 40 * AIR 1940 Mad 299 (301) (DB) * AIR 1955 Lah 251 (251) * AIR 1919 PC 29 (31) : 47 Cal 107 : 46 Ind App 140 * AIR 1938 Nag 470 (472): ILR (1938) Nag 535 * AIR 1964 Bom 287 (294) : 66 Bom LR 525. (Lower Courts misconceiving real question of fact to be tried — Failure also to appreciate and determine a question of fact vitally affecting issue in the case — Findings of fact arrived at by lower Courts not binding in second appeal.)

(4) A finding based on no evidence or in disregard of evidence or on inadmissible evidence or on assumptions of facts without inquiry is an error of law. AIR 1956 Bhopal 22 (23) * AIR 1954 Cal 90 (93) (DB) * AIR 1916 Cal 691 (691) (DB). (Assumption of facts.) * AIR 1961 Punj 275 (278) * AIR 1960 All 534 (535).

(5) Courts are bound to draw, for the purpose of deciding the issue before them, such inferences of facts as are reasonable from the facts placed before them. A refusal to draw any inference from proved facts one way or the other or the drawing of an inference which cannot be drawn from, and is not warranted by the facts is an error of law. AIR 1930 Lah 443 (444) * (1866) 11 Moo Ind App 7 (23) (PC) * AIR 1952 Mys 47 (52): ILR (1952) Mys 151 (DB).

[See AIR 1940 All 349 (350) (DB).]

(6) Overlooking of the principle that the onus is on the appellant to show that the decision of the lower Court is wrong, is an error of law. AIR 1954 Orissa 40 (44) (DB) * AIR 1922 Lah 127 (130) (DB).

(7) Where a Court arrives at a finding by placing the burden of proof on the wrong party it is an error of law. AIR 1956 Nag 20 (22) : ILR (1955) Nag 1016 * AIR 1955 Assam 23 (26) : ILR (1954) 6 Assam 242 (DB).

**10. Decision not on legal evidence .**—(1) A Court will, be committing an error of law—

(a) If it bases its decision on no evidence at all, and on mere surmises and conjectures. AIR 1952 Assam 69 (69) : ILR (1952) 4 Assam 89 (FB) * ILR (1949) 1 Cal 444 (452) (DB). (Per Chatterjee J.) * 1946 Jaipur LR 459 (462) (DB) * AIR 1924 Pat 67 (68) (DB) * (1890) 17 Cal 875 (882) (PC) * AIR 1932 Lah 293 (294) : 13 Lah 116 (DB) * AIR 1919 PC 29 (30): 47 Cal 107 : 46 Ind App 140 * AIR 1914 PC 67 : (1871) 41 Cal 972 : 41 Ind App 110 * AIR 1948 Pat 247 (249, 251) (DB). (Surmise.) * AIR 1920 Pat 264 (266) (DB). (Do.) * AIR 1930 Lah 150 (151) (DB). (Do.) * (1885) 7 All 649 (654) (FB). (Do.) — Case overruled on another point in 19 Ind App 228 : 20 Cal 93 (PC) * AIR 1935 Mad 190 (191) (DB). (Do.)

[See also AIR 1942 Pat 386 (387) (DB).]

[See however AIR 1914 Mad 118 (119) (DB).]

(b) If it bases its decision on irrelevant and inadmissible evidence as such evidence is no legal evidence. ILR (1949) 1 Cal 444 (452) (DB). (Per Chatterjee J.) * (1912) 36 Mad 168 (176) (DB) * AIR 1927 Pat 209 (212) : 6 Pat 698 (FB) * 1886 Bom PJ 284 (DB). (Inadmissible evidence.) * AIR 1923 Lah 630 (631) (DB). (Inadmissible evidence.) * AIR 1920 Lah 322 (323). (Do.) * AIR 1935 Oudh 41 (43): 10 Luck 423 (DB) (Do).

[See AIR 1947 Mad 345 (346) * (1874) 22 Suth WR 272 (273) (DB).]

[But see (1909) 24 Bom 591 (594, 596) (DB).]

(c) If it misreads the evidence, i.e., assumes certain evidence to exist where there is none or vice versa. (1875) 24 Suth WR 119 (119, 120) (DB) * AIR 1932 Lah 128 (128) * AIR 1928 Oudh 333 (334) * (1912) 15 Ind Cas 515 (516) (DB) (Cal) * AIR 1946 Nag 152 (156, 157) : ILR (1946) Nag 73. (Conclusion reached on mistaken assumption that there is no evidence.) * AIR 1918 Cal 544 (544) (DB). (Do.) * (1874) 22 Suth WR 278 (279) (DB). (Do.)

(d) If it disregards or fails to consider material evidence in arriving at the conclusion. AIR 1963 Hyd 64 (65): ILR

**Sections 100 and 101 — Note 10 (contd.)** (1952) Hyd 1036 (DB) * AIR 1953 Raj 167 (168) : ILR (1952) 2 Raj 54 * ILR (1949) 1 Cal 444 (452) (DB). (Per Chatterjee J.) * AIR 1944 Oudh 201 (202) : 20 Luck 26 (DB) * AIR 1940 PC 192 (196, 197) : ILR (1940) Kar PC 380 : ILR (1941) Bom 107 * AIR 1940 Pat 137 (140) : 18 Pat 768 (DB) * (1891) 16 Bom 477 (479) (DB) * AIR 1928 Cal 136 (137) (DB) * AIR 1922 Pat 562 (563) (DB) * AIR 1935 Mad 701 (703).

(2) The mere non-mention of a particular evidence or document in the judgment will not mean that it has not been considered. AIR 1946 Oudh 72 (72): 21 Luck 279 * AIR 1918 Pat 291 (294, 295) * AIR 1934 All 941 (942) * AIR 1939 Nag 221 (223): ILR (1939) Nag 510 (DB) * 1937 Mad WN 393 (395).

(3) If evidence of obvious weight and importance, or the evidence relied upon by the first Court, has not been dealt with in the judgment, it may be regarded as sufficient proof that the evidence has not been considered. AIR 1919 Oudh 44 (45): 22 Oudh Cas 312 (DB).

[See also AIR 1934 Pat 66 (67).]

(4) High Court will not interfere in second appeal with the judgment of the first Appellate Court on the ground of the failure to consider material evidence, if such evidence had not been brought to the notice of the lower Appellate Court or if it had not been relied upon before the said Court. AIR 1944 Oudh 206 (207) (DB) * AIR 1917 Pat 578 (579): 2 Pat L Jour 231 (DB) * (1929) 11 Lah L Jour 381 (384) (DB). (Evidence not relied by lower Appellate Court.)

(5) Where the view taken by the trial Court approximates nearer the truth and is more in accord with the probabilities the High Court in second appeal will not disturb the finding of the trial Court where the lower appellate Court has fallen into an error of record and has reversed that finding on a wrong estimate of the oral evidence. AIR 1954 Orissa 17 (18): ILR (1953) Cut 558 (DB).

**11. Misconception of issue.** — See Note 9.

**12. Appellate Court assuming jurisdiction.** — (1) An appellate Court acts contrary to law if it acts without jurisdiction in any matter. AIR 1918 Cal 435 (436): 45 Cal 926 (DB) * AIR 1936 Lah 575 (576) (DB) * (1965) 69 Cal WN 258.

(2) Second appeal is competent from the first appellate decree which is appealable under this section even though it is made without jurisdiction. AIR 1918 Cal 435 (436): 45 Cal 926 (DB) * AIR 1957 Madh B 122 (123) * AIR 1933 All 403 (404) (DB) * (1912) 16 Ind Cas 940 (942) (DB) (Cal) * AIR 1931 Lah 96 (96) * AIR 1926 Mad 1089 (1089) (DB) * AIR 1926 Pat 164 (165) (DB) * (1960) 64 Cal WN 678.

[See also AIR 1950 Pat 90 (91).]

(3) No Second appeal will lie from first appellate decree, made without jurisdiction, where there is a definite prohibition against a second appeal as in Section 102. AIR 1957 Madh B 122 (123).

(4) No second appeal will lie from the decree of the first Appellate Court where the first appeal itself is not competent in law. AIR 1921 Mad 612 (614) (DB) * (1904) 28 Bom 458 (460) (DB) * (1902) 6 Cal WN 614 (615) * AIR 1936 Pat 119 (120) * AIR 1968 Pat 181 (184). (Appeal wrongly entertained — Second appeal is maintainable.)

[See however AIR 1934 Lah 79 (80).]

[But see AIR 1924 All 183 (185) * AIR 1926 All 401 (401, 402) * AIR 1925 All 737 (738): 47 All 934 (DB) * AIR 1939 All 22 (23) * AIR 1941 Cal 441 (441) * AIR 1919 Cal 368 (369) (DB) * (1900) 27 Cal 362 (363) (DB) * AIR 1935 Lah 319 (319) * AIR 1936 Lah 212 (213) * AIR 1942 Pat 369 (370) * AIR 1941 Pat 616 (617) (DB) * AIR 1930 Pat 280 (282): 9 Pat 685 (DB) * AIR 1954 Trav-Co 118: ILR (1952) Trav-Co 275 (DB) * AIR 1943 Mad 185 (186): ILR (1943) Mad 297 (DB) * AIR 1942 Mad 741 (741, 742).]

(5) Even though a second appeal may lie from a decree passed in an incompetent appeal, such a second appeal will not lie if the lower Appellate Court has dismissed the appeal as incompetent. AIR 1942 Mad 741 (741, 742).

[See also AIR 1943 Mad 185 (186): ILR (1943) Mad 297 (DB).]

(6) Where the first Appellate Court entertains without jurisdiction an appeal against an order, no second appeal will lie because no such appeal will lie under Section 104, Clause (2) even if the first Appellate Court had entertained the appeal with jurisdiction. AIR 1921 Lah 156 (157).

(7) Where the lower Appellate Court erroneously dismisses an appeal on the ground that no appeal lies to it, the dismissal is nevertheless a decree and is open to second appeal. (1904) 8 Cal WN 64 (65) * (1910) 5 Ind Cas 158 (160) (Cal).

(8) Where the first appeal itself is incompetent, since the wrong order of the lower appellate Court interfering with order of the trial Court has to be set aside, even if a second appeal as such is not technically speaking maintainable, the High Court can exercise the powers of revision and quash the order of the lower appellate Court. AIR 1960 Andh Pra 131 (132).

**13. Discretion by lower Court.**—(1) Where a discretion to do or not to do a particular act is vested in the Court by the provisions of the Code, refusal to exercise it or a non-exercise of it is an error

**Sections 100 and 101 — Note 13 (contd.)**
or defect in procedure within the meaning of the section. AIR 1949 Mad 374 (375): ILR (1949) Mad 589 ° AIR 1942 Oudh 485 (486): 18 Luck 464 (DB) ° AIR 1940 Pat 546 (547) (DB) ° AIR 1925 All 288 (289): 47 All 412 (DB).

(2) Where a Court exercises its discretion it must do so judicially, i. e., on sound legal principles. AIR 1939 Nag 110 (112): ILR (1939) Nag 452 * AIR 1959 Mad 12 (14) ° AIR 1942 Oudh 485 (487): 18 Luck 464 (DB).

(3) An exercise of discretion in an arbitrary, unreasonable or non-judicial manner or which is based on wrong conclusions of fact is an error of law which will be a valid ground of second appeal. AIR 1926 Cal 677 (678). (Arbitrary.) ° AIR 1959 Mad 12 (14). (Costs — Arbitrary and capricious exercise of discretion.) * AIR 1933 All 294 (295) (DB) (Do.) ° AIR 1937 Sind 263 (271) (DB) (Do.) * AIR 1936 Lah 742 (743) (Do.) ° AIR 1914 All 74 (75): 36 All 510 (512) (DB). (Unreasonable.) ° AIR 1949 PC 53 (54). (Non-judicial manner.) * AIR 1951 Mad 612 (613). (Do.) ° AIR 1942 Oudh 485 (487): 18 Luck 464 (DB) (Do.) ° AIR 1940 Pat 502 (504) (DB). (Do.) * AIR 1923 All 455 (456): 45 All 432 (DB). (Do.) ° AIR 1919 Pat 503 (505): 4 Pat L Jour 381 (DB). (Wrong conclusions of fact.) ° AIR 1928 Pat 537 (538) (DB) (Do.) * AIR 1934 All 469 (471) (DB). (Misapprehension of fact.)

[See however AIR 1934 Cal 5 (6, 7) (DB).]

(4) Where the Court has exercised its discretion in a judicial manner, there is no error either of law or of procedure and consequently, such exercise of discretion cannot be interfered with in second appeal. AIR 1955 Raj 167 (173) ° AIR 1954 Cal 238 (240) (DB) ° (1955) 8 Sau LR 399 (401) * AIR 1951 Simla (Punj) 231 (233) ° ILR (1951) 1 Raj 618 (620) ° ILR (1949) Bom 883 (889, 890) (DB) * AIR 1953 SC 228 (234): 1953 SCR 1009 ° AIR 1946 Nag 139 (144): ILR (1946) Nag 116 (DB) ° AIR 1942 Oudh 485 (487): 18 Luck 464 (DB) * AIR 1940 Pat 423 (424) (DB) ° (1899) 23 Bom 513 (517, 518) (DB) ° AIR 1929 Rang 221 (222): 7 Rang 561 (DB) ° (1905) 28 Mad 508 (512): 32 Ind App 261 (PC) * AIR 1922 All 335 (335) (DB) ° (1901) 23 All 121 (122) (DB) ° AIR 1935 Pat 256 (260) (DB) ° 1966 Jab LJ 1028 ° (1965) 67 Pun LR 491 (494) ° ILR (1965) 1 Punj 532: 1965 Cur LJ 32 * AIR 1964 Bom 46 (47): 65 Bom LR 505. (A relief for specific performance, is a discretionary one. When the discretion is exercised by the Courts below judiciously and on proper and reasonable grounds the appellate Court cannot interfere with the discretion even if it were to be said that some other view of the matter could have been taken.) ° 1963 Jab LJ 779 ° (1960) 38 Mys LJ 622. (Suit for permanent injunction based on sole ownership — Plaintiff found co-owner with defendants — One of defendants found putting up house to the prejudice of plaintiff's interest — Injunction granted on that ground — Exercise of discretion held not in excess — No interference in second appeal.)

(5) If on examination of the facts the exercise of the discretion is found to be vitiated the second appeal will be allowed. If, on the other hand, it is found to have been exercised judicially, the appeal would fail. AIR 1928 Oudh 224 (225) (DB).

(6) The following are all discretionary matters in which the High Court will not, in second appeal, interfere unless the discretion has not been exercised by the lower Appellate Court in a judicial manner and in accordance with legal principles:

(A) **Granting of adjournments summoning and enforcing the attendance of witnesses.**—Granting adjournment, enforcing the attendance of a witness by any particular method of coercive process, refusing to punish a recusant witness, refusing to summon plaintiff as a witness for the defendant, and refusing to allow the calling of more witnesses after the case is closed. AIR 1914 All 230 (232). (Adjournment.) * AIR 1937 All 284 (285). (Do.) ° AIR 1927 Lah 424 (424). (Enforcing attendance of witness.) ° (1867) 7 Suth WR 460 (461). (Not punishing recusant witness.) * (1868) 10 Suth WR 134 (134) (DB). (Not calling plaintiff as witness.) ° (1869) 12 Suth WR 455 (456) (DB). (Not calling witnesses after close of case.)

(B) **Admission or refusal to admit documents.**—Refusal of an adjournment in order to send for document, admitting or refusing to admit documents not produced at the first hearing. (1881) 7 Cal 560 (565) (DB). (Refusal to adjourn.)

(C) **Admission or rejection of secondary evidence** — Admission or rejection of secondary evidence, disallowing presumptive evidence; and drawing a presumption under Section 90 of the Indian Evidence Act for or against the genuineness of documents. AIR 1946 Bom 193 (196). (Secondary evidence.) ° AIR 1930 All 550 (551) (DB). (Do.) * AIR 1923 Cal 285 (286). (Presumptive evidence.) ° AIR 1926 Oudh 362 (363). (Presumption under Section 90, Evidence Act.) * AIR 1937 Lah 17 (18) (DB). (Do.)

[See also AIR 1950 Raj 47 (49).]

(D) **Directions for local investigation or inquiry.**—Directing local investigation or local enquiry, or refusal to issue a commission, or refusal to remand the case for further enquiry when the Court is not satisfied with the local inquiry made. But where a previous commission to examine a witness had

**Sections 100 and 101 — Note 13 (contd.)**

returned unexecuted, a refusal to examine the witness on commission on the ground that his evidence was not important, was held to be a ground of second appeal. AIR 1933 Pat 542 (543). (Refusal to issue commission.) ° AIR 1919 Cal 672 (673) (DB). (Refusal to remand.) ° (1875) 23 Suth WR 457 (457) (DB).

[See O. 26, R. 9.]

**(E) Amendment of plaint and addition of parties.**—Refusal of application to amend the plaint and refusal to add parties. (1868) 10 Suth WR 87 (88) (DB) ° AIR 1938 Nag 388 (389): ILR (1939) Nag 194 (DB) * (1868) 10 Suth WR 108 (110) (DB). (Refusal to add party.) ° AIR 1935 Rang 23 (24). (Do.) * 1965 All LJ 1147: 1965 All WR (HC) 441. (Amendment of plaint — Discretion — Power of appellate Court to consider exercise of discretion by trial Court — Trial Court refusing permission to amend plaint on grounds which are irrelevant or based as no evidence — Confirmation of order by appellate Court — Decision is vitiated by error of law.)

[See AIR 1937 Mad 520 (522).]

**(F) Declaration and injunction.**—Granting declaratory decree though not asked for, granting injunctions and refusing a specific performance of a contract on the ground of delay. AIR 1949 PC 53 (54). (Declaratory decree not asked for.) ° (1905) 27 All 688 (691) (SB). (Injunction.) * AIR 1926 Cal 536 (537) (DB). (Do.) ° (1884) 10 Cal 1061 (1068, 1069) (DB). (Refusing specific performance.)

**(G) Award or refusal of costs.**—Where, however, the lower Appellate Court interferes with the discretion properly exercised by the trial Court in the matter of award of costs, a second appeal will lie on the ground that the action of the lower Appellate Court is contrary to law. 1955 Andhra WR 779 (783) * AIR 1957 Pat 79 (82). (Costs.) ° AIR 1942 Pesh 39 (40) (DB) ° AIR 1940 Mad 589 (589) ° AIR 1928 Oudh 224 (225) (DB) * AIR 1929 Oudh 406 (412) (FB) ° (1903) 6 Oudh Cas 52 (57) * AIR 1923 Lah 513 (514) ° AIR 1956 Andhra 113 (113). (Discretion properly exercised — Interference by appellate Court — Second appeal will lie.) ° AIR 1940 Mad 620 (621). (Do.) * AIR 1928 Oudh 224 (225) (DB). (Do.) ° AIR 1959 Mad 12 (14): (1958) 2 Mad LJ 157.

[But see (1866) 1 Agra 270 (271) * AIR 1919 Lah 418 (418).]

**(H) Award or refusal of damages.**— Refusal to award damages in a suit for defamation, and award of damages under Section 10 of the Bengal Rent Act, X of 1859, which though excessive is within legal limits AIR 1955 Raj 167 (173) ° AIR 1952 Nag 16 (17) ° (1876) 25 Suth WR 22 (22) (DB). (Suit for defamation.) * (1870) 13 Suth WR 391 (392) (DB). (Damages under Section 10, Bengal Rent Act.) ° AIR 1960 Ker 264 (276). (Reduction of amount of damages on sound principle.)

**(I) Award of future interest.**—ILR (1951) 1 Raj 618 (620, 621) ° AIR 1923 Lah 513 (514).

**(J) Payment of decrees by instalments.**— Directing payment of decree amount in instalments is a matter of discretion with which the High Court will not interfere where, at the time of second appeal the decree-holder has already recovered a substantial sum and there is no hardship. But a decree for payment in instalments without any provision for interest is arbitrary and is liable to be set aside in second appeal. (1911) 11 Ind Cas 736 (737) (DB) (Cal) * (1866) 1 Agra 116 (117). (No provision for interest.)

[See also AIR 1938 All 52 (53).]

**(K) Direction as to mode of execution.**— Order for execution of a decree by arrest of the judgment-debtor instead of by sale and attachment of his property and direction as to the manner of execution of a joint decree. (1867) 8 Suth WR 318 (320) (DB) ° (1875) 24 Suth WR 286 (287) (DB). (Joint decree.)

**(L) Refusal to allow a guardian to go on with an appeal after the minor on whose behalf the appeal was filed had attained majority.**—(1869) 3 Beng LR (App) 115 (116).

**(M) Refusal by the lower Appellate Court to allow a point not mentioned in the memorandum of appeal.**—But allowing a point to be raised when the finding on it has not been appealed from will be a ground of second appeal. AIR 1928 Lah 536 (537) (DB) ° ('82) 9 Cal 635 (636, 637) (DB).

**(N) Admission of additional evidence in appeal.**— Where however, the lower Appellate Court had not exercised its discretion judicially but had refused to admit additional evidence on the ground that there would be no end to litigation, it was held that a refusal to admit additional evidence is, in no case, a ground of second appeal. AIR 1951 SC 1 (4): 1950 SCR 840: ILR (1952) 1 Cal 111 * (1885) 11 Cal 139 (142, 143) (DB) ° AIR 1937 Lah 115 (116) ° AIR 1919 Mad 1166 (1171): 42 Mad 737 (FB). (Followed in AIR 1927 Mad 1099.)

**(O) Withdrawal of appeal.**— Refusal to allow an appeal to be withdrawn and

**Sections 100 and 101 — Note 13 (contd.)**
refusal to restore an appeal withdrawn. (1866) 6 Suth WR (Act X) 24 (24) * (1870) 13 Suth WR 167 (168) (DB). (Refusal to restore.)

**(P) Discretion under O. 21, R. 32** — AIR 1949 Mad 374 (375): ILR (1949) Mad 589.

**(Q) Discretion under O. 22, R. 9** — AIR 1953 Punj 191 (192) (DB).

**(R) Discretion under O. 41, R. 4** — AIR 1914 All 74 (75): 36 All 510 (DB) ° (1885) 8 Mad 192 (195) (DB).

**(S) Discretion under S. 5. Limitation Act.** AIR 1962 Punj 450 (456, 457).

**(T) Discretion allowing minor appellant to produce evidence.** AIR 1960 Punj 434 (435).

**14. Disbelieving witnesses.**— (1) A decision as to the credibility of the witnesses is neither an error of law nor of procedure and will not be interfered with in second appeal unless the witnesses are disbelieved on ground which are opposed to law. AIR 1950 PC 28 (29) ° AIR 1958 Raj 280 (281) * AIR 1951 Him Pra 49 (51) ° AIR 1914 Mad 106 (108) (DB) ° (1875) 24 Suth WR 61 (61) (DB) ° AIR 1925 Oudh 537 (537) * AIR 1917 All 35 (38, 39): 39 All 426 (DB) ° AIR 1935 All 293 (294) ° AIR 1935 Bom 371 (376) (DB) * AIR 1951 Simla (Punj) 223 (224). (Disbelieving witness on ground opposed to law.) ° (1876) 25 Suth WR 137 (138). (Do.) ° (1915) 29 Ind Cas 673 (673) (DB) (U P B R). (Witness disbelieved on vague grounds — Error of law.) * (1875) 24 Suth WR 251 (252) (DB). (Do.) ° (1872) 17 Suth WR 161 (161, 162) (DB). (Witnesses disbelieved because they belonged to particular class — Error of law.) ° (1911) 12 Ind Cas 751 (764) (DB) (Mad). (Do.)

**15. Decision contrary to usage.**—(1) The expression "usage having the force of law" means a local or family usage as distinguished from the general law. (1893) 20 Cal 93 (99): 19 Ind App 228 (PC). (Overruling 7 All 649.)

[But see AIR 1918 Mad 1166 (1167): 40 Mad 1103 (DB). (7 All 649, Approved.)]

(2) A usage is a rule obtaining in a particular family or in a particular local area in derogation of the ordinary law. (1875) 3 Ind App 259 (285) (PC) ° AIR 1917 Mad 255 (256) (DB).

(3) A decision on the question whether parties in a particular case belong to one system of law and not to another is not a decision on any usage. AIR 1915 Mad 711 (716): 38 Mad 1052 (DB) * AIR 1916 Lah 97 (98) (DB).

(4) A usage to have the force of law, should be ancient, invariable, certain and reasonable. AIR 1942 Cal 26 (30): ILR (1941) 2 Cal 258 (DB) ° AIR 1941 PC 21 (32): ILR (1941) Lah 154: ILR (1941) Kar (PC) 22: 68 Ind App 1 * (1875) 3 Ind App 259 (285) (PC) ° (1872) 14 Moo Ind App 570 (585, 586) (PC) * (1960) 2 Andh WR 519.

(5) Questions as to existence of a custom or usage having the force of law are generally questions of mixed law and fact, the Judge first finding what were the things actually done in the alleged pursuance of custom and then determining whether these facts so found satisfy the requirements of law. AIR 1950 PC 56 (57): 76 Ind App 271: 29 Pat 1. (Existence of village custom). ° AIR 1950 All 699 (702) (DB) ° AIR 1954 Andhra 54 (55). (Existence as to customary right.) ° ILR (1954) Trav-Co 1075 (1085) ° AIR 1952 All 527 (528) ° AIR 1951 Orissa 327 (330): ILR (1949) 1 Cut 312 (DB) ° 1951 All L Jour 252 (253) (DB) * AIR 1950 Nag 54 (56): ILR (1950) Nag 128 * AIR 1942 Cal 26 (28): ILR (1941) 2 Cal 258 (DB) ° AIR 1942 Oudh 213 (214): 17 Luck 567 (DB) * AIR 1917 PC 33 (39): 40 Mad 709: 44 Ind App 147 ° AIR 1933 Mad 390 (391) (DB) ° AIR 1931 All 499 (502): 54 All 6 (SB) * AIR 1922 Mad 290 (298) (DB) ° AIR 1938 Bom 492 (494) (DB) ° AIR 1939 Oudh 210 (213): 14 Luck 515 * AIR 1947 Mad 71 (71) (DB). (AIR 1917 PC 33: 40 Mad 709: 44 Ind App 147, Rel. on.) ° 51 Cal WN 179 (182) ° AIR 1937 Cal 245 (250):ILR (1937) 2 Cal 86 (DB) * AIR 1934 All 890 (891) (DB) ° AIR 1964 Manipur 14 (16) ° AIR 1961 J & K 31 (32) (DB) * (1960) 2 Andh WR 519: 1960 Andh LT 1000. (Question whether on the facts found by the first appellate Court, a custom set up in a given case is established or not, is a question of law which may be canvassed in Second Appeal.)

[See AIR 1929 Lah 426 (427): 10 Lah 868 (DB) ° AIR 1935 Oudh 208 (208) ° AIR 1935 All 751 (755) * AIR 1935 PC 71 (72).]

[See also AIR 1935 Bom 371 (375) (DB) ° AIR 1935 All 501 (501).]

(6) What were the things done in the alleged pursuance of custom is a question of fact. AIR 1950 PC 56 (59): 76 Ind App 271: 29 Pat 1 ° 1956 BLJR 150 (152) ° 1955 Andh WR 308 (315) ° AIR 1950 Nag 54 (56): ILR (1950) Nag 128 * AIR 1946 All 384 (385) ° AIR 1946 Oudh 188 (192, 193) (DB) * AIR 1930 PC 234 (235): 53 Mad 597: 57 Ind App 264 ° AIR 1930 Pat 562 (563) (DB) ° (1909) 31 All 557 (570): 36 Ind App 210 (PC) ° (1891) 18 Cal 448 (457): 18 Ind App 59 (PC).

(7) Question whether the things done in pursuance of custom, satisfy the requirements of law is one of law. So is the question whether a practice prevalent for some years has the essential attributes of a legally binding custom. AIR 1950 PC 56 (59): 76 Ind App 271: 29 Pat 1 * AIR 1957 Andh Pra 997 (1000): ILR (1956) Andhra 646 (DB) ° AIR 1950 Nag 54 (56): ILR (1950) Nag 128 * AIR 1946 All 410 (413): ILR (1946) All 240 (DB).

(8) Where a question relating to usage having the force of law is raised in second

**Sections 100 and 101 — Note 15 (contd.)**
appeal the High Court cannot interfere with the findings on all facts from which the custom or usage having the force of law was inferred, or with the credibility or sufficiency of the evidence in support of those facts. AIR 1947 Oudh 139 (141): 22 Luck 220 (DB) ° AIR 1918 Mad 1 (14, 15, 16): 41 Mad 374 (FB). (Overruling 29 Mad 24.) * AIR 1935 Bom 371 (375) ° AIR 1939 All 500 (501) (DB) ° AIR 1946 Oudh 188 (192, 193) (DB) * AIR 1942 Cal 26 (28): ILR (1941) 2 Cal 258 (DB) ° AIR 1918 Mad 1166 (1167): 40 Mad 1108 (DB) * AIR 1924 All 146 (147) (DB) ° AIR 1926 All 153 (155) * AIR 1926 Oudh 460 (460, 461) ° AIR 1935 Oudh 459 (460): 11 Luck 397 * AIR 1968 Mad 105 (107): 80 Mad LJ 388.

[See AIR 1936 All 443 (449): 58 All 889 (DB).]

(9) High Court cannot interfere with the findings as to the instances adduced for or against the custom, or as to the prevalence of a certain practice. AIR 1918 Mad 1 (14, 15): 41 Mad 374 (FB). (Overruling 29 Mad 24.) * AIR 1918 Cal 979 (981, 982): 45 Cal 285 (DB) * AIR 1937 All 290 (291) (DB) ° AIR 1933 All 306 (307) (DB). (Findings as to prevalence of certain practice.) ° AIR 1936 Nag 95 (97): ILR (1936) Nag 13. (Do.)

(10) The question whether the facts found establish the essential legal elements of custom can be gone into in second appeal. 1951 All L Jour 252 (254) (DB) ° AIR 1947 Mad 71 (71) (DB) * AIR 1943 PC 111 (113): ILR (1943) Nag 705: ILR (1943) Kar (PC) 152 * AIR 1942 Cal 26 (29): ILR (1941) 2 Cal 258 (DB) * AIR 1941 Oudh 468 (471): 16 Luck 626 ° ('97) 21 Bom 110 (115, 116) (DB) * AIR 1933 All 306 (307) (DB) ° (1884) 7 Mad 3 (10, 16) (FB) * AIR 1918 Cal 979 (982): 45 Cal 285 (DB) ° AIR 1937 Cal 245 (250): ILR (1937) 2 Cal 86 (DB) * AIR 1967 Mad 164 (167): (1968) 1 Mad LJ 110. (Question whether on facts found conclusion of customary right could be drawn is a question of law — Question can be considered by High Court in second appeal unfettered by restrictions of S. 100.)

[See AIR 1932 Lah 274 (275): 13 Lah 31 (34, 35) (DB).]

[See also (1898) 22 Bom 430 (437) (DB).]

(11) The High Court can see whether the number of instances adduced show invariability and ancient origin of the practice and whether they are reasonable and certain. AIR 1946 All 410 (413): ILR (1946) All 240 (DB) ° AIR 1916 Cal 67 (68) (DB) * (1906) 29 Mad 24 (28) (DB).

(12) Even the findings of fact of the lower Appellate Court can be attacked in second appeal where they are based on no evidence, or on irrelevant or on illegal evidence or on the improper rejection of any evidence or on the misinterpretation of a document, or on a misconception of well-established principles of law, or where the evidence does not warrant the finding arrived at. AIR 1932 Lah 61 (62) (DB). (No evidence.) ° AIR 1918 Mad 1 (16): 41 Mad 374 (FB). (Irrelevant evidence.) ° AIR 1954 Trav-Co 1075 (1085). (Irrelevant evidence.) ° AIR 1918 Cal 979 (981, 982): 45 Cal 285 (DB). (Do.) * AIR 1925 Bom 380 (382) (DB). (Do.) ° (1909) 2 Ind Cas 490 (491) (DB) (All). (Illegal evidence.) ° AIR 1922 All 241 (242). (Do.) ° AIR 1931 All 104 (105): 53 All 308 (DB). (Do.) * AIR 1941 Oudh 468 (472): 16 Luck 626. (Improper rejection.) ° AIR 1922 All 88 (89) (DB). (Misinterpretation of document.) * (1897) 21 Bom 110 (115) (DB). (Misconception of laws.) ° (1909) 3 Ind Cas 6 (6) (DB) (All.) (Finding not warranted by evidence.) * AIR 1914 Cal 289 (289) (DB). (Do.) ° AIR 1916 Mad 700 (702, 705): 39 Mad 664 (DB). (Do.) * AIR 1925 All 718 (718). (Do.) ° AIR 1925 Bom 380 (382) (DB) (Do.) * AIR 1925 Nag 179 (179). (Do.) ° AIR 1924 Pat 147 (157) (DB). (Do.) ° (1908) 30 All 311 (313) (FB). (Do.) * AIR 1931 All 583 (584) (DB). (Do.) AIR 1939 All 500 (501). (Do.)

[But see AIR 1933 All 503 (506) (DB).]

(13) Where the lower Court has held that no question of custom is involved in the case the High Court can see whether such a question was involved or not. AIR 1925 Lah 82 (82) (DB).

(14) In the Punjab, a question of custom cannot be taken up in second appeal without a certificate under Section 41, Cl. (3) of the Punjab Courts Act, 1918. AIR 1936 Lah 115 (116) (DB) * AIR 1938 Lah 191 (192, 193) (DB) ° AIR 1959 Bom 241 (242): 60 Bom LR 1022. (A finding that the parties are governed by the customary law of the Punjab in the matter of inheritance being one of fact cannot be challenged in second appeal.)

**16. Failure to determine issue of law or usage.**—(1) Failure to determine an issue of law or usage having the force of law is a ground of second appeal. (1868) 5 Bom HCR (AC) 57 (59) (DB) * AIR 1925 Oudh 384 (385).

**17. Errors or defects in procedure.**—(1) Where an error or defect could not or does not affect the merits of the case, the Appellate Court cannot upset the decision of the original Court. See Section 99 and Notes thereon.

(2) Section 100, Cl. (c) provides that an error or defect in procedure which is substantial enough to have possibly produced an error or defect in the decision of the case on the merits is a ground of second appeal. (1885) 7 All 649 (659) (FB). (Per Mahmood J.—Overrueld on another point in 19 Ind App 228: 20 Cal 93 (PC).) ° AIR 1917 Cal 573 (573) (DB) * (1968) 81 Mad LW 618.

(3) The word 'procedure' as used in clause (c) must be understood in its most generic sense, as including all the rules contained

**Sections 100 and 101 — Note 17 (contd.)** in the Civil Procedure Code or any other law regulating the investigation of cases by the Civil Courts. AIR 1943 All 209 (209): ILR (1943) All 196 ° (1885) 7 All 649 (657) (DB). (Per Mahmood J.— Overruled on another point in 19 Ind App 228: 20 Cal 93 (PC).)

(4) An erroneous finding of fact is a different thing from an error or defect in procedure. AIR 1929 PC 190 (193): 56 Ind App 280: 25 Nag LR 121.

(5) The fact that the lower Appellate Court believed witnesses on the one side in preference to those on the other is not an error of procedure even if the reasons therefor are bad. AIR 1924 Oudh 265 (266) * (1872) 18 Suth WR 110 (110, 111) (DB).

[See also AIR 1950 Nag 241 (242): ILR (1950) Nag 509.]

(6) The following are examples of errors in procedure:

(i) Basing the decision against the admission of parties or on a point not raised by them and as to which no evidence has been adduced. AIR 1917 Lah 297 (300): 1917 Pun Re No. 106 (DB). (Decision against admission.) ° AIR 1950 East Punj 256 (257): ILR (1950) Punj 249 (DB). (Point not raised.) * (1904) 29 Bom 1 (12): 21 Ind App 154 (PC). (Do.) ° AIR 1924 Pat 341 (342). (Do.)

(ii) Basing the decision on the report of a Commissioner to whom no regular commission was issued or determining a case without awaiting the return of a commission regularly issued. AIR 1922 Lah 47 (49): 3 Lah 209 (DB) ° (1894) 16 All 342 (343) (DB).

(iii) Trying together distinct and independent causes of action. (1868) 10 Suth WR 279 (279).

(iv) Allowing a party to change the nature of his case in the lower Appellate Court. (1879) 4 Cal 46 (50) (DB).

(v) Disposing of an appeal after the party is dead. AIR 1929 Lah 119 (119).

(vi) Rejectnig an appeal on the ground that no appeal lies. (1904) 8 Cal WN 64 (65).

(vii) Dismissing an appeal for deficient court-fee without giving the party an opportunity to make good the deficiency and directing the party after the disposal of the appeal to pay Court-fee. (1870) 5 Mad HCR 330 (333) (DB) * (1885) 7 All 528 (533, 534) (DB). (Directing payment after disposal of appeal.)

(viii) Rejecting the Commissioner's report without directing further enquiry in a case requiring investigation. AIR 1917 Cal 573 (573) (DB) ° AIR 1938 Pat 569 (670): 17 Pat 358 (DB).

[See also AIR 1950 Nag 241 (242): ILR (1950) Nag 509.]

(ix) Admitting a review without enquiry as to the existence of the grounds therefor. (1876) 25 Suth WR 324 (325) (DB) * (1873) 20 Suth WR 84 (85, 86) (FB).

(x) The lower Appellate Court requiring a standard of proof higher than that laid down by Section 3 of the Evidence Act. AIR 1950 Madh B 1 (7) (DB) ° AIR 1943 Mad 38 (39).

(xi) Lower Court wrongly directing deletion of relevant issues — Lower appellate Court further applying principle of estoppel when material pieces of evidence had been wrongly excluded — Held, decision of lower appellate Court involved substantial error of law in procedure which might have possibly produced an error in decision of case on merits. 1960 MPLJ 388.

(xii) If the lower appellate Court ignores some material evidence, which might possibly have the effect of reversing the conclusion it would be an error or defect in procedure of the same category as the discarding of evidence on the ground that it is inadmissible. AIR 1964 Pat 452 (457).

**18. Errors or defects must be substantial.** —(1) An error or defect in procedure will not be a ground of second appeal unless it is substantial and unless it is likely to have caused an error or defect in the decision of the case on the merits. AIR 1940 Pat 33 (36) * (1871) 15 Suth WR 8 (8) (DB) ° (1886) 8 All 111 (115) (FB) * AIR 1929 Pat 609 (612): 9 Pat 408 (DB) ° AIR 1915 Bom 68 (71): 39 Bom 149 (DB) ° AIR 1969 Pat 128 (129). (1968 BLJR 374 held no longer good law in view of AIR 1963 SC 302.) * (1968) 70 Punj LR 292 ° AIR 1967 Orissa 92 (94): 33 Cut LT 72. (Misappreciation of evidence — Failure of lower appellate Court to take into account certain pieces of evidence amounts to substantial defect in procedure affecting the decision on merits — Such findings are not binding in second appeal and can be interfered with.) * (1967) 33 Cut LT 601: ILR (1967) Cut 163. (Not admitting evidence is defect in procedure — AIR 1963 SC 302, Foll.) ° (1966) 32 Cut LT 994: ILR (1966) Cut 598. (Defendant's version as given in evidence not disclosed in written statement — Lower appellate Court failing to notice omission — Evidence of some of defence witnesses also not scrutinised — Such failure introduces substantial defect in procedure — Finding of lower appellate Court not binding on High Court.)* 1966 Raj LW 192. (Statement of important witnesses lost sight of by lower Courts — There is substantial error of procedure — Findings not binding on High Court.) ° AIR 1965 Cal 199 (201): 68 Cal WN 1043. (Lower Appellate Court disregarding report of Commissioner holding other evidence on record

**Sections 100 and 101 — Note 18 (contd.)** sufficient for disposal of case — Disregard of report constitutes no error or defect in procedure nor affects the merits of the case (within meaning of Section 100 (c) to justify interference in second appeal when there is proper exercise of discretion.) * AIR 1965 Mad 205 (206, 207): 77 Mad LW 679 ("Substantial error or defect in procedure" — Proof of document — Dispute as to date of death—Extract from death register, made admissible under Section 35, Evidence Act, erroneously rejected as not proved — Error vitiates finding.) ° (1965) 2 Mys LJ 128: (1965) 2 Law Rep 346. (Errors or defects in procedure — Adoption — Decision about, is finding of fact — Decision arrived at by placing onus on wrong party — Second appellate Court can examine question of adoption.) * AIR 1963 Orissa 133 (135). (Assertion in plaint that plaintiff was 20 years old on date of suit not challenged in written statement — No clear finding by lower Courts — Held that in the absence of denial in the written statement and an issue on the point, it was incumbent for both the Courts to record a clear cut finding that plaintiff was 20 years old at the time of institution of the suit — On the bare assertion in the plaint not challenged in the written statement it was open to the appellate Court in second appeal to record a finding that plaintiff was 20 years old on the date of the suit.) ° ILR (1962) Cut 191. (Suit for eviction —Plea under Section 236, Orissa Tenancy Act not taken by defendants before trial Court — Inference drawn by lower appellate Court dismissing the suit, insufficient to entitle defendant to protection under Section 236 — Suit dismissed — Lower appellate Court held committed serious error.) * 1959 BLJR 117.

(2) The judgment of the lower Appellate Court which is meagre and not in accordance with the rules is an irregularity; but unless the error is substantial and is likely to have affected the decision on the merits i. e., unless it can be shown that the said Court failed to apply its mind properly to the case or to the evidence or that the appellants are prejudiced in any way, the error will not be a ground of second appeal. AIR 1918 Mad 811 (812) (DB).

(3) In the following cases of errors or defects, it has been held that no second appeal will lie, unless it is shown that they have affected the decision on the merits;

(i) Basing decision on evidence recorded in another suit without recording reasons therefor. (1878) 2 Cal L Rep 33 (38) (DB).

(ii) Making a mistake regarding the applicability of a rule of law. (1862) Suth WR 16 (16, 17) (SB) ° (1866) 5 Suth WR (Misc) 29 (29, 30) (DB).

(iii) Misjoinder or non-joinder of parties (1881) 3 Mad 359 (363) (DB) ° AIR 1917 Lah 96 (96): 1916 Pun Re No. 18 * (1870) 2 NWPHCR 443 (444) (FB) ° (1874) 22 Suth WR 288 (288) (DB). (Non-joinder.) ° (1877) 3 Cal 26 (29) (DB). (Do.)

(iv) Misjoinder of claims or causes of action. But where an objection on the ground of misjoinder or causes of action taken in first appeal is allowed and the suit is dismissed, a second appeal will lie. (1864) 1 Suth WR 114 (114) (DB) ° AIR 1929 All 148 (149) (DB) ° (1873) 20 Suth WR 240 (241) (DB).

(v) Omission to frame issues. (1871) 13 Moo Ind App 573 (583).

(vi) Failure to take down the deposition of a witness in the manner prescribed. (1872) 18 Suth WR 112 (113) (DB).

(vii) An irregular order of remand. See O. 41, R. 23.

(viii) Where a big suit was taken up after Court hours and on defendant's vakil not being prepared to cross-examine the plaintiff's witnesses the suit was decreed, the High Court declined to interfere in second appeal in the absence of an affidavit in the lower Appellate Court explaining the facts and showing how the appellant was prejudiced. AIR 1917 Mad 408 (409) (DB).

(ix) Finding of fact based on misreading of evidence and considering irrelevant matters and ignoring relevant matters. 1965 All LJ 794 ° 1965 All WR (HC) 724: 1966 All LJ 7. (Finding of fact based on misreading of vital evidence — High Court can reverse it in second appeal.) ° AIR 1962 Cal 78 (81, 82): 65 Cal WN 626 (DB). (Error or defect in procedure — Lower Court proceeding upon case not made by parties.)

(4) In the following cases, the error or defect was held not likely to have affected the decision on the merits:

(i) Omission to write judgment till after the decree is passed. (1866) 4 Bom HCR (AC) 109 (109).

(ii) Basing decision on evidence recorded by predecessor-in-office. See O. 18, R. 15.

(iii) Admitting document insufficiently stamped. (1875) 23 Suth WR 170 (170).

(iv) Admitting secondary evidence of a lost deed not stamped. But where a copy of the deposition of a dead person in a previous suit was admitted without proof that the copy was a correct one and where the original deposition was not in the records of the previous suit, it was held that such admission was a ground of second appeal especially when great weight had been attached to such

**Sections 100 and 101 — Note 18 (contd.)**

evidence. (1873) 20 Suth WR 63 (63) (DB) ° (1874) 21 Suth WR 257 (257) (DB).

(v) Omission to draw the witnesses' attention to previous contradictory statements. (1875) 24 Suth WR 312 (313) (DB).

(vi) Refusing to allow local investigation when both parties have gone into evidence. (1903) 30 Cal 536 (537) (DB).

(vii) Omission to employ a regular officer of Court for making local enquiry. Where the appointment of an amin as Commissioner to effect partition was acquiesced in, in the first Court no objection to such appointment should be allowed to be taken in appeal. The allowing of such an objection in first appeal was held to be a ground of second appeal. (1867) 8 Suth WR 6 (7) (DB) ° (1881) 7 Cal 318 (321) (DB).

(viii) Hearing an appeal before the date fixed in the presence of the pleaders of the parties. (1864) 1 Suth WR 246 (246).

(ix) Committing an error as to valuation not affecting the jurisdiction. (1868) 10 Suth WR 32 (33) ° (1868) 5 Bom HCR (AC) 153 (155) (FB) * 24 Mad 43 (45) (DB).

(x) Additional evidence — Denial of opportunity — Denial of opportunity to adduce additional evidence cannot be urged in second appeal when party has failed to apply under O. 41 R. 27 in first appellate Court. AIR 1968 Assam 61 (62).

(xi) Transfer of appeal by District Judge to Additional District Judge — Even if the order of transfer is irregular that would not affect the inherent jurisdiction of the Additional District Judge to hear the appeal. Even if the case was not regularly transferred to him, that would be an irregularity not affecting the merits of the case and would, therefore, not come under Section 100 (1) (c). AIR 1962 Cal 265 (268, 269): 65 Cal WN 1165 (DB).

(xii) Finding as to absence of reasonable and probable cause — Finding is one of fact — Finding partly based on trivial error of record committed by lower appellate Court with regard to evidence of one witness — Rest of material on record sufficient to justify finding even if evidence of that witness is discarded — Finding is not vitiated and is binding in second appeal. (1963) 29 Cut LT 357.

(5) The following have been held to be no errors or defects in procedure, much less substantial errors or defects:

(i) Omission to make specific mention of a document in the judgment. AIR 1952 All 191 (192) ° (1912) 13 Ind Cas 495 (495) (DB) (Cal).

(ii) Refusal by the lower Appellate Court to take notice of a question not raised in the memorandum of appeal. On the other hand, if the lower Appellate Court takes up any such question, it will be a ground of second appeal. AIR 1919 Mad 130 (132) (DB) ° AIR 1921 Lah 228 (229).

(iii) Dismissing a suit for misjoinder of parties. (1873) 20 Suth WR 147 (148) (DB).

(iv) Making a mistake in the matter of accounts or making a mistake in the calculation of the claim decreed. (1874) 22 Suth WR 310 (310, 311) (DB) * (1876) 25 Suth WR 63 (64). (Mistake in calculation.)

(v) Erroneous finding of fact by lower appellate Court — Not substantial error or defect in procedure so as to justify High Court to go into question and arrive at its own conclusion by re-appreciating evidence — High Court will be justified in interfering with finding only when finding is based on no evidence or is based on evidence which is inadmissible. ILR (1967) Guj 117.

**19. Omission to frame or try issues of facts.**—(1) An omission to frame proper issues or framing wrong issues is an error or defect in procedure, and if it would have possibly affected the decision on the merits, it would be a ground of second appeal. AIR 1932 PC 28 (30): 59 Ind App 29 ° AIR 1932 Cal 351 (353) ° AIR 1920 Lah 322 (322) * (1872) 13 Moo Ind App 573 (583) (PC) ° (1897) 21 Bom 325 (327) (DB).

(2) An objection that a matter was not raised in the pleading and did not properly form the subject of an issue, will not be allowed to be taken in second appeal when the parties had let in evidence on the point and the matter had been argued in the lower Courts and no prejudice was established. AIR 1926 Mad 156 (156) ° AIR 1931 Lah 220 (221) (DB).

(3) The failure to try, determine and decide a material issue is a good ground of second appeal. (1867) 8 Suth WR 333 (333) (DB) ° (1871) 16 Suth WR 150 (151) (DB) ° (1881) 7 Cal 148 (150) (DB) ° (1892) 16 Bom 545 (547) (DB) * (1895) 17 All 117 (120) ° AIR 1924 Nag 91 (94): 20 Nag LR 17.

(4) Trial Court omitting to frame issues — Matter however fought out by the parties in the trial — Omission of the Appellate Court to record a finding on the ground that no issues have been framed is not error of record — Such finding can be interfered with in Second Ap-

**Sections 100 and 101 — Note 19 (contd.)** peal. AIR 1967 Orissa 99 (100): 33 Cut LT 995.

**20. Defective judgment.**—(1) Parties to a suit are entitled to the benefit of a proper discussion of the materials on record based upon a correct view of the law applicable to them. (1908) 11 Oudh Cas 264 (266, 267).

[See AIR 1935 Mad 803 (807): 58 Mad 893 (FB).]

[See also AIR 1941 Rang 76 (78): 1940 Rang LR 777 (DB).]

(2) A judgment of the first Appellate Court which does not contain the particulars required by O. 41, R. 31 is no judgment at all and will be set aside in second appeal. AIR 1953 Hyd 179 (179): ILR (1952) Hyd 373 (DB) ° AIR 1950 Ajmer 53 (54) * AIR 1943 Pat 177 (180): 22 Pat 154 (DB) ° AIR 1941 Mad 539 (545): ILR (1941) Mad 785 (FB) ° (1887) 9 All 26 (27, 33) (DB) * AIR 1923 Cal 278 (278) (DB) ° AIR 1917 Pat 443 (445) (DB) ° AIR 1927 Oudh 95 (96): 29 Oudh Cas 330: 1 Luck 458 * AIR 1938 Pat 330 (332) (DB) ° AIR 1938 Pat 609 (610) ° AIR 1937 Mad 282 (283): ILR (1937) Mad 299 * AIR 1969 Delhi 197 (198): (1969) 71 Pun LR (D) 59.

(3) Where a suit was dismissed arbitrarily on the ground that the subject-matter involved was very small the dismissal was set aside in second appeal. AIR 1917 Lah 210 (210).

(4) Where the lower Appellate Court reversed the decision of the first Court merely saying that the evidence was meagre, a second appeal was held to lie. AIR 1952 Assam 69 (69): ILR (1952) 4 Assam 89 (FB) • 1955 Raj LW 538 (539) ° AIR 1925 Cal 408 (410) (DB).

(5) The mere fact that the judgment does not deal with all the evidence or all the circumstances relied upon by the first Court or the fact that the discussion of the evidence is unsatisfactory, or that the judgment contains certain mis-statements or that the judgment is written in a few lines, or that the judgment omits to discuss each point separately and to record a finding merely stating that the Appellate Court agrees with the conclusions of the trial Court is not a ground of second appeal if it does not affect the decision on the merits. AIR 1963 SC 302 (306): (1963) 3 SCR 604. (AIR 1941 Mad 393, Overruled.) ('40) 42 Pun LR 94 (95). (Certain documents not referred to in the judgment.) * AIR 1925 Cal 993 (994). (All evidence not dealt with.) ° AIR 1922 Lah 140 (141) (DB). (Do.) ° AIR 1925 Oudh 313 (314). (Circumstances relied on by first Court not dealt with.) * AIR 1915 Cal 99 (99) (DB). (Not disposing seriatim of all the reasons given by the first Court.) ° ILR (1954) 6 Assam 53 (56). (Absence of detailed discussion of evidence on point.) • AIR 1915 Mad 463 (464) (DB). (Discussion of evidence unsatisfactory.) * AIR 1927 Mad 1181 (1183). (Judgment containing mis-statement.) ° AIR 1952 Trav-Co 560 (561) (DB). (Brevity of judgment.) ° AIR 1939 Pat 267 (268) (DB). (Do.) • AIR 1954 Mad 9 (10). (Non-discussion of each point.)

(6) The fact that the reasons for differing from the lower Court's judgment are not specifically stated in the judgment, is not in itself a ground of second appeal where the reasons are evident and it is otherwise clear that the evidence has been considered in arriving at the finding. (1869) 12 Suth WR 272 (273) (DB) * AIR 1916 PC 126 (128): 43 Cal 1104: 43 Ind App 172 ° (1886) 12 Cal 199 (203) (DB).

(7) The following have also been held to be defects in judgment which will justify a second appeal:

(i) Where the judgment is uncertain in its meaning. AIR 1914 Cal 784 (784) (DB).

(ii) Where from the judgment it is difficult to discover what the conclusions are which have been arrived at on evidence. AIR 1924 Mad 710 (711).

(iii) Where a finding is vague and indefinite or not legal. AIR 1948 Nag 122 (123). (Vague finding.) • AIR 1925 Lah 357 (358). (Do.) * (1926) 92 Ind Cas 30 (30) (Mad). (Finding not legal.)

(iv) Where the decision of a lower Appellate Court is based on an objection to Court-fee taken for the first time before it. (1874) 22 Suth WR 433 (434) (DB).

(v) Where additional evidence is admitted in appeal without recording reasons as required by O. 41, R. 27. AIR 1925 Cal 98 (100) (DB).

[See AIR 1938 Sind 198 (200) (DB).]

(vi) The orders of subordinate Courts which are either subject to appeal or subject to revision by the High Court should contain a sufficient statement of the contention of the parties and the reasons in support of the conclusions of the Court; as it is part of the duty of Courts to assist superior Courts also in coming to conclusions on appeals or revisions directed against their orders. Hence where the order is such that on a reading of the order alone the revisional Court finds it impossible to hold one way or the other it must set the order aside as defective in material particulars. (1968) 1 Mys LJ 363: (1968) 15 Law Rep 175.

**21. Admission or rejection of evidence.**—(1) The admission and rejection of docu-

**Sections 100 and 101 — Note 21 (contd.)**
ments is a matter of procedural law. In this sense the admissibility of evidence is question of law. AIR 1952 Raj 91 (92): ILR (1951) 1 Raj 166 ° AIR 1958 Orissa 26 (32) (DB) ° AIR 1951 Pat 641 (643) (DB) * AIR 1918 PC 92 (94): 46 Cal 189: 45 Ind App 183 ° AIR 1926 Cal 727 (727) (DB).

[See AIR 1936 PC 258 (259).]

(2) An error or defect in admitting or rejecting documents is a ground of second appeal provided it is one which may possibly have affected the case on the merits. AIR 1952 Raj 91 (92): ILR (1951) 1 Raj 166 ° (1889) 16 Cal 753 (755): 16 Ind App 125 (PC) * AIR 1916 Cal 691 (692) (DB) * AIR 1941 Pat 118 (127) (DB).

[See AIR 1965 Orissa 113 (114): 31 Cut LT 889. (Objection not to admissibility of documentary evidence but as regards mode of its proof — Objection not taken in trial Court — Objection cannot be allowed for first time in appeal.) * ILR (1963) Cut 451. (Municipal death register — Admissibility in evidence as public document — Finding is contrary to law and not binding in second appeal.) ° (1961) 63 Pun LR 904. (Appraisal of evidence by trial Court cannot be ignored lightly.) ]

[See also AIR 1968 Assam 61 (62). (Additional evidence — Denial of opportunity — Denial of opportunity to adduce additional evidence cannot be urged in second appeal when party has failed to apply under Order 41, Rule 27 in first appellate Court.) ° AIR 1934 Cal 269 (270) * ('68) 9 Suth WR 517.]

(3) Where the objection to the admission of evidence is based on a formal defect, or where the lower Court has arrived at the decision independently of the evidence wrongly admitted, the High Court will not interfere in second appeal. AIR 1945 Nag 212 (213): ILR (1945) Nag 728. (Document not duly stamped.) ° AIR 1943 PC 83 (87): ILR (1943) Kar (PC) 69. (Objection that the mode of proof put forward is irregular or insufficient.) * AIR 1936 Lah 788 (789). (Document not properly tendered.) ° AIR 1948 Pat 185 (186). (Decision independently of evidence wrongly admitted.) ° AIR 1941 Pat 253 (254): 20 Pat 556 (DB). (Do.) * (1881) 7 Cal 293 (296) (DB). (Do.) ° AIR 1934 Nag 124 (126). (Do.) ° AIR 1965 Pat 300 (304). (What weight should be attached to particular piece of evidence is for final court of fact to decide — No interference possible in second appeal.) * 1963 Cur LJ 425 (Punj).

[See AIR 1939 Nag 220 (221): ILR (1940) Nag 671 (DB).

(4) High Court will not interfere where the improper admission of evidence objected to was due to the conduct of the party complaining of it. AIR 1951 Simla (Punj) 223 (225) ° AIR 1941 Pat 253 (254): 20 Pat 556 (DB).

[See AIR 1940 Lah 308 (309).]

(5) The improper rejection of evidence is an error in procedure which ordinarily is likely to affect the decision of the case on the merits, and is therefore a good ground of second appeal. AIR 1943 Nag 265 (266): ILR (1943) Nag 340 ° AIR 1934 Pat 48 (49) (DB) * AIR 1934 Nag 44 (45) ° AIR 1924 Pat 208 (208) ° (1908) 8 Cal L Jour 147 (151) (DB) * AIR 1928 Cal 408 (410) (DB) ° AIR 1935 All 293 (294).

[But see (1865) 2 Mad HCR 418 (419) (DB).]

(6) A party cannot urge a plea that the lower Court has wrongly rejected evidence where such rejection was due to his own conduct. AIR 1939 All 663 (665) ° AIR 1938 Sind 206 (209): ILR (1939) Kar 140

(7) Though in Second Appeal, Court is not to go into pure questions of fact unless they fall under Section 100 by virtue of Order 42, Rule 1 read with O. 41, R. 27, additional evidence can be admitted either for enabling Court to pronounce judgment or for any other substantial cause. AIR 1967 Guj 87 (90): 8 Guj LR 386.

**22. Question of law, question of fact and mixed questions of law and fact.**—(1) Questions of law and fact are sometimes difficult to disentangle. AIR 1918 PC 92 (93): 46 Cal 189: 45 Ind App 18 * AIR 1927 PC 102 (104): 54 Ind App 178: 8 Lah 573 ° AIR 1917 PC 77 (77) ° AIR 1932 Lah 328 (329) * AIR 1938 Pat 413 (421): 17 Pat 507 (DB). ° AIR 1962 Cal 78 (81): 65 Cal WN 626 (DB).

(2) Under Section 3 of the Evidence Act, "fact" means and includes—

(1) any thing, state of thing, or relation of things capable of being perceived by the senses;

(2) any mental condition of which any person is conscious.

A question whether any such fact exists or does not exist is a question of fact and a finding thereon is a finding of fact. AIR 1956 Cal 593 (595) ° AIR 1957 Mad 320 (322): ILR (1957) Mad 529 (DB) * 1956 Madh B LJ 980 (983) ° AIR 1954 Mad 213 (214) ° (1953) 6 Sau LR 383 (384) * AIR 1948 Nag 162 (166): ILR (1947) Nag 631 (DB) ° AIR 1947 Pat 402 (403): 25 Pat 729 (DB) * AIR 1946 Pat 110 (111): 25 Pat 134 (FB) ° AIR 1942 All 233 (234): ILR (1942) All 832 (FB) * AIR 1942 All 308 (314): ILR (1942) All 478 (DB) * AIR 1942 Mad 622 (623): ILR (1943) Mad 15 (FB) ° AIR 1942 Pat 479 (480) (DB) ° AIR 1938 PC 34 (35): 65 Ind App 93: ILR (1938) Mad 551: 32 Sind LR 328.

(3) A finding which has to draw on a rule of law for the recording of it or for the ascertainment of its truth is a finding on a question of law; any other, a finding on a question of fact. AIR 1952 All 54 (64) (DB) * AIR 1960 All 395 (396).

**Sections 100 and 101 — Note 22 (contd.)**

(4) An inference of fact must be distinguished from an inference of law. Where from evidentiary facts and documents, an inference is drawn as to the existence or non-existence of another fact then the inference is one of fact and the question as to the inference, a question of fact. AIR 1945 All 227 (230): ILR (1945) All 148 ° AIR 1957 Andh Pra 841 (843) ° AIR 1957 Andh Pra 824 (826, 827) (DB) * AIR 1957 Andh Pra 604 (606) ° AIR 1942 Cal 505 (508): ILR (1942) 2 Cal 427 ° AIR 1918 PC 92 (93, 94): 46 Cal 189: 45 Ind App 183 ° AIR 1920 Cal 361 (362, 363) (DB) ° AIR 1930 All 218 (219) (DB) ° AIR 1925 Pat 748 (750) (DB) * AIR 1928 Nag 76 (78): 23 Nag LR 156 (DB) ° AIR 1931 Nag 67 (67): 27 Nag LR 8 ° AIR 1956 Bom 204 (205) (DB) * ILR (1954) Nag 404 (406) ° AIR 1952 Cal 585 (586) (DB) ° AIR 1942 Pat 170 (174) (DB) * AIR 1926 All 542 (543): 48 All 588 (DB) ° AIR 1924 Cal 562 (563): 51 Cal 110 (DB) * AIR 1930 Pat 319 (320) ° AIR 1928 PC 243 (245, 247, 248): 55 Ind App 380 ° AIR 1940 Bom 263 (264): ILR (1940) Bom 505 * AIR 1940 Sind 43 (47): ILR (1940) Kar 174 (DB) ° AIR 1936 Nag 186 (188) ° AIR 1933 All 603 (606) (DB) * AIR 1959 SC 1204 (1205): (1960) 1 SCR 271. (Question whether trust deed was fictitious is a question of fact.)

(5) Where a finding is given on a question of fact based upon an inference from facts, that is not always a question of law. The proposition that an inference from facts is one of law will be correct in its application to mixed question of law and fact but not pure questions of fact. Inferences of fact may themselves be inferences of fact and not law and such inferences are not open to review. Inferences from facts would be a question of fact or of law according as the point for determination is one of pure fact or mixed question of law and fact. AIR 1957 SC 49 (59): 1956 SCR 691 ° AIR 1958 All 54 (61) (DB).

(6) When the finding is one of fact, the fact that it is itself an inference from other basic facts will not alter its character as one of fact. AIR 1957 SC 49 (65): 1956 SCR 69.

(7) When the question is whether certain facts give rise to a legal right or liability, the inference is one of law, and the question of such inference, a question of law. AIR 1953 SC 153 (153): 1953 SCR 934 ° AIR 1954 Orissa 40 (44) (DB) * 1953-2 Mad L Jour 241 (241) ° AIR 1952 Sau 86 (87) ° AIR 1951 Pat 641 (643) (DB) * AIR 1950 Nag 127 (129): ILR (1949) Nag 862 ° AIR 1949 Nag 300 (301): ILR (1949) Nag 224 (DB) * AIR 1947 Bom 49 (53): ILR (1946) Bom 984 ° AIR 1947 Mad 426 (428) ° AIR 1946 Nag 266 (270): ILR (1946) Nag 301 (DB) * AIR 1943 Pat 169 (176): 22 Pat 55 (DB) ° AIR 1942 Lah 42 (45) (DB) ° AIR 1940 Bom 263 (264): ILR (1940) Bom 505 * AIR 1918 PC 92 (93): 46 Cal 189: 45 Ind App 183 ° AIR 1927 PC 102 (104): 54 Ind App 178 ° AIR 1924 Cal 92 (95) (DB) ° (1903) 25 All 1 (17): 29 Ind App 203 (PC) * AIR 1928 Nag 87 (88): 23 Nag LR 192 ° ('97) 21 Bom 91 (94) (DB) * AIR 1931 Bom 371 (372, 376) (DB) ° AIR 1928 PC 243 (245): 55 Ind App 380 ° AIR 1959 Punj 117 (119): ILR (1959) Punj 626 (DB).

(8) The proper legal effect of a proved fact is essentially a question of law. Whenever an inference is drawn from certain conclusion on facts, that inference is a question of law in its essential nature. AIR 1958 Cal 273 (275) * AIR 1963 Bom 165 (169): 64 Bom LR 752 (DB). (The finding of legitimacy is a question of fact and merely because the determination of fact depends upon inferences to be drawn from finding of other facts, it does not become a question of law.)

(9) Even an inference of fact must be drawn in a legal manner, i.e., in a manner neither unreasonable nor illogical nor unwarranted by the facts from which it is drawn. If not so drawn, it is an error of law. The question, therefore, whether an inferenve of fact is reasonable or is warranted by facts is also a question of law. AIR 1952 Cal 585 (586) (DB) ° AIR 1951 Him Pra 49 (50) ° AIR 1950 Assam 216 (216): ILR (1950) 2 Assam 137 * AIR 1949 All 699 (702) ° AIR 1944 Mad 465 (468) ° AIR 1940 Pat 201 (203) (DB) * AIR 1919 PC 60 (61): 42 All 152: 46 Ind App 197 ° (1893) 20 Cal 93 (99): 19 Ind App 228 (PC) * (1909) 36 Cal 1 (18): 35 Ind App 193 (PC).

(10) When the point for determination is a mixed question of law and fact, while the finding on the facts found is final the decision of the Court as to the legal effect of those findings is a question of law which can be reviewed. AIR 1957 SC 49 (65): 1956 SCR 691 ° 1957 Pat LR 259 (272). (Money-lending as profession.)

(11) The question of custom is one of mixed law and fact. AIR 1958 All 699 (702) (DB).

See also Note 15.

(12) A question of adverse possession is a mixed question of law and fact. See Note 30.

(13) Whether the interpretation of a particular order is a question of fact, or a question of law, or a mixed question of fact and law depends on the circumstances of each particular case. The general rule is this. Where intention is to be inferred from the terms of a document, in this case the order, the question is one of law, or mixed of fact and law; where the intention is to be inferred from the other facts and circumstances tending to show what was the real intention of the Judge in passing that particular order, then the question may be either a question of pure fact or, again, may be a question of mixed fact and law. AIR 1941 Lah 62 (63) (DB).

**Sections 100 and 101 — Note 22 (contd.)**

(14) A mixed question of law and fact will be open to second appeal where the lower Appellate Court has committed an error on the matter of law involved in the mixed question of law and fact but not if it has committed an error only on the matter of fact so involved. AIR 1952 All 527 (528) ° AIR 1951 Pat 190 (194) (DB) * AIR 1950 Nag 54 (56): ILR (1950) Nag 128 ° AIR 1930 Cal 392 (396): 57 Cal 25 * AIR 1925 Mad 768 (768) (DB) ° AIR 1939 Oudh 210 (213): 14 Luck 515.

[See also AIR 1942 Oudh 213 (214): 17 Luck 567 (DB) ° (1912) 16 Oudh Cas 76 (77) (DB).]

[But see AIR 1929 Lah 266 (267).]

(15) For other examples of mixed questions of law and fact, see the following cases. AIR 1955 Mad 369 (377) (DB). (Whether person can claim kudiwaram and melwaram interest.) ° AIR 1955 Pat 432 (441): 34 Pat 661 (DB). (Question of vis major.) * AIR 1954 Raj 17 (22): ILR (1953) 3 Raj 720 (DB). (Whether a person is a necessary party.) ° ILR (1954) 6 Assam 187 (189). (Bona fide requirement of land.) ° AIR 1952 Orissa 31 (32) (DB). (Exclusion from enjoyment of joint family property.) * AIR 1952 Punj 284 (286) (DB). (Whether person is partner or agent.) ° AIR 1951 Pat 190 (194) (DB). (Whether person is sublessee or licensee.) * AIR 1947 All 16 (17). (Legal cruelty.) ° AIR 1943 Nag 77 (79): ILR (1943) Nag 226. (Structure whether permanent.) * AIR 1940 Lah 35 (35). (Whether an application is a fresh application within S. 48.) ° AIR 1931 Bom 430 (431). (Constructive notice.) ° AIR 1931 Cal 383 (384): 58 Cal 259 (SB). (Question of domicile.) * AIR 1935 All 1008 (1010) (DB). (Whether partnership is dissolved.) ° AIR 1935 PC 1 (2): 13 Rang 63. (Question whether misdescription in insurance policy is material.) ° AIR 1936 Lah 192 (193) (DB). (Validity of gift.) ° AIR 1939 All 163 (164): ILR (1939) All 167 (DB). (Whether there has been a failure of justice.) * AIR 1963 SC 605 (610): (1963) Supp 1 SCR 13. (Tenant acquiring landlord's interest — Question whether raiyati interest subsists after purchase is a mixed question of law and fact.) ° AIR 1967 Assam 61 (63): 63 ITR 389 (DB). (Question whether a trust is charitable or not — Question is a mixed one of law and fact.) ° AIR 1967 Guj 269 (273): 8 Guj LR 418 (DB). (Question of law and fact — Construction of documents — Land acquisition proceedings — Question whether two documents in question are really two separate awards or only one is a mixed question of law and fact.) * ILR (1966) 1 Mad 206. (Question about compliance with S. 240 (3) of Government of India Act, 1935 is question of law and fact.) ° AIR 1965 Assam 42 (45): ILR (1964) 16 Assam 423 (DB). (Competence of Registrar to order registration of document is a mixed question of law and fact — Cannot be allowed to be raised for the first time in second appeal.) ° AIR 1963 Mys 39 (46): 1962 Mys LJ (Supp) 377. (Legality of award — Question of interest and damages referred to arbitrator — Decision by arbitraor on such question involves question of fact and law.) * 1963 Cur LJ 65 (Punj.) (Conclusions based on primary evidentiary facts — Interference in second appeal cannot be done unless there is error of law.) ° AIR 1963 Raj 119 (125): 1963 Raj LW 167 (DB). (Registration of Patta compulsorily — It is mixed question of law and fact.) ° 1962 Raj LW 679: ILR (1963) 13 Raj 41. (Question of time requisite for obtaining copy of decree or order — Decision involving question of principle and not confined to calculation of time only — Question is a mixed question of law and fact.) * AIR 1962 Cal 78 (81, 82): 65 Cal WN 626 (DB). (Whether structure permanent or temporary — Mixed question of law and fact.) ° AIR 1961 All 173 (174). (Agreement stifling prosecution — Mixed question of law and fact.) ° 1960 Raj LW 197 (199): ILR (1959) 9 Raj 1080. (Whether premises are required by the owner reasonably and bona fide.)

[See also AIR 1936 Oudh 143 (145): 11 Luck 481. (Finding that sale took place in execution of both decrees held not to be a pure finding of fact.)]

(16) The question whether trade is carried on by a person at a given place must be determined on a consideration of all the circumstances. The question though of mixed law and fact must be determined on a consideration of the nature of trade, various steps taken for carrying the trade and other relevant facts. AIR 1968 SC 739 (741): (1968) 2 SCR 536.

(17) Whether accident arose out of and in course of employment is question of law and depends on facts of case. 1962 MPLJ 454.

(18) What would be the profits of a particular concern when rights of third parties were not involved could never be a pure question of law. It would be governed by what the parties had contracted for or could be deemed to have agreed upon as profits either by express agreement or as could be implied from the manner in which they had been crediting themselves with the profits. AIR 1966 Mad 60 (61): 78 Mad LW 610.

(19) Question of election is a mixed question of law and fact. AIR 1967 Mad 404 (408): (1967) 1 Mad LJ 96.

(20) Question of law — Acceptance of evidence given by party against its own pleadings is a mistake of law. AIR 1969 Pat 110 (111): 1968 Pat LJR 597 (DB).

(21) Unless there is an error of law in arriving at the conclusion on a question of mixed law and fact, the conclusion though based upon the primary evidentiary facts cannot be challenged in second appeal.

**Sections 100-101 — Note 22** (contd.)

The conclusion on the question of non-existence of partnership being a finding of fact cannot be reversed on second appeal, where the decision is not vitiated by an error of law. AIR 1963 Punj 95 (98, 99) (DB).

(22) Question of Inam fair Register is a question of law. (1967) 2 Andh LT 190.

**23. Construction of documents.** — (1) The expression 'construction of a document' involves several questions:

(i) The meaning of the words used is a question of fact. AIR 1955 Nag 272 (275): ILR (1955) Nag 942 (DB) * AIR 1953 Trav-Co 584 (585): ILR (1953) Trav-Co 568 ° AIR 1943 Cal 565 (568) ° AIR 1914 Cal 836 (838, 839) (DB) * AIR 1934 Cal 461 (463): 61 Cal 45 (DB) ° AIR 1926 Lah 21 (22) ° 1966 Raj LW 438.

(ii) Inference of fact from evidentiary documents is a question of fact. AIR 1952 Ajmer 25 (2) (25) * AIR 1950 Pat 252 (252) ° AIR 1945 Pat 453 (457): 24 Pat 379 (DB) * AIR 1943 Bom 447 (448) ° AIR 1943 Bom 146 (148) (DB) ° AIR 1943 Nag 117 (128): ILR (1943) Nag 176 (FB) * AIR 1923 PC 187 (187) ° AIR 1926 All 542 (543): 48 All 588 (DB) ° AIR 1933 PC 171 (175): 60 Ind App 231: 29 Nag LR 210 * AIR 1934 PC 5 (7): 61 Ind App 93: 13 Pat 254 ° AIR 1934 PC 112 (113): 61 Ind App 163: 57 Mad 652 ° AIR 1938 Lah 445 (446, 447) (DB). (Letters Patent appeal reversing AIR 1937 Lah 410.) * AIR 1939 Mad 564 (568) ° AIR 1928 PC 243 (247): 55 Ind App 380 ° AIR 1967 Pat 246 (249) (DB).

(iii) The legal effect of the words used in a document is a question of law. AIR 1956 Mad 514 (517): ILR (1956) Mad 1004 (DB) * AIR 1957 Pat 278 (285): 36 Pat 471 (DB). (Legal effect of words in document is question of law.) * 1956 Andh WR 746 (747) ° AIR 1953 Bilaspur 1 (3) ° AIR 1953 Trav-Co 584 (585): ILR (1953) Trav-Co 568 * AIR 1952 Punj 181 (183) ° AIR 1952 Punj 82 (88) (DB) ° AIR 1946 Bom 454 (455) ° AIR 1945 PC 165 (187): 72 Ind App 211: ILR (1945) Kar (PC) 314: ILR (1946) Mad 225 * AIR 1943 Nag 117 (128): ILR (1943) Nag 176 (FB) * AIR 1963 SC 884 (887): (1963) 2 SCR 208. (Legal inference from the proved facts will raise a question of law.) ° 1961 MPLJ 410: 1962 Jab LJ 220 ° AIR 1953 Bilaspur 1 (3). (The question whether a transaction amounts to a sale or merely creates occupancy rights depending upon an interpretation of the deed is not a question of fact but one of law.)

(2) Misconstruction of a document is a ground of second appeal. AIR 1955 Nag 272 (275): ILR (1955) Nag 942 (DB) ° AIR 1957 Pat 278 (285): 36 Pat 471 (DB) ° AIR 1954 Orissa 40 (44) (DB) * ILR (1954) 6 Assam 63 (65) ° AIR 1953 Nag 337 (338) * AIR 1952 Punj 82 (88) (DB) * AIR 1950 East Punj 179 (180) (DB) ° AIR 1948 Mad 195 (196) (DB) * AIR 1939 All 672 (677): ILR (1939) All 713 (DB) ° AIR 1928 PC 44 (47): 6 Rang 113 ° AIR 1963 Ori 121 (124, 125): ILR (1963) Cut 175 (DB). (Construction of documents — Misconstruction of document which is foundation of suit is question of law — Mistake as to meaning of portion of document no ground for second appeal.) ° AIR 1969 Punj 244 (247): 71 Pun LR 152.

[But see AIR 1919 Lah 246 (247).]

(3) The construction of a document as regards its legal effect will only arise where the document is an instrument of title or is a contract or is otherwise the direct foundation of legal rights. AIR 1962 SC 1314 (1316): (1962) Supp 3 SCR 549 ° AIR 1967 Andh Pra 64 (65): (1967) 1 Andh LT 104. (Question of the resting on construction of particular document — It is not a question of law — Concurrent finding that plaintiff has established his title to an undivided one-sixth share and possession within 12 years prior to suit — Finding cannot be interfered in second appeal.) ° 1956 BLJR 8 (12) ° 1955 BLJR 293 (296) * AIR 1954 Assam 95 (96) ° AIR 1954 Pat 326 (331) (DB) ° AIR 1951 Sau 50 (51) * AIR 1949 All 493 (496) ° AIR 1945 PC 165 (167): 72 Ind App 211: ILR (1945) Kar (PC) 314: ILR (1946) Mad 225 * AIR 1940 Lah 486 (487): ILR (1941) Lah 601 (DB) ° AIR 1923 PC 187 (187) ° AIR 1924 Oudh 266 (268): 27 Oudh Cas 77 * AIR 1926 All 542 (543): 48 All 588 (DB) ° AIR 1937 Nag 230 (233). (Partition deed.)

(4) While the construction of a document by itself may be a question of law, it becomes a question of fact if it is one which is to be decided on the document together with other circumstances or extraneous evidence. AIR 1952 Pat 98 (98) ° AIR 1951 Sau 50 (51) * AIR 1947 Lah 320 (321) ° AIR 1940 Bom 225 (226): ILR (1940) Bom 453 (DB) ° AIR 1917 Lah 156 (157) ° AIR 1925 Cal 656 (658, 659) (DB) * AIR 1932 Bom 230 (231).

(5) Where two interpretations are possible, the fact that the lower Appellate Court has adopted one rather than the other is no error of law or procedure and is no ground of second appeal. AIR 1951 Sau 50 (52) ° AIR 1931 Mad 137 (138) (DB) ° AIR 1931 Lah 594 (595) (DB).

(6) A finding that a document is so worded as to obscure its meaning and prevent parties from understanding its nature or effect is a question of fact having nothing to do with construction of the document. AIR 1929 Nag 343 (345).

[See AIR 1928 PC 243 (245, 247): 55 Ind App 380.]

(7) A conclusion based on a misreading of a document is like one based on a misreading of evidence and as such is an error of law which can be corrected in second appeal. AIR 1940 Lah 278 (279) * AIR 1940

Sections 100-101 — Note 23 (contd.)
Sind 74 (75) (DB) ° AIR 1931 All 499 (502, 504): 54 All 6 (SB) ° AIR 1927 Mad 1167 (1179) (DB) * AIR 1963 SC 884 (887): (1963) 2 SCR 208. (A construction of documents (unless they are documents of title) produced by the parties prove a question of fact does not involve an issue of law, unless it can be shown that the material evidence contained in them was misunderstood by the Court of fact.) ° AIR 1965 All 202 (205): 1963 All LJ 952. (Alterations in pronote — Consideration of — Error in such construction amounts to misreading of evidence raising question of law.)

(8) Where the question is whether it is open to a person to plead the existence of a transaction at variance with the tenor of a deed to which he was a party it is purely a question of law. AIR 1942 Nag 103 (104): ILR (1942) Nag 349 (DB).

(9) Misconstruction (or misinterpretation) of a document means that the Court has mistrued the legal effect or nature of a document. For example, if the document creates a lease but the Court wrongly thinks it as a license, or if it is an agreement of guarantee but the Court holds it to be one of indemnity this is a misconstruction of the document. But if a document contains allegations or recitals of facts and a party relies on these recitals in proof of his own allegation of facts, and the Court either rejects the recitals as incorrect or misunderstands their effects, this is not a misconstruction of the document but an erroneous view of the facts stated in the document. AIR 1968 All 184 (185).

(10) Finding that writing and signatures in certain documents are writing and signatures of 1st defendant — That is a finding of fact and lower Appellate Court is competent to arrive at — It cannot be interfered in second appeal. AIR 1967 Andh Pra 64 (65): (1967) 1 Andh LT 104.

(11) Whether a document can be read differently from what its tenor justifies is a question of law. AIR 1963 Madh Pra 265 (270): 1963 Jab LJ 174 (DB).

(12) Question of fact — Construction of documents of title in light of extrinsic evidence — Question is one of fact — No interference. AIR 1964 Orissa 63 (64): 29 Cut LT 666 (DB).

**24. Legal effect of document or transaction.** — (1) The legal effect of documents, or of proved facts, or of transactions, is a question of law. AIR 1952 Punj 181 (183). (Legal effect of document.) ° AIR 1957 Andh Pra 445 (447). (Do.) * ILR (1954) Nag 404 (406). (Legal effect of proved facts.) ° AIR 1952 Sau 86 (87). (Do.) ° AIR 1951 Pat 641 (643) (DB). (Do.) ° AIR 1951 Pat 502 (507) (DB). (Do.) ° AIR 1918 PC 92 (93): 46 Cal 189. (Do.) ° AIR 1927 PC 102 (104): 54 Ind App 178: 8 Lah 573. (Do.) * AIR 1936 PC 77 (81, 82): 63 Ind App 140. (Do.) ° AIR 1948 East Punj 26 (29) (DB). (Legal effect of transaction.) ° (1910) 6 Nag LR 78 (80). (Do.) * AIR 1929 All 519 (520) (DB). (Do.)

(2) The effect of a document, as merely evidence of a question of fact, is not a question of law. (1895) 22 Cal 609 (618): 22 Ind App 51 (PC) ° AIR 1952 Pat 429 (430).

(3) Questions relating to the facts of the execution of documents or the existence of facts or transactions are questions of fact. AIR 1945 PC 105 (107): ILR (1945) Kar (PC) 225 ° AIR 1958 Pat 434 (436): 37 Pat 658 (DB). (Benami nature of transaction.) ILR (1958) Kar 713 (727) (DB) * AIR 1957 Raj 299 (300, 301) ° ('57) 1957 Jab LJ 831 (832) ° AIR 1956 Punj 145 (145): ILR (1956) Punj 157 * ILR (1955) 5 Raj 793 (796) ° AIR 1953 Mad 925 (926) ° AIR 1952 Ajmer 25 (2) (25) * ILR (1949) 1 Assam 12 (129) ° AIR 1965 Pat 73 (75): ILR 44 Pat 825 (DB). (Finding based on document admitted on record without objection in trial Court — No interference in appeal on ground that mode of proof was irregular or insufficient.)

(4) Questions of the genuineness of documents are questions of fact. AIR 1958 Orissa 26 (32) (DB) * ILR (1956) 1 Cal 150 (152) ° (1956) 34 Mys LJ 5 (6) ° AIR 1954 Raj 49 (50): ILR (1952) 2 Raj 525 * AIR 1951 Mys 31 (32): ILR (1951) Mys 374 (DB) ° AIR 1950 Mad 560 (561) ° AIR 1950 Nag 226 (227): ILR (1950) Nag 336 (DB) * AIR 1948 Nag 110 (115): ILR (1947) Nag 510 (DB) ° AIR 1945 All 28 (29): ILR (1944) All 714 ° AIR 1935 Pat 349 (350) (DB).

[See also (1937) 166 Ind Cas 531 (532) (Pat) * AIR 1939 Pat 276 (277) (DB) ° AIR 1939 Pat 229 (230) (DB).]

(5) Question of interpretation of document or contract can be agitated in second appeal — Question is answerable without notice to respondent. 1964 Jab LJ 342.

**25. Meaning of words.** — (1) The ordinary meaning of words is a question of fact but the effect of the words is one of law. AIR 1928 PC 243 (245): 55 Ind App 380 ° AIR 1950 East Punj 90 (91) (DB).

[See also AIR 1941 Pat 488 (489) (DB) ° AIR 1923 All 337 (337). (Effect of words.) * AIR 1926 Oudh 360 (361): 2 Luck 216 (DB). (Do.) ° AIR 1937 Oudh 295 (297). (Do.)]

(2) The meaning of the word "assessment" in a resolution is a question of fact. AIR 1926 Cal 607 (608): 53 Cal 453 (DB).

(3) In the case of words having a technical or scientific or special legal significance, the interpretation will be a question of law. AIR 1954 Mad 149 (151) ° AIR 1926 Nag 435 (439).

(4) The question whether a word has been used in a restricted sense is a question of law. AIR 1922 Bom 416 (417, 419): 47 Bom 18 (DB).

**26. Inference from proved facts.**— (1) A Court is bound in law to draw the neces-

**Sections 100-101 — Note 26 (contd.)**

sary inferences, whether of fact or of law, in coming to a conclusion on the question to be decided. A failure to draw any inference at all one way or the other is an error of law. AIR 1938 Nag 470 (472): ILR (1938) Nag 535 * AIR 1958 All 54 (61) (DB) ° 1950 Bur LR (HC) 93 (96, 98) ° (1963) 1 Lab LJ 334: (1962) 5 Fac LR 379 (All).

(2) Where only one inference is possible from proved facts, the failure to draw it is an error of law. AIR 1956 Bhopal 22 (23) ° ('11) 9 Ind Cas 169 (171) (DB) (Mad) * (1896) 21 Bom 91 (95) (DB).

(3) Where one out of two possible inferences is drawn there is no error of law. (1911) 9 Ind Cas 169 (171) (DB) (Mad) ° AIR 1930 Nag 200 (203) (DB) * AIR 1930 Lah 936 (936).

(4) Drawing of an inference which is not improper, or the omission to draw an inference which does not necessarily follow, are not errors of law and are not grounds of second appeal. (1872) 17 Suth WR 418 (418) (DB). (Improper inference.) ° AIR 1921 Sind 20 (22): 15 Sind LR 84 (DB). (Do.) ° (1876) 25 Suth WR 503 (504) (DB). (Omission to draw inference which does not follow.) * (1968) 81 Mad LW 618 ° AIR 1967 Punj 252 (255). (On given set of circumstances, two inferences possible — The one adopted by Court of first appeal is binding on High Court in second appeal.)

(5) A presumption of fact is really an inference of fact depending on the facts and circumstances of each case and where a Court draws such a presumption or refuses to draw it on a consideration of the facts of the case, it will not be interfered with in second appeal. AIR 1952 Assam 43 (44): ILR (1951) 3 Assam 237 (DB) ° AIR 1951 Nag 347 (348): ILR (1951) Nag 909 ° AIR 1934 Cal 215 (216) (DB) * AIR 1930 Lah 557 (557) * AIR 1915 Mad 1113 (1119): 39 Mad 304 (DB) ° AIR 1932 Mad 343 (346, 350) (DB) * AIR 1966 Orissa 66 (70): 32 Cut LT 194. (Presumption of fact — Question of its rebuttal is also a question of fact — Finding by lower Court — Final for second appeal and revision.)

(6) Where the Court fails to direct its mind to the question whether it should draw the presumption or not, it commits an error of law inasmuch as it is its legal duty to make up its mind to draw the presumption or not to draw it for reasons to be given by it. AIR 1952 Bilaspur 13 (14) ° 1947 All L Jour 569 (573) ° AIR 1946 Bom 193 (196) * AIR 1930 Lah 443 (444).

(7) A Court will commit an error of law if it deals improperly with the presumptions which the law raises. (1868) 9 Suth WR 338 (342) (DB) ° AIR 1932 Lah 56 (57) * AIR 1966 All 618 (619). (Misappreciation of evidence — Erroneous presumption under S. 114, Illus. (f), Evidence Act — Findings are vitiated.) ° (1964) 66 Punj LR 515 * AIR 1959 Bom 63 (64): 59 Bom LR 1205. (Where the lower Court has failed to refer and give any effect to the statutory presumption which must be drawn from the entries in the record of rights questions of fact will be open to the High Court in second appeal.) * AIR 1952 Bilaspur 13 (14). (Failure to draw a presumption under S. 114, Evidence Act, if such a presumption could validly be drawn, would amount to an error of law.)

[See also AIR 1932 Mad 415 (415) (DB).]

(8) In the case of a presumption of law where a Court "may presume" a particular thing, e. g., the genuineness of an ancient document under S. 90 of the Evidence Act, the matter is in the discretion of the Court and, unless such discretion is exercised in a non-judicial manner, it cannot be interfered with in second appeal. ILR (1953) 3 Raj 292 (294) ° AIR 1958 Orissa 26 (35) (DB) ° AIR 1952 Bilaspur 13 (14, 15) * AIR 1950 Raj 47 (49) (DB).

(9) If the finding arrived at as a result of the rebuttal of a statutory presumption is a finding on a question of fact, that finding would be final for purposes of a second appeal, but if on the other hand, that finding be a finding on a question of law, it would be open to question in a second appeal. AIR 1958 All 54 (62) (DB).

(10) The question whether a statutory presumption is rebutted is a question of fact. (1956) 60 Cal WN 149 (150) ° AIR 1954 Cal 90 (93) (DB) * AIR 1954 Nag 223 (224): ILR (1954) Nag 457 (DB) ° AIR 1952 Punj 52 (53) ° AIR 1947 Pat 475 (476) * AIR 1930 PC 91 (93): 11 Lah 199: 57 Ind App 86 ° AIR 1963 Orissa 121 (124, 125): ILR (1963) Cut 175 (DB). (Rebuttal of statutory presumption arising out of entry in settlement record of rights.)

[See also AIR 1935 Pat 415 (416) (DB) ° AIR 1937 Lah 468 (470) (DB) ° AIR 1939 Cal 366 (368) * (1886) 165 Ind Cas 763 (764) (DB) (Pat).]

(11) The question of burden of proof is one of law and if it has been placed on the wrong party it is a ground of second appeal. AIR 1956 Nag 20 (22): ILR (1955) Nag 1016 ° AIR 1955 Assam 23 (26): ILR (1954) 6 Assam 242 (DB) ° 1951 Raj LW 160 (163) * AIR 1949 Pat 214 (214) ° AIR 1921 Lah 128 (128): 2 Lah 249 (DB) ° AIR 1932 Cal 351 (353) ° AIR 1936 Rang 256 (260): 14 Rang 242 (FB) * 1966 All WR (HC) 587: 1966 All LJ 725. (Question of — Burden of proof — Question relating to, is a question of law.) ° ILR (1965) Cut 695 ° AIR 1967 All 513 (515): 64 ITR 444. (Question whether onus of proof is rightly placed on a party is one of law — But question whether onus is discharged is only a question of fact. AIR 1930 PC 91, Foll.) ° 1963 Mys LJ (Supp) 391. (Finding of fact arrived at from a wrong point of view about burden of proof, not binding in second appeal.)

[See AIR 1937 Nag 230 (233, 234) * AIR 1939 Nag 78 (80): ILR (1939) Nag 160.]

Sections 100-101 — Note 26 (contd.)

[See also AIR 1936 Rang 262 (265) ° AIR 1932 PC 28 (30): 59 Ind App 29: 59 Cal 1012.]

(12) Where the parties have adduced evidence in support of their cases, the question of onus disappears and, therefore, does not arise in second appeal. (1941) 45 Cal WN 177 (180) * (1909) 3 Ind Cas 431 (431) (DB) (Cal) ° AIR 1932 PC 228 (230): 13 Lah 687: 59 Ind App 386 ° (1968) 34 Cut LT 890 * (1961) 1 Mad LJ 385.

(13) The finding that onus has shifted has to draw on the rules of pleading and proof, of procedure and evidence, for the recording of it as well as for the ascertainment of its truth. It is therefore a finding on a question of law. AIR 1958 All 54 (64) (DB).

(14) Inference of fact from other primary facts proved — A question of fact unless it involves application of some principle of law. 1962 All LJ 967: 1962 All WR (HC) 791 * AIR 1967 All 221 (223): 1968 All LJ 656. (Inference to be drawn from evidentiary facts — Question is a question of fact — Cannot be interfered in second appeal.)

(15) Interference in second appeal — Finding becoming final on date of decision — Not affected by subsequent change in law — Finding as to actual possession of property — Is one of fact. 1961 Ker LT 1142: 1961 Ker LJ 712.

(16) Whether the plaintiff has succeeded on the evidence of the admitted facts in discharging his burden is a question of fact but the question whether the burden of proof shifts back to the plaintiff in the circumstances of the case is a matter of law: AIR 1963 Madh Pra 15 (16): 1963 Jab LJ 113. (1938 Nag LJ 459: AIR 1939 Nag 78, Rel. on.)

(17) Question whether proved or admitted facts lead to inference of dissolution of partnership is question of law. AIR 1963 Madh Pra 155 (158): 1962 Jab LJ 796.

(18) Mixed question — Inference about waiver of notice to quit is mixed question — Such inference can be drawn from facts — But whether inference like that can be drawn from particular set of facts is not purely question of fact and, therefore can be scrutinised in second appeal. AIR 1966 Pat 434 (437): 1966 BLJR 808 (DB).

(19) If an inference from facts does not logically accord with and follow from them then one must say that there is no evidence to support it and to come to a conclusion to which there is no evidence to support is to make an error of law. Such conclusions are open to question on second appeal. ILR (1965) 2 Punj 590.

**27-28. Relevancy and sufficiency of evidence.**— (1) The relevancy of evidence is a question of law. AIR 1946 Bom 193 (196) ° AIR 1945 Cal 492 (493, 494): ILR (1946) 1 Cal 149 (DB) * (1897) 19 All 76 (92): 23 Ind App 106 (PC).

(2) The question whether there is any evidence to support a finding is one of law. AIR 1950 Nag 127 (129): ILR (1949) Nag 862 ° AIR 1958 All 54 (61) (DB) ° AIR 1935 All 720 (722) * AIR 1935 Mad 26 (26).

(3) The question whether there has been omission to consider material evidence is a question of law. 1958 Ker LJ 396 (400).

(4) Where there is evidence from which a conclusion of fact can be drawn, the weight of the evidence or the sufficiency of proof is a question of fact. AIR 1957 Raj 299 (300, 301) ° ILR (1956) Hyd 52 (57). (Weight of evidence.) ° AIR 1953 Orissa 98 (98) (DB). (Do.) * AIR 1951 Him Pra 49 (51). (Do.) ° AIR 1951 Simla (Punj) 223 (224). (Do.) ° AIR 1947 Pat 475 (476). (Do.) * AIR 1932 Mad 415 (415, 416) (DB). (Do.) ° AIR 1919 Cal 721 (721): 46 Cal 152 (DB). (Do.) ° AIR 1939 Nag 78 (80): ILR (1939) Nag 160. (Do.) * AIR 1952 Assam 52 (54) (SB). (Sufficiency of proof.) ° AIR 1955 Andhra 209 (211). (Do.) ° AIR 1955 Cal 226 (228) (DB). (Do.) * AIR 1955 Mys 8 (5): ILR (1954) Mys 413. (Do.) ° (1955) 8 Sau LR 146 (147). (Do.) ° 1954 Andh LT (Civil) 35 (39). (Do.) ° AIR 1953 Trav-Co 41 (43) (DB). (Do.) * 1953 AMLJ 69 (69). (Do.) ° AIR 1918 PC 92 (93): 46 Cal 189: 45 Ind App 183. (Do.) ° AIR 1963 SC 1633 (1637-1638): (1964) 2 SCR 673. (AIR 1960 Andh Pra 397, Reversed.) ° 1964 All WR (HC) 115. (Credibility of witness and reliability of testimony — Questions as to — Cannot be agitated in second appeal.) ° 1964 All LJ 747: 1964 All WR (SC) 537. (No question of law arises in second appeal when the oral testimony of a witness or any part of it is rejected by the lower Appellate Court on the ground that it cannot be believed.) * (1964) 68 Cal WN 752 ° (1964) 68 Cal WN 379 ° AIR 1964 Punj 323 (324): 1964 Cur LJ 50 ° AIR 1964 Raj 88 (90): 1963 Raj LW 627.

**29. Nature of tenancy.** — (1) The question of tenancy is a mixed question of law and fact. It is one of fact so far as the length of the tenancy, the fixity of rent and other similar matters are concerned and it is one of law in so far as the inference as to the nature of tenancy from the facts found is concerned. AIR 1946 Pat 298 (299): 25 Pat 84 (DB). (Question of rent.) * AIR 1934 Pat 31 (32). (Fair rent.) ° AIR 1933 Cal 319 (320). (Rent whether payable in money or kind.) ° 1957 All L Jour 435 (435). (Length of tenancy — Question of fact.) * AIR 1932 Lah 43 (44). (Length of the tenancy.) ° AIR 1930 PC 221 (223). (Whether a particular tenure existed prior to permanent settlement.) ° AIR 1936 Pat 96 (96). (Questions regarding area of land and payment of rent.) * AIR 1936 Cal 582 (584) (DB). (Whether tenant has held at uniform rate for number of years.) ° AIR 1953 SC 153 (153): 1953 SCR 930. (Inference as to nature of tenancy — Question of law.) ° AIR 1954 Bom 100 (101): ILR

**Sections 100-101 — Note 29 (contd.)**
(1953) Bom 969 (DB). (Do.) * AIR 1954 Pat 326 (331) (DB). (Do.) ° AIR 1945 Cal 283 (283): ILR (1947) 1 Cal 270 (DB). (Do.) ° AIR 1940 PC 192 (196): ILR (1940) Kar PC 380: ILR (1941) Bom 107. (Do.) * AIR 1927 PC 102 (104): 54 Ind App 178: 8 Lah 573. (Do.) ° (1968) 2 Mys LJ 62: 15 Law Rep 165. (Rent due from tenant is a question of fact — No investigation in revision before High Court.) ° 1968 BLJR 626 (DB). (Finding as to nature of tenancy being for non-agricultural purposes and a homestead holding is one of fact.) ° 1967 Punj LJ 273: 1967 Cur LJ 725 ° (1966) 79 Mad LW 530 ° AIR 1965 Andh Pra 474 (478): (1965) 1 Andh WR 268 (DB). (Courts below holding plaintiff to be in possession of land for certain period — This is finding of fact and cannot be interfered with in second appeal.) ° AIR 1965 Pat 311 (313) (DB). (Question whether purpose of tenancy and nature of land were agricultural is a question of fact — Cannot be entertained in second appeal.) ° 1963 All LJ 1005. (Finding as to the nature of tenancy in disregard of effect of S. 107, T. P. Act — Not binding in second appeal — Question is one of law.) * AIR 1963 Cal 470 (471): 67 Cal WN 522. (Question whether there was one tenancy and not two is one of fact — Concurrent finding by both lower Courts — Matter is concluded for second appeal.) * (1961) 63 Punj LR 71. (Question as to extinguishment of occupancy tenancy — Concurrent finding of fact by lower Courts — No interference in second appeal.) ° AIR 1960 All 395 (396) * (1960) 62 Pun LR 723: ILR (1961) 2 Punj 262. (Concurrent finding about dates of commencement and ending of tenancy — Being finding of fact, binding on High Court in second appeal.)

(2) Though a second appeal will lie on the question as to the nature of tenancy, the High Court will not interfere with an inference drawn or with a refusal to draw an inference by the lower Court, unless such inference or the refusal to draw the inference, as the case may be, can be shown to be demonstrably wrong. AIR 1926 Cal 592 (593) (DB).

(3) The incidents of a "joti" tenancy are in the nature of a contract and consequently a decision on the question whether a certain "joti" is a tenure or a raiyati holding is a finding of fact. AIR 1918 Cal 517 (518) (DB).

(4) A finding as to joint tenancy, or as to the date of commencement of a tenancy, or as to whether the tenant has held at a uniform rate for 20 years or more or as to whether a tenancy has been forfeited by denial of the title of the landlord, or as to whether certain charges are parts of rent or not, is a finding of fact. AIR 1924 All 231 (232). (Joint tenancy.) ° AIR 1941 Cal 368 (370) (DB). (Date of commencement of tenancy.) ° AIR 1923 PC 187 (187, 189). (Do.) * AIR 1926 Cal 359 (360) (DB). (Whether tenant held at uniform rent.) ° AIR 1933 Lah 377 (378). (Forfeiture of tenancy by denial of title.) * AIR 1915 Cal 17 (18) (DB). (Whether charge is part of rent.)

(5) The question whether a new tenancy has been created is essentially a question of fact. AIR 1955 Cal 229 (230): ILR (1956) 1 Cal 136 (DB).

(6) If the finding arrived at as a result of the rebuttal of statutory presumption is a finding on a question whether a tenancy is permanent or precarious, which is a question of law, the finding would be open to question in second appeal. AIR 1958 All 54 (62) (DB).

(7) The question whether the legal right of a tenant has been determined is a question of law. (1912) 15 Ind Cas 857 (859) (Oudh). ° 1960 Raj LW 103. (The question whether a tenancy ceased by mutual agreement is a question of fact which cannot be raised in second appeal for the first time.)

(8) The question whether korfa (underraiyati) right is heritable by custom is a mixed question of law and fact. AIR 1954 Pat 32 (33).

(9) Question whether rent was enhanced is one of fact. AIR 1953 All 316 (317).

(10) Whether a land held under "Buta Hak" has been forfeited for mismanagement or not is a question of fact. AIR 1953 Sau 94 (95).

(11) An inference as to whether the land in question constituted a service tenure drawn from the entries in the record of rights, is one of fact. AIR 1950 Pat 252 (252).

(12) The purpose of a tenancy, i.e., whether it was for agricultural purpose or not is purely a question of fact. AIR 1947 Cal 139 (140).

(13) Finding that lessee admitted liability to pay rent from a certain date is one of fact. AIR 1946 Oudh 144 (145): 21 Luck 292.

(14) Question that a person is settled raiyat, raised for first time in second appeal — Not allowed as it depended on evidence. AIR 1941 Pat 11 (13).

(15) Whether jote lands purchased by proprietor become his khas lands under S. 22, Bengal Tenancy Act, is question of fact. AIR 1939 Cal 593 (594) (DB).

(16) Whether a new tenancy has been created can never be said to be a pure question of law; it is a question of mixed fact and law and a question which certainly depends upon a number of facts. AIR 1936 Pat 411 (412).

(17) Tenant acquiring landlord's interest — Question whether raiyati interest subsists after purchase is mixed question of law and fact. AIR 1963 SC 605 (610): (1963) Supp 1 SCR 13.

(18) Question of fact — Question whether land is sir and khudkhast is question of fact — Such question cannot be assailed in second appeal. 1966 All LJ 1027:

Sections 100-101 — Note 29 (contd.)
1966 All WR (HC) 495 ° 1966 All WR (HC) 518.

(19) Conversion by tenant of verandah into a room is a breach of clause (m) of S. 108 of T. P. Act and is a question of law. AIR 1962 Cal 78 (82): 65 Cal WN 626 (DB).

(20) Landlord and tenant — Holding over — Damages — Lease for ten years — Lessee holding over — Lower Courts granting compensation to lessor by way of rent for period of holding over — No circumstances to show that rent would have appreciated considerably after expiry of ten years — High Court will not interfere. (1964) 1 Mad LJ 110.

(21) Service tenure — Question whether holder of tenure refused to perform the services is one of fact — Cannot be assailed in second appeal. 1962 BLJR 698.

**30. Nature of possession.** — (1) A question as to the factum of possession or dispossession is a question of fact. AIR 1954 All 493 (495): ILR (1955) 1 All 113 (FB) * AIR 1952 Pat 341 (349): 31 Pat 446 (SB) * AIR 1958 Pat 530 (534) * AIR 1958 Punj 333 (334): ILR (1957) Punj 1997 (DB). (Finding as to occupation of land.) * 1957 All WR (HC) 567 (568) ° AIR 1956 All 207 (209) ° AIR 1956 Pat 345 (347) (DB) * (1955) 34 Pat 235 (239, 240) (DB) ° 1955 BLJR 20 (23) * 1954 All L Jour 693 (695) * (1954) 7 Sau LR 137 (139) * (1954) 7 Sau LR 70 (75) * ILR (1953) 3 Raj 585 (590) * AIR 1951 Bom 22 (24): ILR 1951 Bom 169 (DB) * AIR 1950 Mad 39 (39) * ('50) 1950 All L Jour 44 (45) * (1967) 33 Cut LT 601: ILR (1967) Cut 163 ° (1965) 6 Guj LR 529: ILR (1965) Guj 691. (Suit to establish ownership of Government land by adverse possession — Questions whether there is evidence of possession as distinguished from that mere user and whether mere user amounts to adverse possession are questions of law.) * (1965) 31 Cut LT 288. (Concurrent finding of both Courts — No interference in second appeal except on sufficient reason.) * AIR 1965 Punj 415 (420): ILR (1965) 2 Punj 97 (FB) ° (1964) 30 Cut LT 325: ILR (1964) Cut 132 * ILR (1964) Cut 111 * 1963 BLJR 90. (Question of possession arrived at after full consideration of all relevant materials on record is a finding of fact when binding in second appeal.) ° 1960 All LJ 145: 1960 All WR (HC) 98 * AIR 1960 Mys 87 (90): 37 Mys LJ 905 (DB) ° AIR 1959 Raj 146 (147): 1959 Raj LW 175.

[See also AIR 1926 All 465 (466).]

(2) The question whether possession is adverse or not though often one of fact, may also be a question of law or a mixed question of law and fact when it depends upon the proper legal conclusion to be drawn from the findings as to facts. 1956 Madh BLJ 43 (46) ° AIR 1958 Punj 335 (337): ILR (1957) Punj 1739 (DB) * 1953-2 Mad L Jour 241 (241) ° AIR 1949 Bom 137 (138): ILR (1949) Bom 135 (FB) ° AIR 1949 Nag 300 (302, 303): ILR (1949) Nag 224 (DB) * AIR 1947 Pat 99 (104): 25 Pat 412 (DB) ° (1892) 19 Cal 253 (262, 263): 19 Ind App 48 (PC) ° AIR 1968 Tripura 5 (10) * AIR 1969 Ker 222 (225): 1969 Ker LT 121 ° 1967 Raj LW 135 ° AIR 1965 Orissa 96 (98): 31 Cut LT 272 (DB) * AIR 1964 Pat 510 (514). (Decision of appellate Court that defendant's possession was adverse — Decision is an inference from facts in the Courts below — The correctness of the decision, as a legal conclusion to be drawn or not, is a question open to second appeal.) ° AIR 1964 Punj 187 (190, 191): 66 Pun LR 141 (DB) * 1963 BLJR 339. (Trial Court rejecting defendant's plea of adverse possession — First appellate Court reversing that finding without going into entire material on record and without any discussion on the matter — Finding of first appellate Court held perverse and not maintainable in law.) * AIR 1962 Andh Pra 518 (519): (1962) 1 Andh LT 494 ° 1960 All LJ 126: 1960 All WR (HC) 113. (Finding of fact — Interference — Finding that defendant acquired title by adverse possession — No evidence — Plea not set up — No issue framed — Second appellate Court has power to interfere.)

(3) Where both the facts and the legal inference to be drawn therefrom are in dispute, the question will be one of mixed law and fact. AIR 1951 Madh B 80 (80) ° AIR 1942 Pat 341 (342, 343): 21 Pat 441.

[See also 1944 All L Jour 344 (346) (DB).]

(4) Where the question of adverse possession is a matter of evidence merely, it is one of fact. AIR 1954 Mad 772 (779): ILR (1954) Mad 980 (DB) * AIR 1958 Pat 530 (534) ° AIR 1952 J and K 24 (25): 10 J & K LR 186 (DB) * AIR 1945 All 394 (394) * AIR 1942 All 221 (222): ILR (1942) All 667 (FB).

[See also AIR 1944 PC 24 (26): ILR (1944) Kar (PC) 170 ° AIR 1943 Pesh 37 (40).]

(5) Where the facts are not in dispute the legal inference to be drawn from them is a question of law, which is open to examination in second appeal. AIR 1958 Madh Pra 200 (201) (FB) ° 1953-2 Mad L Jour 241 (241) * AIR 1947 Pat 99 (104): 25 Pat 412 (DB) ° AIR 1942 Mad 725 (725) ° AIR 1942 Nag 75 (78): ILR (1942) Nag 781 (DB) * AIR 1919 PC 60 (61): 42 All 152: 46 Ind App 197 ° AIR 1922 Cal 54 (55) (DB).

[See also AIR 1939 Nag 260 (261).]

(6) Even where the question is one of legal inference from the facts found, the High Court will not interfere unless such inference is obviously wrong or unless the finding could not be legally arrived at upon the evidence. (1895) 21 Bom 91 (96) (DB) ° (1911) 33 All 757 (763) (FB).

**Sections 100-101 — Note 30 (contd.)**

(7) A finding on the question whether a person in possession is an ostensible owner or as to who is the true owner, is a finding of fact. AIR 1914 All 232 (234): 36 All 808 (312) (DB) * 1957 All L Jour 435 (435) * AIR 1921 Lah 117 (118) (DB).

(8) That the person was or was not a tenant of the premises or was a licensee, is a finding of fact. AIR 1963 SC 361 (364): (1963) 2 SCR 693. (Landlord and tenant — Ejectment suit — Status of defendant as tenant denied by plaintiff — Finding as to status of defendant is finding of fact and cannot be set aside in second appeal.) ° AIR 1958 Cal 179 (180) ° AIR 1957 Tripura 8 (9). (Licensee.) * 1957 All L Jour 486 (487) ° 1957 All L Jour 435 (435).

**31. Nature of property.** — (1) The question as to the nature of a particular property is one of fact unless it involves a consideration of legal principles, in which case it will be a question of mixed law and fact. Thus, the question whether a particular property is ancestral property or self-acquired property or a grove or a "parjaut" land or forms part of an estate or is an unenfranchised service inam, or is a separate subdivision or was thrown into partnership assets or is joint family property or is moveable property, is a pure question of fact. AIR 1958 Pat 115 (116). (Finding that certain property was not a separately acquired property of the coparcener.) ° AIR 1951 Punj 358 (358, 359): ILR (1950) Punj 313. (Whether property is ancestral or self-acquired.) * AIR 1921 Lah 138 (138). (Do.) ° AIR 1934 Lah 351 (352): 15 Lah 791 (DB). (Do.) ° AIR 1931 Cal 666 (667) (DB). (Do.) ° ILR (1955) Mys 320 (323). (Do.) * ILR (1954) Madh B 123 (125). (Do.) ° AIR 1924 Oudh 306 (306): 27 Oudh Cas 26. (Whether grove.) ° AIR 1926 All 83 (84) (DB). (Whether parjaut land.) * AIR 1924 Mad 117 (118) (DB). (Whether part of estate.) ° AIR 1927 Cal 457 (458). (Do.) ° (1954) 20 Cut LT 591 (593). (Whether enfranchised service inam.) * AIR 1934 Lah 424 (425). (Whether separate sub-division.) ° AIR 1951 Simla (Punj) 182 (182). (Whether village comprises recognised sub-division.) ° AIR 1928 PC 135 (137). (Whether partnership assets.) * AIR 1940 Lah 205 (208). (Do.) ° AIR 1953 All 541 (542). (Whether joint family property.) ° AIR 1952 Ajmer 52 (52). (Do.) ° AIR 1934 Oudh 177 (177) (DB). (Do.) * AIR 1952 Sau 107 (108). (Whether movable property.) ° AIR 1922 All 45 (45) (DB) ° AIR 1963 Pat 384 (386): ILR 44 Pat 391 (DB). (Finding that certain property did not upon partition fall to the share of A, based upon proper consideration of evidence.) * AIR 1959 Bom 491 (493): 59 Bom LR 1144. (Finding that suit property belonged to a Math which was a public institution and was trust property is a finding of fact.)

[See AIR 1938 Pat 372 (374) (DB).]

[See however AIR 1950 East Punj 179 (180) (DB).]

(2) A finding that the property was mortgaged is one of fact. AIR 1958 Raj 269 (272): ILR (1958) 8 Raj 233.

(3) The question whether a property is a "talukdari property" or a "sulka stridhana" or has ceased to be part of a mahal or is saleable or transferable, or has become parti, has been held to involve questions of law. AIR 1914 Oudh 206 (207) (DB). (Whether taluqdari property.) ° AIR 1929 All 25 (27) (DB). (Whether sulka.) ° AIR 1914 All 517 (517): 36 All 231 (DB). (Whether ceased to be part of mahal.) * AIR 1925 All 652 (652): 47 All 900 (DB). (Whether saleable.) ° AIR 1928 All 721 (724): 50 All 894 (DB). (Transferability.) ° 1950 All WR 16 (17). (Whether land has become parti.)

(4) The question whether a property has been dedicated to a religious or charitable purpose is a question of fact. AIR 1927 All 377 (377) * AIR 1957 Andh Pra 824 (826, 827) (DB) ° (1911) 9 Ind Cas 650 (650) (Cal) ° AIR 1921 Lah 343 (343) (DB) * (1892) 33 Pun LR 288 (289) ° AIR 1933 Lah 342 (342) ° AIR 1931 Lah 170 (172) (DB).

(5) The question whether a property has been dedicated to religious or charitable purpose is one of law or at any rate a mixed question of law and fact. (1912) 16 Oudh Cas 76 (77) (DB) ° AIR 1938 Oudh 238 (240) (DB) ° AIR 1936 Oudh 154 (155) (DB) * AIR 1946 Mad 209 (212): ILR (1946) Mad 707. (It is not pure question of law.)

[See also AIR 1937 Sind 230 (231): 31 Sind LR 510 (DB).]

(6) The question whether a particular property is wakf property or not is a question of law where it involves a question of legal inference to be drawn from proved facts. 1956 Andhra WR 922 (925) (DB).

[But see AIR 1957 Andh Pra 941 (943) (DB) ° AIR 1957 Andh Pra 824 (826, 828). (Question whether temple is dedicated to public or not is one of fact.)]

(7) The question as to the scope of the dedication is a mixed question of law and fact, the decision of which must depend on the application of legal concepts of a public and private endowment to the facts found. AIR 1957 SC 133 (136): 1956 SCR 756: ILR (1957) 1 All 171.

(8) A finding as to ownership is a finding of fact. AIR 1955 Bhopal 7 (8) ° 1955 Andh WR 617 (619) * AIR 1953 All 251 (253) ° AIR 1951 All 634 (634) ° AIR 1947 Bom 394 (395) * AIR 1923 Lah 611 (612) ° (1928) 113 Ind Cas 886 (887) (Nag) * (1965) 1 Andh WR 361. (Whether bed of natural stream belongs to Government.)

(9) Where the finding as to ownership depends upon legal presumptions, it will be a mixed question of law and fact. AIR 1914 Cal 811 (811) (DB).

(10) Whether a wall erected by a coowner on top of a joint wall is joint or

**Sections 100-101 — Note 31 (contd.)**

not is a question of law. AIR 1939 Lah 28 (29).

(11) Question whether land is private land or ryoti under Madras Estates Land Act is essentially one of fact unless it involves applicability of correct test. AIR 1952 Mad 323 (328): ILR (1952) Mad 741 (FB).

(12) Question whether property was damaged after the decree for possession is essentially one of fact. AIR 1955 All 223 (225) (DB).

(13) Whether the railway which carries the city's refuse is the property of the Corporation or is an independent organisation is a question of fact. AIR 1955 Cal 307 (309) (DB).

(14) Finding on question whether land in suit was proprietor's private land or settled with respondent for cultivation is one of fact. AIR 1955 Pat 393 (396): 34 Pat 524 (DB).

(15) Finding that a particular plot is still a tank is finding of fact. 1955 All L Jour 585 (586).

(16) Finding that certain accretion to land was gradual and not a reformation in situ — Finding is one of fact — No interference in second appeal. AIR 1964 Pat 348 (350, 351): 1964 BLJR 19 (DB).

(17) Question whether structure is permanent or not within S. 108 (p) T. P. Act is mixed question of law and fact. AIR 1965 Cal 408 (411).

32. **Nature of contract or transaction.**—(1) Whether a contract can be implied from certain facts may be a question of fact or of law according to circumstances. If it is based on offer and acceptance, for instance, it is a question of fact. If it is a matter of inference of law to be drawn from proved facts or documents, it will be a question of law. (1911) 9 Ind Cas 41 (44) (DB) (Mad) ° AIR 1936 Rang 383 (385).

(2) The question whether certain representations made amount to a warranty, is a question of law. (1912) 14 Ind Cas 135 (135) (DB) (All).

(3) If the presumption to be drawn for or against the contract being implied is one depending upon the circumstances of the case, the lower Court's decision drawing or refusing to draw the presumption will be no error of law. (1894) 17 Mad 43 (47) (DB).

(4) The following findings with reference to contracts generally are findings of fact:

(i) A finding as to whether a contract has been superseded or not. 1886 All WN 18 (19) (DB).

(ii) A finding as to the legal origin of a presumed contract. AIR 1930 Mad 339 (340).

(iii) A finding as to whether time was of the essence of a contract. AIR 1949 Cal 661 (663) ° AIR 1915 Mad 546 (547) (DB) * AIR 1931 Lah 696 (701) (DB).

[See also AIR 1947 Lah 352 (353).]

[But see AIR 1963 Pat 254 (259) (DB).]

(iv) A finding as to whether a contract is hard and unconscionable or not binding. AIR 1918 Lah 264 (265) ° AIR 1929 Mad 673 (673).

(v) A finding as to who committed breach of a contract. ILR (1952) 2 Raj 1 (2) ° AIR 1921 Lah 316 (317) (DB) * AIR 1935 Nag 111 (112): 31 Nag LR 250.

(vi) A finding as to the damaged condition of goods in a contract for sale of goods. AIR 1924 Pat 240 (241) (DB).

(vii) A finding as to whether a tender was or was not within time. AIR 1925 All 353 (354).

(viii) A finding as to whether certain money was received as a deposit or by way of loan. AIR 1934 Nag 219 (220).

(ix) A finding as to the consideration for the contract being the love and affection between the parties. AIR 1934 Pat 44 (45) ° AIR 1964 Raj 72 (74): 1963 Raj LW 351.

(x) Finding as to adequacy of consideration. AIR 1950 Pat 478 (480) (DB) ° 1958 Ker LJ 396 (402) * AIR 1949 Nag 389 (390): ILR (1949) Nag 849 (DB).

(xi) Question whether a party to contract is ready and willing to perform his part of the contract is a question of fact. AIR 1968 Andh Pra 190 (193).

(5) The question whether an agreement is in restraint of trade within the meaning of Section 27 of the Contract Act, is one of law. AIR 1934 Lah 110 (111).

(6) See also the following cases for further illustrations: AIR 1950 PC 28 (29). (Finding that transaction was benami is one of fact.) ° AIR 1957 Assam 188 (190, 191) (DB) * AIR 1957 Mad 715 (716): ILR (1957) Mad 987 (DB). (That the payment of a certain sum was simultaneous with the execution of the promissory note, that there was no advance prior to the execution of the promissory note and that the promissory note had been materially altered by the plaintiff creditor are findings of fact.) ° (1955) 21 Cut L Tim 364 (368). (Whether certain transaction is benami is mixed question of law and fact.) ° AIR 1956 Madh B 25 (27): ILR (1956) Madh B 13 (DB). (Question whether the parties intended to substitute a new contract for the old one is a question of fact in each case depending for its decision on the circumstances of the case.) * AIR 1956 Pat 53 (54). (A finding that there was no benefit to the minor by the transaction of a sale is a finding on a question of fact.) ° AIR 1955 Cal 21 (22) (DB). (Finding as to genuineness of agreement is one of fact.) ° AIR 1954 Raj 49 (50): ILR (1952) 2 Raj 525. (Do.) * AIR 1942 Pat 406 (406): 21 Pat 300 (DB). (Do.)

**Sections 100-101 — Note 32 (contd.)**
° AIR 1954 Assam 95 (96). (Question whether contract is void on ground of perpetuity depending on construction of document of title — Question is one of law.) ° AIR 1953 Bilaspur 1 (3). (Deed — Construction — Whether transaction amounts to sale or merely creates occupancy rights is a question of law.) * AIR 1952 Ajmer 43 (1) (43). (Finding that one of two transactions was benami and the other fraudulent, is one of fact.) ° AIR 1952 Ajmer 25 (2) (25). (Existence of certain agreement between parties — Finding on, is one of fact — Appreciation of evidentiary value of certain documents relating to agreement is also question of fact and not of law.) ° AIR 1952 J and K 29 (30): 11 J and K LR 75. (Question whether transaction is sham is one of fact.) * AIR 1944 Mad 121 (122) (FB). (Do.) ° AIR 1952 Punj 181 (183). (Question whether transaction is mortgage by conditional sale or sale with a condition of repurchase can be gone into in second appeal.) ° AIR 1951 Pat 299 (303): 29 Pat 610 (DB). (Question whether there is a completed agreement between the parties is one of fact.) * AIR 1950 Pat 541 (542). (Finding that transaction was benami is one of fact.) ° (1936) 38 Pun LR 590 (592) (SB). (A conclusion of the lower Appellate Court that a certain contract was not acted upon by the parties is a finding of fact.) ° (1966) 2 Andh WR 46: ILR (1967) Andh Pra 968. (Findings that sale deed was not a nominal or sham document and was supported by consideration is a finding of fact.) * (1965) 31 Cut LT 499. (Question of benami is a question of fact and not a mixed question of law and fact.) ° AIR 1965 Pat 214 (216): 1965 BLJR 115. (Dispute whether particular contract is of hire purchase or of sale — Plea to determine nature of contract not taken in courts below could not be taken in appeal.) ° AIR 1964 Madh Pra 224 (225): 1964 MPLJ 326 (DB). (Registration of partnership firm — Inference about existence and genuineness of partnership — Is a mixed question of law and fact — It was held that there was no material, on which the finding that the firm was not genuine could be rested.) ° 1963 Ker LT 1105. (Question whether a particular transaction is kanam or kanam Kuzhikanam or whether a person is a tenant — Is a mixed question of fact and law.) ° AIR 1962 Pat 319 (322): 1962 BLJR 549 (DB). (Finding that a transaction of sale was not genuine is one of fact — Finding even if erroneous cannot be interfered with in second appeal.) ° AIR 1962 Pat 165 (168): 1961 BLJR 775. (Handnote amounting to promissory note — Lower Appellate Court holding that handnote was not genuine and that no consideration passed — Second appeal — Finding will not be disturbed.) * AIR 1959 Andh Pra 70 (74): (1959) 2 Andh WR 140 (DB). (Benami transaction — Purchase of property being benami is question of fact.) * AIR 1960 Pat 420 (421): 1960 BLJR 148 (DB). (Benami transaction — Question of benami is question of fact.) ° AIR 1960 Punj 575 (578) (DB). (Benami — Cannot be raised in second appeal.) ° (1959) 1 Orissa JD 377. (Benami — Concurrent findings of fact — In common parlance, it is often said that the question of benami is a question of fact — The fact, however, is that a question of benami is one of mixed law and fact, and accordingly a finding thereon is open to review.)

[See however AIR 1969 Orissa 67 (69): 35 Cut LT 98. (Plea of "benami" — It is mixed question of law and fact — Cannot be raised for first time in second appeal.)

**33. State of mind, acquiescence, good faith, consent, intention, negligence, wilful neglect, misconduct, reasonable care, reasonable and probable cause and waiver.** — (1) The state of mind of a person is a fact and a question relating thereto is a question of fact. AIR 1950 All 202 (204) * AIR 1944 Cal 4 (12) (DB) * AIR 1935 Cal 168 (174): 61 Cal 1005 (DB) * ILR (1967) 2 Punj 804 * 1967 Raj LW 413 * 1963 Cur LJ 65 (Punj). (Finding on question whether person executing will was of competent understanding when he executed the will — Finding is one of fact — High Court cannot interfere in second appeal.) * AIR 1960 Raj 219 (221): ILR (1960) 10 Raj 360 (DB).

(2) A finding as to the intention, or state of mind of a person, or his good or bad faith or a finding as to misrepresentation or the fraudulent nature of a transaction, or the position to dominate the will in case of undue influence, or a finding as to notice, or consent or knowledge or wilful default, is a finding of fact and will not be interfered with in second appeal unless the inferences are not warranted by the facts from which they are drawn. AIR 1958 Bom 426 (427): ILR (1958) Bom 372 (DB). (Bona fides.) * AIR 1958 Punj 190 (199, 200): ILR (1958) Punj 481 (DB). (Letters Patent Appeal — Finding of undue influence. AIR 1937 Oudh 254, Dissented from.) * AIR 1957 Andh Pra 1041 (1041). (Genuineness of lease.) * AIR 1957 Andh Pra 781 (784). (Misrepresentation.) * AIR 1957 Tripura 1 (4). (Fraud.) * 1957 All L Jour 435 (435). (Notice.) * ILR (1956) 1 Cal 150 (152). (Collusive transaction.) * AIR 1956 Madh B 25 (27): ILR (1956) Madh B 13 (DB). (Intention.) * AIR 1952 Pat 98 (98). (Do.) * AIR 1949 Cal 661 (663). (Do.) * AIR 1943 Mad 369 (370). (Do.) * AIR 1940 Oudh 324 (326): 15 Luck 586 (FB). (Do.) * AIR 1938 PC 34 (35): ILR (1938) Mad 551: 65 Ind App 93: 32 Sind LR 328. (Do.) * AIR 1936 Rang 256 (260): 14 Rang 242 (FB). (Do.) * (1955) 8 Sau LR 110 (116). (State of mind.) * ('44) AIR 1944 Nag

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232 (234): ILR (1944) Nag 698. (Do.) * AIR 1936 Lah 685 (687). (Do.) * AIR 1938 PC 91 (97). (Do.) * AIR 1952 Bom 106 (113): ILR (1952) Bom 226 (DB). (Good or bad faith.) * AIR 1948 Nag 367 (369): ILR (1948) Nag 506. (Do.) * AIR 1946 Sind 14 (15): ILR (1945) Kar 293 (DB). (Do.) * AIR 1916 Lah 232 (233): 1916 Pun Re No. 75 (DB). (Do.) * AIR 1934 Pat 121 (122) (DB). (Do.) * AIR 1921 Mad 198 (199) (DB). (Misrepresentation.) * AIR 1923 Cal 165 (165) (DB). (Do.) * AIR 1926 Mad 39 (39, 40). (Do.) * AIR 1935 Bom 326 (327): 59 Bom 502. (Do.) * 1956 Andhra WR 771 (772). (Fraudulent transaction.) * ILR (1955) Cut 163 (166). (Do.) * AIR 1952 Ajmer 43 (1) (43). (Do.) * AIR 1952 Mys 47 (51): ILR (1952) Mys 151 (DB). (Do.) * AIR 1919 PC 39 (41). (Do.) * AIR 1932 PC 89 (90): 59 Ind App 147: 7 Luck 64. (Do.) * AIR 1950 Nag 71 (75): ILR (1950) Nag 105. (Do.) * AIR 1955 Cal 21 (22) (DB). (Notice.) * 1956 Raj LW 238 (239). (Do.) * (1955) 59 Cal WN 430 (432). (Do.) * AIR 1952 Pat 434 (434). (Do.) * AIR 1950 Cal 467 (469): ILR (1951) 2 Cal 143 (DB). (Do.) * AIR 1932 All 540 (542): 54 All 557 (DB). (Do.) * 1955 Andh LT (Civil) 382 (384). (Consent or knowledge.) * (1955) 34 Pat 156 (160) (DB). (Do.) * AIR 1954 Orissa 219 (220): ILR (1954) Cut 256 (DB). (Do.) * 1955 AMLJ 101 (103). (Wilful default.) * AIR 1950 All 202 (204). (Inference not warranted by fact — Finding will be interfered with in second appeal.) * AIR 1933 Lah 458 (459). (Do.) * AIR 1938 Pat 147 (148). (Do.) * AIR 1968 Mad 256 (258): (1968) 1 Mad LJ 513. (Sale whether fraud on creditors — Normally a question of fact.) * (1967) 8 Guj LR 766 * AIR 1967 Guj 7 (11): (1965) 6 Guj LR 893. (Promissory note — Negotiability — Intention as to — Is a question of fact and cannot be revised in second appeal.) * AIR 1965 Mad 337 (338): 77 Mad LW 683. (The question whether an alienation was in fraud of creditors or not is a pure question of fact a finding upon which is conclusive in second appeal.) (1965) 67 Pun LR 1021. (Finding about 'due diligence' in Section 14, Limitation Act (1908), is finding of fact and cannot be interfered with in second appeal.) * AIR 1964 Pat 452 (457, 458) * 1963 Raj LW 90: ILR (1963) 13 Raj 458. (In a suit for eviction of a tenant on the ground of personal need of the landlord, the question whether the disputed premises are reasonably and bona fide required by the landlord, for his personal use is essentially one of fact.) * AIR 1961 Pat 76 (78). (Finding as to fraud.) * AIR 1961 Punj 299 (301). ('Bona fides' — Finding on question — High Court will not in second appeal review the evidence.) * AIR 1959 Ker 237 (239): 1958 Ker LT 1062 (DB). (The presence or absence of good faith and due diligence is a question of fact and to the extent it is not canvassed in the Court below it is not open to the party to raise it for the first time in appeal.)

[But see AIR 1938 Lah 704 (706). (Question whether party acted in good faith within the meaning of Section 14, Limitation Act, on facts found by lower Appellate Court is mixed question of law and fact.) * AIR 1937 Oudh 254 (255, 256) (DB). (Finding that bond was executed owing to undue influence is one of law being a legal inference from the facts of the case — Submitted not correct.)]

[See however AIR 1968 Mad 362 (365): (1968) 1 Mad LJ 1.]

(3) The question whether a transaction is collusive is one of fact. AIR 1945 Pesh 28 (28) * (1939) 41 Pun LR 462 (466) (DB) * AIR 1933 Cal 18 (22). (Finding that certain compromise decree was brought about collusively and fraudulently is question of fact — Not proper to set aside such finding in second appeal.)

(4) The question as to the existence of malice is one of fact. AIR 1953 All 302 (306) (DB) * AIR 1952 Sau 16 (17) * AIR 1952 Sau 9 (9) * AIR 1951 Raj 160 (160): ILR (1951) 1 Raj 78 * 1950 All L Jour 44 (46) * AIR 1947 Mad 236 (236) * AIR 1938 PC 91 (97) * AIR 1934 Lah 907 (908) * AIR 1960 Orissa 29 (33): 25 Cut LT 366.

[But see AIR 1939 Pat 13 (14).]

(5) The question whether the facts alleged are sufficient to constitute undue influence, duress or coercion is a question of law but the question whether the facts alleged existed is one of fact. AIR 1954 Mad 213 (214) * AIR 1959 Madh Pra 11 (12): 1958 MPLJ 648. (Ordinarily the finding of fact on the question of fraud would be concluded in second appeal, but where the lower Courts commit an error by excluding from consideration the circumstantial evidence altogether the High Court would be justified in interfering with the finding.)

[See also AIR 1953 Sau 53 (55).]

(6) Questions of waiver, acquiescence and estoppel are not questions of fact but inferences of law from facts proved and are, therefore, open to examination in second appeal. AIR 1955 Cal 594 (596) * (1951) 4 Sau LR 71 (72) * AIR 1949 Ajmer 2 (5) * AIR 1929 Cal 437 (439): 56 Cal 201 (DB) * (1899) 21 All 496 (504); 26 Ind App 58 (PC) * AIR 1925 Cal 288 (289) * AIR 1926 Nag 416 (422) * AIR 1917 Mad 47 (49) * (1913) 37 Bom 480 (483) (DB) * (1903) 27 Bom 1 (13) (FB) * (1966) 70 Cal WN 135. (Question of fact and question of law — Question of consent is not always a question of fact — It becomes a question of law when it is to be inferred from facts.) * AIR 1965 Pat 489 (490): 1965 BLJR 420 (DB). (Question as to whether the other co-sharers had given any consent or not

**Sections 100-101 — Note 33 (contd.)**
was a mixed question of law and fact which could not be considered in second appeal.)

[See also Madh BLJ 1955 HCR 522 (528).]

[But see AIR 1936 Lah 159 (161) (DB) * AIR 1958 Mys 10 (11): ILR (1957) Mys 72 (DB). (Waiver is a question of fact.) * AIR 1919 Oudh 384 (385) * AIR 1915 All 255 (256): 37 All 350 (DB).]

(7) The question of negligence is a question of fact. AIR 1945 PC 168 (169): 72 Ind App 206: ILR (1946) Mad 73: ILR (1945) Kar (PC) 310 * AIR 1953 Mad 726 (726) * AIR 1920 PC 88 (90) * AIR 1933 All 214 (215) * AIR 1927 Mad 443 (444) (DB) * AIR 1924 Lah 594 (594) * AIR 1936 Pat 84 (85) * AIR 1967 Mad 318 (322): (1966) 2 Mad LJ 226 * (1966) Cur LJ 817: 31 FJR 131 * AIR 1961 Pat 301 (301): 1961 BLJR 132 (DB). (Suit against Railway — Finding as to defective packing of goods or as to negligence or misconduct by Railway administration — Finding is one of fact — No interference in second appeal.)

[See AIR 1943 Nag 252 (253): ILR (1943) Nag 577 * AIR 1936 All 771 (775): 58 All 771 (DB).]

[See also AIR 1933 All 158 (159) (DB).]

(8) Whether an inference as to the negligence is warranted by the facts is a question of law. AIR 1949 Pat 110 (111) (DB) * AIR 1932 All 139 (139) (DB) * AIR 1937 Mad 472 (474) * AIR 1969 Mys 8 (10): (1968) 2 Mys LJ 42 * AIR 1963 Pat 316 (317). (Finding on negligence arrived at without considering all materials on record — Not binding and conclusive in second appeal.)

[See AIR 1935 Mad 81 (86) (DB).]

(9) Where there is a special legal significance attached by statute to the word "negligence" the question whether there has been such negligence is a question of law. AIR 1921 All 314 (316): 43 All 29 (DB) * AIR 1924 All 613 (613) (DB) * AIR 1928 Lah 774 (775): 10 Lah 360 (DB) * AIR 1928 Lah 837 (838): 10 Lah 329 (DB).

(10) The legal standard of reasonable care required by Section 151 of the Contract Act, or by Section 41 of the Transfer of Property Act, is a question of law. AIR 1924 Cal 92 (95) (DB). (Section 151, Contract Act.) * AIR 1952 Nag 106 (109): ILR (1953) Nag 684. (Section 41, T. P. Act.) * AIR 1949 Cal 666 (673) (DB). (Do.) * AIR 1948 Mad 320 (322) (DB). (Do.) * AIR 1927 All 158 (159) (DB). (Do.) — (Mixed question of law and fact.)

[But see AIR 1940 Pat 480 (481) (DB) * AIR 1927 Nag 41 (42). (Section 41, T. P. Act.)]

(11) The question of laches is a mixed question of law and fact as the inference of laches based upon findings of fact is an inference of law. AIR 1956 Pat 53 (54).

(12) The question whether the process-server had affixed the summons after using all due and reasonable diligence to find the party to be served is one of fact. AIR 1952 Pat 65 (65, 66) (DB).

(13) Whether misconduct can be inferred from a set of facts is a question of law. AIR 1956 Pat 68 (69) * AIR 1955 Madh B 70 (74) (DB).

[See also AIR 1952 Pat 435 (437) (DB).]

(14) The question of the existence or otherwise of reasonable and probable cause for the doing of a thing is a question of fact. AIR 1956 Andhra 174 (176) * AIR 1955 Mad 562 (567) * AIR 1953 Madh B 269 (270) * AIR 1952 Sau 16 (17) * AIR 1952 Sau 9 (9) * AIR 1951 Raj 160 (160): ILR (1951) 1 Raj 78 * (1901) 25 Bom 332 (336) (PC) * AIR 1935 Bom 355 (356) * AIR 1933 Lah 263 (264): 14 Lah 46. (It is a question of fact.) * AIR 1939 All 554 (557): ILR (1939) All 424 (DB) * AIR 1959 Pat 490 (497). (Bona fide belief of existence of cause of action.) * AIR 1959 Raj 37 (40): 1958 Raj LW 434. (The question of want of reasonable and probable cause in a suit for malicious prosecution is not altogether a question of fact.)

[See also AIR 1946 All 204 (210): ILR (1945) All 685 (DB).]

[But see AIR 1916 Pat 174 (175): 1 Pat L Jour 149 * AIR 1932 Pat 91 (92): 10 Pat 842 * AIR 1939 Pat 13 (14) * AIR 1932 Lah 183 (185) * AIR 1935 Lah 765 (767): 17 Lah 190 (DB).]

(15) The question whether the proved facts warrant the inference of a reasonable and probable cause is one of law. AIR 1942 Lah 94 (95) * AIR 1940 Oudh 320 (322): 15 Luck 404 * (1901) 24 Mad 549 (552, 553) (DB) * (1901) 28 Cal 591 (593) (DB) * AIR 1930 Cal 392 (396): 57 Cal 25 * AIR 1933 Nag 23 (26): 28 Nag LR 312 * AIR 1932 All 386 (389) (DB) * AIR 1939 Mad 783 (786).

[See also 1946 Jaipur LR 416 (417) (DB) * AIR 1944 Cal 4 (11) (DB) * AIR 1932 Mad 601 (603).]

[But see AIR 1947 Mad 236 (236). (AIR 1939 Mad 783, Not foll.)]

(16) Whether the plaintiff is entitled to the deduction of period during which the suit remained pending in the trial Court depends on the question whether the suit was prosecuted in good faith which is a question of fact and if the lower appellate Court decided it in favour of the plaintiff after adverting to the evidence bearing on it the question cannot be allowed to be raised in second appeal. AIR 1959 Cal 78 (81): 1958 Cal LJ 199 (DB).

(17) Whether there was due diligence is a question of fact. AIR 1950 Nag 37 (38): 51 Cri LJ 427: 1950 Nag LJ 384.

**Sections 100-101 — Note 33 (contd.)**

(18) Forgery, finding as to — Finding of lower appellate Court that the cheque was forged based upon expert and other evidence is not open to challenge in second appeal. AIR 1961 Punj 571 (572).

**34. Existence of liability.** — (1) Questions relating to the existence of liability depend upon principles which are generally principles of law. Consequently, such questions involve questions of law. (1906) 33 Cal 1047 (1061): 33 Ind App 165: 2 Nag LR 130 (PC) * AIR 1928 Cal 123 (124) (DB) * AIR 1930 Cal 815 (816): 58 Cal 585 (DB).

**35. Existence of custom.** —See Note 15.

**36. Status.** — (1) Where the question of status depends upon certain legal conditions being made out, it is a question of law. AIR 1952 Punj 284 (286) (DB) * AIR 1951 Pat 190 (194) (DB) * AIR 1951 Raj 136 (137) (DB) * AIR 1925 Cal 1238 (1239) (DB) * AIR 1927 Pat 209 (212): 6 Pat 698 (FB) * (1911) 38 Cal 278 (281) (DB) * AIR 1925 Mad 768 (768, 769).

(2) Where the question of status does not depend upon any legal condition being made out, it is a question of fact. AIR 1952 SC 29 (37): 1952 SCR 241 * AIR 1958 Ker 178 (181): ILR (1958) Ker 389 (FB). (Status as members of tarwad.) * AIR 1952 Pat 341 (349): 31 Pat 446 (SB) * AIR 1957 Andh Pra 604 (606) * AIR 1957 Madh Pra 238 (239) * AIR 1957 Pat 70 (72). (Whether person is Hinduised.) * (1958) 60 Pun LR 132 (132) (DB). (Finding that a person has been appointed heir by another.) * AIR 1956 Hyd 131 (132): ILR (1956) 1 Hyd 477 (DB) * AIR 1956 Sau 110 (111) * AIR 1955 Andhra 209 (211) * ILR (1955) Mys 241 (243) * ILR (1955) Punj 553 (560) (DB) * 8 Sau LR 240 (241) * AIR 1954 Bhopal 3 (4) * AIR 1954 Mad 218 (220) * ILR (1954) Madh B 155 (158) * (1955) 8 Sau LR 146 (149) * AIR 1953 Nag 19 (19) * AIR 1951 Raj 136 (137) (DB) * 1951 Raj LW 160 (163) * AIR 1953 Madh B 242 (242) * AIR 1953 Pat 316 (316) * 1953 BLJR 447 (449) * ILR (1954) Cut 140 (143) * AIR 1952 All 191 (192) * AIR 1952 All 427 (427) * AIR 1952 Bom 327 (340): ILR (1952) Bom 795 * AIR 1952 Cal 253 (254): ILR (1951) 2 Cal 263 * 1951 Raj LW 123 (124) * AIR 1940 Pat 310 (310): 19 Pat 382 (DB) * AIR 1925 PC 49 (50, 51): 52 Ind App 83: 48 Mad 254 * AIR 1936 Pat 129 (129) (DB) * AIR 1935 Bom 333 (336) * AIR 1938 Cal 724 (728) (DB).

[But see AIR 1934 Nag 13 (14).]

(3) Where the principles of law applicable to the question of status have been misconceived, or where there has been a misapprehension of the evidence, or an entire misconception of the real question that has to be tried, there will be an error of law. AIR 1926 Nag 389 (390): 24 Nag LR 68. (Principles of law misconceived.) * AIR 1957 Tripura 8 (9). (Whether person is permanent licensee.) * AIR 1934 Nag 44 (45). (Misapprehension of evidence.) * AIR 1934 Pat 48 (49) (DB). (Do.) * AIR 1925 Nag 284 (287). (Misconception of question.)

(4) The question whether a certain woman is a 'public prostitute' within the meaning of a particular enactment (e.g., Section 152 (2) of the Punjab Municipal Act), is a question of law. AIR 1926 Lah 461 (462) * AIR 1930 Lah 824 (825) (DB).

**37. Merger.** — (1) The question as to whether there has been a merger of interest or not is a mixed question of law and fact. AIR 1927 Cal 136 (139) (DB) * AIR 1918 Pat 651 (652) (DB).

[See (1935) 39 Cal WN 694 (696).]

[See also AIR 1942 Mad 716 (717).]

**38. Limitation.** — (1) Questions of limitation are ordinarily mixed questions of law and fact. AIR 1956 Assam 85 (95): ILR (1956) 8 Assam 51 (DB) * AIR 1927 Cal 30 (31) (DB) * AIR 1939 Rang 42 (44) (DB).

[See AIR 1935 All 716 (717).]

(2) The question whether the facts proved come within any provision of the Limitation Act is a mixed question of law and fact. AIR 1927 Pat 256 (256) (DB).

(3) The following questions are questions of fact:

(i) Whether a plaintiff filed a prior suit in a wrong Court in good faith and conducted it diligently so as to secure exclusion of time under Section 14 of the Limitation Act. AIR 1950 Nag 37 (38): ILR (1949) Nag 743 * AIR 1946 Oudh 116 (117, 118): 21 Luck 350 * AIR 1927 Lah 909 (910).

(ii) Whether a person had attained majority at any particular time. (1908) 31 Mad 540 (543) (DB) * (1907) 29 All 29 (32): 34 Ind App 1 (PC).

(iii) The time requisite for obtaining copies which has to be deducted in calculating the time for preferring an appeal. AIR 1918 Lah 29 (29, 30): 1918 Pun Re No. 100 * AIR 1922 Lah 423 (423).

(iv) Whether there is sufficient cause for extending time under S. 5 of the Limitation Act. (1955) 8 Sau LR 399 (400) * AIR 1931 All 28 (28) (DB) * (1930) 123 Ind Cas 83 (83) (Lah).

[See AIR 1930 Lah 1068 (1070) * AIR 1930 Oudh 184 (184).]

(v) Whether the legal representatives of a deceased party were joined within time. AIR 1953 Assam 206 (206): ILR (1952) 4 Assam 357 (DB).

(iv) Whether there were acknowledgments other than the one produced

**Sections 100-101 — Note 38 (contd.)**

in suit. ILR (1955) 5 Raj 793 (806).

(4) Whether a certain payment and an endorsement amount to an acknowledgment within Section 19, Limitation Act, is a question of law. AIR 1957 Andh Pra 445 (447).

(5) Erroneous finding as to sufficiency of cause for delay in filing appeal after accepting facts alleged — It is an error of law which could be corrected in second appeal. AIR 1969 All 210 (213).

**39. Existence of legal necessity for, and binding nature of transaction.** — (1) The question of legal necessity for an alienation is ordinarily a question of fact. AIR 1956 Bhopal 66 (69) * 1958 Ker LJ 396 (402) * AIR 1954 Bom 311 (312): ILR (1954) Bom 586 * ILR (1954) Cut 140 (143) * ILR (1953) Punj 333 (336) (DB) * AIR 1950 Mad 560 (561) * (1948) 53 Mys HCR 59 (61) (DB) * ('48) AIR 1948 Nag 170 (172) * AIR 1943 All 63 (64): ILR (1943) All 171 (DB) * AIR 1943 Cal 203 (204) (DB) * AIR 1936 Pat 275 (278) (DB) * ILR (1964) Cut 298. (Question whether sale was for legal necessity or not — Question is pure question of fact which has to be determined on basis of evidence on record.) * AIR 1959 Pat 557 (559): 1959 Pat LR 152. (Overruled on another point in AIR 1963 Pat 277 and AIR 1962 Pat 436.) * AIR 1961 Pat 416 (418): 1961 BLJR 137. (Finding by lower appellate Court that deeds of agreement were neither for legal necessity nor for benefit of estate — Findings based on proper consideration of evidence cannot be reversed.) * AIR 1960 Mys 260 (261): 38 Mys LJ 476.

[See AIR 1936 Pat 426 (428).]

[See also AIR 1950 Cal 368 (369) (DB).]

(2) When the application of any principle of law is in question, the question of legal necessity for an alienation will be a question of law. AIR 1949 Oudh 87 (87) * AIR 1925 Oudh 557 (557): 27 Oudh Cas 329 * AIR 1927 Lah 896 (897) * AIR 1936 Pat 275 (279, 280) (DB).

(3) The propriety of the inference drawn from facts is always a question of law and can be examined in second appeal. AIR 1926 Nag 332 (333).

(4) The question whether a guardian was justified in entering into a compromise on behalf of a minor is one of fact. AIR 1925 Mad 1285 (1287) (DB).

(5) The question of the sufficiency of notice in connexion with an objection that an award is not binding is question of fact. AIR 1927 Cal 619 (621) (DB).

(6) The question whether a family arrangement, or an alienation by the guardian is binding on a minor, is a question of fact. AIR 1921 Lah 291 (291) (DB). (Family arrangements.) * AIR 1951 Simla (Punj) 297 (300). (Alienation by a guardian.)

[See AIR 1934 Lah 329 (330). (Whether guardian is justified in alienating minor's property for necessity is mixed question of law and fact.) * AIR 1941 Oudh 226 (228) (DB). (Do.) * (1906) 34 Cal 36 (38) (DB). (Do.)]

(7) The existence of an antecedent debt is also a question of fact. AIR 1926 Oudh 33 (33, 34).

(8) A finding that an elder brother had no authority to bind his younger brother with a promise to pay a barred debt is one of fact. AIR 1943 All 63 (64): ILR (1943) All 171 (DB).

(9) Son incurring debt — Father alive — Son, if had power to bind entire joint family — Question is one of fact. AIR 1950 Cal 368 (369) (DB).

**40. Existence of nuisance.** — (1) The following are the findings of fact:

(i) A finding that no nuisance has been proved. AIR 1925 Lah 424 (424).

(ii) A finding that a public lane has not been narrowed so as to cause damage to the residents in the lane. AIR 1929 All 504 (505).

(iii) A finding that a latrine is not likely to cause pollution to the water of a well. AIR 1926 Nag 50 (50).

(iv) A finding that a latrine would constitute a nuisance. AIR 1941 Mad 650 (650).

(v) A finding that water flowing through a municipal drain into the plaintiff's lake is polluted and would cause injury to crops and fish. AIR 1941 All 78 (79): ILR (1941) All 141 (DB).

(vi) Whether a certain act is a public nuisance or not is a question of fact which ought to be pleaded at the earliest opportunity and cannot be allowed to be raised as a question of law at the stage of the second appeal. AIR 1962 Mad 431 (432): (1962) 2 Mad LJ 201.

(2) A question whether certain proved facts establish a nuisance is a question of law. AIR 1943 Lah 306 (307).

**41. Interpretation and applicability of the law.** — (1) The following are questions of law.

(i) Whether correct tests have been applied in determining the infringement of legal rights. AIR 1914 PC 45 (47): 42 Cal 46: 41 Ind App 180.

(ii) Whether on the facts proved a relief prayed for should be granted. (1913) 35 All 487 (498): 40 Ind App 182 (PC).

(iii) Whether in the circumstances of a case an appeal lies. AIR 1914 Cal 592 (594) (DB).

(iv) What constitutes exclusion from a joint estate. AIR 1917 PC 77 (77).

(v) Whether an estoppel arises on the facts found. AIR 1949 Nag 300 (301): ILR (1949) Nag 224 (DB).

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(vi) Whether the requisites for res judicata are proved. AIR 1933 Lah 606 (609).

(vii) Whether on the facts proved a person can be called a "trespasser." AIR 1916 Pat 381 (382): 1 Pat L Jour 47.

(viii) Whether the occasion on which a libellous statement is alleged to have been made was a privileged one. AIR 1939 Pat 190 (193) (DB).

(ix) Whether a particular section of an Act applies or not to the facts proved in a case. AIR 1951 SC 16 (20): 1950 SCR 852 * AIR 1952 Nag 106 (108): ILR (1953) Nag 684 * AIR 1942 Oudh 499 (501): 18 Luck 484 (DB).

[See (1913) 20 Ind Cas 363 (364) (DB) (Cal).]

[See also AIR 1954 Pat 40 (40) (DB).]

(x) Whether a stipulation in a deed is by way of penalty under S. 74 of the Indian Contract Act is a question of law. AIR 1921 Lah 212 (213) * AIR 1925 Mad 84 (84).

[See also AIR 1925 Mad 177 (179.)]

(xi) Whether the cause or the reason alleged by the plaintiff landlord to eject the tenant is "satisfactory" within the meaning of the proviso to Section 10 of the Punjab Urban Rent Restriction Act, 1941. AIR 1944 Lah 477 (479).

(2) The following questions have been held to be mixed questions of law and fact:

(i) Whether an alteration in a document is 'material' or not. AIR 1925 Nag 243 (244).

(ii) What is the reasonable time for presentment for payment of a bill of exchange. AIR 1929 Lah 577 (577): 11 Lah 34 (DB).

(iii) What are "necessaries" within the mening of the term, under Section 68 of the Indian Contract Act. AIR 1924 Nag 360 (361).

(iv) Whether there has been a proper investigation of a claim preferred under Order 21, Rule 58 of the Code so as to make an order therein binding on the claimant. AIR 1917 Oudh 99 (100): 19 Oudh Cas 357.

(v) Whether a deposit of decretal amount by an unregistered purchaser of a transferable undertenure is sufficient under the Sale of Under-Tenures Act (VIII of 1865). (1913) 20 Ind Cas 337 (339) (DB) (Cal).

(vi) Whether there was a partnership as defined in the Contract Act. AIR 1922 Nag 96 (97).

(vii) Whether the parties, who are of non-Hindu origin, have been sufficiently Hinduised so as to attract the provisions of the Hindu Law in matters of inheritance and succession. AIR 1956 Pat 123 (124).

(viii) Question whether family or tribe of non-Hindu origin is governed by Hindu Law. AIR 1946 Pat 218 (223): 24 Pat 727 (DB).

(3) Where the law and its application are clear and the only question relates to facts and their proof, the finding will be a finding of fact. Madh BLJ 1955 HCR 1023 (1025) * AIR 1958 Cal 85 (91) (DB) * AIR 1952 All 934 (935) * AIR 1946 Nag 131 (132): ILR (1945) Nag 709 (DB) * AIR 1942 Pat 279 (281) (DB) * AIR 1922 Cal 429 (434): 49 Cal 477 (DB).

[See AIR 1926 All 1 (3): 48 All 126 (DB).]

[See also AIR 1931 Oudh 344 (344) (DB).]

(4) There is no provision in the Kerala Act (13 of 1957) amending the Civil P. C. depriving then existing decisions of their finality or extending the operation of the Act to all pending second appeals. 1961 Ker LT 1142: 1961 Ker LJ 712.

(5) Kerala Act 29 of 1958 coming into force during pendency of appeal in lower appellate Court — Appellant not raising plea regarding award of claim for improvements to her — Appellant held was not entitled to raise same plea in second appeal. AIR 1965 Ker 32 (35): 1964 Ker LT 676.

(6) While disposing of an appeal a court may take into consideration the change in law brought about by the Legislature after the decree appealed against. AIR 1963 Orissa 130 (131, 132) (DB).

**42. Abandonment.** — (1) Abandonment is a question depending on the nature of evidence adduced in each case. (1910) 5 Ind Cas 840 (841) (Lah) * AIR 1935 Cal 80 (82): 61 Cal 937.

(2) Abandonment is largely a question of fact in the sense that the lower Court's inference for or against abandonment will not, ordinarily, be interfered with in second appeal. ILR (1954) Punj 719 (721) * AIR 1958 Andh Pra 99 (100). (Abandonment of contract.) * 1950 All WR 16 (18) * (1913) 20 Ind Ca 198 (199) (DB) (Cal) * AIR 1925 Pat 741 (743): 4 Pat 838 (DB) * AIR 1928 Lah 924 (925): 9 Lah 487 (DB) * AIR 1966 Assam 129 (134) (DB).

(3) Whether the facts found warrant the inference of abandonment, will be a question of law. AIR 1930 Lah 215 (215) * AIR 1928 Cal 891 (891) (DB) * AIR 1936 All 553 (554) * AIR 1935 Cal 80 (82): 61 Cal 937.

(4) Waiver means an intentional relinquishment of a known right. It implies being conscious of one's right and giving it up. AIR 1962 Andhra Pra 500 (505): (1962) 2 Andh WR 71 (FB) * AIR 1966 Assam 129 (133, 134): ILR (1965) 17 Assam 166

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(DB). (Abandonment — What constitutes — Finding that raiyat left the place without arranging for payment of rent is question of fact — High Court will not interfere in second appeal.)

**43. Foreign law.** — (1) What a foreign law is on any particular point is a question of fact. AIR 1926 Mad 218 (219).

**44. Acquisition of easement and customary rights of privacy.** — (1) A finding as to the acquisition of a right of easement or as to the infringement thereof is a question of fact. AIR 1957 Madh Pra 203 (204): ILR (1957) Madh Pra 106 * (1954) 7 Sau LR 146 (148) * AIR 1953 Sau 39 (41) * AIR 1951 Sau 35 (37) * AIR 1947 Nag 175 (176): ILR (1947) Nag 254 * AIR 1946 Mad 168 (168) * AIR 1942 Cal 505 (507): ILR (1942) 2 Cal 427 * AIR 1924 Lah 488 (489) * (1963) 2 Mys LJ 74. (Right of support to wall.) * AIR 1960 Pat 498 (499): ILR 40 Pat 20 * AIR 1959 Raj 235 (239): 1959 Raj LJ 490.

[See also AIR 1935 Lah 346 (346) * AIR 1931 Mad 128 (131) (DB). (Infringement.) * AIR 1935 Lah 558 (559). (Do.)]

(2) A question as to whether an easement is one of necessity or as to whether a customary right of privacy exists in a particular p'ace or as to whether such right has been infringed is a question of fact. AIR 1927 Mad 963 (963). (Easement whether of necessity.) * AIR 1921 Sind 155 (156): 16 Sind LR 17. (Customary right of privacy.) * AIR 1954 All 668 (669). (Infringement of customary right of privacy.) * AIR 1929 Oudh 535 (536) (DB). (Do.)

(3) The question whether there has been a substantial increase in the easement is one of tact. (1955) 8 Sau LR 250 (253).

(4) The question whether a licence is transferable or not is not a pure question of law and in the absence of specific plea in the trial Court, which alone can give the defendants an opportunity to meet it and adduce evidence, the contention cannot be allowed to be raised in second appeal. AIR 1969 Ker 23 (25).

(5) Right of easement — Enjoyment whether continuous and for requisite period — Question of fact — Not to be interfered with in second appeal. AIR 1964 Mys 214 (215): (1963) 2 Mys LJ 471 * AIR 1965 Mys 124 (127). (Finding by lower appellate Court that defendants had been baling out water from picota from certain point for irrigating fields for about 30 years and had acquired prescriptive right on that basis is one of fact — Finding based on consideration of evidence — Finding cannot be interfered with in second appeal.)

(6) Finding by lower appellate Court that on the evidence produced, defendants had acquired a prescriptive right to use water from a tank for irrigation purposes — Contention that finding was vitiated because there was no plea and no issue framed with regard to Easements Act — Held that on the evidence the provisions of the Easements Act were attracted to the case and if the lower appellate Court had adverted towards the same, it could not be said that there was any error of substantial nature so as to vitiate the finding — When once the provisions of an enactment are attracted, the Court is not absolved from its duty of following the clear provisions of law which are applicable to the case. AIR 1965 Mys 124 (127, 128).

**45. Miscellaneous. — Representation.** — (1) Where the facts are known, the question whether a Hindu son was effectively represented in a former suit is an inference of law from facts, and is therefore a question of law. ('27) AIR 1927 Mad 406 (408).

[See however AIR 1957 Pat 174 (176) (DB).]

(2) The question whether one heir of a tenant represents another or the tenancy, is a question of fact. (1911) 10 Ind Cas 116 (116) (DB) (Cal) * AIR 1929 Cal 28 (30).

(3) The question whether in a rent reduction proceeding a tenant represents the whole body of tenants, is a mixed question of law and fact. AIR 1948 Pat 153 (154): 26 Pat 592 (DB).

[See however AIR 1952 Pat 51 (52).]

**Quantum of damages.** — (4) The measure of damages awardable in a particular case is a question of fact. AIR 1955 All 594 (594) (DB) * AIR 1958 Madh Pra 48 (51) (DB) * AIR 1952 Nag 16 (17) * AIR 1952 Sau 16 (18) * AIR 1946 Mad 147 (149) * AIR 1946 Nag Nag 392 (393) * AIR 1934 Pat 16 (18) * AIR 1933 Nag 29 (30): 28 Nag LR 320 * (1909) 31 All 333 (334, 335) (DB) * (1911) 9 Ind Cas 984 (985) (DB) (All).

[See also AIR 1945 PC 168 (169): 72 Ind App 206: ILR (1946) Mad 73: ILR (1945) Kar (PC) 310.]

[But see AIR 1914 Lah 531 (534): 1915 Pun Re No. 1]

(4-a) Assault and battery — Damages — Assessment of — Question of fact. AIR 1967 Madh Pra 48 (49): 1966 Jab LJ 370.

[See also 1965 All LJ 317. (Suit for damages — Finding as to absence of reasonable cause is one of fact.)]

[But see 1963 Mys LJ (Supp) 368.]

(5) Where the principle on which damages are to be assessed is involved. it is a question of law. AIR 1946 Nag 392 (393) * AIR 1958 Madh Pra 48 (51) (DB).

**Question of market-value of property.** — (6) The question of the market-value of a property is a question of fact. AIR 1953 Nag 376 (376): ILR (1954) Nag 124 * AIR 1929 Oudh 244 (246): 4 Luck

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643 (DB) * AIR 1930 All 363 (365): 52 All 532 (DB).

[See also ILR (1949) 1 Cal 444 (451) (DB).]

(7) The following have also been held to be questions of fact:

(i) Whether a caste was split up or not. AIR 1926 Bom 69 (70): 50 Bom 124 (DB).

(ii) Whether two houses have a common entrance. AIR 1925 Lah 257 (258) (DB).

(iii) Whether a person is the owner of a particular property. AIR 1953 All 251 (253) * AIR 1926 Mad 1052 (1053) (DB).

(iv) Whether a particular standard of measurement prevails in a particular place. AIR 1918 PC 92 (93, 94): 46 Cal 189: 45 Ind App 133 * AIR 1921 Cal 220 (222) (DB).

(v) Whether certain lands appertain to one village or another. ('54) AIR 1954 Cal 90 (93) * AIR 1934 Oudh 449 (450) (DB).

(vi) Whether parties agreed to a certain decree being passed. AIR 1929 Bom 68 (69) (DB).

(vii) Question as to what portion of a property is mortgaged. AIR 1934 All 152 (155): 56 All 496 (DB).

(viii) Whether a kotha was built within 12 years. AIR 1934 Lah 529 (530) (DB).

(ix) Whether a partnership was dissolved. AIR 1952 Bom 337 (340): ILR (1952) Bom 795 * AIR 1933 Pat 73 (79) : 12 Pat 139 (DB) * AIR 1934 Lah 557 (557) (DB) * AIR 1935 All 1008 (1010) (DB).

(x) Question of non-access. AIR 1934 Nag 124 (125) * AIR 1935 Lah 628 (629, 630).

(xi) Whether a certain unpublished manuscript was handed over to a party and whether it was improperly used by him in breach of confidence. AIR 1933 PC 26 (27) (PC).

(8) See also the following cases, for illustrations of what are questions of fact. AIR 1956 SC 593 (598) : 1956 SCR 451 : ILR (1956) Mys 152. (Question whether a particular proceeding was collusive or not.) * AIR 1949 PC 30 (31). (Question whether certain words constituted libel is one essentially for jury — Finding cannot be disturbed — But verdict must be one as would be reached by reasonable men.) * AIR 1958 All 353 (356) : ILR (1957) 2 All 280 (FB). (Finding that the plaintiff had an opportunity of showing cause against the charges which had been levelled against him is a finding on a question of fact.) * AIR 1958 Assam 34 (38) (DB). (Conclusion that the distribution of the accreted land made by the Revenue Authorities cannot be regarded as unreasonable or unequitable.) * AIR 1958 Madh Pra 413 (414) : 1958 Cri LJ 1485. (The question whether the inquiry in respect of a complaint against a Government servant was closed or not is a question of fact.) * AIR 1958 Pat 537 (538). (Benami.) * AIR 1958 Pat 434 (436): 37 Pat 658 (DB). (Do.) * 1958 Raj LW 367 (368). (Finding about payment of money by debtor, is not of fact.) * AIR 1957 All 395 (396). (Marzulmaut.) * AIR 1957 Andh Pra 958 (959). (That the goods were lost while in transit as result of robbery.) * AIR 1957 Andh Pra 841 (843). (Inference that a particular amount paid to the decree-holder was not taken into account by the Court when the decree was scaled down.) * AIR 1957 Cal 177 (178) (DB). (Finding of benami.) * AIR 1957 Madh Pra 238 (239). (Finding A, a Hindu widow, has remarried with B.) * AIR 1957 Madh Pra 84 (85): ILR (1957) Madh Pra 10 (DB). (A finding that the building which was being constructed was more than 20 feet in height from the ground to the apex of the building.) * 1957 Jab LJ 831 (832). (Where there was partition of house.) * AIR 1956 Bom 749 (752) : ILR (1956) Bom 51 (DB). (Company whether bogus or real.) * AIR 1955 All 192 (192) (DB). (Question whether the company did or did not obtain the approval of the Central Government to change its name as provided by sub-section (4) of Section 11 of the Companies Act.) * AIR 1955 Cal 290 (290) (DB). (Question as to rate of salary.) * AIR 1955 Punj 63 (64) (DB). (That trees were planted by ancestors of party.) * (1955) 34 Pat 269 (273). (Finding that person is resident of certain place.) * ILR (1955) 5 Raj 412 (417). (Question whether the workman was forbidden to go to the site by the Master or his Circle Manager.) * AIR 1954 Raj 26 (28) : ILR (1951) 1 Raj 558. (Finding as to genuineness of signature.) * AIR 1954 Trav-Co 392 (394) (DB). (As to how much land is required for the plaintiff for building a residential house is a question of fact.) * AIR 1956 Madh B 195 (196). (Whether certain place is required for shop, or for business or for residence.) * AIR 1953 Mad 854 (855). (Whether prevailing rent in respect of suit lands is the cropwar rate.) * AIR 1953 Nag 337 (338). (Finding that a particular amount was offered and was refused.) * AIR 1953 Punj 191 (192) (DB). (Finding as to when marriage took place.) * AIR 1952 Assam 5 (10) : ILR (1951) 3 Assam 332 (DB). (Question whether property itself or right, title and interest of judgment-debtor is sold in execution.) * AIR 1952 Mad 377 (384) (DB). (Finding on question of substantial injury due to irregularity in execution sale.) * AIR 1952 Mys 47 (51) : ILR (1952) Mys 151 (DB). (That execution sale was vitiated by fraud and irregularity.) * AIR 1952 Nag 103 (104). (That the house was built in certain year.) * AIR 1952 Pat 426 (427). (That there was no reclamation of land.) * AIR 1952 Trav-Co 148 (149) : 1950 Trav-Co LR 235 (DB). (Whether grant is for future service — Whether grantee's family

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has become extinct.) * AIR 1951 All 578 (579) (DB). (Question whether particular locality forms part of a particular mohalla.) * AIR 1951 Cal 269 (271): ILR (1951) 2 Cal 76. (What is reasonable notice.) * AIR 1950 Mad 586 (590) (DB). (Whether particular grant comprised both Kudiwaram and Melwaram or only Melwaram.) * AIR 1950 Pat 391 (391) (DB). (Question whether person is interested in tenure.) * 1950 Bur LR (SC) 113 (118). (When and by whom document was presented for registration.) * AIR 1968 SC 615 (618) : (1968) 2 SCR 117. (Proceedings under Land Acquisition Act (1894) — Question as to mala fides of Government or the Government having misused its power or having acted in fraud of statute is entirely a question of fact — Concurrent finding on that question by Trial Court and District Court — High Court observing that 'prima facie' there is no reason to differ from findings made by lower Courts — Held, that by expression 'prima facie' High Court meant that finding being concurrent was binding on it and that no contention as to finding being perverse having been urged there was not even a prima facie case to justify re-opening of that finding — Hence allegation as to mala fides or abuse of power by Government was conclusively negatived and it could not be canvassed in appeal before Supreme Court.) * AIR 1966 SC 1953 (1955) : (1965) 3 SCR 708. (Instalment decree with a default clause — Question whether its benefit is waived by the decree-holder is one of fact and cannot be raised for the first time in second appeal.) * AIR 1966 SC 902 (904) : (1966) 2 SCR 918. (Question of valuation of property is one of fact — High Court not entitled to go into it in second appeal.) * AIR 1963 SC 1890 (1892): (1964) 3 SCR 186. (Public purpose — Declaration of Government — Colourable exercise of power — It is question of fact.) * AIR 1969 Bom 40 (46) : 70 Bom LR 195 (DB). (Date of institution of suit — Concession regarding the date on which plaintiff lodged the plaint in a suit in accordance with Rules 104 and 105 of Bombay High Court Original Side Rules — Held that concession related to question of fact and was binding on party in second appeal.) * AIR 1969 Mad 257 (260). (Finding as to non-reconstitution of firm after its dissolution is one of fact.) * AIR 1969 Mys 222 (224) : (1968) 2 Mys LJ 581 (DB). (Finding as to service of notice under S. 6 Mysore Motor Vehicles (Taxations on Passengers and Goods) Act (1961) is a finding of fact.) * (1968) 1 Andh WR 429. (Whether a will is properly attested or not is a question of fact and point cannot be raised for first time in second appeal.) * AIR 1968 Cal 391 (394) (DB). (Claim referred to arbitrators — Question whether items of claims included later for consideration by arbitrators fall within the scope of entire claim — Is one of fact.) * AIR 1968 Delhi 79 (80) (DB). (Findings about impotency at the time of the marriage and of its continuance until institution of proceedings are essentially findings of fact, primarily based on oral evidence.) * AIR 1968 Mys 288 (293) : 12 Law Rep 580. (Question whether a daughter claiming maintenance under the Hindu Maintenance Act (1956) has any earnings out of her own property is a question of fact.) * AIR 1968 Orissa 36 (38) : 33 Cut LT 974 : 1968 Cri LJ 336. (Transfer whether genuine or benami — Finding cannot be assailed in second appeal.) * (1968) 34 Cut LT 890. (Finding that alleged adoption of defendant is not proved is one of fact — Finding on consideration of entire evidence is binding in second appeal.) * AIR 1968 Pat 222 (224) (DB). (Question whether a person is a money lender is a question of fact.) * AIR 1968 Pat 496 (500) : 1969 BLJR 208 (DB). (Execution of gift deed by Purdanashin lady — That she had independent advice and understood effects of transaction are questions of facts and cannot be raised in second appeal.) * 1968 BLJR 74 (DB). (Construction of a document is a question of law — But construction in the light of evidence of the circumstances and conduct of parties is one of fact.) * 1968 BLJR 143 (DB). (Finding as to validity of marriage arrived at by first appellate Court affirmed by single Judge of High Court after considering entire evidence — Finding cannot be reversed in Letters Patent Appeal.) * AIR 1968 Tripura 5 (10). (Finding as to existence of agreement set up by defendant — Finding is one of fact.) * AIR 1967 All 488 (489, 490) : 1967 All LJ 8 (DB). (Question of adoption, i.e., whether certain person was adopted son of another, cannot be challenged in Second Appeal because therein no question of law is raised.) * AIR 1967 All 423 (425). (Finding as to whether a custom which would displace operation of personal law governing a Hindu Widow's right to succession on re-marriage, has been established is a question of fact.) * AIR 1967 All 278 (280). (Status of the plaintiff under an agreement — Is a question of fact.) * 1967 All LJ 371 : ILR (1967) 2 All 49. (Whether a letter was received or not by particular person is question of fact.) * AIR 1967 Andh Pra 64 (65) : (1967) 1 Andh LT 104. (Finding of lower appellate Court as to maintenance of accounts in usual course of business — Finding cannot be interfered in second appeal.) * AIR 1967 Cal 255 (255). (Ejectment suit — Whether premises were required by owner for own use is question of fact — Finding cannot be interfered with in second appeal.) * AIR 1967 Mad 404 (408) : (1967) 1 Mad LJ 96 * (1967) 11 Law Rep 469 (Mys). (Finding as to genuineness of will is one of pure fact — Finding is binding in second appeal.) * AIR 1967 Orissa 57 (58) (DB). (That certain person is adopted son of another is finding of fact and

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is concluded in second appeal.) * AIR 1967 Pat 93 (94) * AIR 1967 Punj 328 (329) : 68 Pun LR 866. (Finding that an admission made by one of the parties is erroneous and the finding that such party is tenant of land in dispute are pure findings of fact — Such findings are binding in second appeal.) * (1967) 69 Punj LR (D) 260. (Question of bona fide requirement of landlord is one of fact.) * 1967 Raj LW 199 : ILR (1966) 16 Raj 1140. (Question as to whether property has been resumed by the State under the Rajasthan Land Reforms and Resumption of Jagirs Act 6 of 1952 is a question of fact.) * AIR 1967 Raj 251 (253) : 1967 Raj LW 509. (Finding as to surrender of land and execution of receipt and rent notes are pure findings of fact.) * 1967 Raj LW 51 (54). (Finding that the guardian had not borrowed the money for benefit of minors is a finding of fact.) * 1966 All LJ 909 : 1966 All WR (HC) 698. (Finding as to 'A' being the mother of 'B' — No interference in second appeal.) * AIR 1966 Andh Pra 240 (243) : (1965) 1 Andh WR 233. (Madras Pawn Brokers Act (23 of 1943), S. 2 (8) — Existence of pledge — Question of fact — Concurrent finding is binding in second appeal.) * AIR 1966 Andh Pra 197 (200) : (1965) 2 Andh WR 457 (DB). (Finding that suit temple is public temple and suit properties belong to the deity and not to defendant warranted by evidence on record — Finding cannot be interfered with in second appeal.) * AIR 1966 Assam 56 (58) (DB). (Finding that facts failed to prove that landlord was prevented by fraud from enforcing his right in court of law — Finding is one of fact and cannot be interfered with in second appeal.) * (1966) 68 Bom LR 891 : 1966 Mah LJ 446. (Onerous nature of agreement — Purely a question of fact — Cannot be raised for the first time in second appeal.) * AIR 1966 Madh Pra 318 (320) : 1966 Jab LJ 1133. (Question of plaintiff being bona fide purchaser for value and without notice is question of fact — Finding of lower appellate court based on appreciation of evidence — Finding is binding in second appeal.) * AIR 1966 Madh Pra 207 (209) : 1965 Jab LJ 905. (Landlord and tenant — Question of genuine need either for residential or non-residential purposes is finding of fact — In the absence of illegality or misapprehension on the part of Courts below, the finding is not open to challenge in second appeal.) * AIR 1966 Mad 419 (421) : (1966) 1 Mad LJ 333. (Finding as to truth of arrangement between co-owners is finding of fact binding in second appeal — Error not vitiating finding — Not sufficient to disturb finding.) * AIR 1966 Orissa 228 (229) : 32 Cut LT 881. (Equal division of entire properties between the parties and their exclusive and separate possession thereafter — Finding, one of fact — No interference in second appeal.) * AIR 1966 Orissa 24 (26) : ILR (1965) Cut 756. (Application to set aside ex parte decree — Dismissal for default — Restoration — Whether there was sufficient cause for non-appearance is question of fact.) * (1966) 32 Cut LT 181 : ILR (1965) Cut 885. (Question of divisibility of contract is a question of fact.) * (1966) 68 Pun LR 619. (Finding that breach of contract is committed by vendee is a finding of fact.) * AIR 1966 Raj 111 (114, 115) : 1966 Raj LW 29 (DB) * AIR 1965 All 586 (589). (Question of bona fide mistake or misapprehension is question of fact.) * AIR 1965 All 154 (155). (Lower Courts finding that disputed property belonged to plaintiff and also that no notice under section 80, Civil P. C. was sent by plaintiff — Finding being of facts cannot be assailed in second appeal.) * 1965 All LJ 118 : 1964 All WR (HC) 746. (Finding by trial Court under U. P. Control of Rent and Eviction Act (III of 1947) that parts of certain premises are new — Finding cannot be reviewed in second appeal.) * 1964 All WR (HC) 746 : 1965 All LJ 118 * * AIR 1965 Andh Pra 136 (141) : (1965) 1 Andh WR 60 (DB). (Forward contracts of wager — Determination of nature — Test — There must be intention of both parties not to transfer goods — Ascertaining of intention — Pucca Adithiya — Position of — Forward contract in groundnut oil through pucca adithiya — Goods not actually transferred — Pucca adithiya paying difference to seller of goods — Suit by adithiya to recover amount from purchaser — Transaction found by lower courts as wagering contract — Conclusion held was finding of fact — Held further that contract was prohibited also by Vegeable Oils and Oil Cakes (Forward Contracts Prohibition) Order, 1944.) * AIR 1965 Andh Pra 98 (100) : ILR (1963) Andh Pra 931 (DB). (Sufficient evidence to substantiate findings on record — No valid reasons adduced to disturb them — Findings will not be disturbed.) * (1965) 6 Guj LR 529 : ILR (1965) Guj 691. (Adequacy and sufficiency of evidence is question of fact — Same cannot be argued in second appeal.) * 1965 MPLJ 97: 1964 Jab LJ 620. (Question as to whether landlord genuinely requires accommodation is a question of fact — Interference in second appeal is permissible only if finding is based on no evidence or if the finding is perverse.) * AIR 1965 Mad 389 (390) : 78 Mad LW 86. (Finding on question of partition being of fact is binding in second appeal.) * AIR 1965 Mad 200 (205) : 77 Mad LW 697. (Question whether the wife was divorced, or whether the child born was legitimate, are questions of fact — High Court will not interfere in second appeal.) * AIR 1965 Pat 184 (185) : (1966) 1 Lab LJ 769 (DB). (Finding of lower appellate Court that resolution of executive committee of Worker's Union was ratified by general meeting will not be interfered with in second appeal if the finding is not shown to be

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perverse.) * AIR 1965 Punj 479 (480). (Finding as to whether payment was made is one of pure fact — Cannot be attacked in second appeal when it is based on evidence on record.) * AIR 1965 Punj 119 (120) : 66 Punj LR 1174. (Question whether purpose of which licence was granted was abandoned within S. 62 cl. (f), Easements Act, is one of fact — Question cannot be raised for first time in second appeal.) * (1965) 67 Pun LR 362. (Trial Court giving finding that occupancy tenants who were mortgagors died before year 1948 — It being finding of fact is binding in second appeal.) * AIR 1964 All 348 (349). (Suit for recovery of arrears of rent — Finding as to agreement between parties regarding rate of rent — Finding of fact — Cannot be reviewed in second appeal.) * AIR 1964 All 228 (230). (Finding that appellant was not negligent in filing appeal — Finding of fact — Not to be interfered with in second appeal.) * (1964) 2 Andh WR 136. (Question as to genuineness of will is one of fact — Finding of lower appellate Court that will is not genuine based on consideration of all evidence — Finding is binding in second appeal when it is not vitiated by error of law.) * (1964) 1 Andh WR 233. (Madras Pawn Brokers Act (23 of 1943), S. 2(8) — Existence of pledge — Question of fact — Concurrent finding is binding in second appeal.) * (1964) 2 Mad LJ 242 : 76 Mad LW 431. (Question of fact — Finding of lower appellate Court — No error of law — No interference in second appeal.) * (1964) 1 Mad LJ 86. (Genuineness of document — Finding that document is genuine and that there is ample proof thereof — Finding is one of fact.) * AIR 1964 Orissa 224 (225) : 32 Cut LT 985. ILR (1964) Cut 406. (Finding about execution of a deed — is a finding of fact — Not assailable in second appeal.) * 30 Cut LT 490: (1964) 6 Orissa JD 223. (Finding that there was relationship of landlord and tenant between plaintiff and tenant — Pure finding of fact — Cannot be assailed in second appeal.) * (1964) 66 Pun LR 988 : 1964 Cur LJ 427. (The finding that A is the son of B is a finding of fact and when no ground has been made for disturbing the same in second appeal cannot be interfered with.) * 1964 Cur LJ 427 (Punj). (Pre-emption — Suit for, brought by minor son of one of vendors — Defence that suit was collusive at the instance of vendors — Onus on vendees to prove that suit was for vendor's benefit — Finding that vendees failed to establish it is finding of fact.) * AIR 1963 All 205 (206) : 1963 (1) Cri LJ 562. (Question whether person has migrated to Pakistan is one of fact.) * AIR 1963 Assam 137 (141) : ILR (1963) 15 Assam 120. (Question as to service of notice is one of fact — Finding on, by lower Court is binding in second appeal.) * AIR 1963 Assam 176 (178) : ILR (1963) 15 Assam 315. (Suit for redemption — Mortgagee's plea that Mortgage was already redeemed by plaintiff's father who was the original mortgagor — Plea accepted by lower appellate court — Held that it was a finding of fact binding on High Court in second appeal.) * AIR 1963 Bom 225 (229, 230) : 64 Bom LR 602. (Whether a thing is purported to be done under the Act is substantially a question of fact and must be examined with reference to the act complained of.) * (1963) 67 Cal WN 617. (Whether deterioration in the condition of premises is material is question of fact — High Court cannot interfere with it in second appeal.) * AIR 1963 Madh Pra 234 (237) : 1963 Jab LJ 415. (Question whether document is properly executed is a question of fact.) * AIR 1963 Punj 402 (403). (Finding of fact — Finding that gift by husband to his wife was intended to be only for her life time and that she had no power of disposal over it — Finding is one of fact — High Court cannot in second appeal interfere with the same.) * AIR 1963 Punj 363 (364): 65 Pun LR 362 (DB). (Finding of fact — Compromise in execution — Decree made payable in instalments — Instalment not paid — Execution taken out — Finding that in compromise interest was not abandoned by decree-holder being finding of fact cannot be assailed in second appeal.) * (1962) 1 Andh LT 442. (Question as to probative value of entries in document— No issue of law involved — Findings cannot be interfered with in second appeal.) * (1962) 66 Cal WN 470 : 1963 (1) Cri L Jour 117. (Suit to recover specific movable property seized by police in criminal case — Finding of the lower appellate Court with respect to ownership and possession of such property — High Court will not interfere in second appeal.) * AIR 1962 Pat 420 (426) : 1962 BLJR 323. (Finding on non-existence of relation between two persons — It is question of fact.) * AIR 1962 Pat 125 (129): 1962 BLJR 159 (FB). (Performance of formalities of pre-emption is a finding of fact.) * (1961) 2 Guj LR 572. (Question whether inquiry was held by Government — Essentially a question of fact.) * (1961) 2 Guj LR 268. (Finding that the services of a temporary Government employee were terminated and that he was not dismissed by way of punishment or removed from service by way of punishment, is a finding of fact.) * 1961 Jab LJ 1516 * 1961 Jab LJ 1359. (Concurrent finding that defendant is agriculturist — Finding is one of fact and cannot be disturbed in second appeal.) * AIR 1961 Mad 413 (414): 73 Mad LW 666. (Question concerning identity of property mortgaged and that sought to be redeemed — Question is one of fact and finding on the question cannot be challenged in appeal.) * AIR 1961 Punj 329 (330). (Finding that exercise of option by plaintiff was a provisional one is one of fact —

**Sections 100-101 — Note 45 (contd.)**
Ordinarily such finding cannot be disturbed in second appeal.) * AIR 1961 Punj 414 (415, 416): 63 Pun LR 90 (DB). (Finding that there was obstruction to flow of natural water by defendant is one of fact — Cannot be attacked in second appeal.) * AIR 1960 Madh Pra 223 (225): 1960 MPLJ 54 (DB). (The finding that the relationship between certain persons was that of principal and agent and not that of a seller and a buyer is a finding of fact and is not open to challenge in second appeal.) * 1960 MPLJ 631 : 1960 Jab LJ 427. (Question whether house is required for use of plaintiff is one of fact and cannot be disturbed in second appeal.) * AIR 1960 Pat 289 (291) : 1960 Pat LR 65 (DB). (Finding that lease was created, during particular years cannot be challenged, unless it is perverse in second appeal.) * AIR 1960 Punj 575 (580) (DB). (The question whether the owner of self-acquired property has voluntarily thrown it into the joint stock with the clear intention of abandoning all separate claims on it must, normally speaking, be one of fact to be decided in the light of all the attending circumstances.) * AIR 1959 Bom 287 (288): 60 Bom LR 675 * AIR 1959 Bom 61 (63) : 60 Bom LR 1422 (DB) * AIR 1959 Cal 755 (758) : ILR (1960) 1 Cal 701. (Finding as to value of goods consigned is one of fact — It is binding in second appeal.) * 1959 MPLJ 517 : 1959 Jab LJ 173. (The ascertainment of the price on a particular date is a finding of fact.) * AIR 1952 Punj 52 (53). (The question whether the presumption arising from the Jamabandi has been rebutted is a question of fact.)

[See AIR 1957 Nag 73 (76 (DB). (Whether debt is bad debt and at what time it became bad debt — Income-tax Act case.)]

[See also AIR 1957 Mad 320 (322): ILR (1957) Mad 529 (DB). (Finding that candidate at election committed illegal practice within meaning of Section 125 (3), Representation of the People Act, 1951,)]

**46. Finding of fact binding in second appeal.**— (1) Sections 100 and 101 taken together distinctly prohibit second appeals on questions of fact, unless in the process of arriving at a finding of fact the Court has committed an error of law or a substantial error of procedure. AIR 1958 All 353 (356): ILR (1957) 2 All 280 (FB) * AIR 1958 All 335 (337) * AIR 1958 Assam 34 (38) (DB) * AIR 1958 Pat 537 (538) * AIR 1958 Pat 211 (217): 37 Pat 88 (DB) * AIR 1958 Punj 333 (334): ILR (1957) Punj 1997 (DB) * ILR (1958) Ker 713 (727) (DB) * AIR 1957 All 395 (396) * AIR 1957 All 21 (22): ILR (1957) 1 All 220 (DB) * AIR 1957 Assam 188 (190, 191) (DB) * AIR 1956 Pat 53 (54) * AIR 1954 Pat 455 (456) (DB) * AIR 1951 All 578 (579) (DB) * AIR 1914 PC 87 (88): 37 Mad 443: 41 Ind App 258 * (1892) 19 Cal 249 (252): 19 Ind App 1 (PC) * AIR 1952 Mad 323 (328): ILR (1952) Mad 741 (FB) * AIR 1954 Cal 90 (93) (DB) * ILR (1954) Punj 719 (721) * ILR (1951) 1 Raj 284 (286) (DB) * ILR (1950) Ajmer 50 (51) * AIR 1967 SC 1786 (1789): (1967) 3 SCR 454. (Finding of fact — Is binding on High Court in second appeal.) * AIR 1966 SC 1718 (1721) * AIR 1969 Mad 252 (253, 256): 81 Mad LW 561 * AIR 1969 Mad 172 (175) * AIR 1969 Orissa 134 (135) * AIR 1968 Delhi 5 (6) * (1968) 70 Punj LR 973 * AIR 1967 Delhi 158 (159, 160): 69 Pun LR (D) 228 * AIR 1967 Delhi 70 (71): 69 Pun LR 137 (Delhi) * (1966) 7 Guj LR 421: ILR (1966) Guj 401 * 1966 Jab LJ 279 * (1966) 79 Mad LW 368: ILR (1967) 3 Mad 550 * ILR (1965) Andh Pra 142. (Finding as to date of birth is a question of fact and interference is not ordinarily called for in second appeal.) * AIR 1965 Manipur 10 (12) * AIR 1963 Orissa 133 (134, 135) * AIR 1963 Raj 212 (214): 1963 Raj LW 195 * AIR 1962 Madh Pra 69 (72): 1962 Jab LJ 429. (Finding of fact based on material on record — It is final in second appeal.) * 1962 Jab LJ 211 * ('62) 64 Pun LR 825 (826) * (1962) 2 Ker LR 611: 1961 Ker LT 972 * 1961 Jab LJ 1334: ILR (1960) Madh Pra 486 * AIR 1960 Manipur 16 (17) * AIR 1959 All 13 (14) (DB) * (1959) 37 Mys LJ 551.

(2) The High Court can neither investigate the grounds on which the finding has been arrived at nor interfere with it, either at the instance of the appellant or at the instance of respondent. AIR 1958 Punj 333 (334): ILR (1957) Punj 1997 (DB) * Madh B LR 1956 (Civ) 838 (838) * AIR 1949 Cal 204 (205). (No investigation of grounds of finding.) * AIR 1927 PC 117 (119): 54 Ind App 196: 54 Cal 586. (Do.) * AIR 1930 Mad 590 (592). (Do.) * AIR 1954 All 493 (495): ILR (1955) 1 All 113 (FB). (No interference with finding of fact.) * AIR 1956 All 205 (209). (Do.) * AIR 1956 Bom 204 (205) (DB). (Do.) * AIR 1956 Bom 143 (144). (Do.) * AIR 1956 Orissa 79 (80) (DB). (Do.) * AIR 1956 Punj 145 (146): ILR (1956) Punj 157. (Do.) * AIR 1956 Sau 110 (111). (Do.) * AIR 1955 Bhopal 7 (8). (Do.) * AIR 1955 Cal 229 (230): ILR (1956) 1 Cal 136 (DB). (Do.) * AIR 1955 Cal 21 (22) (DB). (Do.) * AIR 1955 Pat 393 (396): 34 Pat 324 (DB). (Do.) * (1955) 38 Pat 235 (235, 240) (DB). (Do.) * 1954 Andh LT (Civ) 35 (39). (Do.) * ILR (1954) Cut 547 (552). (Do.) * AIR 1953 All 251 (253). (Do.) * AIR 1953 Pat 316 (316). (Do.) * AIR 1952 Ajmer 52 (52). (Do.) * AIR 1950 Madh B 85 (87) (DB). (Do.) * AIR 1918 PC 92 (94): 46 Cal 189: 45 Ind App 183. (Do.) * AIR 1951 Nag 8 (11): ILR (1951) Nag 301. (No interference at the instance of respondent or appellant.) * AIR 1961 SC 174 (177): (1962) 3 SCR 910. (Finding of fact—Interference -- Trial Court giving a finding on question of possession but first appellate Court giving no proper finding on that question —

**Sections 100-101 — Note 46 (contd.)**
no proper finding on that question — High Court requiring first appellate Court to give fresh finding on such question — High Court in doing so cannot be said to be reversing finding of fact given by first appellate Court.) * 1965 Jab LJ 507 (SC). (Where case is remanded to the trial Court for taking evidence on some issues and recording its findings thereon, the finding so given by trial Court is not binding on High Court.) * AIR 1968 Punj 289 (290): ILR (1967) 2 Punj 772 (DB) * AIR 1967 Mad 410 (413): (1967) 2 Mad LJ 265 * (1967) 1 Mad LJ 177: 79 Mad LW 705. (Conclusion of Court below fully in consonance with evidence cannot be impeached in second appeal.) * (1967) 33 Cut LT 1077 * AIR 1967 Pat 428 (430) * AIR 1967 Pat 338 (339). (Conclusion of lower appellate Court as to where the contract has been entered into cannot be interfered with in second appeal.) * AIR 1967 Punj 259 (259) * 1966 All WR (HC) 392: 1966 All LJ 486 * 1966 All WR (HC) 170 * 1966 All WR (HC) 651 * 1966 Cur LJ 526 (Punj) * (1966) 68 Pun LR 6 (Delhi) * AIR 1966 Raj 70 (74): 1964 Raj LW 412 * AIR 1966 Mad 32 (35): (1965) 2 Mad LJ 123 (DB). (Finding of fact — No interference in second appeal.) * (1966) 2 Mad LJ 49: 79 Mad LW 440 * (1966) 2 Mad LJ 223: 79 Mad LW 358 * (1966) 2 Mad LJ 577: 78 Mad LW 728 * (1966) 32 Cut LT 766: ILR (1966) Cut 307 * AIR 1965 Pat 73 (75): ILR 44 Pat 825 (DB) * 1965 BLJR 575 * AIR 1965 Punj 351 (354) * (1965) 67 Pun LR 97 * AIR 1964 All 300 (301). (Question whether purchase of house was benami is one of fact — Finding by appellate Court based on evidence — Correctness cannot be challenged in second appeal.) * AIR 1964 Mad 80 (81): (1964) 1 Mad LJ 352 * AIR 1964 Pat 401 (403): 1964 BLJR 583 (FB) * AIR 1963 All 121 (122): 1963 All WR (HC) 295 * AIR 1963 Assam 190 (193). (Finding of fact — Lower Appellate Court finding that there was acknowledgment of liability by the defendant — This being finding of fact same is binding in second appeal.) * (1963) 29 Cut LT 55 * ILR (1963) Cut 901 * (1963) 65 Punj LR 559. (Finding of fact cannot be assailed in a writ petition — Finding about existence of a dairy farm is a finding of fact.) * (1962) 4 Orissa JD 27. (Lower Courts coming to conclusion that the husband kept a concubine and the wife was entitled to separate maintenance and residence as claimed by her — No interference, in second appeal, with decision of lower Courts based on findings of facts.) * 1962 BLJR 258 * AIR 1962 Punj 495 (495): ILR (1962) 1 Punj 376 * AIR 1961 Punj 398 (400): 63 Pun LR 319 (DB) * (1961) 63 Pun LR 195: 1963 Cur LJ 523 * AIR 1961 Raj 136 (137): 1961 Raj LW 576 * 1961 Raj LW 31: ILR (1961) 11 Raj 818 * AIR 1960 Pat 533 (535) (DB) * AIR 1960 Pat 156 (157) * 1960 All LJ 308: 1960 All WR (HC) 206. (Suit for ejectment — Finding by lower appellate Court that disputed plots had been usufructuarily mortgaged to defendant and that plaintiffs were sir or khudkasht holders at that time — Finding held one of fact and binding in second appeal.) * AIR 1959 All 22 (24): 1958 All LJ 526.

(3) It may be that the evidence is unsatisfactory or insufficient or that it has not been properly appreciated; it may be that the High Court is inclined to take a different view or that the decision is open to doubt; it may even be that the finding may seem to be grossly and inexcusably erroneous; still if there is some legal evidence for the finding, and there is no such error or defect as mentioned above, then the High Court cannot entertain a second appeal on the finding. AIR 1957 SC 49 (50): 1956 SCR 691. (High Court inclined to take different view.) * AIR 1958 Cal 434 (436) (DB). (Evidence not properly assessed.) * AIR 1958 Cal 179 (180). (Finding based on consideration of evidence.) * AIR 1958 Pat 211 (217): 37 Pat 88 (DB) * AIR 1958 Raj 280 (281). (Finding on credibility of witness.) * AIR 1957 Cal 177 (178) (DB). (Finding of benami based on cogent evidence — Absence as to motive — Finding is not negatived.) * AIR 1957 Madh Pra 238 (239). (Finding based on legal evidence.) * 1957 BLJR 414 (415) (DB). (Appreciation of evidence.) * 1954 All WR (HC) 522 (524). (Unsatisfactory or insufficient evidence.) * ILR (1953) 1 Cal 101 (103). (Do.) * AIR 1943 Pat 180 (181): 22 Pat 99 (DB). (Do.) * AIR 1942 Pat 429 (430). (Do.) * ILR (1956) Hyd 52 (57). (No proper appreciation of evidence.) * AIR 1955 Ajmer 14 (15). (Do.) * AIR 1954 Ajmer 63 (1) (63). (Do.) * AIR 1954 Raj 26 (28): ILR (1951) 1 Raj 558. (Do.) * AIR 1953 Orissa 98 (98) (DB). (Do.) * AIR 1952 Nag 317 (320): ILR (1953) Nag 413 (DB). (Do.) * AIR 1951 All 634 (634) (Do.) * AIR 1939 Lah 548 (553) (DB). (High Court inclined to take different view.) * AIR 1929 All 885 (886) (DB). (Do.) * AIR 1933 Nag 185 (186). (Do.) * AIR 1940 Lah 118 (119) * AIR 1917 Lah 363 (364): 1917 Pun Re No. 89 (DB). (Decision doubtful.) * AIR 1939 Lah 12 (13). (Do.) * AIR 1939 Pat 386 (386). (Do.) * AIR 1951 SC 193 (196): 1951 SCR 258. (Grossly erroneous finding.) * AIR 1952 Assam 52 (54) (SB). (Do.) * 1956 Madh BLJ 154 (155). (Do.) * AIR 1955 All 594 (595) (DB). (Do.) * AIR 1954 Aimer 75 (76). (Do.) * AIR 1952 Bom 106 (113): ILR (1952) Bom 226 (DB). (Do.) * AIR 1950 East Punj 90 (91) (DB). (Do.) * AIR 1929 PC 152 (155): 56 Ind App 223: 52 Mad 538. (Do.) * AIR 1950 PC 28 (29). (Existence of some legal evidence.) * AIR 1952 Pat 341 (349): 31 Pat 446 (SB). (Do.) * AIR 1955 Mad 562

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(567). (Do.) * AIR 1954 Nag 103 (105): ILR (1954) Nag 96 (DB). (Do.) * AIR 1954 Orissa 40 (44) (DB). (Do.) * AIR 1954 Sau 79 (80). (Do.) * ILR (1953) Punj 333 (336) (DB). (Do.) * AIR 1952 All 191 (192). (Do.) * AIR 1946 Cal 326 (329): ILR (1946) 1 Cal 325 (DB). (Do.) * AIR 1935 Lah 765 (769): 17 Lah 190 (DB). (Do.) * AIR 1961 SC 1720 (1729, 1730): (1962) 2 SCR 509. (The High Court has no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, however gross the error may be.) * AIR 1961 SC 1097 (1099): 1960 Jab LJ 870. (When all the questions at issue had to be tried in the light of oral evidence and surrounding circumstances, if the appellate Court recorded definite findings it is not open to the High Court to attempt to reappreciate that evidence. S. A. No. 151 of 1958, dated 13-11-1958 (MP), Reversed.) * AIR 1959 SC 1204 (1205): (1960) 1 SCR 271. (A High Court on second appeal cannot go into questions of fact, however erroneous the findings of fact recorded by the Courts of fact may be.) * AIR 1959 SC 57 (59): 1958 Andh LT 834 * AIR 1968 Delhi 79 (80) (DB). (In the matter of appreciation of oral evidence, the appellate Court attaches a great deal of weight to the opinion of the trial Judge who had the benefit of observing the demeanour of the witnesses in the box.) * (1968) 34 Cut LT 890. (Finding arrived at after considering material pieces of evidence — Mere fact that lower Court has not referred to some non-essential fact is not sufficient to hold that finding is arrived at after ignoring important evidence so as to justify interference in second appeal.) * (1968) 70 Punj LR 553 * AIR 1967 Bom 80 (88, 89): 67 Bom LR 837. (Finding of fact — Finding recorded by appellate Court cannot be questioned in second appeal.) * (1967) 71 Cal WN 302. (Lower Appellate Court holding a sale deed proved by secondary evidence — High Court cannot interfere with such finding even if the lower Court falls into an error of a fact in arriving at such finding) * (1967) 2 Mad LJ 302: 80 Mad LW 44 * (1967) 80 Mad LW 434: ILR (1968) 1 Mad 465. (AIR 1959 SC 57; 17 IA 122, 29 CWN 281, Foll.; AIR 1960 Pat 420, Expl.) * AIR 1967 Orissa 139 (140, 141): 33 Cut LT 1163 * AIR 1967 Pat 250 (253). (Finding of fact by lower appellate Court though erroneous cannot be interfered with in second appeal.) * AIR 1967 Pat 254 (256): 1967 Cri LJ 1042. (No interference on the mere ground that judgment refers only to some of the witnesses — No presumption that Court was unmindful of the other evidence can arise.) * 1967 Raj LW 413 * AIR 1966 Andh Pra 305 (308): (1965) 2 Andh LT 187. (Finding of fact — Binding in second appeal — Court will not re-valuate evidence to find out whether conclusion of lower appellate Court is correct or not.) * (1966) 68 Bom LR 891: 1966 Mah LJ 446 * 1966 Jab LJ 1028 * ILR (1966) Cut 193. (Evidence not considered by Courts of fact as confused — High Court will not consider it so in second appeal.) * ILR 1966 Cut 139 * AIR 1966 Raj 229 (230): 1965 Raj LW 346 * AIR 1965 Guj 152 (155): (1965) 6 Guj LR 27 (DB) * AIR 1965 Madh Pra 102: 1965 Jab LJ 1167 * (1965) 2 Mad LJ 220: 78 Mad LW 388 * AIR 1965 Orissa 130 (131): ILR (1964) Cut 886 * ILR (1965) Cut 695. (Finding of fact — Finding based on discussion of relevant evidence — Interference by High Court not permissible.) * AIR 1964 Mad 373 (374): (1964) 2 Mad LJ 237. (Factual finding supported by evidence — No misdirection by the lower appellate Court on the correct principle of law applicable — Finding cannot be interfered with in second appeal.) * AIR 1964 Pat 348 (350): 1964 BLJR 19 (DB) * 1964 BLJR 147 * (1964) 66 Pun LR 444 * (1964) 66 Pun LR 91 * (1964) 66 Pun LR 24: ILR (1964) Punj 299 * AIR 1964 All 416 (417): 1963 All WR (HC) 553. (Finding based on consideration of evidence.) * AIR 1963 Assam 184 (186): ILR (1963) 15 Assam 325. (Appreciation of evidence — Powers and duties of appellate Court — Court comparing evidence of both parties and coming to its own conclusion — Failure to write elaborate judgment is no error in procedure — No interference in second appeal.) * (1963) 29 Cut LT 357. (Question as to sufficiency or adequacy of evidence in arriving at a finding — Interference in second appeal not permissible.) * ILR (1963) Cut 901 * AIR 1961 All 430 (431): 1962 All WR (HC) 64. (Erroneous finding based on evidence — No interference.) * 28 Cut LT 506: (1962) 2 Orissa JD 269 * AIR 1962 Punj 457 (462): 64 Pun LR 651 (DB) * 1962 Raj LW 478: ILR (1962) 12 Raj 83 * 1962 Raj LW 588: ILR (1962) 12 Raj 925 * AIR 1961 Mys 242 (244): 39 Mys LJ 155 * AIR 1961 Pat 314 (317): 1960 BLJR 277. (That the findings of the final Court of fact are vitiated by errors of record and misreading of evidence, without mentioning the specific error of record is too vague a ground to be taken into consideration in second appeal.) * AIR 1960 Bom 543 (547, 548): 62 Bom LR 341 * AIR 1960 Pat 420 (421): 1960 BLJR 148 (DB) * AIR 1959 Bom 78 (80): 60 Bom LR 457 * (1956) 60 Cal WN 149: ILR (1957) 1 Cal 176 * ILR (1954) 1 Cal 207 (DB). (Finding of fact — Sufficient evidence on record, if believed, justifying finding on actual fact of appointment of one K as shebait by previous shebait — Finding of fact must be considered to be final finding of fact binding in second appeal.)

[See AIR 1933 Mad 460 (460). (Civil Miscellaneous appeals stand on the same footing as second appeals — They can be argued only on question of law.)]

[See also AIR 1950 FC 21 (30): 1949 FCR 441. (Appellate Court not to inter-

**Sections 100-101 — Note 46 (contd.)**
fere where evidence as a whole can reasonably be regarded as justifying the conclusion.)]

(4) The findings to be binding in second appeal, need not be concurrent. The fact that the trial Court and the lower Appellate Court have differed on the point is immaterial. AIR 1928 Rang 303 (308): 6 Rang 586 * AIR 1937 Oudh 165 (166): 12 Luck 516 (DB) * AIR 1955 Cal 21 (22) (DB) * AIR 1947 Lah 172 (172) * AIR 1946 Pat 120 (121) (DB) * AIR 1946 Sind 89 (93): ILR (1945) Kar 475 * AIR 1969 Pat 203 (205).

[See also AIR 1937 Sind 36 (36). (Lower appellate Court considering a case from a different aspect from that of the trial Court.)]

(5) The fact that the finding has been based by the lower Appellate Court on additional evidence recorded by it, or on evidence treated as inadmissible by the trial Court, would not give the High Court a right to interfere with it. (1885) 12 Cal 37 (38) (DB). (Finding based on additional evidence.) * AIR 1915 Cal 568 (569) (DB). (Do.) * AIR 1935 Pat 105 (107). (Do.) * AIR 1933 Rang 35 (36, 37). (Trial Court treating evidence inadmissible.)

(6) Though the lower Appellate Court should not ordinarily reject witnesses accepted by the trial Court in respect of credibility, still the fact that it has rejected witnesses accepted by the trial Court will be no ground for interference on a question of fact, when the lower Appellate Court has given satisfactory reasons for doing so. AIR 1925 Rang 117 (117) * AIR 1923 PC 156 (158): 1 Rang 451.

(7) If the finding arrived at as a result of the rebuttal of a statutory presumption is a finding on a question of fact, that finding would be final for purposes of second appeal. AIR 1958 All 54 (62) (DB) * (1968) 72 Cal WN 796. (Presumption raised by Record of Rights, if rebutted or not is a question of fact — Cannot be raised in second appeal.)

(8) If a finding of fact given by the trial Court has not been challenged in the first appeal, it cannot be challenged in second appeal on any ground. ILR (1955) 7 Assam 544 (549) * AIR 1954 All 310 (312) (DB) * (1948) 53 Mys HCR 59 (63) (DB).

[See also AIR 1955 Punj 117 (117): ILR (1955) Punj 365 * AIR 1933 Pat 270 (271).]

(9) Where a finding on one point necessarily involves a finding on another point, the finding cannot be challenged because the Court failed to give a definite and express finding on the latter point. AIR 1952 Assam 52 (53, 54) (SB).

(10) Where findings are remitted to the High Court by the first Appellate Court under Order 41, Rule 25 of the Code the appeal in the High Court continues to be a second appeal and in the absence of special provisions in law, the findings of facts, when they are before the High Court, are immune from attack, except on the ground of error of law or procedure within the meaning of this section. AIR 1954 Cal 90 (94) (DB) * AIR 1962 Mys 61 (65): 39 Mys LJ 715 (DB).

(11) (Kerala) Trial Court coming to decision on one question in particular way on several grounds — Lower appellate Court coming to same decision on some of those grounds alone but disagreeing with trial Court on remaining grounds not sufficient to give right of second appeal. AIR 1966 Ker 294 (296): 1966 Ker LT 707.

**47. Finding of facts when not binding in second appeal.** — (1) Where in the process of arriving at the finding of fact the lower Appellate Court has committed an error of law or has adopted an erroneous or defective procedure, the finding of fact will be open to attack on the ground of such error or defect. AIR 1956 Bhopal 22 (23) * AIR 1958 All 54 (61) (DB) * AIR 1955 Assam 23 (26): ILR (1954) 6 Assam 242 (DB) * AIR 1954 Ajmer 75 (76) * AIR 1954 Orissa 17 (18): ILR (1953) Cut 558 (DB) * AIR 1954 Pat 562 (565): 33 Pat 638 (DB) * AIR 1953 Bilaspur 17 (18) * AIR 1952 Bilaspur 13(14) * AIR 1952 Kutch 87 (88) * AIR 1952 Punj 340 (343) * AIR 1952 Raj 91 (92): ILR (1951) 1 Raj 166 * AIR 1951 Cal 320 (321) * AIR 1951 Punj-Simla 223 (224) * 1951 Raj LW 160 (163) * AIR 1950 Nag 71 (75): ILR (1950) Nag 105 * AIR 1950 Pat 293 (295) * AIR 1966 SC 1652 (1653): (1964) 5 SCR 965. (Error of law — Misconstruction of document on which claim of party based — High Court competent to correct such error in second appeal.) * AIR 1966 Raj 172 (176): 1966 Raj LW 50. (Judgment vitiated by error of law — Question whether a widow had consented to act as guardian of her infant son — Second Appellate Court can decide the question on evidence.) * AIR 1966 All 39 (41): 1965 All LJ 339. (Wrong approach with regard to onus of proof.) * (1962) 64 Punj LR 165 * 1960 MPLJ 673: 1960 Jab LJ 706 * AIR 1960 Mys 97 (100) (DB) * AIR 1954 Cal 90 (93): 91 Cal LJ 327 (DB).

[See AIR 1946 Pat 440 (441).]

[See also AIR 1935 Pat 415 (416) (DB).]

(2) A finding of fact can be set aside in second appeal in the following cases:

(a) Where it is not based on any evidence or on legal evidence, or on mere conjectures or surmises or on a judicial consideration of the evidence adduced or by placing a wrong onus of proof. AIR 1957 SC 49 (56): 1956 SCR 691. (Finding not based on evidence or legal evidence.) * AIR 1958 All 699 (702) (DB). (Failure to consider important evidence.) * AIR 1958 All 335 (337) * AIR 1958 All 54 (61)

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(DB). (No legal evidence — Mere conjuctures and surmises.) * AIR 1958 Mad 527 (530). (Wrong onus.) * AIR 1958 Pat 211 (217): 37 Pat 88 (DB) * ILR (1958) Ker 713 (727) (DB) * 1958 Ker LJ 396 (400). (Material evidence not considered.) * AIR 1957 All 21 (22): ILR (1957) 1 All 220 (DB). (No evidence.) * AIR 1957 Andh Pra 1041 (1041). (Lower appellate Court not examining material evidence.) * AIR 1957 Pat 174 (176) (DB) * AIR 1951 SC 193 (196): 1951 SCR 258. (Finding not based on evidence or legal evidence.) * AIR 1952 Pat 341 (349): 31 Pat 446 (SB). (Do.) * AIR 1955 Raj 45 (49): ILR (1955) 5 Raj 191 (DB). (Do.) * AIR 1954 Andhra 29 (33). (Do.) * Madh BLJ 1954 HCR 1046 (1050). (Do.) * AIR 1952 Nag 106 (109): ILR (1953) Nag 684. (Do.) * AIR 1952 Pat 9 (10): 30 Pat 317 (DB). (Do.) * AIR 1952 Punj 284 (286) (DB). (Do.) * AIR 1950 Nag 127 (132): ILR (1949) Nag 862. (Do.) * (1890) 17 Cal 875 (882): 17 Ind App 65 (PC). (Do.) * AIR 1919 PC 29 (30, 31): 47 Cal 107: 46 Ind App 140: 15 Nag LR 97. (Do.) * AIR 1927 Pat 209 (212): 6 Pat 698 (FB). (Do.) * (1904) 29 Bom 1 (12): 31 Ind App 154 (PC). (Do.) * (1937) 39 Punj LR 361 (363) * AIR 1955 Ajmer 14 (15). (Evidence not judicially considered.) * AIR 1954 Orissa 40 (44) (DB). (Do.) * (1954) 7 Sau LR 130 (131). (Do.) * AIR 1953 Raj 167 (168): ILR (1952) 2 Raj 54. (Do.) * AIR 1952 Pat 435 (437) (DB). (Do.) * AIR 1950 All 202 (204). (Do.) * AIR 1950 Nag 71 (76): ILR (1950) Nag 105. (Do.) * AIR 1922 Lah 149 (153) (DB). (Do.) * (1967) 2 SCR 686. (Court ignoring statutory presumption arising out of entry in settlement Khatian — Finding not binding on High Court in second appeal.) * AIR 1963 SC 1917 (1919): (1963) Supp 1 SCR 55. (Bona fide purchase in good faith — Finding not based on evidence — Impact of Section 41, T. P. Act, also not considered by lower appellate Court — Finding cannot bind the High Court in second appeal.) * AIR 1963 SC 1279 (1288): (1964) 1 SCR 270. (Decision of the first appellate Court reached after placing the onus wrongly or based on no evidence, or where there has been substantial error or defect in the procedure, producing error or defect in the decision of the case on the merits.) * AIR 1959 Raj 1 (7): ILR (1958) 8 Raj 717 (FB) * AIR 1968 Cal 532 (536) (DB) * AIR 1968 Guj 287 (289): 9 Guj LR 1060. (Suit for injunction restraining adjoining owner from using open space in front of his (defendant's) house — Burden of proof — Lower Courts ignoring aspect — Interference in second appeal justified.) * (1968) 13 Law Rep 627 (Mys). (Finding that adoption has not been established being contrary to law by reason of omission on part of appellate Court to consider valuable corroboration afforded by registered instrument of adoption in support of oral evidence must be set aside.) * 1968 PLJR 442 * AIR 1968 Punj 60 (62): (1966) 68 Pun LR (D) 276 (DB) * (1967) 2 Mys LJ 499: 12 Law Rep 423 * AIR 1967 Punj 259 (261) * 1966 All WR (HC) 651. (Finding based on irrelevant evidence.) * (1966) 68 Bom LR 874: 1967 Mah LJ 51. (Determination of mesne profits — Finding made without there being evidence in respect of basis of rent and in disregard of other evidence in case — Held, ordinarily Court would not have interfered with determination of mesne profits, it being a question of fact, but in circumstances of case finding could not be sustained.) * ILR (1966) Cut 816: 1966 Raj LW 148 * (1965) 67 Pun LR 1194: 1965 Cur LJ 716 * AIR 1964 Guj 174 (181, 182): (1964) 5 Guj LR 678. (Question whether particular sale deed was sham — Burden of proof put on wrong party — Irrelevant matters taken into consideration — Finding held was vitiated in law — High Court could determine such question of fact in second appeal.) * 1964 BLJR 483 * 1964 Cur LJ 409: (1964) 66 Punj LR 985 * 1964 Raj LW 7. ILR (1963) 13 Raj 1158 * AIR 1963 Andh Pra 72 (74, 78) (DB). (Finding that there was undue influence — No evidence to support finding — High Court can interfere in second appeal.) * ILR (1963) Guj 806. (Notice under Section 260, Bombay Provincial Municipal Corporation Act signed by Junior Assistant, to Estate Officer — No evidence of delegation of power by Commissioner — Notice invalid — Finding of fact of delegation of power based on no evidence — Can be interfered with in second appeal.) * AIR 1963 Pat 216 (220) * 1962 BLJR 404 * AIR 1961 All 418 (420) (DB). (A finding of fact based on no evidence.) * AIR 1961 Mys 146 (148, 149, 150): 39 Mys LJ 54 (DB) * (1960) 62 Bom LR 94: ILR (1960) Bom 412 * AIR 1960 Cal 264 (267): 64 Cal WN 272 (DB). (Failure to consider evidence by final Court of fact — Finding vitiated by error of law — High Court can look into evidence in second appeal.) * (1960) 62 Pun LR 29: ILR (1959) Punj 1269. (A finding which is based on part only of the evidence which is legally on the record, is not a legal finding and is not binding on parties in appeal. AIR 1929 Lah 145, Foll.) * 1959 Andh LT 67. (Wrong onus — Reversed on another point in AIR 1961 Andh Pra 390.) * AIR 1959 Manipur 32 (33). (Findings of fact not based on legal evidence.) * 1960 Raj LW 595: ILR (1960) 10 Raj 1256 * AIR 1952 Punj 284 (286) (DB). (In deciding question of fact Court not taking into consideration documents having important bearing on such question — Finding on question not binding in second appeal.) * AIR 1952 Sau 44 (44) (DB).

(b) Where it is based on a misconception of the real point in controversy in

**Sections 100-101 — Note 47 (contd.)**
the case. (1954) 20 Cut L Tim 432 (435) * AIR 1958 SC 1042 (1045) * AIR 1958 All 335 (337). (Wrong approach to the case.) * AIR 1949 Oudh 87 (88) * AIR 1947 Mad 203 (204) * AIR 1939 Lah 455 (456) * AIR 1915 Lah 477 (478) * AIR 1920 Mad 252 (255) (DB) * AIR 1919 PC 29 (31): 47 Cal 107: 46 Ind App 140 * AIR 1926 Oudh 353 (354) * AIR 1930 Pat 405 (405) * AIR 1931 All 547 (548) (DB) * AIR 1938 Nag 470 (472): ILR (1938) Nag 535 * 1964 Raj LW 587: ILR (1965) 15 Raj 149 * 1963 Jab LJ 994 * (1961) 63 Pun LR 228 * 1960 MPLJ 673 * AIR 1952 Mys 47 (52): 31 Mys LJ 70 (DB). (Misconception of evidence.)

(c) Where the conclusion of fact is not warranted by the facts on which it is based, or is inconsistent with the other findings in the case, or is opposed to the case set up by the party in whose favour it is drawn, or is contrary to pleadings and evidence in the case. 1957 All WR (HC) 567 (568). (Not warranted by evidence.) * ILR (1955) Mys 250 (252). (Conclusion of fact not warranted.) * ILR (1953) 5 Assam 508 (512) (DB). (Do.) * AIR 1952 Mys 47 (51): ILR (1952) Mys 151 (DB). (Do.) * AIR 1950 Assam 216 (216): ILR (1950) 2 Assam 137. (Do.) * ILR (1949) 1 Cut 534 (537) (DB). (Do.) * AIR 1949 Cal 286 (287) (DB). (Do.) * AIR 1949 Nag 21 (23): ILR (1948) Nag 299 (DB). (Do.) * AIR 1948 Mad 481 (487): ILR (1949) Mad 41 (DB). (Do.) * (1878) 3 Cal 198 (204): 4 Ind App 247 (PC). (Do.) * (1903) 5 Bom LR 174 (176) (DB). (Do.) * AIR 1925 Nag 211 (214). (Inconsistent conclusion of facts.) * AIR 1920 Pat 285 (286) (DB). (Do.) * AIR 1926 Lah 535 (536). (Opposed to case set up.) * (1937) 39 Pun LR 361 (363). (Do.) * AIR 1954 Nag 337 (338): ILR (1955) Nag 45 (DB). (Finding contrary to pleading.) * AIR 1969 Orissa 18 (21) * AIR 1966 Punj 502 (504) * 1960 MPLJ 673: 1960 Jab LJ 706 * AIR 1960 Mys 231 (232): 38 Mys LJ 13 (DB). (Question whether sale was beneficial to estate — Finding vitiated — High Court will interfere and arrive at proper finding.)

(d) Where it is contrary to the facts found, or is inconsistent with the statement of reasons therefor in the judgment, or is based on quaint reasoning, or is vague or indefinite. AIR 1956 Bom 155 (158). (Finding contrary to facts found.) * AIR 1952 Sau 44 (44) (DB). (Do.) * (1913) 18 Ind Cas 814 (815) (DB) (Cal). (Do.) * 1890 Unrep Print Judgt. 358. (Inconsistent with statement of reasons.) * AIR 1925 Oudh 386 (387). (Finding based on quaint reasoning.) * AIR 1934 All 902 (903). (Do.) * AIR 1943 PC 24 (25): 70 Ind App 18: ILR (1943) 1 Cal 372: ILR (1943) Kar (PC) 39. (Vague finding.) * AIR 1943 Oudh 274 (276) (DB). (Do.) * AIR 1951 Pat 508 (510) (DB). (Indefinite finding.) * AIR 1925 Cal 993 (994). (Do.) * AIR 1963 All 239 (240). (Finding of fact — Finding inconsistent with another correct finding — High Court is not bound by inconsistent finding.)

(e) Where the finding has been given in reversal of the decision of the first Court either without properly appreciating or discussing the reasons given by the latter Court, or on unsatisfactory grounds. 1955 Raj LW 538 (539) * AIR 1958 Orissa 7 (9): ILR (1957) Cut 574 (DB) * AIR 1957 Andh Pra 1041 (1041) * AIR 1957 Orissa 86 (88): ILR (1956) Cut 393 (DB) * AIR 1952 Mad 176 (176) * AIR 1949 All 172 (175): ILR (1949) All 414 * (1902) 4 Bom LR 822 (822) (DB) * (1936) 40 Cal WN 769 (772) (DB) * AIR 1936 Cal 178 (180): 63 Cal 846 (DB) * AIR 1946 Mad 147 (149). (Finding in reversal of first Court's decision based on unsatisfactory ground.) * AIR 1923 PC 62 (64). (Do.) * (1968) 2 Mys LJ 179: 15 Law Rep 376 * 1968 BLJR 374: 1968 Pat LJR 359 * (1966) 70 Cal WN 37 * (1964) 66 Pun LR 189.

(f) Where it is arbitrary, or vitiated by prejudice, or is based on a distorted view of the evidence, or where no reasons have been given for the finding. AIR 1958 All 699 (702) (DB). (Misreading and misinterpretation of evidence.) * AIR 1923 All 199 (201). (Arbitrary finding.) * 1931 Mad WN 102 (103) (DB). (Do.) * 1940 Oudh WN 550 (553). (Prejudice.) * AIR 1922 Bom 296 (299) (DB). (Finding based on distorted view of evidence.) * AIR 1930 All 510 (511) (DB). (Do.) * AIR 1948 Oudh 27 (28): 22 Luck 363. (No reasons given.) * (1885) 9 Bom 452 (454) (DB). (Do.) * AIR 1921 Pat 18 (20): 6 Pat L Jour 72 (DB). (Do.) * AIR 1937 Mad 282 (283) (Do.) * AIR 1963 All 260 (264, 265): 1963 (1) Cri LJ 724. (Decision of appellate Court based on ambiguous statement without giving party concerned opportunity to explain ambiguity — Court also importing into evidence its own opinion on controversial situations — Finding cannot stand.) * AIR 1963 All 413 (415): 1963 All WR (HC) 518. (Finding of appellate Judge based on misreading of pleadings — High Court can review decision in second appeal.) * AIR 1963 Cal 399 (401): 67 Cal WN 279 * (1963) 1 Ker LR 408. (Error of law — Overlooking material evidence on record is error of law.) * AIR 1961 Assam 13 (14): ILR (1958) 10 Assam 34 (DB) (Finding of fact based upon wrong hypothesis or wrong presumption — High Court will correct that finding.) * 1958 Ker LJ 396. (A finding arrived at without considering material evidence.)

(g) Where material facts have been ignored in arriving at the conclusion of fact. AIR 1952 Pat 435 (437) (DB) * AIR 1952 Punj 284 (286) (DB) * AIR 1944 Mad 121 (122) (FB) * AIR 1932 All 603 (606) (DB) * AIR 1968 SC 466 (468, 470): (1968) 1 SCR 617. (Lower Appellate Court in arriving at its conclusion ignoring important evidence on record — Its conclusion is

**Sections 100-101 — Note 47 (contd.)**
not binding in Second Appeal.) * AIR 1968 Cal 91 (99): 72 Cal WN 717. (Failure to consider material evidence — Amounts to error of law.) * AIR 1963 All 194 (198) * AIR 1963 Madh Pra 155 (158): 1962 Jab LJ 796 * AIR 1960 All 482 (483): 1960 All LJ 579. (Appellate Court refusing to consider material evidence — Finding vitiated by error of law.) * AIR 1959 Assam 189 (190): ILR (1957) 9 Assam 199 (DB).

[See also AIR 1955 Bom 413 (419): ILR (1955) Bom 856 (DB).]

(h) Where the finding is perverse in the sense that no normal person could have arrived at that finding. AIR 1957 SC 49 (56): 1956 SCR 691 * AIR 1957 Pat 168 (172): 35 Pat 986 (DB). (Powers under Section 25, Provincial Small Cause Courts Act are similar to those under Sec. 100 of the Code.) * AIR 1956 Bhopal 22 (23) * 1968 Cri LJ 988 (Delhi): (1968) 70 Pun LR (D) 142 * 1960 Pun LR 29: ILR (1959) Punj 1269.

(i) Judgment of Appellate Court — Presumption as to Court having dealt with all points urged — Presumption rebuttable by filing an affidavit by advocate. AIR 1968 Andh Pra 223 (227, 228): (1968) 1 Andh WR 374.

(3) A finding based on the opinions of experts is not necessarily a finding based on facts proved or directly demonstrated and the sufficiency of the facts observed or of the inferences or opinions formed, can be examined in second appeal. AIR 1925 All 24 (25): 47 All 243 (DB).

[But see AIR 1935 All 501 (501).]

(4) An error of law on one point is not sufficient justification for re-opening a finding of fact which has been mainly decided by applying correct principles of law. AIR 1927 Mad 331 (335).

(5) Where a finding of fact has become irrelevant by reason of a change in the law at the time of the second appeal, the High Court can consider the evidence in the light of the altered aspect of the finding. AIR 1926 All 725 (727) (DB). (Overruled on another point in AIR 1927 All 1: 49 All 25 (FB).) * AIR 1926 Nag 49 (50).

(6) Whether a transferee took reasonable care to ascertain that the transferor had power to make the transfer has no doubt to be determined with reference to the circumstances of the particular case the test being whether he acted like a reasonable man of business and with ordinary prudence. But the question whether that test has or has not been properly applied in any particular case cannot be regarded as one of pure fact not open to review in a second appeal. AIR 1959 Assam 15 (19): ILR (1957) 9 Assam 465 (DB).

(7) Suit for declaration and possession — The plaintiff brought a suit for a declaration that the land in question constituted accretion to his land and plaintiff's title as periodic settlement-holder be declared in respect of such land and for khas possession. On the question of title both the Courts below found that accretion to the land of the owner becomes part of his land under the Assam Land and Revenue Regulation. Held that the finding on the question of title could be canvassed in second appeal. AIR 1963 Assam 188 (190).

(8) Certified copy of public document — Admissible in evidence without being proved by calling a witness — No objection raised to mode of proof either in trial Court or in appellate Court — High Court commits error of law in rejecting such document on ground that it had not been proved. Supreme Court would interfere. AIR 1963 SC 1633 (1637): (1964) 2 SCR 673.

(9) The following categories of findings may be regarded as coming within the scope of Clause (1) (a) of Section 100, Civil P. C.:

(1) Where the decision is based on no evidence;

(2) Where the decision is based on evidence which no reasonable individual having regard to Section 3 of the Indian Evidence Act would consider a sufficient basis for the decision;

(3) Where the decision is based on evidence which the High Court considers insufficient in law to support it;

(4) Where an apparent illegality has been committed;

(5) Where an express provision of law has been disregarded which affects the merits of the decision;

(6) Where the decision of the lower appellate Court is otherwise against law and hence legally unsustainable. AIR 1960 Andh Pra 397 (404): 1959 Andh LT 554.

**48. Concurrent findings of fact.** — (1) A finding of fact is conclusive in second appeal unless it is arrived at by committing an error of law or of procedure. The same principles apply with greater force in the case of concurrent findings of fact by two Courts. AIR 1952 Bilaspur 13 (14) * AIR 1958 Cal 434 (436) (DB) * AIR 1957 Andh Pra 958 (959) * ILR (1956) 1 Cal 150 (152) * AIR 1944 Lah 1 (3) (DB) * AIR 1963 SC 1203 (1207): (1963) 1 SCR 456. (Finding that there was partition and separation in the joint family — Finding based on evidence — Finding having direct impact on main question to be decided in case — Finding being finding of fact based on evidence is binding in second appeal.) * AIR 1969 Pat 233 (235) (DB) * 1968 All WR (HC) 163 * AIR 1968 Manipur 12 (14) * AIR 1967 Cal 354 (355) * AIR 1967 Cal 204 (205). (Suit for eviction — Defendant setting up claim of rival title to property — Concurrent finding of Courts below negativing claim — In circumstances of case held matter must be held to be concluded against defendant.) * AIR 1967 Mad 404 (408): (1967) 1 Mad LJ 96 * AIR 1966 Cal 502 (503) * (1965) 67 Pun LR 1164 *

**Sections 100-101 — Note 48 (contd.)**
AIR 1964 Mad 474 (475): 77 Mad LW 115. (Existence of enforceable contract — Question is of fact — Concurrent finding thereon is binding in second appeal.) * 1963 Ker LT 125 (Mad) * AIR 1960 Punj 471 (473): 62 Pun LR 442 (DB).

[See AIR 1940 Rang 126 (127, 128): 1940 Rang LR 180 (DB).]

(2) Concurrent findings of fact will be conclusive in second appeal. AIR 1956 SC 593 (598): 1956 SCR 451: ILR (1956) Mys 152 * AIR 1952 SC 29 (37): 1952 SCR 241 * AIR 1958 Ker 178 (181): ILR (1958) Ker 389 (FB) * (1958) 60 Pun LR 132 (DB) * AIR 1958 Pat 530 (534) * 1958 Raj LW 367 (368) * AIR 1958 Raj 269 (272): ILR (1958) 8 Raj 233 * AIR 1957 Andh Pra 781 (784) * AIR 1957 Bom 201 (206): ILR (1957) Bom 302 (DB) * AIR 1957 Orissa 124 (125): ILR (1957) Cut 334 (DB) * AIR 1957 Raj 175 (176): ILR (1956) 6 Raj 406 * AIR 1956 Bhopal 13 (14) * AIR 1956 Madh B 74 (75) * AIR 1956 Orissa 61 (62): ILR (1955) Cut 697*AIR 1956 Pat 345 (347) (DB) * 1956 Andh WR 994 (996) * (1956) 34 Mys L Jour 5 (6) * (1955) 59 Cal WN 430 (432) * Madh BLJ 1955 IICR 1013 (1014) * ILR (1955) Mys 241 (243) * (1955) 8 Sau LR 146 (147) * AIR 1954 Mad 681 (683): ILR (1954) Mad 775 (DB) * AIR 1954 Orissa 219 (220): ILR (1954) Cut 256 (DB) * AIR 1954 Pepsu 1 (2): ILR (1952) Patiala 151 (DB) * AIR 1954 Raj 49 (50): ILR (1952) 2 Raj 525 * AIR 1954 Trav-Co 478 (486): ILR (1954) Trav-Co 627 (FB) * ILR (1954) 6 Assam 53 (56) * AIR 1953 Madh B 184 (186) (DB) * AIR 1953 Trav-Co 321 (322): ILR (1953) Trav-Co 326 (DB) * (1953-54) 12 J and K LR 108 (109) * (1953) 6 Sau LR 446 (449) * AIR 1951 Mys 31 (32): ILR (1951) Mys 374 (DB) * AIR 1950 Mad 761 (762) * AIR 1950 Pat 178 (179) * AIR 1942 All 221 (222): ILR (1942) All 667 (FB) * AIR 1942 All 233 (234): ILR (1942) All 832 (FB) * AIR 1914 PC 87 (89): 37 Mad 443: 41 Ind App 258 * AIR 1917 PC 33 (39): 40 Mad 709: 44 Ind App 147 * AIR 1918 PC 182 (183): 42 Mad 400: 46 Ind App 44 * AIR 1922 PC 159 (160): 48 Cal 856: 48 Ind App 144 * AIR 1928 PC 243 (245): 55 Ind App 380 * AIR 1929 PC 63 (64) * AIR 1930 PC 232 (234) * AIR 1963 SC 1203 (1206): (1963) 1 SCR 456 * AIR 1959 SC 1204 (1207): (1960) 1 SCR 271 * AIR 1959 SC 960: 1959 Cri LJ 1223. (Supreme Court accepts concurrent findings of fact.) * (1969) 73 CWN 88 (91) * AIR 1969 Ker 9 (10): 1968 Ker LR 268. (The question as to whether or not the accident was caused by the negligence on the part of the driver of a motor-car is purely one of fact and a concurrent finding entered thereon by the Courts below is not ordinarily liable to canvassed before the High Court in second appeal.) * AIR 1969 Orissa 140 (141) * AIR 1968 Andh Pra 61 (62): (1967) 1 Andh WR 64 * 1968 BLJR 626 (DB) * AIR 1967 Assam 99 (100) * AIR 1967 Guj 87 (90): 8 Guj LR 386. (Issue of ownership of certain wall — Concurrent finding of lower Courts that wall was joint wall, based on evidence — Finding even if grossly erroneous, no interference therewith lies in second appeal.) * 1967 Ker LT 74: 1967 Ker LJ 80 * AIR 1967 Mad 318 (322): (1966) 2 Mad LJ 226 * (1967) 10 Law Rep 798 (Mys) * (1967) ILR 46 Pat 970 * AIR 1967 Punj 447 (448). (Concurrent finding — Nature of property, as to whether particular property was ancestral — Both the Courts arriving at a correct finding on examining the revenue records — Finding not interfered with in Second Appeal.) * AIR 1967 Punj 252 (255). (Abandonment of possession is a question of fact — Concurrent decision of lower Courts is binding on High Court in second appeal.) * AIR 1966 All 234 (236): 1965 All LJ 651. (Concurrent finding on question whether possession was with consent or without consent, cannot be interfered with in second appeal.) * AIR 1966 All 367 (369): 1965 All LJ 549. (Concurrent finding of fact supported revenue extracts on record — Finding is binding in second appeal.) * AIR 1966 All 185 (187): 1965 All LJ 446 * 1966 All LJ 1057: 1966 All WR (HC) 736 * ILR (1966) 18 Assam 285 * AIR 1966 Mad 130 (132): (1965) 2 Mad LJ 113 * (1966) 32 Cut LT 478: ILR (1966) Cut 284 * 1966 BLJR 103 * 1965 Cur LJ 665: (667): 68 Pun LR 191: ILR (1966) 1 Punj 291 * 1965 Mad 432 (434): (1965) 2 Mad LJ 371 (DB) * (1965) 67 Pun LR 1164 * AIR 1965 Raj 217 (219): 1965 Raj LW 242 * (1964) 2 ITJ 505 (Guj) * 1964 Jab LJ 279 * ILR (1964) 1 Punj 84 (DB) * AIR 1964 Raj 71 (72): 1963 Raj LW 302 * AIR 1963 J and K 14 (15): 1962 Kash LJ 123 (DB). (Concurrent finding that plaintiff had not waived his right to preempt — Finding is conclusive in second appeal.) * 1963 Ker LT 937: 1963 Ker LJ 543 * (1963) 2 Mad LJ 528: 76 Mad LW 725 * (1965) 2 Mys LJ 275 (DB). (Concurrent findings that endorsements for payment of interest made on the mortgagedeed were genuine — Question as to genuineness of endorsements cannot be raised in second appeal.) * ILR (1963) Cut 610 * AIR 1963 Pat 146 (149): 1963 BLJR 169 (DB). (Findings that sale was collusive, without consideration and with notice of prior contract of sale cannot be reopened.) * AIR 1962 Raj 227 (228): 1961 Raj LW 644 * ILR (1961) 2 All 90 * AIR 1961 Assam 70 (71): ILR (1961) 13 Assam 101 (DB) * 1961 Jab LJ 1175: 1961 MPC 826 * 1961 Jab LJ 513: ILR (1961) Madh Pra 856 * AIR 1960 Andh Pra 70 (74): (1959) 2 Andh WR 140 (DB). (Benami transaction — Purchase of property being benami is a question of fact — Concurrent findings binding in second appeal.) * AIR 1960 Mad 568 (571): (1960) 2 Mad LJ 262 (DB). (Concurrent finding of fact — No interference merely on the ground that a different inference is possible on the evidence recorded from that drawn by

**Sections 100-101 — Note 48 (contd.)**
the Courts below.) * AIR 1959 All 631 (633): 1959 All LJ 522 (DB) * AIR 1959 Andh Pra 153 (154): 1959 Andh LT 67. (Reversed in AIR 1961 Andh Pra 390 on another point.) * AIR 1959 J and K 107 (109, 110) (DB) * AIR 1959 Orissa 65 (68) (DB). (Concurrent finding of fact — Finding that there was severance in status — Finding is binding in second appeal.) * (1959) 1 Orissa JD 558. (Benami nature of transaction—Concurrent finding —No interference by High Court in second appeal.) * (1958) 60 Pun LR 132 * AIR 1950 Mad 761 (762): (1950) 1 Mad LJ 209. (Concurrent finding of fact — Finding as to delivery of possession — No interference.)

(3) If an error of law or of procedure is committed in arriving at the findings the findings are not conclusive in second appeal. AIR 1929 PC 38 (38, 39, 40) * AIR 1951 Mys 38 (40): ILR (1951) Mys 259 (FB) * AIR 1953 Madh B 184 (186) (DB) * AIR 1952 Bilaspur 13 (14) * AIR 1929 PC 205 (209) * AIR 1967 Mad 85 (88): (1966) 2 Mad LJ 263 (DB) * 1959 Andh LT 67. (Wrong onus of proof — Reversed on another point in AIR 1961 Andh Pra 390.)

(4) If the finding is based on no evidence, or on an improper rejection of material evidence or on a misconstruction of documents, or on inferences not warranted by the facts, it can be set aside in second appeal. AIR 1914 PC 67 (71): 41 Cal 972: 41 Ind App 110. (No evidence.) * AIR 1952 J and K 24 (25): 10 J and K LR 186 (DB). (Do.) * AIR 1916 Mad 692 (693): 39 Mad 597 (DB). (Do.) * AIR 1918 Bom 161 (161): 42 Bom 352 (DB). (Do.) * 1954 Raj LW 488 (492). (Ignoring material evidence.) * AIR 1941 Oudh 468 (472): 16 Luck 626. (Do.) * AIR 1922 Nag 52 (55): 18 Nag LR 163. (Misconstruction of document.) * AIR 1935 Oudh 304 (305) (DB). (Do.) * (1949) 54 Mys HCR 451 (479) (DB). (Unwarranted inference.) * AIR 1949 Nag 21 (23): ILR (1948) Nag 299 (DB). (Do).

[See also ILR (1953) Madh B 18 (23).]

(5) A litigant who seeks before a second appellate tribunal to reverse findings of fact which have been arrived at by the trial Judge and have, after consideration, been confirmed on appeal, comes always with a very heavy burden upon his shoulders. AIR 1934 PC 127 (129).

(6) The circumstance that the lower Appellate Court and the trial Court, in arriving at the same conclusion, have not been influenced by the same considerations, will not detract from the binding nature of the concurrent finding. (1893) 20 Cal 847 (852): 20 Ind App 95 (PC).

(7) Where the lower Appellate Court does not deal with the question and fails to give independent opinion thereon, then the finding is not "concurrent". AIR 1954 Pepsu 1 (2): ILR (1952) Patiala 151 (DB) * AIR 1954 Trav-Co 297 (299) * ILR (1953) Madh B 299 (301).

[See AIR 1916 PC 126 (128): 43 Ind App 172: 43 Cal 1104 * 1955 Andh WR 308 (312).]

(8) Where the plaintiff's evidence has been believed by both the Courts below, even though it was not in conformity with his statement in the plaint, the High Court in a second appeal has no jurisdicion to make a different estimate of that evidence. But it can examine the question whether that evidence, if accepted would establish the plaintiff's case. AIR 1957 Cal 357 (358, 359) (DB).

(9) Concurrent findings of fact based on appreciation of evidence — No interference with them by Supreme Court. AIR 1967 SC 1044 (1045, 1046): (1967) 2 SCR 618.

**49. New case.**— (1) Parties are bound by the case which arises on their pleadings and which has been enquired into by the trial Court. AIR 1915 Lah 399 (400) * (1957) 23 Cut L Tim 473 (475).

(2) Parties should not be allowed to depart from the facts and grounds of relief originally pleaded by them, or to change their case and present it in an entirely new shape. (1953) 6 Sau LR 380 (382) * AIR 1958 Pat 467 (470) * AIR 1957 Madh Pra 138 (139) (DB) * AIR 1957 Raj 375 (377): ILR (1957) 7 Raj 423 * AIR 1957 Raj 175 (176): ILR (1956) 6 Raj 406 * AIR 1957 Tripura 8 (9) * (1957) 23 Cut L Tim 473 (475) * 1956 All L Jour 730 (732). (Altering nature of defence.) * AIR 1952 All 934 (936) * (1866) 6 Suth WR 57 (58) (PC) * AIR 1932 Cal 77 (79) (DB) * AIR 1927 Mad 1197 (1198, 1199) * AIR 1954 Madh B 134 (135). (Change of case.) * AIR 1952 All 996 (1001): ILR (1952) 2 All 984 (DB). (Do.) * AIR 1940 Pat 161 (162): 18 Pat 854 (DB). (Do.) * AIR 1935 Cal 817 (820) (DB). (Do.) * AIR 1934 Mad 639 (640) (DB). (Do.) * (1888) 10 All 495 (497) (DB). (Do.) * AIR 1936 Pat 275 (282) (DB). (Do.)

[See also AIR 1936 Pat 49 (50): 15 Pat 219 (DB).]

(3) A party will not in appeal be permitted to put forward a new plea contrary to the one taken by him in the trial Court. AIR 1958 Andh Pra 322 (324) * 1968 BLJR 74 (DB). (Suit all along fought on the ground that title had passed upon execution and registration of sale deed — Even upon existing averments in the plaint and findings of trial Court a relief based on specific performance held could not be claimed.)

(4) If there is any defect in the case of the parties it is not the function of the High Court to remedy it. AIR 1952 Kutch 55 (58) * AIR 1922 Bom 150 (152): 46 Bom 213 (DB).

(5) A new plea not being one of pure law, which is inconsistent with, or different from, the one set up in the Courts below,

**Sections 100-101 — Note 49 (contd.)**
will not be allowed in second appeal. AIR 1958 Manipur 7 (11) * AIR 1955 Punj 31 (33, 34): ILR (1955) Punj 274 (DB). (Inconsistent plea.) * Madh BLJ 1954 HCR 457 (459). (Do.) * AIR 1953 Orissa 17 (19): ILR (1952) Cut 493 (DB). (Do.) * AIR 1953 Pepsu 101 (102). (Do.) * AIR 1953 Punj 38 (40). (Do.) * AIR 1951 Bom 22 (24): ILR (1951) Bom 169 (DB). (Do.) * AIR 1923 Cal 177 (178) (DB). (Do.) * AIR 1929 Mad 349 (350) (DB). (Do.) * AIR 1955 Cal 503 (506) (DB). (Different plea.) * AIR 1954 Nag 334 (334): ILR (1954) Nag 866 (DB). (Do.) * ILR (1954) 1 All 563 (567). (Do.) * AIR 1953 Ajmer 53 (1) (53). (Do.) * AIR 1953 Sau 39 (42). (Do.) * AIR 1951 All 850 (850) (Do.) * AIR 1951 Raj 126 (127). (Do.) * AIR 1951 Sau 53 (54). (Do.) * AIR 1950 Pepsu 42 (42). (Do.) * AIR 1946 PC 97 (99): 73 Ind App 98: ILR (1946) Kar (PC) 94: ILR (1946) Bom 694. (Do.) * (1869) 12 Moo Ind App 470 (475): 11 Suth WR 27 (28) (PC). (Do.) * (1892) 15 Mad 503 (511): 19 Ind App 179 (PC). (Do.) * AIR 1961 SC 1720 (1729, 1730): (1962) 2 SCR 509. (Plea of being the holder of the office of 'arulipad' set up for first time in second appeal.) * AIR 1969 Raj 11 (14, 15): 1968 Raj LW 501 * AIR 1967 All 481 (483): 1967 All LJ 92 * AIR 1966 Guj 116 (120): (1965) 6 Guj LR 458 * 1964 BLJR 59 * 1963 BLJR 44.

[See also AIR 1943 Bom 447 (448). (Second appeal — Plaintiff's allegation that consideration was cash, found not true — Plaintiff can prove what real consideration was.)]

(6) In the case of new pleas which are in the nature of additional pleas, the general rule is that the parties are not entitled to relief on facts or grounds not stated or referred to in their pleadings. AIR 1960 SC 213 (216): (1960) 1 SCR 861 * AIR 1966 Andh Pra 225 (226). (Pure question of law — Not raised in Courts below — Can be raised in second appeal.) * AIR 1954 Andh 29 (30) * AIR 1950 Orissa 64 (67): ILR (1949) 1 Cut 611 * AIR 1942 Cal 133 (136) * (1867) 11 Moo Ind App 468 (473, 474) (PC) * (1868) 12 Moo Ind App 470 (475) (PC).

(7) Except upon very strong grounds, or under very special circumstances, a party will not be allowed to urge new pleas in the nature of additional pleas in second appeal. ('82) 6 Bom 107 (110) (DB). (There must be strong grounds or special circumstances.) * (1883) 7 Bom 146 (150). (Do.) * AIR 1956 Pat 441 (444) * AIR 1954 Andhra 15 (16, 17) * AIR 1953 Trav-Co 563 (567) (DB) * AIR 1952 Assam 5 (10): ILR (1951) 3 Assam 332 (DB) * (1951) 4 Sau LR 201 (207) * AIR 1915 Lah 169 (170) (DB) * AIR 1920 Cal 499 (500) (DB) * AIR 1921 All 405 (406) * AIR 1922 Bom 329 (331): 46 Bom 966 (DB) * AIR 1937 Nag 205 (208): ILR (1937) Nag 367 * AIR 1967 Orissa 81: ILR (1966) Cut 913. (New plea arising out of admitted case and findings of lower Courts — Such plea permitted to be raised for first time in second appeal.) * (1966) 70 Cal WN 925: (1967) 2 Lab LJ 782. (Per Datta. J.: Point depending on undisputed documents before the High Court — Point should be allowed to be agitated in the ends of justice.) * 1966 MPLJ 1124: 1967 MPWR 258 * AIR 1966 Punj 310 (312): 67 Pun LR 735 (DB). (Questions of fact cannot be raised in second appeal.) * AIR 1965 Punj 494 (495): 67 Pun LR 1053. (New point involving determination of questions of facts — Cannot be raised in second appeal.) * AIR 1965 Punj 479 (480). (Disputed question of fact as to previous permission of Court — Cannot be allowed to be raised for first time in second appeal.)

[See also AIR 1936 PC 139 (141).]

(8) Even if the new plea is in the nature of an alternative case arising out of the lower Appellate Court's decision, it will not be allowed to be urged in second appeal, except upon very strong grounds. AIR 1950 All 421 (423) * (1957) 23 Cut L Tim 473 (475) * AIR 1926 Pat 156 (158) (DB) * AIR 1969 SC 204 (208): (1969) 1 SCJ 538. (AIR 1964 Pat 254, Reversed.) * AIR 1964 Raj 50 (55): 1963 Raj LW 491.

(9) An alternative title not urged before can nevertheless be allowed if the facts are so plain that it will be doing an injustice to the party to deny him a right to which he is entitled on that basis. AIR 1923 All 176 (179): 45 All 59 (DB) * ILR (1957) 7 Raj 101 (109).

[See also AIR 1938 All 188 (191): ILR (1938) All 218 (DB).]

(10) A new prayer may be allowed if it naturally arises from the findings of the lower Appellate Court. (1872) 18 Suth WR 424 (432, 433) (DB).

(11) A new prayer will not be allowed, if it would change the frame or nature of the suit, even if it naturally arises from the findings of the lower Appellate Court. AIR 1942 Sind 81 (82): ILR (1942) Kar 32 (DB) * (1913) 19 Ind Cas 661 (662) (DB) (All).

(12) A prayer for consequential relief may be allowed if its omission in the first instance was through a bona fide mistake. AIR 1924 Pat 310 (311): 2 Pat 919 (DB).

(13) See also the following cases:

(a) Plea of rate of interest being usurious cannot be raised for first time in second appeal. 1956-2 Mad L Jour 286 (288).

(b) Suit for possession of Zamindari share decreed — Suit dismissed in appeal on ground that zamindari had vested in State during pendency of appeal — Appellant can put forward his claim for compensation in second appeal though not raised in lower Appellate Court especially when it would avoid multiplicity of litigation. AIR 1954 All 751 (752).

**Sections 100-101 — Note 49 (contd.)**

(c) Defendant not pleading waiver of notice or of a condition of a contract, in written statement — He cannot be allowed to raise the contention in second appeal. Madh BLJ 1954 HCR 730 (734). (Waiver of notice.) * AIR 1958 Mys 10 (11): ILR (1957) Mys 72 (DB). (Waiver of condition in a contract.)

(d) Suit for recovery of possession — Plaintiff's claim to dispossessed lands under deed of settlement — Case of prescriptive rights not raised in pleadings — High Court refused to construe issue of title raised as covering plea of title by prescription or entertain that point in second appeal. AIR 1951 Mad 608 (609).

(e) Plea based on Section 41, Transfer of Property Act — Plea not raised in Courts below — Plea cannot be allowed to be raised for the first time in second appeal. (1949) 28 Pat 542 (550) (DB) * AIR 1959 Cal 69 (70).

(f) Plea not taken in pleading but raised in course of arguments — Objection to new case being set up not taken in lower Courts and before single Judge of High Court — Objection about new case not to be entertained by Division Bench. AIR 1949 East Punj 325 (327) (DB).

(g) Point that decree was not for payment of money and was not executable raised throughout — Contention that there is no reference to defendant in decree and therefore, decree is not money decree is not new and can be raised in second appeal. AIR 1942 Mad 748 (750).

(h) Suit for possession — Claim for damages made for first time in second appeal cannot be decreed. AIR 1941 Pat 247 (248) (DB).

(i) Suit for ejectment of defendant — Second appeal — Plea that defendant was not actually in arrears when notice was served not indicated in written statement — Defendant would not be allowed to raise plea in second appeal — U. P. (Temporary) Control and Eviction Act (III of 1947), Section 3. 1965 All LJ 249: 1965 All WR (HC) 161.

(j) Plea of part performance against transferee for consideration — Cannot be allowed to be raised in second appeal for first time. AIR 1964 All 300 (301).

(k) Suit for ejectment of tenant after expiry of lease on ground that he was a tenant at will — Defendant pleading protection of Section 5, Assam Act (12 of 1955), which came into force pending suit No specific plea that he had constructed a building within five years of the new tenancy created by virtue of Section 116, T. P. Act — Decree for eviction on ground that tenant had not built any construction within five years from date of original lease and was entitled to protection under Section 5 — Defendant cannot be allowed to plead protection under Section 5 on basis of new tenancy created under Section 116, T. P. Act. AIR 1963 Assam 137 (139): ILR (1963) 15 Assam 120 (DB).

(l) Suit for ejectment after notice terminating tenancy — Date of commencement of tenancy not mentioned in plaint — Point that notice was invalid not raised in Court below — Appellant not allowed to raise it in second appeal. AIR 1965 Assam 55 (58): ILR (1964) 16 Assam 435 (DB).

(m) Suit for eviction — Damages not claimed by plaintiff — Issue not raised on point — No witness proving any damages — High Court in second appeal assessing damages merely on guess work — Assessment and award of damages held were beyond jurisdiction. (1963) 67 Cal WN 617.

(n) New point — Suit to recover possession of land from lessees — Averments that first defendant alone was the lessee who had surrendered possession by endorsement on lease deed and that defendant 2 was only a surety for defendant 1 —In second appeal surrender by defendant 1 held not operative — Thereupon counsel for defendant 2 stating that defendant 2 has surrendered whatever rights he had in lease — Held, that such submission would prejudice rights of other parties and the High Court could not take note of it at such late stage. (1964) 2 Mad LJ 242: 76 Mad LW 431.

(14) In the case of new points or objections, the following propositions may be laid down:

(a) A point or objection not raised in the Courts below or in the grounds of appeal — that is, as to which the respondent has had no notice that it is going to be urged — will not be allowed to be argued in second appeal. AIR 1954 Ajmer 57 (2) (60) * AIR 1958 SC 199 (202): 1958 SCR 948: ILR (1958) Punj 807 * AIR 1958 Andh Pra 427 (435) (DB) * 1956 All L Jour 730 (732) * AIR 1954 Sau 8 (9) * ILR (1954) 1 All 563 (567) * 1954 All WR (HC) 522 (523) * AIR 1953 All 236 (238) * AIR 1953 Bom 412 (415): ILR (1953) Bom 948 (DB) * AIR 1953 Trav-Co 360 (361) (DB) * AIR 1950 All 1 (8) * AIR 1950 Cal 467 (469): ILR (1951) 2 Cal 143 (DB) * AIR 1949 Assam 22 (22) (DB) * AIR 1943 Mad 322 (324) * AIR 1966 SC 1024 (1024): (1966) 1 SCJ 601 * AIR 1969 Ker 19 (21): 1968 Ker LJ 614. (Suit for redemption and possession of mortgaged property — Amendment seeking to convert it into one for possession on basis of title — Cannot be allowed in second appeal.) * AIR 1969 Pat 24 (25) * AIR 1968 Bom 208 (214): 69 Bom LR 394 (DB) * AIR 1968 Madh Pra 175 (177): 1968 MPLJ 180 * AIR 1968 Pat 496 (499): 1969 BLJR 208 (DB) * 1968 BLJR 850 * 1968 Raj LW 354 * 1967 Ker LT 596; 1967 Ker LJ 718 * 1967 Raj LW 255: ILR (1966) 16 Raj 1229 * 1966 Ker

**Sections 100-101 — Note 49 (contd.)**

LT 1125: 1966 Ker LJ 337. (Contention that plaint was not properly verified — Contention not raised in first appeal — Appellant not allowed to raise the contention in second appeal.) * 1966 Ker LT 1031: 1966 Ker LJ 1014. (Plea of debtor that he was not an agriculturist — Plea not taken in objection to execution of decree and case dealt with by lower Courts as if Kerala Act XXXI of 1958 applied to debtor — Plea cannot be allowed in second appeal.) * AIR 1966 Madh Pra 307 (309): 1966 Jab LJ 1112 * AIR 1966 Mys 299 (304): (1965) 2 Mys LJ 692 * AIR 1966 Orissa 76 (79): ILR (1965) Cut 867 * (1966) 33 Cut LT 892: ILR (1966) Cut 619 * (1966) 32 Cut LT 148: ILR (1965) Cut 486 * AIR 1966 Punj 36 (40): 67 Pun LR 849 * (1966) 68 Pun LR 874 * 1966 Raj LW 498. (Plea not taken in written statement — Fact constituting plea mentioned in the document executed by defendant in favour of plaintiff and relied on by the latter to prove his claim — Facts constituting the plea cannot be held proved — New plea cannot be allowed.) * 1966 Raj LW 492 * 1966 Raj LW 141: ILR (1966) 16 Raj 454 * 1965 All WR (HC) 544. (A plea as to identifiability of plots not raised before the Courts below cannot be allowed to be raised in second appeal.) * AIR 1965 Andh Pra 98 (100): ILR (1963) Andh Pra 931 (DB) * (1965) 67 Pun LR 767 * AIR 1964 Guj 174 (177): (1964) 5 Guj LR 678. (Plea of misjoinder not taken in suit — It cannot be allowed for first time in second appeal.) * AIR 1964 Pat 66 (71) * AIR 1963 Cal 325 (328, 329): 67 Cal WN 110 (DB) * AIR 1963 Guj 244 (249) * AIR 1963 Orissa 97 (99) * ILR (1963) Cut 146 * AIR 1963 Raj 241 (244, 245): 1963 Raj LW 497 * AIR 1962 All 233 (237) * AIR 1962 Ker 36 (37): 1960 Ker LT 1080. (Plea of non-joinder of party cannot be allowed for first time in second appeal.) * 1962 Cur LJ 287 (Punj) * (1961) 65 Cal WN 1110 * (1961) 39 Mys LJ 936. (Plea as to abandonment not raised before — Party cannot be permitted to raise it for first time in second appeal.) * ILR (1961) Mys 221 * 1960 Jab LJ 549: 1960 MPC 420. (New ground taken regarding defect in quit notice — Point not urged either in trial Court or in first appeal — It cannot be allowed to be urged in Second Appeal.) * (1960) 2 Orissa JD 367: ILR (1960) Cut 92 * AIR 1959 Cal 328 (331): ILR (1959) 2 Cal 325 (DB) * AIR 1959 Madh Pra 389 (390): 1959 MPLJ 884 * AIR 1959 Pat 477 480) * AIR 1957 Madh Pra 138 (139): 1957 MPLJ 368 (DB) * AIR 1952 Orissa 165 (166): 17 Cut LT 209. (Suit for ejectment of sub-tenant — Plea of want of valid notice to quit cannot be raised in second appeal for first time.)

[See however AIR 1942 Mad 317 (318).]

(b) A point or objection which, if it had been taken in the first instance, could have been cured or met by the other side adopting a course of action which is not open to him at the stage of second appeal, will not be allowed. AIR 1956 Hyd 170 (171): ILR (1956) Hyd 321 * AIR 1958 Punj 116 (121): ILR (1958) Punj 335 (DB). (Objection as to admissibility of secondary documentary evidence.) * 1956 All L Jour 730 (732) * 1956 Madh BLJ 269 (272, 273) * AIR 1952 All 996 (1006, 1011): ILR (1952) 2 All 984 (DB) * 1951 All L Jour 145 (147) (DB) * AIR 1948 Nag 293 (296): ILR (1947) Nag 710 (DB) * AIR 1945 All 202 (204): ILR (1945) All 676 (FB) * AIR 1963 All 250 (251): 1963 All LJ 25.

(c) A new point or objection involving fresh investigation on facts will not be allowed. AIR 1956 Andhra 105 (107, 108): ILR (1955) Andhra 393 * AIR 1957 Andh Pra 604 (606) * AIR 1957 Pat 408 (417) (DB) * 1956 All L Jour 355 (356) * 1956 Raj LW 238 (239) * AIR 1955 All 192 (192) (DB) * AIR 1955 Pat 375 (379) (DB) * AIR 1955 Pat 189 (192) * AIR 1957 Andh Pra 604 (606) * Madh BLJ 1955 HCR 2194 (2196) * AIR 1954 All 441 (442) (DB) * AIR 1954 Pat 8 (9) (DB) * AIR 1954 Trav-Co 392 (394) (DB) * 1954 All LJ 580 (581) * AIR 1951 Orissa 105 (110) (FB) * AIR 1951 Pat 502 (503) (DB) * (1965) 67 Pun LR 887 * 1961 Jab LJ 1359 * 1961 Jab LJ 1175: 1961 MPC 826.

(15) A point not taken in the Court below, whether the omission is by the appellant in that Court, or whether the respondent failed to support his decree by taking the point, will not be permitted to be raised, except possibly where the point may be described as involving a question of public policy, e.g., involving jurisdiction, involving the principle of res judicata or when the decision of the point would prevent future litigation. Where the plaint discloses no cause of action, or the written statement, no ground of defence, it is not a ground for permitting a new point to be argued, merely because it was omitted by oversight in the Court below, or the materials are all on record and the answer to the point is plain. This does not, however, preclude the Court itself from deciding the case on such new point. AIR 1931 All 35 (38): 53 All 65 (FB) * AIR 1931 All 490 (494): 54 All 25 (FB).

[See AIR 1938 Rang 468 (470) (DB).]

[See also AIR 1934 Bom 316 (317): 58 Bom 544 (DB).]

[But see AIR 1947 Mad 360 (360) (DB).]

(16) The following are some of the objections which were not allowed to be raised for the first time in second appeal:

(i) Objections to the admission of evidence or to the reception of secondary evidence unless such objection is one which could not have been cured even in the first instance. Further, an erroneous omission to object to evidence in the trial Court will not make an irrelevant evidence

**Sections 100 and 101 — Note 49 (contd.)**
relevant in second appeal. AIR 1958 Punj 116 (121): ILR (1958) Punj 335 (DB). (Admissibility of secondary evidence.) * AIR 1955 Nag 170 (172): ILR (1955) Nag 151 (DB). (Admission of evidence.) * ILR (1954) 6 Assam 63 (65). (Do.) * AIR 1949 Ajmer 23 (27). (Do.) * (1890) 14 Bom 372 (377) (DB). (Do.) * AIR 1914 Cal 534 (534) (DB). (Do.) * AIR 1924 All 709 (710) (DB). (Do.) * AIR 1927 Mad 1107 (1108). (Do.) * AIR 1953 Him Pra 52 (53). (Objection as to mode of receiving secondary evidence.) * AIR 1951 Punj (Simla) 223 (225). (Do.) * (1869) 12 Suth WR 13 (14) (DB). (Do.) * AIR 1925 Cal 1034 (1036) (DB) * AIR 1916 Cal 278 (278) (DB). (Omission to object — Irrelevant evidence does not become relevant.) * (1966) 2 Mys LJ 61: (1966) 7 Law Rep 106 * 1960 Raj LW 111: ILR (1959) 9 Raj 1059.

[But see AIR 1936 Lah 1005 (1006). (Question of admissibility not raised in lower Courts can be raised in second appeal — AIR 1927 Lah 448: 8 Lah 651, Followed — But the view of Agha Haider, J., personally was contrary to that which he had to follow.)]

(ii) Objections to reception, proof and admissibility of documents. AIR 1953 Him Pra 52 (53). (Reception of evidence.) * AIR 1950 Assam 133 (137): ILR (1950) 2 Assam 257 (DB). (Objection as to proof.) * AIR 1946 Bom 193 (196). (Do.) * AIR 1922 Pat 122 (143) (DB). (Do.) * AIR 1940 Bom 63 (64) (DB). (Objection as to admissibility.) * AIR 1916 Mad 147 (150). (Do.) * AIR 1916 All 11 (12) (FB). (Do.) * AIR 1918 Cal 394 (395) (DB). (Do.) * AIR 1969 Mys 103 (105): (1968) 2 Mys LJ 410 * 1962 Cur LJ 425 (Punj).

(a) An objection to the admissibility of a document on the ground of want of registration has been held to be allowable. (1947) 82 Cal L Jour 183 (186) * (1873) 19 Suth WR 22 (23) (DB) * AIR 1925 Cal 370 (372).

[See however AIR 1932 PC 118 (120, 121): 10 Rang 242: 59 Ind App 161.]

[But see (1869) 3 Beng LR App 125 (127) (DB) * (1869) 11 Suth WR 381 (381) (DB) * AIR 1915 Lah 217 (217, 218.)]

(b) Objections on the ground of invalidity of registration or no the ground of want of sufficient stamps will not be allowed. AIR 1927 Mad 92 (93). (Invalidity of registration.) * (1909) 37 Cal 63 (65): 2 Ind Cas 414 (415) (DB). (Insufficiency of stamps.) * AIR 1935 Lah 172 (173). (Do.) * AIR 1961 Mys 62 (64): 38 Mys LJ 589.

(c) An instrument not duly stamped will not be admitted in second appeal on payment of stamp duty and penalty. when there is no evidence that such stamp duty and penalty were tendered in the lower Courts. (1896) 20 Bom 791 (792, 794) (DB).

(iii) Objections as to the sufficiency of evidence, or as to the construction of evidentiary documents, or an objection that a document has been materially altered. AIR 1922 Pat 167 (169): 1 Pat 350 (DB). (Sufficiency of evidence.) * (1869) 12 Suth WR 244 (245) (DB). (Do.) * AIR 1929 Rang 213 (214). (Do.) * AIR 1924 Cal 353 (354) (DB). (Construction of document.) * AIR 1927 Mad 791 (791). (Do.) * AIR 1929 Mad 622 (624). (Alteration of document.) * 1963 Raj LW 621: ILR (1963) 13 Raj 1188.

(iv) Objections relating to the burden of proof. (1875) 23 Suth WR 324 (325) (DB) * AIR 1965 Raj 115 (120): 1965 Raj LW 37.

(v) An objection that a witness who ought to have been examined by the trial Court has not been examined. (1882) 6 Bom 524 (527) (DB) * (1871) 15 Suth WR 87 (88) (DB).

(vi) An objection that the decision has been given by the District Court on evidence recorded by the Munsif before the transfer of the suit to the District Court. (1874) 6 NWPHCR 80 (83) (DB).

(vii) An objection that the plaintiff should have, but has not asked for, another or consequential relief. (1890) 14 Mad 46 (48) (DB) * (1878) 2 All 134 (135) (DB).

(viii) Objections on the ground of misjoinder or non-joinder of parties. But the question whether a particular defendant is necessary party and could contest the suit can be allowed if no further evidence is thereby rendered necessary. AIR 1941 Mad 506 (507). (Joinder of parties.) * AIR 1925 Lah 65 (65). (Objection allowed if no evidence is necessary.)

(ix) Objections on the ground of misdescription of parties. (1893) 16 Mad 317 (319) (DB).

[See (1869) 12 Suth WR 117 (118) (DB).]

(x) Objections on the ground of the misjoinder of causes of action. See Order 2 Rule 7.

(xi) Objections to the frame of issues. AIR 1917 Lah 68 (69) (DB).

(xii) An objection that the suit is not maintainable or that it is premature if it depends on facts. AIR 1947 Mad 194 (195). (Plea that suit is not maintainable.) * AIR 1945 Pat 286 (287) (DB). (Do.) * AIR 1917 Mad 177 (177) (DB) (Do.) * AIR 1930 Cal 267 (269) (DB). (Do.) * (1878) 2 All 134 (135) (DB). (Do.) * AIR 1932 All 661 (662) (DB). (Do.) * AIR 1935 Bom 254 (255). (Do.) * AIR 1924 Lah 328 (328, 329) (DB). (Objection that suit is premature.)

[See however AIR 1952 Punj 387 (388): ILR (1952) Punj 539.]

(xiii) Objections based on the ground of illegality and insufficiency of notice to quit. AIR 1950 Mys 63 (64) * AIR 1918 Mad 980 (982) (DB) * AIR 1917 Pat 469 (470): 2 Pat L Jour 595 (DB) * AIR 1929 Mad 617 (620) (DB).

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[See also (1878) 1 Cal L Rep 421 (423, 424) (DB).]

[But see (1880) 2 Mad 346 (351) (DB).]

(xiv) Objections to court-fee and to the valuation of the suit for purposes of court-fees. (1862) 1 Bom HCR 62 (63) (DB) * AIR 1925 Lah 241 (241) (DB) * AIR 1927 Nag 321 (322).

(xv) For other cases of objections, see the following cases. 1956 Madh BLJ 568 (570). (New plea as to non-registration of document.) * (1955) 8 Sau LR 240 (244). (New plea as to reunion cannot be taken for first time in second appeal.) * AIR 1953 Assam 206 (206): ILR (1952) 4 Assam 357 (DB). (Whether legal representatives were joined within time.) * AIR 1950 East Punj 278 (281) (DB). (The objection that there was defect in title of the seller if not raised in the plaint cannot be raised in appeal.) * AIR 1950 Raj 47 (49). (Plea that an old document should have been presumed to be genuine under Section 90, Evidence Act — It is for the lower Courts to have exercised the discretion under Section 90, Evidence Act.) * AIR 1943 Mad 288 (290): ILR (1943) Mad 509 (DB). (Objection as to absence of notice to certain persons before cancellation of security bond.) * AIR 1932 Bom 255 (255). (Plea of purchase in good faith and for consideration from ostensible owner.) * ILR (1965) 2 Punj 419. (Objection disallowed by the lower appellate Court on the ground that it was never plaintiff's case, cannot be allowed to be raised in second appeal.) * AIR 1962 Pat 273 (275): 1962 BLJR 11. (Commissioner for measuring land — Report of — Admissible in evidence and forms part of record — Fact that Commissioner is not examined is not material — Objection as to its admissibility — Cannot be raised for first time in second appeal.) * AIR 1959 Bom 475 (477): 60 Bom LR 1083. (A new plea that the suit being collusive the doctrine of lis pendens did not apply, will not be allowed to be raised for the first time in second appeal.)

(17) A point which, though, mentioned in the pleadings, was not put forward or agitated in the Courts below, will not be allowed to be raised in second appeal. AIR 1947 Oudh 122 (127) * AIR 1942 Cal 586 (587): ILR (1943) 1 Cal 123 (DB) * AIR 1941 Mad 612 (614) * AIR 1917 PC 23 (25).

[But see (1913) 18 Ind Cas 367 (368) (Oudh).]

(18) A point put forward in the trial Court but not urged in the first appeal will not be allowed in second appeal. AIR 1950 East Punj 325 (326): ILR (1950) Punj 308 * AIR 1921 All 232 (233): 43 All 555 (DB) * AIR 1916 PC 166 (168) * AIR 1936 Oudh 52 (53, 54): 11 Luck 575 (DB) * AIR 1937 Oudh 243 (244): 13 Luck 167 (DB) * AIR 1939 Cal 593 (594) (DB) * AIR 1935 Lah 590 (591): 17 Lah 84 (DB) * ILR (1960) 10 Raj 60.

(19) Where one party sets up a new case in first appeal, the other side should ask the lower Appellate Court for an opportunity to meet it, if he fails to do so, he cannot raise the objection in second appeal. AIR 1948 All 382 (391): ILR (1949) All 26 (FB) * AIR 1920 Cal 325 (326) (DB).

(20) Where an unsuccessful defendant was content to rest his case in first appeal on a question of law without challenging the trial Court's findings on other points, it was held that, when the point of law was decided against him in second appeal, he could not be allowed to meet the case on the other points. (1909) 32 Mad 76 (82) (DB).

(21) The plaintiff cannot be precluded from putting forward a lesser case in second appeal because he had bargained for a much higher claim in the Court of the first appeal. AIR 1956 Mad 514 (517): ILR (1956) Mad 1004 (DB).

(22) A plea that the judgment appealed against is erroneous under a Full Bench ruling of the High Court given during the pendency of the second appeal, will not be allowed to be raised in the second appeal. (1869) 3 Beng LR 271 (272) (DB).

(23) Suit having been originally contested on different grounds, it is not open for first time in second appeal to ask for the dismissal of the suit on the strength of the Full Bench decision given in another case, pending the second appeal. (1869) 11 Suth WR 430 (431) (DB).

[See also (1875) 24 Suth WR 6 (7) (DB) * (1875) 24 Suth WR 72 (72).]

(24) Suit for enforcement of vendor's lien — Second appeal — Omission to implead necessary parties — Plea cannot be allowed to be raised for the first time in second appeal to enable defendant to avoid liability.) ** AIR 1962 Mad 423 (425): 1962 Mad WN 355.

(25) An appellant cannot raise, for the first time in appeal a so-called constitutional point, namely, that the Central Legislature or the Central Government, acting as a Legislature, could legislate only with respect to contracts to be performed wholly within India which he had never thought of before and of which he had not given any warning to respondent at any stage. AIR 1959 Cal 328 (331): ILR (1959) 2 Cal 325 (DB).

(26) Whether a point raised by means of a new ground taken in a second appeal is arguable is obviously for the Court to decide, and it would certainly be failing in its duty if it takes the line of least resistance and admits the case for hearing as a matter of course. 1960 Jab LJ 549: 1960 MPC 420. (AIR 1953 SC 282, Disting.)

(27) As to the power of appellate Court to take notice of subsequent events or changes in law. See Order 41, Rules 23, 27 and Rule 33.

**50. New point involving pure question of law.**— (1) A point of pure law apparent on the face of the record and in-

**Sections 100-101 — Note 50 (contd.)**

volving no further development by evidence may be taken in second appeal, even though it may not have been raised in the Courts below. AIR 1955 SC 604 (607): 1955-2 SCR 874 * AIR 1958 Andh Pra 280 (282) (DB) * AIR 1957 Tripura 1 (6) * AIR 1956 Pat 345 (348) (DB) * 1955 Andh LT (Civil) 22 (24) * AIR 1954 Assam 102 (106): ILR (1954) 6 Assam 95 (DB) * AIR 1954 Punj 159 (162): ILR (1954) Punj 602 * 1954 All WR (HC) 647 (649) * (1954) 33 Pat 894 (899) * AIR 1931 Mad 632 (633) * (1968) 81 Mad LW 623 * AIR 1968 Punj 473 (474): 1968 Cur LJ 557 (DB). (New point — Contention that no suit for redemption is competent can be urged in second appeal.) * 1968 Cur LJ 247: 1968 Service LR 399 (Punj) * 1968 Cur LJ 203: (1968) 70 Pun LR 526 * AIR 1967 Guj 257 (262): ILR (1966) Guj 930 * AIR 1967 Orissa 142 (143): 33 Cut LT 244 (DB) * AIR 1967 Raj 199 (202, 203): 1967 Raj LW 13 * AIR 1966 Assam 118 (120): ILR (1965) 17 Assam 285. (Raising question of law — Allowed to be argued in second appeal.) * AIR 1966 Cal 97 (98): 69 Cal WN 833. (Whether certain provision of an Act is ultra vires is pure question of law — It can be raised for the first time in second appeal.) * AIR 1966 Ker 276 (278): 1966 Ker LT 440 (DB). (Point about constitutionality of special provisions in favour of banking companies in Kerala Agriculturists Debt Relief Act raised for first time without adequate data as to basis or otherwise of classification permitting differential treatment — Point left open.) * AIR 1965 Mad 221 (223): 77 Mad LW 727. (Contention raised for first time in appeal — Contention involving question of law — It was allowed to be raised in appeal.) * ILR (1965) 2 (Punj) 419. (Objection regarding validity of Rule 6(A) of Delhi Land Reform Rules not raised in lower Courts — Such question can be permitted to raise in second appeal since it relates to the very validity of rules itself.) * AIR 1963 Ker 356 (357): 1962 Ker LT 801. (Suit under Order 21, Rule 63—Allegation that deed of assignment in favour of transferee was in fraud of creditors — Relief for setting aside document — Point that action should have been brought as a representative one on behalf of all creditors after complying with provisions of Order 1, Rule 8 — Question held was pure question of law and could be dealt with in second appeal.) * AIR 1963 Orissa 183 (184): 29 Cut LT 460 * AIR 1960 Cal 597 (600). (Adoption — Question of capacity to give, take and be taken, in adoption, is one of law, open for consideration by High Court in second appeal.) * AIR 1960 J and K 35 (36). (Question as to maintainability of suit is essentially one of law — Point though not pressed in lower appellate Court can be allowed to be raised in second appeal.) * AIR 1960 Punj 176 (177, 178) * AIR 1959 Raj 162 (163): 1959 Raj LW 459.

(2) A point of law not depending upon an examination of the evidence and not requiring fresh investigation of facts, may be taken for the first time in the second appeal. AIR 1958 Andh Pra 280 (282) (DB) * AIR 1958 Pat 553 (556) * AIR 1957 Pat 729 (730): 36 Pat 1139 (DB). (Question of lis pendens.) * (1889) 16 Cal 33 (36) (DB). (Not requiring examination of evidence.) * AIR 1938 Bom 291 (293). (Do.) * AIR 1955 Cal 169 (170). (Not requiring fresh investigation of fact.) * Madh BLJ 1955 HCR 2194 (2196). (Do.) * 1955 BLJR 20 (23). (Do.) * AIR 1923 Bom 82 (83): 47 Bom 128 (DB). (Do.) * AIR 1937 All 99 (100). (Do.) * 1966 Cur LJ 110 * (1964) 1 Mad LJ 110: 77 Mad LW 551. (New point raising no new facts — It can be allowed to be raised in second appeal.) * AIR 1961 Punj 157 (160): 63 Pun LR 294. (Debatable point cannot be allowed for first time in second appeal.) * (1960) 1 Guj LR 5.

(3) A new point of law will be allowed where it arises on the findings of the lower Court, or where it arises on the facts found by the said Court, or where it arises on admitted facts or facts not in dispute. (1893) 17 Bom 303 (305) (DB) * AIR 1920 Lah 489 (491) * AIR 1953 Bom 50 (54, 55): ILR (1953) Bom 339 (DB) * AIR 1951 Punj 129 (131) * AIR 1938 All 396 (397): ILR (1938) All 563 (FB) * AIR 1956 Assam 100 (103): ILR (1956) 8 Assam 215 (DB) * ILR (1955) Hyd 20 (22) * AIR 1954 Cal 539 (539) * AIR 1951 Punj 129 (131) * AIR 1944 Bom 50 (52) (DB) * AIR 1938 Mad 405 (410) * AIR 1938 Rang 236 (238): 1938 Rang LR 356 (DB).

[See also AIR 1951 Pat 641 (643) (DB) * AIR 1950 Hyd 58 (58): ILR (1951) Hyd 283 (DB) * AIR 1950 Mad 367 (369) * AIR 1949 Cal 546 (548): ILR (1945) 2 Cal 623 (DB) * AIR 1949 Mad 689 (690) * AIR 1949 Pat 405 (406): 27 Pat 143 (DB) * AIR 1946 Nag 266 (270): ILR (1946) Nag 301 (DB) * AIR 1942 Bom 95 (96) (DB) * AIR 1917 Cal 681 (684) (DB) * AIR 1916 Oudh 199 (201) * AIR 1922 Pat 252 (253): 6 Pat L Jour 650 (DB) * AIR 1925 All 783 (784): 47 All 932 (DB) * AIR 1925 Cal 370 (372) * (1968) 9 Guj LR 1082 * 1961 BLJR 745.)]

(4) In respect of points of law arising on the findings of the lower Court, or on the facts found by it, or on the admitted facts, it is not necessary that they should have been mentioned in the appeal grounds if there can be no legitimate objection on the grounds of surprise to the other side. AIR 1953 Bom 50 (54, 55): ILR (1953) Bom 339 (DB).

[See AIR 1940 Mad 577 (579).]

[See also AIR 1942 Bom 95 (96) (DB).]

(5) The power of allowing new points of pure law to be raised for the first time in second appeal is discretionary though as a general rule, the discretion will be exer-

**Sections 100-101 — Note 50 (contd.)**
cised in favour of allowing them to be raised. AIR 1931 Cal 565 (567) (DB) * AIR 1930 All 885 (886) (DB) * AIR 1921 All 337 (339): 43 All 193 (SB) * AIR 1918 Cal 13 (17, 18) (SB). (Point should be allowed.) * AIR 1951 Punj 129 (131). (Do.) * AIR 1917 Cal 716 (718): 44 Cal 47 * AIR 1925 Oudh 506 (507) * AIR 1962 Punj 147 (149): 33 Pun LR 716.

(6) When a question of law or a constitutional issue is raised for the first time in the Court of the last resort upon facts eiher admitted or proved beyond controversy, it is not only expedient but highly essential in the interests of justice to entertain the same. AIR 1956 Hyd 120 (121): ILR (1956) Hyd 565.

[See AIR 1957 Cal 560 (563) (DB). (Point of law going to the root of the jurisdiction of the trial Court.)]

(7) Question regarding applicability of Section 53-A, T. P. Act not raised by the defendant in his proceeding, but gone into at the hearing by the Courts below and finding given -- Held High Court will not be justified in refusing to allow defendant to avail himself of provisions of Sec. 53-A, T. P. Act. AIR 1959 Mys 173 (175): 35 Mys LJ 266 * AIR 1966 Mys 86 (89): (1965) 2 Mys LJ 229.

(8) Plea under Section 43, T. P. Act not taken by plaintiffs in plaint and necessary element of Section 43 not pleaded or proved — Plaintiffs are precluded from raising plea in second appeal. ILR (1963) Cut 146.

(9) Plea under Section 39 of the Orissa Estates Abolition Act — Maintainability of suit — Plea not taken in any of the Courts — Not permissible in second appeal. ILR (1963) Cut 146.

(10) Second appeal — New plea available as a result of latter judicial pronouncement may be taken. AIR 1967 Pat 35 (40).

**51. New case of mixed questions of law and fact.—** (1) A plea involving a mixed question of law and fact and depending on fresh investigation of facts will not be allowed to be taken for the first time in second appeal. AIR 1954 Mad 829 (830): ILR (1955) Mad 654 (DB) * AIR 1958 SC 199 (202): 1958 SCR 948: ILR (1958) Punj 807 * Madh BLJ (1955) HCR 522 (528) * AIR 1951 Mad 417 (418) * AIR 1942 All 36 (38) (DB) * AIR 1933 Nag 299 (301): 30 Nag LR 101 * AIR 1934 All 692 (693) * (1885) 9 Bom 285 (287, 288) (DB) * AIR 1923 Cal 247 (248) * AIR 1924 Bom 469 (469) (DB) * AIR 1924 Pat 446 (447): 3 Pat 236 (DB) * AIR 1950 Lah 62 (65) (DB) * AIR 1947 Cal 398 (401) * AIR 1936 Lah 629 (634): 17 Lah 737 (DB) * AIR 1967 Cal 354 (355) * AIR 1966 Mys 13 (14): (1965) 1 Mys LJ 389 * AIR 1963 Cal 470 (471): 67 Cal WN 522 * AIR 1963 Raj 241 (244): 1963 Raj LW 497.

For specific questions not allowed on this ground, see the following cases:

1956 Madh BLJ 43 (46) * AIR 1955 Cal 594 (596) * AIR 1955 Mad 369 (377) (DB) * AIR 1955 Raj 167 (172) * AIR 1954 Pat 40 (40) (DB) * AIR 1954 Raj 243 (246) (DB) * ILR (1954) 1 All 722 (726) * AIR 1953 Bom 129 (133): ILR (1953) Bom 98 (DB) * AIR 1953 Punj 304 (304) (DB) * AIR 1952 Orissa 31 (32) (DB) * AIR 1952 Sau 107 (108) * AIR 1967 Raj 199 (202, 203): 1967 Raj LW 13 * AIR 1965 Pat 192 (195) * AIR 1965 Punj 117 (118): 66 Punj LR 1201. (Plea of part performance cannot be raised for first time in second appeal.) * ILR (1964) Cut 111. (Question of applicability of Section 107, T. P. Act cannot be raised for first time in second appeal, question being mixed question of law and fact.) * AIR 1964 Pat 288 (289): 1964 BLJR 39 (DB) * (1964) 66 Punj LR 12 * AIR 1964 Raj 232 (234): 1964 Raj LW 362 * AIR 1963 Orissa 217 (220): (1963) 5 OJD 361 * 1963 Raj LW 92. (Transfer from ostensible owner — Burden of proof on transferee — Plea should be raised in trial Court and not in second appeal for the first time.) * AIR 1962 Pat 218 (219): 1961 BLJR 795. (The point that the title of a certain person in regard to the land in dispute was mutated by adverse possession, when not raised in the two Courts below, cannot be allowed to be agitated for the first time in second appeal.) * AIR 1961 Guj 151 (159): (1961) 2 Guj LR 343 (DB). (Preliminary objection to second appeal based on mixed question of law and fact — Not allowed to be raised for the first time.) * AIR 1961 Orissa 94 (95) * AIR 1961 Pat 164 (168): 1961 BLJR 554 * AIR 1961 Raj 241 (243): 1961 Raj LW 330 * AIR 1960 Pat 502 (502, 503): 1960 BLJR 490 (DB) * AIR 1960 Pat 410 (411): 1960 BLJR 382. (New point that suit by Union of India is not maintainable in view of Section 172 (1), Government of India Act, 1935 and Article 294 of the Constitution involves a mixed question of law and fact and cannot be allowed for first time.) * 1960 BLJR 403 * AIR 1959 Cal 400 (401) (DB) * AIR 1959 Mys 43 (44): 36 Mys LJ 455 * AIR 1959 Punj 318 (319): 61 Punj LR 245 * AIR 1952 Sau 107 (108).

(2) Pleas of mixed question of fact and law — Plea raised for first time in Supreme Court — Not allowed. AIR 1963 SC 1227 (1233): (1963) Supp 1 SCR 750 * AIR 1963 SC 1703 (1707): (1963) Supp (2) SCR 834. (Point involving mixed question of fact and law raised before Supreme Court — No exceptional grounds for deviating from usual practice of Court — Appellant will not be allowed to raise the point when he failed to do so in Courts below.)

(3) Subrogation — Presumption in favour of — Plea that presumption was discharged raised in argument before Supreme Court -- Plea being one of question

**Sections 100-101 — Note 51 (contd.)**
of fact held could not be raised. AIR 1963 SC 1607 (1610): (1964) 2 SCR 324 * AIR 1965 SC 1812 (1816): (1966) 2 SCJ 310. (Case of family settlement never set up by party either in trial Court or in High Court — It cannot be allowed to be set up before Supreme Court for the first time.)

**52. Plea going to the root of the case.**— (1) A plea of law which goes to the root of a case can be taken up even for the first time in second appeal, if it arises from the evidence on record and does depend on other facts or further enquiry on facts. AIR 1956 Madh B 209 (211) * AIR 1958 All 54 (60) (DB)*AIR 1958 Manipur 7 (11) * AIR 1957 Tripura 1 (6) * AIR 1952 Punj 387 (388): ILR (1952) Punj 539 * AIR 1950 Hyd 58 (58): ILR (1951) Hyd 283 (DB) * AIR 1949 Mad 127 (131) (DB) * AIR 1942 Bom 273 (274): ILR (1942) Bom 649 * (1887) 14 Cal 586 (590) (DB). (Arising from evidence on record.) * AIR 1923 Lah 491 (492). (Do.) * AIR 1942 Pat 79 (80) (DB). (Not depending on other facts or further enquiry.) * AIR 1927 Bom 157 (158): 51 Bom 231 (DB). (Do.) * AIR 1961 Bom 221 (223): 63 Bom LR 58 * AIR 1960 Manipur 49 (51). (A pure question of law such as the incompetency of the plaintiff to bring a suit in tort, which goes to the very root of the matter can be allowed to be raised for the first time at the stage of arguments in second appeal.)

[But see 1962 Raj LW 667: ILR (1962) 12 Raj 875. (New plea — Plea going to the root of plaintiff's case — Not taken in trial Court — Not allowable to be raised in appellate Court.)]

(2) Where the objection is one which, if it had been taken in the lower Courts, might have been cured, it will not be allowed to be taken for the first time in second appeal. AIR 1942 Pesh 81 (82) * AIR 1939 Mad 918 (919) * (1843) 3 Moo Ind App 229 (242) (PC).

(3) A plea of want of cause of action which is merely technical and capable of being cured if the objection had been taken in the lower Court cannot be allowed to be raised in second appeal. (1869) 11 Suth WR 350 (351) (DB) * AIR 1958 All 54 (60) (DB). (Existence of legal evidence.) * (1890) 13 Mad 277 (281) (DB) * AIR 1920 Mad 965 (967) (DB) * (1895) 19 Bom 43 (45, 46) (DB).

(4) Where the plea is one which is fundamental and incurable, it can be allowed to be raised for the first time in second appeal. (1899) 21 All 341 (345) (FB) * (1893) 18 Bom 110 (113) (DB) * AIR 1917 Cal 681 (684) (DB).

(5) An objection that the appellant in the lower appellate Court was not competent to file the appeal or that there being no decree the appeal to the lower appellate Court was not competent goes to the very root of the appeal and can be raised for the first time in second appeal. Where such a plea is allowed, the opposite party may be given an opportunity to meet it. AIR 1953 Kutch 28 (29) * AIR 1934 All 677 (679) * (1879) 2 Mad 346 (350, 351) (DB) * AIR 1925 Mad 67 (68) (DB).

[See AIR 1957 Cal 560 (563) (DB).]

(6) An objection that the suit had abated by reason of defendant's death during the pendency of appeal in the lower appellate Court, even though not raised there, can be allowed to be raised in second appeal as it is one affecting the very jurisdiction of the Court to pass the decree. 1949 Trav-Co LR 11 (14) (DB).

**53. Plea of jurisdiction.**— (1) A plea of jurisdiction is a point of law and except in cases covered by Section 21 of the Code and Section 11 of the Suits Valuation Act, 1887, can even as a new plea be raised in second appeal, unless such plea cannot be determined on the facts found by or admitted in the lower Court, or on the facts already in evidence. AIR 1956 Madh B 209 (211) * AIR 1958 Manipur 7 (11) * AIR 1931 All 556 (557) (DB) * AIR 1927 Nag 164 (165) * (1894) 21 Cal 249 (252) (DB) * AIR 1933 Nag 318 (321, 322): 29 Nag LR 342 * (1895) 18 Mad 418 (420) (DB) * AIR 1956 Bom 687 (689) * AIR 1955 Bom 75 (76): ILR (1954) Bom 1227 (DB) * AIR 1953 Nag 236 (237): ILR (1952) Nag 150 * AIR 1950 Him Pra 36 (39) * AIR 1949 PC 171 (171) * AIR 1943 Bom 427 (429): ILR (1948) Bom 534 (DB) * (1888) 12 Bom 155 (157) (DB) * AIR 1924 PC 95 (101): 20 Nag LR 33: 51 Ind App 72: 51 Cal 361 * AIR 1914 PC 140 (143): 42 Cal 116: 41 Ind App 197 * AIR 1932 All 273 (276): 54 All 573 (FB) * ILR (1954) Cut 277 (282) * (1862) 1862 Suth WR (Supp) No. 31 (32, 33) (FB) * (1895) 22 Cal 483 (486) (DB) * (1967) 2 Mys LJ 629. (Decree of lower appellate Court passed without jurisdiction — Decree is contrary to law and must be set aside in second appeal.) * 1965 All LJ 1045: 1965 All WR (HC) 521. (Finding under Section 1-A of U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947) on question whether building was constructed after 1st January 1951 or not is a finding on jurisdictional fact — Finding can be challenged in second appeal.) * AIR 1963 Bom 179 (181): 64 Bom LR 541. (Jurisdiction of High Court — Question of fact — Notice of ejectment — Question of waiver raised for first time in writ petition— Decision necessary for disposal of petition — High Court could decide it in the circumstances.) * AIR 1961 All 150 (151). (Suit for restitution of conjugal rights — Munsif has no jurisdiction to entertain suit — Suit tried by Munsif — Trial is nullity — Objection to jurisdiction in second appeal can be allowed.) * AIR 1961 Punj 24 (28): 62 Pun LR 916 (DB) * AIR 1959 Punj 206 (206, 207): 61 Pun LR 208 * AIR 1964 Pat 348 (350): 1964 BLJR 19 (DB).

[See AIR 1957 Cal 560 (563) (DB).]

**Sections 100-101 — Note 53 (contd.)**

[See also AIR 1943 Oudh 365 (366) * AIR 1935 Bom 254 (255).]

(2) Second appeal — New point — Point not raised before lower appellate Court — Point raising a question of jurisdiction over the suit — Being purely a question of law can be allowed to be raised even for the first time in second appeal — No estoppel because of non-raising of the point in lower appellate Court. AIR 1966 All 370 (376): 1966 All LJ 426 (FB) * AIR 1966 All 367 (368): 1965 All LJ 549. (New point — Point involving question of jurisdiction and capable of disposing of on finding of facts recorded by trial Court — Point can be allowed in second appeal.) * AIR 1965 All 589 (590): 1965 All LJ 849. (Question of want of jurisdiction in lower appellate Court can be raised for first time in second appeal in case of inherent want of jurisdiction.) * 1963 All WR (HC) 32 * AIR 1962 All 248 (251): 1961 All LJ 991 (DB). (Question as to power of Civil Court to remit an issue to revenue Court for determination — Question, even if raised for first time in second appeal should not only be permitted to be raised but should be determined. AIR 1960 All 573: 1960 All LJ 314, Overruled.)

[See however AIR 1968 All 285 (288): ILR (1967) 2 All 917 (DB). (U. P. Town Areas Act (2 of 1914), Section 15-B (3) — No allegation in plaint that notification as required by Section 15-B (3) of U. P. Act was not issued — Written statement not referring to any such notification — There being no such plea in plaint, High Court would not decide whether such notification was ever issued.) * AIR 1965 All 309 (310). (Plea of want of jurisdiction — Neither urged before lower appellate Court, nor made a ground in memorandum of appeal—Plea not allowed to be raised in second appeal.)*AIR 1964 All 136 (138, 139). (The Court has an inherent power to prevent the abuse of the right of appeal by refusing to hear an appellant who raises a question of law or jursdiction for the first time in second appeal and cannot give any explanation why he did not do so before the trial Court or the lower appellate Court.) * AIR 1963 All 117 (118). (Plea of want of jurisdiction raised for first time in second appeal — No reasons given for conceding point at trial stage — Fair trial to appellant in Courts below—Court may refuse to entertain plea.) * AIR 1960 All 573 (575). (Second appeal — New plea as to jurisdiction — High Court has inherent power to refuse to entertain.)]

(3) Suit for accounts — Parties leading evidence on issues relating to merits — Preliminary decree passed — Question of jurisdiction — Appellate Courts in appeal against preliminary decree cannot go into such question in the absence of failure of justice. AIR 1967 Punj 163 (166): (1966) 68 Pun LR 214 (DB).

**54. Plea of limitation, estoppel or res judicata.**— (1) Pleas of limitation or of estoppel or of res judicata are all pleas raising question of law and can be raised for the first time in second appeal. AIR 1949 PC 302 (304) * AIR 1951 SC 16 (20): 1950 SCR 852 * AIR 1948 Nag 308 (310): ILR (1947) Nag 683 * AIR 1945 All 76 (78): ILR (1944) All 601 * AIR 1922 Lah 240 (241) (DB) * (1907) 34 Cal 941 (946) (SB) * AIR 1928 Cal 870 (871) (DB) * AIR 1929 Pat 173 (175): 8 Pat 107 (DB) * AIR 1936 Cal 497 (503): ILR (1937) 1 Cal 1 (FB) * AIR 1938 Lah 558 (559) * AIR 1965 Punj 415 (426): ILR (1965) 2 Punj 97 (FB) * AIR 1969 Pat 85 (87) * (1968) 9 Guj LR 220 (DB). (Partition decree of agricultural land — Question whether Civil Court can effect partition by metes and bounds being purely a question of law was allowed to raise in appeal.) * AIR 1968 Raj 81 (83): 1968 Raj LW 62 * AIR 1967 Pat 93 (95) * 1966 All LJ 389: 1966 All WR (HC) 266 * (1966) 32 Cut LT 766: ILR (1966) Cut 307 * AIR 1965 Madh Pra 102 (107): 1965 Jab LJ 1167.

[See AIR 1935 Mad 947 (953).]

[See also AIR 1947 Oudh 122 (127): 22 Luck 37 * 1898 All WN 104 (104).]

[See however AIR 1942 Lah 217 (219): ILR (1943) Lah 191 (FB) * AIR 1963 Pat 455 (458).]

(2) Pleas of limitation or of estoppel or of res judicata cannot be raised for first time in second appeal in the following cases :

(a) Where they depend on facts which are not admitted or undisputed. AIR 1940 Pat 480 (482) (DB) * AIR 1914 Sind 27 (28): 8 Sind LR 272 (DB) * AIR 1918 Lah 388 (389) (DB) * AIR 1937 Nag 184 (185): ILR (1938) Nag 167.

[See AIR 1952 Kutch 55 (58) * AIR 1944 Nag 37 (40): ILR (1943) Nag 764 (DB) * AIR 1939 Pat 19 (20) (DB).]

[See also AIR 1949 All 54 (56) * AIR 1943 Lah 129 (137) * AIR 1967 Orissa 55 (57): 32 Cut LT 510 * 1960 Raj LW 29: ILR (1959) 9 Raj 938.]

(b) Where they involve questions of fact requiring further evidence. AIR 1955 Vind Pra 28 (30) * AIR 1957 Tripura 11 (13). (Estoppel and res judicata.) * (1951) 55 Cal WN 21 (26, 27) * AIR 1946 Pat 365 (369): 25 Pat 145 (DB) * AIR 1923 Bom 254 (255) (DB) * AIR 1928 Nag 203 (204) * AIR 1916 PC 182 (185): 44 Cal 759: 41 Ind App 65 * AIR 1929 Mad 775 (776) * AIR 1939 All 194 (196) * AIR 1961 All 558 (559): 1961 All WR (HC) 111. (Application under Section 20, Arbitration Act — Plea of limitation — Question is one of fact and cannot be allowed for first time in second appeal.) * 1960 BLJR 142.

[See AIR 1936 PC 258 (259).]

[See also AIR 1946 Lah 134 (141): ILR (1946) Lah 672 (FB) * AIR 1942 Cal 586 (587): ILR (1943) 1 Cal 128 (DB).]

(c) Where they depend on a possible question regarding which the party ad-

**Sections 100-101 — Note 54 (contd.)**
versely affected might have adduced evidence. AIR 1916 Mad 535 (535) (DB) * AIR 1958 Orissa 145 (148): ILR (1957) Cut 725 (DB) * (1967) 69 Pun LR 1021. (Bar is however not absolute — Court has discretion to allow.)

[See also AIR 1934 Oudh 55 (55): 9 Luck 365 (DB).]

(d) Plea of limitation involving mixed question of fact and law raised for the first time in the arguments by the non-contesting defendant who had not filed the written statement should not be allowed. AIR 1963 SC 1165 (1170): (1964) 1 SCR 316. (AIR 1956 All 660, Reversed.)

(e) Plea of res judicata not raised before the High Court — Plea will not be allowed to be raised before the Supreme Court. AIR 1966 SC 1024 (1024): (1966) 1 SCJ 601.

(f) Plea of res judicata — Plea cannot be raised for first time in second appeal especially when no sufficient material on record. AIR 1960 All 519 (526) * (1961) 2 Guj LR 264: (1961) 2 Guj HCR 158. (Plea of estoppel neither raised nor proved in lower Courts cannot be raised for first time in second appeal.) * AIR 1961 Manipur 25 (27). (Point of limitation not raised in first appeal — Cannot be allowed.)

(g) The question whether the claim as laid by the plaintiff is not barred by limitation by reason of certain acknowledgment is a question which rests on allegations of fact. Where those allegations are not made in the Courts below the question cannot be allowed to be raised for the first time in second appeal which is not concerned with question of fact. 1961 MPLJ 38: 1960 Jab LJ 808.

(h) New point — Estoppel not pleaded in lower Courts — New point cannot be allowed to be set up in second appeal when it is one of fact — Evidence Act (1872), Section 115. 1962 MPLJ 290: 1962 Jab LJ 920.

(3) Even a plea which could be raised for the first time in second appeal cannot be heard at the hearing of the appeal unless it has been set out in the memorandum of appeal or unless the Court grants leave under Order 41, Rule 2. AIR 1955 Vind Pra 28 (30) * AIR 1949 Pat 214 (214) * (1893) 15 All 123 (128) (SB) * (1882) 4 All 69 (70, 71, 72) (FB) * AIR 1961 Cal 155 (159, 160): 64 Cal WN 734. (Deposits under Order 21, Rule 89 — Question whether made within limitation — Decision dependent on investigation of facts — Question held not of law only and could not be allowed to be raised for the first time in second appeal.)

(4) Pleas of bar of suit and res judicata given up in lower appellate Court cannot be reviewed in second appeal. (1967) 69 Pun LR 1062.

(5) Revision petition before Director whether time barred — Plea cannot be taken before High Court for the first time. 1968 Punj LJ 64.

**55. Plea abandoned or waived is barred.** — (1) No amount of consent by parties can give jurisdiction and there can be no waiver or abandonment of such a plea. AIR 1936 Pat 177 (178) (DB).

[See also AIR 1927 Mad 273 (274) * 1963 All WR (HC) 602. (Question of jurisdiction expressly given up before lower appellate Court — Decision given on merits by consent — Question of jurisdiction should not be allowed to be raised in second appeal.)]

(2) Where a plea, whether of fact or of law is one which could be waived or abandoned and is so abandoned, it cannot be raised again in second appeal. AIR 1956 Assam 154 (158) * AIR 1956 Bom 196 (197) * AIR 1954 Trav-Co 57 (59) * Madh BLJ 1954 HCR 1097 (1098) * AIR 1951 Pat 457 (459) (DB) * AIR 1951 Simla 239 (240): ILR (1950) Punj 347 * AIR 1926 Nag 160 (161) * AIR 1967 Delhi 125 (128) (DB). (Pleas conceded by counsel in lower Court — Such pleas cannot be agitated in appeal.) * AIR 1961 Raj 271 (272): 1961 Raj LW 170 * 1960 Raj LW 676: ILR (1960) 10 Raj 1453 * AIR 1953 Ajmer 52 (52): 1953 AMLJ 113.

(3) Whether a plea has been abandoned or waived has to be gathered from the conduct of the party in the Courts below. (1902) 26 Bom 410 (413) (DB).

[See 1954 Raj LW 682 (683).]

(4) In the following cases, the pleas will be taken to have been abandoned or waived and cannot be raised in second appeal:

(a) Where points taken in the pleadings or in the memorandum of first appeal are not pressed in the trial Court or in the lower Appellate Court, as the case may be. (1954) 93 Cal L Jour 151 (165) * AIR 1941 Mad 612 (614) * AIR 1941 Pesh 69 (72) (DB) * AIR 1918 PC 53 (55): 40 All 497 * AIR 1967 Cal 461 (468): (1969) 1 Lab LJ 290 (DB) * 1966 All WR (HC) 615: 1966 All LJ 1016.

(b) Where parties conduct the case in the lower Courts as if certain facts are admitted. AIR 1952 Sau 107 (108) * AIR 1945 Mad 256 (256, 257).

(c) Where the findings of the trial Court are not challenged in the first Appellate Court. ILR (1955) 7 Assam 514 (549) * (1948) 53 Mys HCR 59 (63) (DB) * AIR 1943 All 196 (197): ILR (1943) All 493 (DB) * AIR 1960 All 584 (584, 585). (Illegality of procedure — Objection not raised in trial Court and lower appellate Court — Objection in second appeal cannot be allowed.)

(5) Objections as to the admissibility or exclusion of evidence if not raised in the trial Court, or in the lower Appellate Court, cannot be raised in second appeal. AIR 1940 Bom 63 (64) (DB) * (1968) 10 Suth WR 50 (50) (DB) * AIR 1923 Cal 378 (379)

**Sections 100-101 — Note 55 (contd.)**
(DB) * AIR 1927 Mad 1107 (1108) * (1912) 16 Ind Cas 213 (214) (DB) (Cal).

(6) The mere fact that the lower Appellate Court has not referred to a certain point does not necessarily mean that the point was abandoned. AIR 1943 Mad 455 (457) * AIR 1929 Lah 81 (82).

[See AIR 1953 Ajmer 52 (52).]

(7) Compromise signed by defendant only — Compromise between parties proved as a fact — Compromise recorded and made a decree of Court — Affirmed on appeal — Not disturbed in second appeal. 1968 Jab LJ 443: 1968 MPLJ 420.

**56. Who may appeal and who may not.** — See Section 96.

**57. Remand.**— (1) Where, in appeal from an order of remand, the High Court determines a question of law, the decision of the question will be final for all purposes and in any appeal that may be subsequently made to the High Court. (1893) 15 All 413 (414) (DB).

[See also Order 41, Rr. 23 and 25.]

(2) Where the Appellate Court reverses the decree passed by the trial Court on the ground that the suit as framed was not maintainable in law, without deciding the questions of fact raised, and the High Court in second appeal reverses that decision, it cannot go into the questions of fact left undecided but should remand the case to the lower Appellate Court. AIR 1952 Madh B 168 (170).

(3) Trial Court stating that certain issues were not pressed by counsel for defendant — Decree in favour of plaintiff — Appellate Court deciding appeal on basis of statement — New point in second appeal that counsel was not competent to make such concession — High Court remanded the case for fresh disposal after deciding the point of competency of counsel. AIR 1955 Trav-Co 193 (195).

(4) Remand in second appeal — Suit for possession — Issues involving question of fact requiring reconsideration and fresh findings with reference to all relevant material on record — Case remanded to lower appellate Court for rehearing. AIR 1965 All 313 (319).

(5) Execution of will — Lower Court not going beyond the finding that the will was duly executed and attested — No finding on the question whether the testator had testamentary capacity and the will was result of his own act and wish — Held, that it was not necessary to remand the case and it could be raised in second appeal. AIR 1968 All 425 (427).

(6) Suit for ejectment — Defaults in payment of rent — Decision of Courts below based on oral evidence — Documentary evidence, e.g., rent counterfoils and letters having bearing on payment and receipt of rents, not adverted to — Finding, held not on consideration of all relevant materials — Case remanded to first appellate Court for fresh consideration. AIR 1967 Cal 441 (442).

(7) Civil Revision and not second appeal lies against order of remand — (Second appeal treated as revision as higher Court-fee than that required for revision had been paid). ILR (1963) Cut 482.

(8) Remand in appeal — Specific direction to examine question of title — Plaintiff not challenging settlement pleaded by defendant — Lower Court examining evidence on the question and holding that defendant failed to prove settlement and injuncting them completely from cultivating land in dispute — Question was a pure question of law on proved or admitted facts — Question though not specifically raised in lower Courts can be raised in second appeal — Lower Courts, held, erred in injuncting defendants who were entitled to use land in reasonable manner. ILR 46 Pat 977: 1968 BLJR 515.

(9) Remand in second appeal — Inherent power of remand — Finding given by lower Court without consideration of evidence — Remand by High Court for submitting fresh finding is one under Section 151 and not under Order 41, Rules 23 to 25 — Contrary finding given after remand to be taken into consideration in disposing of appeal. AIR 1960 Pat 41 (43): 1959 BLJR 316.

(10) New point raised for first time in second appeal — Proper issues not obtained on pleadings — Point requiring evidence — Case cannot be remanded for framing fresh issue for trial. AIR 1965 Punj 13 (14): 1964 Cur LJ 382: ILR (1964) 2 Punj 338.

(11) Question whether defendants could claim protection under Section 5, Assam Non-agricultural Urban Areas Tenancy Act (1955) — No definite finding given on questions of facts which were essential for arriving at conclusion by Court below — High Court remand the case to give the necessary findings. ILR (1964) 16 Assam 354 (357).

**58. Ex parte appellate decree.**— (1) Under sub-section (2) to Section 100 a second appeal from an ex parte appellate decree is competent. (1886) 8 All 354 (357, 358) (FB) * (1892) 16 Bom 117 (118) (DB) * AIR 1922 Lah 439 (440): 3 Lah 357 (DB) * ('25) AIR 1925 Cal 497 (498) (DB).

**102. No second appeal in certain suits.**—No second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed [a]one thousand rupees.]

[1882, 1887, S. 586; 1861, S. 27.]

[a] Substituted for "five hundred rupees" by the Code of Civil Procedure (Amendment) Act, 1956 (66 of 1956), S. 10 (1-1-1957).

**STATE AMENDMENT**

**Uttar Pradesh.**

In Section 102, for the words "five hundred rupees" occurring at the end of the section the words "two thousand rupees" shall be substituted.

—U. P. Act 24 of 1954, S. 2 and Sch., Item 5, entry 6 (30-11-1954).

**SECTION 102 — SYNOPSIS**

1. Scope.
2. Small Cause suits.
3. Effect of trying Small Cause suits as ordinary suits.
4. Suit includes execution proceedings.
5. Appeal from order of remand — See also O. 43, R. 1 (u).
6. Appeal from order of review — See also O. 43, R. 1 (w).

**TOPIC INDICATOR**

Appeal from order refusing to re-admit an appeal — See Note 1.
Effect of decision when question of title is raised. — See Note 2.
It is the character of the suit as originally framed that determines whether second appeal lies or not — See Note 2.
Pecuniary value of the suit is determined from plaint allegations — See Note 2.
Prayer for declaration does not alter the nature of the suit — See Note 15.
Return of plaint involving question of title — See Note 2.
Suit for recovery of excess amount of tax paid — See Note 2.
Suit for return of document — See Note 1.

**1. Scope.**—(1) Where a suit of a small cause nature is tried not by a Small Cause Court, but by a Court in its ordinary jurisdiction the decree or order is not open to a second appeal, when the value of the original suit does not exceed the value prescribed in Section 102. AIR 1941 Mad 665 (665) ° AIR 1935 Bom 254 (255).

(2) An order, passed by executing Court in execution of a decree in a suit of a small cause nature, is not open, to second appeal though it may be within section 47. AIR 1953 Sau 16 (17) (FB) * AIR 1921 All 55 (55): 43 All 403 (DB).

[See however AIR 1922 Lah 290 (291): 3 Lah 141 (DB).]

(3) This section does not apply to an order refusing to re-admit a first appeal dismissed for default as an appeal lies from such order under Order 43, Rule 1 (t). 1883 Pun Re No. 100 p. 311 (312) (DB).

(4) An objection as to bar under this section can be raised in Letters Patent appeal for the first time. AIR 1940 Cal 528 (528) (DB).

(5) Suit for mesne profits of immovable property is exempt from the jurisdiction of Small Cause Court — Second appeal lies from such suit. AIR 1967 Assam and Nagaland 53 (54) (DB).

(6) Mere breach of contract by Government or any of its officers does not amount to an act referred to in Art. 3 of Sch. II of Provincial Small Cause Courts Act 1887. Hence suit for recovery of balance of cost of paper supplied to the Election Department and utilised by it is not excepted from cognizance of the Court of Small Causes. (1966) 32 Cut LT 383: ILR (1966) Cut 102.

(7) Since a suit for return of document could not be entertained by a Court of Small Causes under the Hyderabad Small Cause Courts Act, the suit could not be held to be one of a Small Cause nature so far as the area to which the Hyderabad Act applies. Hence the appeal and also a second appeal would lie and High Court had jurisdiction to entertain the second appeal and deal with it in accordance with law. (1967) 1 Andh WR 370.

**2. Small cause suits.**—(1) The test for finding out whether a particular suit is a small cause suit within Section 102 is to see whether it is excepted under Sch. II to the Provincial Small Cause Courts Act. AIR 1945 Pat 417 (419): 24 Pat 307 (DB) ° AIR 1935 Rang 386 (386): 13 Rang 633 (FB) ° (1967) 33 Cut LT 1091: (1968) 2 Lab LJ 326 * (1960) 64 Cal WN 172.

(2) Suit not excepted from Sch. II, Provincial Small Cause Courts Act — No second appeal lies when its value does not exceed sum prescribed. AIR 1946 Pat 97 (98) ° AIR 1945 Bom 197 (198, 199): ILR (1945) Bom 382 (FB) ° AIR 1939 Sind 35 (35): ILR (1939) Kar 134 (DB).

(3) Character of suit as originally framed and presented to Court that will determine

**Section 102 — Note 2** (contd.)
nature of suit and not the defence which may be set up or the character which it may assume. (1900) 23 Mad 547 (556) (FB) * AIR 1915 Nag 124 (125): 12 Nag LR 47 ° (1891) 15 Bom 400 (405) (DB) ° (1908) 32 Bom 356 (360) (DB) * (1910) 35 Bom 29 (32) (DB) ° (1913) 40 Cal 537 (540) (DB) ° AIR 1918 Mad 162 (162) (DB) * 1963 BLJR 175 (175, 176) ° AIR 1959 Andh Pra 92 (93): (1959) 1 Andh WR 148 (DB).

[See also AIR 1967 Mad 298 (299): (1965) 2 Mad LJ 543. (The claim was based on the failure of the defendants to pay according to the terms of the contract and was cognizable by a Court of Small Causes. The claim was not for rent, nor one for specific performance.)]

(4) Value of suit is to be determined on allegations in plaint and not upon defence pleaded or relief granted. AIR 1924 Cal 405 (406): 51 Cal 62 * (1904) 27 All 200 (202) (DB) ° (1906) 30 Mad 212 (213) (DB).

(5) The mere fact that a Small Cause Court returns a plaint under Section 23, Provincial Small Cause Courts Act, 1887, to be presented to another Court on ground that it involves a question of title will not alter nature of suit. AIR 1943 Cal 464 (465) (DB) ° AIR 1929 Mad 389 (390).

(6) Suit exclusively cognizable by Small Cause Court does not change its nature by reason of its having been registered and tried as regular suit. AIR 1961 Bom 221 (223): 63 Bom LR 58.

(7) Nature of suit not affected by fact that Small Cause Court decides a question of title incidentally raised. AIR 1925 All 821 (822) ° (1901) 25 Bom 625 (628, 629) (DB) ° (1913) 37 Bom 675 (680) (FB) ° (1881) 3 Mad 192 (195, 199) (FB).

(8) For purposes of Section 102 it is not necessary that a Court of Small Causes should exist in the area or that its pecuniary jurisdiction must be at least Rs. 500. 1956 Madh B LJ 253 (255).

(9) The mere fact that Munsiffs in the State are not empowered to try suits under the Provincial Small Cause Courts Act up to the valuation of Rs. 500 cannot affect the minimum amount or value of the subject-matter of the original suit in which a second appeal will lie. AIR 1954 Vind Pra 16 (16). (S. A. No. 216, D/- 20-12-1952 (Vind Pra), Dissented from.)

(10) Plaintiff is entitled to file a suit in regular Court even though part of claim is cognizable by Small Cause Court. AIR 1952 Cal 195 (196) * AIR 1917 Mad 128 (129) (DB).

(11) A collateral claim to which the plaintiff is not entitled but put forward in plaint, will not deprive suit of the character of a small cause. (1901) 24 Mad 508 (511) (DB) ° (1906) 28 All 293 (294) (DB).

(12) If the principal claim is of a small cause nature the interest on the sum due on that claim will also be of a small cause nature. AIR 1944 Mad 442 (443).

(13) Suit not of small cause nature when filed, but it subsequently assuming that character by virtue of coming into force of an Ordinance — It was held that the new Ordinance could not be given a retrospective effect so as to take away the right of appeal which had vested in the plaintiffs when they instituted their suit. ILR (1954) 4 Raj 1019 (1023, 1024).

(14) The amendment of Section 102 by Act (LXVI of 1956) does not take away the right of second appeal in a suit instituted prior to 1st January 1957, on which the amendment came into effect: ILR (1962) Madh Pra 119 (120, 121): 1961 Lab LJ 410. (1956 MBLJ 253, Disting.) ° AIR 1967 Guj 7 (8): (1965) 6 Guj LR 893 ° AIR 1962 Orissa 35 (36): 27 Cut LT 177.

(15) Central amendment prevails over State amendment — Suit for recovery of Rs. 1,700 filed in 1956 — Decree passed after 1-1-57 — Second appeal and not revision lies. AIR 1962 All 299 (300): 1961 All LJ 996 (DB). (AIR 1961 All 320, Overruled.) (Amendment of Section 102 by Central Act of 1956 prevailed over the amendment by U. P. Act of 1954, the Central Act being later in date.)

(16) Decree in ejectment and for rent in favour of a number of decree-holders. Suit not being of small cause nature second appeal was not barred. AIR 1967 Assam and Nagaland 27 (27): ILR (1966) 18 Assam 482.

(17) Suit for recovery of excess amount of Octroi tax and for a declaration that the realisation of excess tax was highhanded, illegal and wrongful. Held suit was of a nature cognizable by the Court of Small Causes. 1966 All WR (HC) 211 (212): 1966 All LJ 141.

(18) Suit against Railway for non-delivery of goods — Claim for Rs. 484 and odd — Suit held was of nature cognizable by Court of Small Causes — Second appeal by defendant held was not competent under Section 102. AIR 1962 Madh Pra 190 (193): 1961 MPLJ 159 (DB).

(19) Averments in plaint made against defendant charged him with offence punishable under Chap. XVII of Penal Code (theft or misappropriation) and hence Art. 35 (h) (ii) of Provincial Small Cause Courts Act of 1887 applied and the suit was not at all of the nature cognizable by a Court of Small Causes. (1968) 81 Mad LW 296.

**3. Effect of trying small cause suits as ordinary suits.**—(1) A small cause suit though tried as regular suit, will nevertheless be subject to all incidents of a small cause suit and a decree or order in such a suit will not admit of a second appeal. AIR 1956 Punj 233 (234) ° AIR 1957 Madh B 122 (123) ° AIR 1945 Pat 417 (419): 24 Pat 307 (DB) * (1913) 40 Cal 537 (540) (DB).

**103. Power of High Court to determine issues of fact.**—In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue of fact necessary for the disposal of the appeal [a][which has not been determined by the lower Appellate Court or which has been wrongly determined by such Court by reason of any illegality, omission, error or defect such as is referred to in sub-section (1) of Section 100.]

[a] Substituted by the Code of Civil Procedure (Amendment) Act, 1926 (VI of 1926), Section 2, for "but not determined by the lower Appellate Court".

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**Section 102 (contd.)**

**4. Suit includes execution proceedings.**—(1) The term suit includes execution proceedings. AIR 1953 Sau 16 (17) (FB) ° AIR 1949 Bom 115 (116) ° AIR 1946 Nag 165 (168): ILR (1946) Nag 26 * AIR 1918 Cal 925 (926): 45 Cal 519 (DB) ° (1896) 18 All 481 (482) (FB).

(2) An order passed in execution of a decree in a suit cognizable by a Small Cause Court is not subject to second appeal when the amount or value of suit does not exceed prescribed value. AIR 1955 Pat 316 (317) ° AIR 1953 Sau 16 (17) (FB) * AIR 1949 Bom 115 (116) ° AIR 1946 Nag 165 (167): ILR (1946) Nag 26.

(3) Small Cause Court decree transferred to regular side for execution — Order passed in execution not open to second appeal though it may be open to first appeal. AIR 1950 All 580 (581): ILR (1951) 2 All 375 (FB) * 1957 Andh LT 584 (585) ° AIR 1928 Bom 534 (537): 53 Bom 46 (DB).

(4) The test in all cases is what was the nature or value of the suit the decree in which is sought to be executed and not the actual amount affected by the order sought to be appealed against. (1885) 11 Cal 169 (172) (DB) ° (1907) 30 Mad 212 (213) (DB) ° AIR 1922 Lah 290 (291): 3 Lah 141 (DB).

**5. Appeal from order of remand.**—(1) No appeal lies against an order of remand made in a suit of a small cause nature. AIR 1916 All 125 (125) * AIR 1921 All 55 (55): 43 All 403 ° AIR 1916 Cal 581 (581) (DB) ° AIR 1914 Lah 328 (331): 1914 Pun Re No. 85 (DB).

[See also O. 43, R. 1 (u).]

**6. Appeal from order of review.**—(1) Where an Appellate Court passes a decree on review in a suit of a small cause nature, no second appeal lies against that decree on the merits though an appeal will lie against the order granting review under O. 43, R. 1 (w) and O. 47, R. 7. AIR 1921 Lah 124 (125) * (1895) 22 Cal 734 (737) (DB) ° AIR 1916 Pat 370 (370): 1 Pat L Jour 193.

[See also O. 43, R. 1 (w).]

**Section 103 — Note 1**

(1) Section 103 enables the High Court in second appeal to determine a question of fact, if there is sufficient evidence on the record, in the two cases mentioned therein. AIR 1946 Sind 10 (11): ILR (1945) Kar 301 (DB) ° AIR 1920 PC 67 (69, 70): 43 Mad 567: 47 Ind App 76 ° AIR 1928 All 220 (221): 50 All 640 (DB) * AIR 1919 PC 29 (31): 47 Cal 107: 15 Nag LR 97: 46 Ind App 140 ° AIR 1927 Bom 228 (229, 230): 51 Bom 258 (DB) ° AIR 1966 Mad 32 (35, 36): (1965) 2 Mad LJ 123 * (1966) 32 Cut LT 478: ILR (1966) Cut 284 (299). (Question of fact wrongly determined by lower appellate Court.) * (1965) 31 Cut LT 349 (353). (Question of fact not determined.)

(2) Power under Section 103 can be exercised in cases where a case is remanded under Order 41, R. 25 and the lower Appellate Court fails to give the findings or its findings are incomplete. AIR 1920 PC 67 (69): 43 Mad 567: 47 Ind App 76 ° AIR 1930 Mad 489 (490) (DB) * AIR 1922 PC 292 (297): 45 Mad 586: 49 Ind App 286 ° AIR 1936 Nag 140 (142): ILR (1936) Nag 188.

(3) Where the necessary finding has actually been given it cannot be said that it was not given merely because a correct issue was not framed. (1897) 21 Bom 325 (327) (DB).

(4) Where the lower Appellate Court determines an issue of fact but it is vitiated by an illegality such as an improper admission or exclusion of evidence, etc., the High Court can itself determine the issue of fact. AIR 1954 Pat 326 (333) (DB) ° AIR 1958 All 54 (63) (DB) * AIR 1949 All 493 (498) ° AIR 1933 Oudh 28 (30) (DB) ° AIR 1941 Pat 118 (128) (DB) * AIR 1927 Cal 1 (8-10) (SB) ° AIR 1930 Cal 235 (238) (DB) ° AIR 1964 Guj 174 (181, 182): (1964) 5 Guj LR 678. (Burden of proof put on wrong party — Irrelevant matters taken into consideration — Finding held was vitiated in law.) ° AIR 1960 Mys 231 (232): (1961) 2 Mad LJ 235.

(5) Where the lower Appellate Court has relied on inadmissible evidence as also other evidence in arriving at its finding, the High Court has, generally, no power to decide whether the evidence other than that which has been improperly admitted warrants the finding of the lower Court and the proper course for the High Court in such cases is to remand the case to the lower Court. AIR 1937 Cal 537 (540): ILR (1937) 2 Cal 661 (DB).

(6) Lower Appellate Court not applying its mind to points in controversy — Second Appellate Court is competent to decide question without remanding the case — Existence of power of remand does not mean order of remand must necessarily be made. ILR (1965) Guj 262 (275, 276): (1965) 6 Guj LR 342.

## APPEALS FROM ORDERS

**104. Orders from which appeal lies.**—(1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders:—

[a] ° ° ° ° °

[b][(ff) an order under Section 35A];

(g) an order under Section 95;

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree;

(i) any order made under rules from which an appeal is expressly allowed by rules:

[b][Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.]

(2) No appeal shall lie from any order passed in appeal under this section.

[1882, S. 588, para 2; 1877, S. 588; 1859, Ss. 363 to 365. See O. 16, Rr. 10 and 12; O. 38, R. 1; O. 39, R. 2; O. 43, R. 1.]

[a] Clauses (a) to (f) (both inclusive) of sub-sec. (1) were repealed by the Arbitration Act, 1940 (X of 1940), Sch. III For corresponding provisions in the above Act, see Section 39 thereof.

[b] Inserted by the Civil Procedure (Amendment) Act, 1922 (IX of 1922), Section 3. See also Note 1 of Section 35A.

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**Section 103 — Note 1 (contd.)**

(7) Where there was no specific finding of the lower appellate Court on some of the important issues which had a direct bearing on the decision of the case, it is open to the High Court in second appeal to examine the evidence in the case so far as those issues are concerned. AIR 1964 Orissa 123 (125): (1963) 5 OJD 350 (DB) • AIR 1964 Orissa 233 (235): 31 Cut LT 1082. (Lower appellate Court not answering the main issue of fact.)

(8) Though in second appeal Court is not to go into pure questions of fact unless they fall under Section 100, by virtue of O. 42, R. 1 read with O. 41, R. 27 additional evidence can be admitted either for enabling Court to pronounce judgment or for any other substantial cause. AIR 1967 Guj 87 (88, 89): ILR (1967) Guj 199.

(9) Mysore C. P. Code, Ss. 103 and 100 (1) (d) — Second appeal — Finding of fact — Finding of fact recorded by trial Court but not by lower appellate Court — Question of fact material for decision on merits — Section 103 applies and not S. 100 (1) (d). AIR 1963 Mys 5 (10): 1962 Mys LJ (Sup) 73 (DB).

(10) Finding as to question of possession — Commission of error of record and overlooking important pieces of evidence amount to defect in procedure within S. 100 (1). Such finding of fact is not binding in second appeal and can be reviewed under S. 103. AIR 1969 Orissa 18 (21).

**SECTION 104 — SYNOPSIS**

1. SCOPE.
2. RETROSPECTIVE EFFECT.
3. NON-APPEALABLE ORDERS.
3A. "SAVE AS OTHERWISE EXPRESSLY PROVIDED....." See Note 4 to 6.
4. Letters Patent Appeals.
5. Execution proceedings.
6. Appeals to Supreme Court.
7. CLAUSE (FF).
8. CLAUSE (G).
9. CLAUSE (H).
10. CLAUSE (I). See also O. 43, R. 1.
11. PROVISO TO SUB-SECTION (1).
12. SUB-SECTION (2).

**TOPIC INDICATOR**

Appeal under S. 202, Companies Act, 1913 —See Note 1.
Interlocutory orders — See Note 3.
Orders under Hindu Marriage Act — See Note 1.
Order fixing standard rent — See Note 1.
Order striking off execution case — See Note 5.
Order of single Judge of High Court — See Note 8.
Second appeal — See Note 12.

**1. Scope.**—(1) Section 104 is restrictive in character. By sub-section (1) it limits a party's rights of appeal against an order

**Section 104 — Note 1** (contd.)
to the cases specified in Clauses (ff) to (i) and by sub-section (2) that right is further restricted to only one appeal. (1911) 33 All 479 (480) (DB).

(2) Where an order is one not specified in the section but is a "decree" within the meaning of Section 2, Clause (2), this section will have no application. AIR 1942 Lah 95 (99): ILR (1942) Lah 491 (FB) ° AIR 1950 Cal 582 (583): ILR (1951) 1 Cal 216 ° AIR 1965 Ker 303 (304): 1965 Ker LT 236. (Order declaring suit to have abated — Amounts to decree.)

(3) The right of appeal conferred by Section 202, Companies Act, 1913, on an aggrieved party, to appeal against an 'order or decision' given by a Court in winding up, and depriving him of his right or affecting the same, cannot be cut down by imposing a condition that such order or decision should also be appealable, either as a decree or order, under the provisions of this Code, when passed by a District Judge, or as a "judgment" under Cl. 15 of the Letters Patent, when passed by a Judge on the Original Side of the High Court. AIR 1955 Bom 355 (356, 357): ILR (1955) Bom 550 (DB).

[But see AIR 1956 All 222 (223): 1956 Cri L Jour 369 (DB).]

(4) An order refusing to set aside a sale on the ground of fraud is appealable under Section 104 and O. 43, R. 1 as an order and therefore no second appeal will lie, though the order may be one within S. 47. AIR 1918 All 209 (210): 40 All 122 (DB) ° AIR 1920 Bom 60 (61): 44 Bom 472 (DB) ° AIR 1923 Lah 592 (593): 4 Lah 243 (DB) * AIR 1917 Cal 443 (444) (DB).

(5) A decree as defined by Section 2 excludes an order appealable as an order even though it is within Section 47. (1911) 38 Cal 339 (340) (DB).

(6) Section 104 and O. 43, R. 1 deal only with right of appeal and not grounds of appeal. The absence of anything in the body of the section, in limitation of the right of appeal, cannot have the effect of enlarging the grounds where they are limited and specified under the rules. AIR 1946 Cal 530 (534): ILR (1946) 2 Cal 527 (FB).

(7) Orders passed by District Court or by the Single Judge are appealable under Sec. 202 of the Companies Act, 1913 independently of provisions of Sections 96 and 104 of Civil P. C. AIR 1965 SC 507 (513, 514): (1964) 1 SCR 717.

(8) Decrees and orders under Hindu Marriage Act — Right of appeal is provided by Section 28 of that Act — Reference to C. P. Code not necessary — Order granting alimony under Section 25 — Appeal lies under Section 28. AIR 1961 Guj 202 (204, 205): (1961) 2 Guj LR 536 ° (1964) 68 Cal WN 316 (320, 321). (Order on application for maintenance pendente lite — Appeal against order is competent.)

(9) Order fixing standard rent passed in suit consolidated with rent application under Section 11, Bombay Rents, Hotel and Lodging House Rates Control Act — Order is appealable. (1964) 5 Guj LR 982 (986).

(10) Section 104 and Order 43 do not apply to Provincial Small Cause Courts. (1966) 7 Guj LR 401 (402).

(11) Mysore Arbitration Act (12 of 1949), Sections 47, 48, 14 — Award in arbitration without intervention of Court long before coming into force of Act — Filing of award — Act does not apply — Law applicable is one under Mysore Arbitration Regulation (1 of 1917) — Order refusing to file award is appealable under Section 104 (1) (f) of Mysore Civil P. C. of 1911. 1962 Mys LJ (Supp) 211 (212) (DB).

2. **Retrospective effect.**—(1) A disabling provision of law such as this section cannot be so interpreted as to have a retrospective effect. (1910) 5 Ind Cas 103 (105) (SB) (Mad).

[But see Madh B LJ 1955 HCR 3 (5) ° ILR (1955) Madh B 159 (160, 161) (DB).]

3. **Non-appealable orders.**—(1) Orders not being "decrees" and not falling within Clauses (ff) to (i) of this section nor within Order 43, Rule 1 are not appealable. AIR 1953 SC 23 (27): 1953 SCR 136 * 1958-1 Mad L Jour 99 (100). (Order appointing Commissioner to ascertain mesne profits.) * AIR 1957 Cal 135 (136) (DB). (Order holding that Court has jurisdiction to try suit.) ° 1955 Andh WR 178 (180) ° AIR 1957 Cal 67 (68) (DB) ° AIR 1953 Mad 485 (487): ILR (1953) Mad 808 (DB) ° AIR 1951 All 564 (566) (DB) ° AIR 1951 Assam 147 (148): ILR (1951) Assam 383 (DB) ° AIR 1951 Pat 364 (365) (DB) * AIR 1950 Mad 212 (212, 213) (DB) ° (1902) 24 All 532 (537) (FB). (Order on application to be brought on record as legal representative.)

(2) Order rejecting application under Section 4, Partition Act is not decree under Section 8 and is not appealable — Same also is not appealable as order under O. 43 — Validity of order can be questioned only in appeal from final partition decree. 1967 All LJ 379 (380).

(3) Order under Section 8, Arbitration Act is not appealable. AIR 1965 All 269 (271): 1964 All LJ 771. (Reversed on another point in AIR 1969 SC 474.)

(4) Order of Single Judge of High Court refusing interim injunction — Order is not appealable either under Clause (15) or under Order 43, Rule 1 and Section 104 of C. P. Code. AIR 1967 Bom 56 (59, 60): 68 Bom LR 209 (DB).

(5) Suit in Special List under Chap. 10, Rule 35, Calcutta High Court Original Side Rules, struck out for want of prosecution — Application to set aside order, dismissed — Appeal against dismissal order is not maintainable. AIR 1965 Cal 547 (549).

(6) Interlocutory orders—Only decree and orders such as are appealable under S. 104

**Section 104 — Note 3** (contd.)
and Order 43 of Civil P. C. are appealable — Order directing parties to be present for examination is revisable and not appealable. AIR 1965 J and K 88: 1965 Kash LJ 11.

(7) Order under S. 24 of Hindu Marriage Act — Not appealable. AIR 1968 Mys 8 (10, 11): (1967) 2 Mys LJ 44 ° AIR 1960 Bom 315 (317): 62 Bom LR 47.

[But see AIR 1967 Andh Pra 323 (331) (FB). (AIR 1960 Andh Pra 30, **OVERRULED.**)]

(8) Order rejecting application that proceedings ceased to be under the Rent Control Act — Order not within the ambit of appealable orders as mentioned in O. 43, R. 1, or S. 104, C. P. Code. AIR 1962 Punj 369 (370): 64 Punj LR 65.

(9) Application for stay of proceedings under Hindu Marriage Act made under Ss. 10 and 151, Civil P. C. — Order refusing stay is not appealable under Civil P. C. or under S. 28 of the Hindu Marriage Act. AIR 1967 Punj 148 (151, 152): ILR (1967) 1 Punj 695 (DB).

(10) Order refusing to set aside abatement of appeal — Not competent. AIR 1967 Punj 70 (71, 72): ILR (1967) 2 Punj 751.

(11) Madras Co-operative Societies Act (6 of 1932) S. 49 — Order of District Judge refusing to set aside surcharge order passed by Registrar, Co-operative Societies — It is neither a decree nor an appealable order — Order is revisable under S. 115, C. P. Code as it amounts to a decision of a case by a Court subordinate to High Court. 1962 Ker LT 393 (394, 395).

(12) Section 40, Special Marriage Act (1954) attracts the provisions of Civil P. C. — Order refusing affidavit evidence in divorce proceedings by mutual consent is interlocutory in nature — Maintainability of appeal against such order is doubtful. AIR 1968 Cal 48 (49) (DB).

**3A. "Save as otherwise expressly provided ....."**— See Notes 4 to 6.

**4. Letters Patent Appeals.** — (1) An appeal may lie from an order under the Letters Patent, although such order may be unappealable under this section by virtue of the saving clause. AIR 1940 Bom 216 (224): ILR (1940) Bom 426 (DB) * AIR 1924 Cal 1025 (1026): 51 Cal 905 (DB) ° AIR 1922 Lah 380 (383): 3 Lah 188 (DB) ° AIR 1916 Cal 361 (362, 365): 43 Cal 857 (872) (SB) * AIR 1921 PC 80 (82): 48 Cal 481: 48 Ind App 76 • 1966 BLJR 230. (Order of Single Judge disposing of appeal and remanding case is 'judgment' and is appealable.) • (1960) 2 Andh WR 462. (Clause 15 of Letters Patent is a special law. Therefore S. 104 does not modify or limit or take away the right given by Cl. 15 of Letters Patent.)

[See AIR 1940 Nag 39 (39): ILR (1940) Nag 141 (FB).]

[But see AIR 1923 All 356 (357): 45 All 535 (536) (DB). (Section 104 bars an appeal under Letters Patent if order is unappealable under S. 104.)]

(2) Although an order may fall under this section read with O. 43, R. 1, a Letters Patent appeal will not lie from such an order unless it amounts to a 'judgment' within the meaning of the Letters Patent. AIR 1953 All 647 (650) (DB) * AIR 1961 Punj 424 (425, 426): ILR (1960) 2 Punj 386. (Order setting aside abatement under O. 22, R. 9, Civil P. C. is not 'judgment' under Cl. 10.)

(3) Where in an appeal to the High Court from an order appealable under this section the High Court passes a judgment therein a further or second appeal will lie against that judgment on the ground that it is also a "judgment" within the meaning of the Letters Patent. AIR 1937 All 165 (167): ILR (1937) All 386 (DB) ° AIR 1956 Nag 215 (217) (DB) ° AIR 1956 Nag 211 (213): ILR (1956) Nag 226 (DB) * AIR 1954 Sau 152 (154, 155) (DB) ° AIR 1940 Bom 216 (218, 224): ILR (1940) Bom 425 (DB).

[But see AIR 1917 All 325 (326): 39 All 191 (DB).]

(4) A special appeal under Chap. 8, R. 5 Allahabad Rules of Court (1952) from an order passed by a Single Judge under S. 104 (1) is not barred under S. 104 (2) as it is a special provision to the contrary. AIR 1962 All 543 (545): 1962 All LJ 729. (14 All 226 held not good law.)

(Note— AIR 1962 All 543 and AIR 1937 All 165 held to be impliedly overruled in view of AIR 1962 SC 256 in AIR 1964 All 235.)

(5) Although bar imposed by S. 104 does not operate to prevent the appeal being filed but the bar imposed by Ch 8. R. 5 of Allahabad Rules of Court namely that it cannot be filed without special leave of the Judge stands. If there are two bars on maintainability of appeal and only one is removed, the appeal is still not maintainable on account of the other. AIR 1964 All 235 (236): ILR (1963) 1 All 867 (DB).

**5. Execution proceedings.** — (1) Where an order in execution neither falls under S. 47 nor is specified in this section, then there will be no appeal at all. AIR 1953 SC 23 (27): 1953 SCR 136 ° AIR 1953 All 708 (709): ILR (1954) 2 All 94 (DB).

[See also AIR 1960 Bom 334 (336): 61 Bom LR 1591 (DB). (Order under S. 24, Bombay Money Lenders Act (31 of 1947) is not one under S. 47 but is decree within S. 2 (2) and hence appealable.)]

(2) An appeal against an order in execution which is appealable under this section is not barred by the mere fact that the order is only a preliminary one, and that a final order has been passed at the time of appeal. AIR 1915 Mad 197 (199): 37 Mad 29 (37) (DB).

(3) Application under O. 21, R. 2 for recording full satisfaction of decree — Dismissal for default — Application for restoration under O. 21, R. 105 (2) — Court

**Section 104 — Note 5 (contd.)**

imposing terms for restoration after hearing petitioner — Order neither final nor appealable. (1968) 1 Andh LT 321.

(4) Order allowing application of decree-holder under O. 21, R. 66 for reduction of upset price in sale proclamation — Order does not fall under S. 47 — Order is not appealable. AIR 1966 Andh Pra 152 (153): (1965) 2 Andh WR 481.

(5) An order striking off execution case, though comes within S. 47, is neither a decree nor an appealable order. Such an order does not come within purview of S. 104. ILR (1965) Cut 823: 32 Cut LT 628.

**6. Appeals to Supreme Court.**— (1) This section does not govern appeals to the Supreme Court. See AIR 1924 PC 95 (100, 101): 51 Cal 361: 20 Nag LR 33: 51 Ind App 72 ° AIR 1934 Oudh 291 (292) (DB) ° (1913) 40 Cal 645 (647, 648): 40 Ind App 140 (PC).

**7. Clause (ff).** — (1) The fact that an order under S. 35A is appealable as an order in terms of this clause does not mean that such an order even where it forms part of a decree cannot be a decree within the meaning of S. 2 (2). AIR 1954 Nag 272 (274): ILR (1954) Nag 418 (DB).

**8. Clause (g).** — (1) Section 104 read with S. 95 shows that an order for compensation for obtaining an improper arrest or attachment is appealable. (1911) 11 Ind Cas 349 (349) (DB) (Mad).

(2) An "order under S. 95" will include an order either granting or refusing compensation and, in either case, will not be open to second appeal. AIR 1919 Mad 20 (20) (DB). (Order refusing compensation.) * AIR 1942 All 261 (262): ILR (1942) All 360. (Order allowing compensation.)

(3) Where an order under S. 95 is passed by a Court of Small Causes, no appeal will lie against the order. AIR 1919 Mad 23 (23) (DB). (Dissenting from the obiter dictum to the contrary expressed in AIR 1915 Mad 1072.) * AIR 1937 Nag 126 (127): ILR (1938) Nag 361.

(4) Section 104 contemplates appeals from one Court to another Court to which appeals are preferred from its orders. The Code does not contemplate appeal from order of Single Judge of a High Court to another Bench of High Court. Hence an order under S. 95 passed by a Single Judge of High Court is not appealable under S. 104. AIR 1958 All 105 (106) (DB).

**9. Clause (h).** — (1) This clause applies only to orders made under the provisions of the Code. (1880) 5 Cal 311 (313, 314) (DB). (Order imposing fine under the Stamp Act is not appealable.)

(2) A negative order of refusal is not appealable under this clause. Nor is an order for arrest or detention appealable under this clause if it is in execution of a decree. AIR 1943 Pesh 58 (58) ° AIR 1932 All 523 (524) (DB).

(3) An order for attachment for contempt is not within this clause. (1883) 7 Bom 5 (12) (DB).

(4) Order refusing arrest or attachment under O. 39, R. 2 is appealable under O. 43, R. 1 though not under S. 104. AIR 1917 Mad 448 (449, 450): 39 Mad 907 (914) (DB).

(5) A conditional order of arrest, though not appealable under O. 43, R. 1 is appealable under Section 104. AIR 1924 Rang 361 (361): 2 Rang 362 (DB).

(6) Even apart from O. 43, R. 1, a right of appeal from orders is provided for by S. 104 and this right has not been curtailed by O. 43 of the Code. Hence an order of detention of a person in civil prison for breach of an order of injunction passed under R. 2A of O. 39 as amended by the Allahabad High Court would therefore be appealable under S. 104 (1) (h) and that right would not be affected by any failure to make a consequential amendment in O. 43, R. 1 after the introduction of new R. 2-A in O. 39 by the High Court. AIR 1958 All 641 (642) (DB). (AIR 1958 All 639. Foll.: 1951 All WR (HC) 636 and Civil Revn. No. 838 of 1955, D/- 17-1-1958 (All), Overruled.) * AIR 1958 All 639 (640): ILR (1957) 2 All 240.

**10. Clause (i).** — See also Order 43, R. 1.

(1) An order vacating an interim injunction though appealable under O. 43, R. 1 (r) read with S. 104 to the Subordinate Court, is revisable by the High Court even though no appeal has been filed before the subordinate Court. AIR 1966 Mad 370 (371): (1966) 1 Mad LJ 451.

(2) Order refusing to set aside an ex parte decree is appealable under O. 43. AIR 1967 Bom 361 (365): 68 Bom LR 857.

(3) Order dismissing application for restoration of another application dismissed for default is not appealable but revision lies. AIR 1961 Manipur 35 (37). (AIR 1937 Oudh 344, Diss. from; AIR 1924 All 682 (2), Rel. on.)

**11. Proviso to sub-section (1).** — (1) The effect of proviso is that an appeal against an order under S. 35A lies only when the order is one awarding compensatory costs. When the order is one refusing to award compensatory costs, no appeal will lie. (1935) 162 Ind Cas 860 (860) (Nag).

**12. Sub-section (2).** — (1) An order passed on appeal under sub-sec. (1) is not open to any further appeal. AIR 1954 Nag 125 (126) ° 1958-1 Andh WR 369 (370) ° AIR 1954 Pepsu 49 (50): ILR (1953) Patiala 343 (DB) * AIR 1947 Nag 75 (75) (DB) ° AIR 1942 All 261 (262): ILR (1942) All 360 ° AIR 1942 Bom 82 (84): ILR (1941) Bom 629 (DB) ° AIR 1942 Oudh 370 (371) (DB).

(2) The sub-section is general and bars a second appeal against any order passed in an appeal under this section and not merely against an order deciding an appeal on the merits. AIR 1941 All 338 (339).

(4) An order rejecting a Civil Miscellaneous appeal as incompetent cannot be re-

**105. Other orders.**—(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

[1882, S. 591; 1877, Ss. 580, 591; 1861, S. 26; 1859, S. 360, last para.]

## OBJECTS AND REASONS

"Clause 105.— Though, the remarks of the Privy Council in Moheshur v. The Bengal Government (7 Moo Ind App 283) are wide enough to embrace an appeal from an order of remand the Committee think that those orders were probably not in their Lordships' contemplation when they condemned the view that a failure to appeal from an interlocutory order should deprive the person aggrieved of his right to object to such an order when subsequently appealing from the decree. And the Committee think there are good reasons on the score of delay and expense for treating an appeal from order of remand as a special case and precluding an appellant from taking, on an appeal from decree, any objection that might have been urged by way of appeal from an order of remand. The Committee have deleted the word 'such' to remove a difficulty it creates (10 Moo Ind App 340, 413; 12 Moo Ind App 157)". —S. O. R.

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**Section 104 — Note 12 (contd.)**

garded as an adjudication or a final order, in the Civil Miscellaneous Appeal coming within S. 104 (2) and as such a second appeal is not barred. AIR 1961 Andh Pra 112 (113): (1960) 2 Andh WR 4.

(5) Appeal preferred to District Judge from interlocutory order made by trial Court in suit — Application made in appeal praying for interlocutory order — Application dismissed — Nature of such dismissal order indicated — Appeal preferred to High Court from dismissal order — Appeal held barred under S. 104 (2), AIR 1964 Ker 23 (24, 25): 1963 Ker LT 502. (AIR 1941 All 338 and 1958 Ker LT 829, Rel. on; AIR 1961 Andh Pra 112, Diss. from.)

(6) Order under S. 95 C. P. Code — Second appeal does not lie. (1967) 1 Mys LJ 181 (182): (1967) 9 Law Rep 387 (DB).

## SECTION 105 — SYNOPSIS

**1. Scope and object.**
**2. Order must be one under the Code.**
**3. "Where a decree is appealed from."**
**4. Error, defect or irregularity.**
**5. "Affecting the decision of the case."**
**6. Compliance with order.**
**7. Sub-section (2).**
**8. Supreme Court appeals.**
**9. Letters Patent appeals.**
**10. Order granting review.**
**11. Revision.**

## TOPIC INDICATOR

Appeal apparently against decree, but not really directed against interlocutory order — See Note 3.
Applicable and non-applicable orders — See Note 1.
Preliminary decree — See Section 97.
Save as expressly provided — See Note 2.
Section does not control O. 47, Rr. 7 and 9 — See Note 10.
This section and Section 36, Stamp Act — See Note 1.

**1. Scope and object.** — (1) Section 105 only makes a negative provision and is not meant to create a right of appeal from orders other than those mentioned in S. 104 (1); it merely provides a remedy. It cannot be said that in such cases the order is one from which an "appeal lies" so as to preclude a revision. AIR 1955 Pepsu 113 (114): ILR (1956) Patiala 41 (DB).

(2) In view of S. 105 no appeal lies from any order under C. P. C. which is not covered by S. 104 or O. 43, R. 1, C. P. C. AIR 1953 SC 23 (27): 1953 SCR 136. (An order under S. 151, Civil P. C. is not appealable.)

(3) Section 105 applies to appealable as well as to non-appealable orders. AIR 1943 Oudh 288 (290) (DB) * AIR 1958 Andh Pra 494 (496) (DB) ° AIR 1957 Raj 367 (371): ILR (1957) 7 Raj 460 ° ILR (1955) 1 Cal 299 (311). (Order refusing leave to defend under O. 37, R. 3.) * (1896) 18 All 19 (21, 22) (FB) ° AIR 1952 Bom 80 (84): ILR (1952) Bom 323 (DB) ° AIR 1950 Mad 541 (542) (DB) * AIR 1954 Mad 334 (336): ILR (1954) Mad 354 (DB) ° (1897) 24 Cal 725 (736, 738) (FB) ° AIR 1935 Rang 245 (246): 13 Rang 239 (DB) * (1968) 2 Mad LJ 266: (1968) 81 Mad LW 387.

(4) This section and S. 99 are not mutually destructive. AIR 1927 Rang 150 (154): 5 Rang 80 (DB). (Overruled on another point in AIR 1937 Rang 334: 1937 Rang LR 207 (FB).) ° AIR 1957 All 527 (532).

(5) An interlocutory order which is otherwise appealable can be appealed against after the decree in the suit has been passed. AIR 1951 Mad 883 (1)(883): ILR (1951)

**Section 105 — Note 1 (contd.)**

Mad 835 (DB). (Party aggrieved by remand order is entitled to appeal against it even if suit is disposed of — AIR 1949 Mad 377, Reversed.) * AIR 1951 Mad 218 (219) ° AIR 1940 Nag 104 (105, 106) (DB) * 1966 Lab LJ 820 (822, 823): 1966 MPLJ 507 (DB). (The error, defect or irregularity must be either in law or procedure but not in matter of fact.)

[But see (1905) 32 Cal 1023 (1029) (DB) ° (1909) 36 Cal 762 (763) (DB).]

(6) Rejection of document — Order not final — S. 36 of Stamp Act does not override S. 105, Civil P. C. 1961 MPLJ 169 (171, 172).

(7) Where an order under O. 11, R. 21 was passed against the defendant and the defendant did not file an appeal against the order and did not comply with the order and eventually a decree against him was passed it was held that an appeal from the decree was competent and the defendant could raise in view of S. 105 the error or irregularity of the order made under O. 11, R. 21, C. P. C. AIR 1968 Punj 298 (299, 300): ILR (1967) 2 Punj 352.

(8) Section 105 allows an appealable order which has not been appealed from to be made a subject of appeal in an appeal from the decree. AIR 1952 Bom 80 (84): 53 Bom LR 793 (DB). (Case under Bombay Agricultural Debtors' Relief Act.) ° ILR (1963) 1 Ker 473. (Interlocutory order — Plaintiff acting in pursuance of it — Plaintiff not precluded from objecting to it in final appeal against the decree.) ° 1962 Mys LJ (Sup) 211 (DB).

(9) The language of S. 105 makes it clear that it is open to a party not to prefer an appeal against an order which is appealable under Civil Procedure Code and yet, to challenge its correctness in an appeal preferred against the final decree where that order has affected the decision of the case. By virtue of S. 108, Civil Procedure Code, provisions of S. 105 will apply to a case of an appeal against final order also. (1968) 2 Mad LJ 266: (1968) 81 Mad LW 387.

(10) By virtue of S. 108, C. P. C. the provisions of S. 105 will apply to a case of an appeal against final order also. (1968) 2 Mad LJ 266: (1968) 81 Mad LW 387. (Appeal from an order dismissing to set aside sale.)

**2. Order must be one under the Code.**— (1) The word "order" refers to orders passed under the Code. (1895) 17 All 438 (443) (DB).

(2) The words "save as otherwise expressly provided" contemplate appeals from orders of a character provided for elsewhere than in the Civil Procedure Code and include appeals allowed under other laws. AIR 1952 Bom 80 (84): ILR (1952) Bom 323 (DB) ° ILR (1956) 1 Cal 317 (322) * (1895) 17 All 438 (440) (DB).

(3) As section 43 of the Delhi Rent Control Act (59 of 1958) makes a provision contrary to the provision of S. 105, C. P. C. that section does not apply to appeals from orders passed under S. 38 of that Act. (1964) 66 Punj LR 586 (588).

**3. "Where a decree is appealed from."**— (1) An erroneous order of remand passed by an Appellate Court cannot be attacked in an appeal from a decree of the trial Court passed on such remand. (1909) 32 Mad 318 (320) (DB).

[But see AIR 1940 Mad 756 (757): ILR (1940) Mad 901 (DB).]

(2) A final decision by a Division Bench of High Court against an interlocutory order of lower Court passed in a revision cannot be agitated in an appeal against the decree in the same suit to another Division Bench of High Court. AIR 1951 Hyd 132 (134): ILR (1951) Hyd 798 (DB).

(3) An appeal will lie from a decree where the only ground of appeal is the defect, error or irregularity of an order made in the suit. (1890) 14 Bom 232 (235) (DB) ° (1881) 7 Cal 148 (149) (DB) ° (1910) 34 Mad 228 (230) (DB).

[But see AIR 1928 All 194 (196) (DB) * (1896) 18 All 19 (22) (FB) ° (1900) 22 All 366 (367) (DB).]

(4) What the section means is that the ground of objection is open to the aggrieved party when appealing from the decree and should be considered and disposed of in deciding the appeal if taken. AIR 1956 Pat 244 (251) (DB). (AIR 1923 Mad 147: 46 Mad 47 (DB), Foll.)

(5) The principle of this section would apply not only to decrees and interlocutory orders but also to orders and interlocutory orders which lead up to the final order. AIR 1952 Trav-Co 316 (316): ILR (1951) Trav-Co 369 (DB) ° AIR 1917 Mad 404 (405) ° AIR 1936 Mad 936 (937).

[But see (1936) 164 Ind Cas 730 (731) (DB) (All) ° AIR 1944 Pesh 33 (34).]

(6) Sub-s. (1) of S. 105 only postpones the challenge to an interlocutory order till an appeal is preferred from the final decree. But the challenge must be in an appeal from the final decree filed not in the Court making the interlocutory order attached but in appeal ultimately taken to the higher Court from the final decree. AIR 1964 Madh Pra 288 (294): 1964 MPLJ 502 (DB).

**(4) Error, defect or irregularity.** — (1) Error, defect or irregularity must be one in law or procedure and not in matters of fact. (1890) 12 All 200 (202) (DB) * AIR 1930 Pat 266 (269): 9 Pat 102 (DB) ° AIR 1929 Cal 26 (27) (DB) ° 1966 Jab LJ 820 (823): 1966 MPLJ 507 (DB).

**5. "Affecting the decision of the case."** — (1) An error, defect or irregularity in any order should have affected decision of case. AIR 1955 Pepsu 113 (115): ILR (1956) Patiala 41 (DB) * AIR 1943 Oudh 288 (290) (DB) ° AIR 1929 Pat 609 (612): 9 Pat 408 (DB).

(2) Words "affecting the decision of the case" mean affecting the decision of the

**Section 105 — Note 5 (contd.)**

case on the merits. AIR 1956 All 216 (218) ° ILR (1953) 3 Raj 880 (882) (DB) * AIR 1946 Mad 344 (345) (DB) ° AIR 1925 Lah 466 (467): 6 Lah 94 (DB) * AIR 1936 Nag 8 (11): 31 Nag LR (Sup) 72 ° AIR 1931 All 294 (297, 298, 299): 53 All 612 (FB) ° 1968 Jab LJ 370: 1968 MPWR 163 * (1967) 9 Law Rep 400 (404) (Mys,

(3) The following are examples of orders affecting decision of case on the merits:

(a) Order setting aside award and directing case to be tried by Court. AIR 1915 All 247 (248): 37 All 456 (DB) ° AIR 1933 Oudh 563 (564) (DB). (AIR 1929 Cal 322, Followed.) * AIR 1939 Sind 241 (245): ILR (1940) Kar 22 (FB) ° AIR 1929 Cal 322 (323, 324): 56 Cal 21 (DB).

(b) Order extending time for payment of money under a preliminary mortgage decree. (1911) 7 Nag LR 162 (164).

(c) Order in a suit for the dissolution of partnersrip that a particular party was a partner. (1896) 23 Cal 406 (409) (DB).

(d) Order admitting or excluding a document. AIR 1925 Cal 711 (713) (DB).

(e) Order allowing or refusing amendment of plaint. ILR (1953) 3 Raj 880 (884) (DB) ° AIR 1914 Mad 17 (17) (DB).

(f) Order giving directions for preparation of a final decree. (1913) 35 All 159 (162) (DB).

[See also AIR 1958 Mad 462 (462): ILR (1958) Mad 417.]

(g) Order deciding that mortgagor was liable to pay interest only at a particular rate. (1869) 2 Beng LR 44 (48): 12 Moo Ind App 157 (PC).

(h) Order making a person respondent in appeal. (1887) 9 All 447 (451) (DB).

(i) Order refusing to set aside abatement. AIR 1933 All 294 (295) (DB).

(j) Order entertaining a claim after the period of limitation. AIR 1943 Oudh 288 (290) (DB) * AIR 1967 All 459 (463): 1957 All LJ 61 (DB). (AIR 1951 All 614, Overruled; AIR 1943 Oudh 288, Foll.)

(k) Order holding a suit as not barred by time. ILR (1953) 3 Raj 880 (881) (DB).

(l) Order wrongly allocating burden of proof. AIR 1954 Raj 83 (83): ILR (1953) 3 Raj 1003 (FB).

(m) Order passed, after preliminary decree for partition, regarding plaintiff's liability to pay amount representing moiety share of defendant in the usufruct of the land under suit. AIR 1956 Pat 244 (250) (DB).

(n) Order striking out defence. AIR 1957 Raj 367 (372): ILR (1957) 7 Raj 460.

(o) Order deciding questions as to limitation and maintainability of application under S. 33, Arbitration Act. AIR 1963 Raj 193 (194, 195): 1963 Raj LW 183 (DB).

(4) The following are orders not affecting decision of case on merits:

(a) Order allowing to sue in forma pauperis. (1901) 20 All 364 (365) (DB).

(b) Order setting aside dismissal of an appeal for default. AIR 1946 Mad 344 (345) (DB).

(c) Order of remand passed in appeal from order returning a plaint for presentation to proper Court. AIR 1926 Mad 900 (902) (DB).

(d) Order refusing to record adjustment of suit. AIR 1936 Nag 8 (11): 31 Nag LR (Sup) 72. (This case is overruled on another point in AIR 1940 Nag 349: ILR (1940) Nag 538 (DB).)

(e) Order rejecting a petition for amendment of issues. AIR 1951 Hyd 132 (137): ILR (1951) Hyd 798 (DB).

(f) Order relating to court-fee. AIR 1953 Madh B 151 (152): ILR (1952) Madh B 345 (DB).

(g) Order passed, after preliminary decree for partition, dismissing an application by one of defendants claiming his share. ILR (1955) 5 Raj 588 (592) (DB).

(h) Order dismissing plaintiff's objection to an application by one of defendants to set aside preliminary decree. AIR 1954 Raj 246 (247): ILR (1953) 3 Raj 1028 (DB).

(5) According to the High Courts of Allahabad, Bombay, Calcutta, Lahore, and Rangoon and the Judicial Commissioner's Court of Oudh an order setting aside an ex parte decree does not affect the decision of the case on the merits, but only ensures the re-hearing of the case on the merits. AIR 1931 All 294 (297): 53 All 612 (FB) ° AIR 1927 Bom 455 (455): 51 Bom 495 (DB) ° (1895) 22 Cal 981 (984) (DB) ° AIR 1925 Lah 466 (467): 6 Lah 94 (DB) * AIR 1937 Rang 334 (334, 335): 1937 Rang LR 207 (FB) ° (1916) 34 Ind Cas 713 (713) (Oudh).

[But see (1912) 34 All 592 (595) (DB).]

(6) See also the undermentioned cases: 1968 MPWR 163: 1968 Jab LJ 378. (An interlocutory order setting aside an ex parte order does not affect the decision of the case on merits.) ° 1964 Ker LT 32: 1963 Ker LJ 1184. (Held that the decision as to the right to represent the estate, was one which could not affect the decision of the case on the merits within the meaning of S. 105, Civil P. C. and viewed as an order under O. 22, R. 5, its propriety was not open to challenge in the appeal from the decree.) ° (1963) 29 Cut LT 256: ILR (1963) Cut 226 (Orissa). (In second appeal objection that State could not be allowed to be made party under O. 22, R. 10 taken — Objection held could not be raised in arguments in second appeal — S. 105 held had no application — Mere addition of the State as a co-plaintiff held had nothing to do with the merits of the case itself.)

(6A) It is open to a defendant who has filed an appeal against an ex parte decree under S. 96 (2) to show from the record as it stands, that is, in the order proceeding ex parte against him, any error, defect or

Section 105 — Note 5 (contd.)
irregularity which has affected the decision of the case. 1966 Jab LJ 820 (825): 1966 MPLJ 507 ° AIR 1962 All 107 (108) (DB). (Garnishee proceedings — Notice under O. 21, R. 131 — Ex parte order dismissing objections for non-compliance with certain directions subsequently recalled — Order recalling order of dismissal cannot be challenged, because merits of the matter were not affected.)

(7) According to the High Court of Madras, where a decree against two defendants ex parte was set aside in toto on an application by one of them only, the order can be attacked in an appeal from the final decree. (1903) 26 Mad 604 (605) (DB).

(8) The Madras High Court has held that when the result of setting aside the ex parte decree is not the hearing of the suit de novo on the merits but to burke such a decision altogether as where the ex parte final decree alone is set aside retaining the ex parte preliminary decree, the order is one which will affect the decision of the case, and can be attacked in an appeal from the decree. AIR 1924 Mad 890 (892) (DB).

(9) An order improperly refusing an adjournment and placing a defendant ex parte is one affecting decision of case. AIR 1925 Pat 534 (534, 535) (DB).

(10) An order setting aside an ex parte decree only against some of defendants, is one affecting decision of case. AIR 1930 Pat 266 (269): 9 Pat 102 (DB).

(11) An order under O. 9, R. 9 restoring a suit to file cannot be challenged in appeal against the decree under this section. AIR 1941 Oudh 367 (368) (DB). (AIR 1933 Oudh 331, Overruled.) ° AIR 1956 All 216 (218) ° AIR 1959 Pat 225 (227, 230): 1958 BLJR 848 (DB).

(12) According to High Courts of Calcutta, Lahore and Pepsu an order setting aside an abatement under 0. 22, R. 9 does not affect decision whether the order is made simultaneously or not. The decisions of the High Court of Lahore are conflicting. AIR 1925 Cal 766 (768): 52 Cal 472 (DB) ° AIR 1957 Raj 68 (71): ILR (1957) 7 Raj 501 (DB) * AIR 1933 Cal 498 (500) ° AIR 1925 Cal 473 (474) (DB) ° ILR (1954) Patiala 501 (506) ° AIR 1933 Lah 152 (153): 14 Lah 361 (DB).

[But see AIR 1923 Lah 230 (232) (DB).]

(13) The Allahabad High Court has held that an order setting aside abatement affects the decision of case if the order is made simultaneously with the decree in the suit, but otherwise not. (1900) 22 All 430 (432).

[See AIR 1933 All 294 (295) (DB) * AIR 1917 All 434 (435) (DB) ° AIR 1925 All 426 (427): 47 All 555 (DB).]

(14) An order under O. 22, R. 5 impleading a person as the legal representative of the deceased plaintiff does not affect the decision of the case and cannot be challenged in an appeal from the final decree. (1909) 27 Bom 162 (187, 188) (SB) ° AIR 1933 Cal 498 (500) * AIR 1919 Mad 971 (971) (DB) ° (1967) 9 Law Rep 400 (404) (Mys).

[But see AIR 1965 Ker 303 (304): 1965 Ker LT 236 ° AIR 1918 Mad 1055 (1055) (DB).]

**6. Compliance with order.** — (1) Compliance with directions contained in an interlocutory order does not preclude a party from objecting to it in an appeal against the final decree. AIR 1919 Lah 38 (39): 1 Lah 54 * 1891 Pun Re No. 89, page 431 (433) (FB) ° AIR 1927 Cal 733 (735) (DB).

(2) Dismissal of an appeal against an order which is non-appealable does not affect party's right to object to it in appeal against final decree. AIR 1922 All 118 (119): 44 All 534 (DB).

**7. Sub-section (2).** — (1) A non-appealable order of remand can be challenged in the appeal from the final decree. AIR 1926 Mad 900 (901) (DB) ° AIR 1938 All 37 (38): ILR (1938) All 79 (DB) * AIR 1918 Pat 680 (682): 2 Pat L Jour 663 (SB) ° AIR 1962 Raj 57 (65): 1962 Raj LW 7 (FB) ° AIR 1964 Orissa 83 (85).

(2) Where an appealable order of remand has not been appealed against, the propriety or correctness thereof or of any of the incidental findings and decisions which are a material part of the basis of that order cannot be challenged in an appeal from the final decree, or by the lower Court. AIR 1943 Mad 706 (708) * AIR 1921 Lah 154 (155): 2 Lah 252 (DB) ° AIR 1928 Rang 297 (298): 6 Rang 506 ° AIR 1917 All 144 (145) (DB) * AIR 1919 Cal 65 (65): 46 Cal 738 (DB) ° AIR 1914 Nag 58 (59, 60): 10 Nag LR 28 * AIR 1923 Pat 226 (228) (DB) * AIR 1921 Nag 129 (130) ° AIR 1930 Lah 719 (721) (DB) ° AIR 1969 Andh Pra 45 (46) ° (1969) 1 Mad LJ 64: ILR (1968) 2 Mad 653 * AIR 1966 Cal 580 (584) (DB) ° 1961 Ker LJ 1367: ILR (1962) 1 Ker 205 ° AIR 1960 Bom 543 (544, 545, 546): 62 Bom LR 341.

(3) Order of remand — Finality — Issue No. 1 decided by trial Court but issue No. 2 left undecided — Appellate Court reversing decision of trial Court on issue No. 1 and giving anticipatory and provisional reasoning in respect of matter of issue No. 2 in support of its finding on issue No. 1 — Finality will attach to decision of Appellate Court on issue No. 1 and not issue No. 2. AIR 1960 Bom 543 (547, 548): 62 Bom LR 341.

(4) In order to determine the question of finality under S. 105 (2) it is not the decision of trial Court which is material. Finality does not attach to that decision but attaches to the decision of the first appellate Court and it is to the decision of that Court to which one must turn for determining the question as to what part thereof is final and conclusive. AIR 1960 Bom 543 (547): 62 Bom LR 341.

**106. What Courts to hear appeals.**—Where an appeal from any order is allowed, it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made, or where such order is made by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court.

[1882, 1877, S. 589.]

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**Section 105 — Note 7 (contd.)**

(5) To prevent obvious injustice, High Court can refuse to be bound by a remand order of a subordinate Court though neither party can question it by reason of its not having been appealed therefrom. AIR 1929 All 421 (428): 51 All 780 (DB).

(6) An order of remand passed without jurisdiction is outside sub-section (2) and open to question in an appeal from the final decree. (1910) 6 Ind Cas 464 (465) (DB) (All).

(7) A failure to appeal from order of remand does not affect right of appeal from final decision on remand. (1910) 37 Cal 552 (558) (DB).

(8) Order of remand illegal—Order not appealable — Irregularity of the order can be challenged in an appeal from the final decree in the case — Bar under Section 105 (2) does not apply. AIR 1969 Orissa 67 (69): 35 Cut LT 98 * AIR 1960 Pat 47 (50). (Order of remand not under O. 41, R. 23 and hence not appealable.)

[See also AIR 1962 Manipur 36 (39). (Order not falling under O. 41, R. 23.)]

(9) Sub-sec. (2) of S. 105 contains a special provision which is an exception to the provision contained in sub-s. (1). In view of this exception no Court (other than a higher Court) can entertain any challenge to the correctness of any final decision in the order of remand made by the High Court. AIR 1969 Pat 16 (20) (DB) ° AIR 1966 Pat 209 (214): 1966 BLJR 270 (FB) ° AIR 1963 Madh Pra 344 (347): 1963 MPLJ 542 (DB).

(10) Provision of sub-sec. (2) of Sec. 105 cannot be read to the effect that an issue about which nothing is said in the order of remand cannot be agitated thereafter before the same judge when the case comes to him in appeal for the second time from the order or decree made after remand. AIR 1969 Pat 16 (20) (DB).

(11) Section 105 (2) does not lay down any rule of general application to other proceedings not governed by Civil P. C. as for example proceedings before hierarchy of quasi-judicial Tribunal under a tax enactment. ILR (1965) 2 Mad 397 (DB).

**8. Supreme Court appeals.**— (1) Sub-section (2) of S. 105 does not apply to appeals to the Supreme Court. See AIR 1915 Mad 423 (423, 424): 38 Mad 509 (DB) * AIR 1933 Bom 251 (252) (DB). (Principle of S. 105 (1) will however apply.) ° AIR 1925 Nag 349 (349): 22 Nag LR 132 (DB) ° AIR 1960 SC 941 (946): 1960 SCR 590. (Order of remand passed by High Court can be challenged.)

**9. Letters Patent appeals.**— (1) Clause 15, Letters Patent is not controlled by S. 105. An order of remand, though not appealed against, can be challenged in Letters Patent Appeal against final judgment. AIR 1929 Mad 349 (351) (DB) * AIR 1963 Madh Pra 344 (347): 1963 MPLJ 542 (DB).

[See however 1960 BLJR 230 (235). (Section 105 applies to appeal under the Letters Patent and the judgment of a single Judge remanding a case if not appealed against cannot be questioned in Letters Patent Appeal.) ° AIR 1963 Pat 165 (167): 1962 BLJR 985 (DB).]

(2) In appeal filed against judgment of Single Judge, the Letters Patent Bench can decide all points decided by Single Judge in his interlocutory order. S. 105 (2) does not apply to such a case. AIR 1969 SC 560 (563): 1969 Mah LJ 495.

**10. Order granting review.**— (1) An order granting review can be challenged in an appeal from final decree only on grounds specified in O. 47, R. 7. AIR 1941 Nag 308 (309, 310): ILR (1942) Nag 487 * (1908) 31 Mad 49 (50, 51) (DB) * (1905) 27 All 695 (696) (DB) * (1913) 19 Ind Cas 481 (485): 1913 Pun Re No. 109 (DB).

(2) Where an application for review is rejected matters raised in such application can be pressed again in appeal from final decree passed. AIR 1941 Nag 308 (310): ILR (1942) Nag 487.

**11. Revision.** — (1) High Court will not, as a rule, interfere in revision with interlocutory orders which can be challenged under S. 105. AIR 1914 Mad 17 (17) (DB) ° (1912) 34 All 592 (594) (DB) * AIR 1963 Mad 428 (431): (1963) 2 Mad LJ 220 (DB). (Objections to findings should be raised in appeal against final decree and not in revision against findings.)

(2) In exercise of its powers of superintendence High Court may interfere in proper cases in order to avoid irreparable injury being caused. AIR 1920 Pat 131 (136): 5 Pat L Jour 550 (DB).

(3) High Court of Pepsu has held that a revision against an interlocutory order is competent even though the order can be challenged under this section. The fact that it can be so challenged is, one of the matters that fall for consideration for exercising the discretion in favour of or against petitioner. AIR 1955 Pepsu 113 (120): ILR (1956) Patiala 41 (DB).

**Section 106 — Note 1**

(1) Where the value of the subject-matter of suit does not exceed Rupees 5,000, the appeal from the order lies to District Judge and where the value of the suit exceeds Rs. 5,000 the appeal lies to High Court.

## GENERAL PROVISIONS RELATING TO APPEALS

**107. Powers of appellate Court.**—(1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power—

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.

[1882, S. 582, first part. See O. 41, Rr. 23, 25, 27, 28, 33.]

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**Section 106 — Note 1 (contd.)**
(1890) 17 Cal 680 (682, 683) (DB) ° 1968 Mah LJ 284: ILR (1969) Bom 25.

(2) Where the order appealed from is passed by a Court in the exercise of appellate jurisdiction, the appeal lies to the High Court. (1903) 25 All 174 (177) (FB) * (1899) 26 Cal 275 (279) (DB).

(3) Order rejecting an application under O. 9, R. 13 to set aside ex parte decree passed in a suit under S. 16, West Bengal Premises Rent Control (Temporary Provisions) Act, 17 of 1950, would be appealable and such an appeal would lie, in view of this section, to the Court specified in S. 32 (6) of the Rent Control Act. ILR (1956) 1 Cal 362 (365) (DB).

(4) The forum of appeal is to be decided with reference to Court which decided the proceeding, notwithstanding the fact that the proceeding is originally instituted in a Court of higher jurisdiction. AIR 1964 Ker 37 (38) (DB). (Proceeding under O. 21, R. 90.)

(5) When first appeal was filed before the Dharwar District Court, the appeal was within four corners of S. 106. The provisions of the Mysore Civil Courts Act, though slightly different cannot be made the basis for making a difference between appeals against decrees and appeals against interlocutory orders. Held District Court, Dharwar had jurisdiction to hear and dispose of the appeal. (1965) 2 Law Rep 439 (Mys).

### SECTION 107 — SYNOPSIS

1. **SCOPE.**
2. **"PRESCRIBED."** See S. 2, Clause (16).
3. **POWER TO DETERMINE CASE FINALLY—CLAUSE (a).** See O. 41, Rr. 4, 24 and 33.
4. **POWER TO REMAND CASE — CLAUSE (b).** See O. 41. R. 23.
5. **POWER TO FRAME ISSUES AND REFER THEM FOR TRIAL — CLAUSE (c).** See O. 41, R. 25.
6. **POWER TO TAKE ADDITIONAL EVIDENCE—CLAUSE (d).** See O. 41, Rr. 27, 28.
   7. **Power to summon witnesses.** See O. 41, Rr. 27 and 28.
8. **SUB-SECTION (2).**
   9. **Inherent powers.**
   10. **Interference with the discretion of the Court below.**
   11. **Powers in matters of evidence.**
   12. Appreciation of evidence by the appellate Court.
   13. **Powers regarding court-fee.**
   14. **Power to direct stay of proceedings, grant interim injunctions and pass interlocutory orders.**
   15. **Power to refer to arbitration.**
16. **DUTIES OF THE APPELLATE COURT.**

### TOPIC INDICATOR

Appellate Court to exercise same powers and perform same duties as original Court — See Note 8.
Appellate Court, powers of — Admission and rejection of documents. See Note 11.
Appellate Court, powers to raise objection to court-fee on plaint suo motu. See Note 13.
Power of Appellate Court to direct local investigation. See Note 8.
Power of Appellate Court to pass a decree for an amount larger than that claimed. See Note 13.
Power of Appellate Court to decide on points not raised or covered by issues. See Note 9.
Power of Appellate Court in cases of assignment, creation or devolution of any interest, pending appeal. See Note 8.
Power of Appellate Court to add, transpose or substitute parties. See Note 8, S. 151 and O. 1, R. 10.
Power of Appellate Court to allow amendment. See S. 153, O. 1, R. 10, O. 6, R. 17, O. 41, R. 2.
Power of Appellate Court to allow time to pay deficit court-fee. See Note 13 and O. 7, R. 11.
Power of Appellate Court to decide new point suo motu. See O. 41, R. 2.
Power of Appellate Court to entertain application to set aside ex parte decree. See O. 41, R. 21.
Power of Appellate Court to expunge remarks from judgment. See O. 6, R. 16.

**Section 107 (contd.)**

Power of Appellate Court to interfere with appointment of receiver. See O. 41, R. 1.

Power of Appellate Court to make a new case. See O. 41, R. 1.

Power of Appellate Court to mould relief. See Note 8.

Power of Appellate Court to permit withdrawal of proceeding. See O. 23, R. 1.

Power of Appellate Court to reject memorandum of appeal for presentation to proper Court. See O. 7, R. 10.

**1. Scope.**—(1) Sub-section (2) provides that an Appellate Court shall have the same powers as the original Court under this Code and thereby comprehensively makes the relevant provisions of the Code applicable to appeals. (1894) 18 Mad 94 (98) (DB) * (1885) 7 All 693 (698, 699) (FB).

(2) Certain provisions of the Code which are not applicable to the original side of the High Court are equally inapplicable to the appellate side of that Court. (1890) 12 All 129 (151, 152) (FB).

(3) A second Appelate Court has the same powers and duties as the first Appellate Court. (1907) 29 All 535 (536) (DB) * (1961) All LJ 597 (DB).

(4) The powers and duties contemplated in this section are such as are provided for in the Civil Procedure Code, and not in any other enactment, such as the Limitation Act. (1886) 12 Cal 590 (593) (FB).

(5) Per Mudholkar J. — Appellate Court's power under S. 107 of the Civil Procedure Code to remand a case or to frame issues and refer them for trial, or to take additional evidence or require such evidence to be taken is regulated by the provisions of O. 41, Rr. 23 to 25 and 27. AIR 1965 SC 364 (399) : (1964) 9 SCR 267.

(6) The power given to an appellate Court under S. 107 is only a part of its appellate jurisdiction. It cannot be characterised as an original jurisdiction in an appellate Court. It confers power on the appellate Judge not only to dispose of the appeal on merits but also to pass any incidental or interlocutory orders deemed necessary in the circumstances of the case to maintain the status quo or to preserve the subject matter of the appeal till the disposal of the appeal. AIR 1964 Ker 23 (24) : 1963 Ker LT 502.

(7) An appellate authority has no power of remand under the provisions of Kerala Buildings (Lease and Rent) Control Act and S. 107 C. P. C. has not been made applicable to such authority by S. 23 of that Act. 1963 Ker LJ 66 (68).

(8) Bench dealing with a Letters Patent appeal has all powers which can be exercised by Single Judge in first appeal. AIR 1966 Pat 61 (68) : 1965 BLJR 367 (DB).

(9) The powers of the Sales Tax Appellate Tribunal under the Sales Tax Act are much wider than the powers given under S. 107 C. P. C. to an appellate Court. (1961) 12 STC 677 (Orissa).

**2. "Prescribed."** — See Section 2, clause (16).

**3. Power to determine case finally — Clause (a)** — See O. 41, Rr. 4, 24 and 33.

**4. Power to remand case — Clause (b).** — See O. 41, R. 23.

**5. Power to frame issues and refer them for trial—Clause (c)** — See O. 41, R. 25.

**6. Power to take additional evidence — Clause (d).**—See O. 41, Rr. 27 and 28.

**7. Power to summon witnesses.** — See O. 41, Rr. 27 and 28.

**8. Sub-section (2).**— (1) Sub-section (2) is based on the general principle that an Appellate Court has the same powers as the original Court, and can do, while the appeal is pending, what the original Court could have done, while the suit was pending. AIR 1954 Pat 497 (499) (DB) * AIR 1957 All 527 (534) (DB) * AIR 1953 All 97 (99) (DB) * AIR 1953 Assam 30 (32): ILR (1952) 4 Assam 363 (DB) * AIR 1968 Cal 528 (531). (Exercise of initial power by such authorities is a responsible task.) * AIR 1961 Pat 178 (186) : ILR 39 Pat 909 (DB). (O. 22 applies to appeals.) * AIR 1961 Raj 187 (188): 1960 Raj LW 678 (Leave to sue under Section 20 (b).) * AIR 1961 Raj 51 (52): 1960 Raj LW 667. (Power under Section 24 Hindu Marriage Act, 1955.)

[See AIR 1960 All 252 (253): 1960 All LJ 97. (After a dismissal of the suit no ad interim injunction under Order 39, Rule 1 purporting to be for the benefit of the suit itself can be passed in an appeal against the order refusing ad interim injunction.)]

[See also AIR 1967 SC 1244 (1250): (1967) 3 SCR 134. (Effect of doctrine of merger.) * AIR 1967 SC 681 (684): (1967) 1 SCR 732. (Doctrine of merger as applied to Sales Tax proceedings.) * AIR 1968 Mad 137 (142): (1966) 2 Mad LJ 329 (DB). (Doctrine of merger.) * AIR 1964 J and K 54 (57): 1963 Kash LJ 192 (DB) * 28 Cut LT 414: (1962) 4 Orissa JD 266 (DB). (Case under Section 153, Orissa Municipal Act, 1950.) * (1961) 3 FLR 25 (29) (All). (Doctrine of merger not applicable to executive orders in proceeding for dismissal of Government servant.)]

(2) The provisions of the Code relating to incidental proceedings in original Courts are equally applicable to an Appellate Court. AIR 1931 Lah 610 (611): 13 Lah 195 (DB) * AIR 1923 Nag 310 (311) * AIR 1932 Cal 482 (484, 486): 59 Cal 388 (DB) * AIR 1916 Mad 641 (641) (DB) * (1888) 10 All 223 (234) (FB).

[See also AIR 1962 Andh Pra 10 (10, 11): (1962) 2 Andh WR 432 (DB). (Appellate Court can restore appeal for sufficient cause.)]

**Section 107 — Note 8 (contd.)**

(3) The words "as nearly as may be" mean, "so far as may be necessary, to carry into effect the requisite reliefs." (1885) 7 All 693 (697) (FB).

(4) The powers which the appellate Court will exercise must be determined in relation to the state of facts at the time when the appellate Court is called upon to exercise the powers under Section 107. AIR 1954 Cal 365 (366) (DB) * AIR 1968 Tripura 5 (11). (Appellate Court has power to take note of subsequent events.)

(5) The appellate Court is free to mould the relief according to the circumstances of the case and requirements of justice in a manner permissible under law. AIR 1957 All 527 (530) (DB) * AIR 1968 All 79 (81) * (1966) 70 Cal WN 131 131. (The Court of appeal can always decide as to whether Lower Court decision express or implied is correct or not and grant necessary reliefs.)

[See also AIR 1962 Punj 158 (162): ILR (1961) 1 Punj 450 (DB) * (1966) 68 Pun LR 787. (Subsequent events cannot divest a vested right except in case where statute expressly so provides.)]

(6) Where there is an appeal from an order refusing to set aside an award, it is open to the appellate Court, while disposing of the appeal, to set aside any consequential or incidental order passed by the trial Court. AIR 1958 All 720 (728): ILR (1958) 1 All 614 (DB).

(7) Appellate Court bound to take into account state of law on the date of hearing of appeal. See Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 15. AIR 1967 All 214 (217): 1963 All LJ 185 (FB) * AIR 1966 SC 1423 (1427): (1966) 3 SCR 275. (Case under Punjab Relief of Indebtedness Act 7 of 1934.)

(8) Appellant has unconditional right to withdraw appeal and if he makes an application to the Court, it has to grant it. This right flows either from S. 107 (2) or O. 23, R. 1. AIR 1963 SC 1566 (1571): (1964) 2 SCR 538.

(9) It is true that Section 107 (2) gives the appellate Court the same powers and the same duties as nearly as may be as are conferred by C. P. C. on Court of original jurisdiction in respect of suits instituted in them. But when sub-section (1) and the matters mentioned therein are kept in view, the power of the appellate Court under sub-section (2) should be understood not as widely as it may prima facie appear to justify. Assuming that appellate Court has power of a Commissioner for inspection the power should be very sparingly used and only in the interest of justice. AIR 1969 Mad 144 (145): 81 Mad LW 374.

(10) Where the appeal from an order of the Subordinate Judge properly lay to the High Court but it was wrongly entertained by the District Judge and allowed by him the proper course to be followed in appeal to the High Court from the order of the District Judge is to direct the lower appellate Court to return the memorandum of appeal for presentation to the proper Court applying the provisions of O. 7, R. 10 read with Section 107, C. P. Code. AIR 1961 Andh Pra 327 (328) * (1967) 2 Mys LJ 629.

(11) Section 107 (2) read with O. 1, Rule 10, C. P. C. enables the appellate Court to add parties in appeals in suitable cases, but this power must be exercised within the period of limitation. AIR 1959 Punj 277 (287): 61 Pun LR 326 (FB).

(12) Leave to file Letters Patent Appeal refused to one of respondents — He cannot be transposed as appellant in Letters Patent Appeal by the other respondent. (1964) 66 Punj LR 985: 1964 Cur LJ 409.

(13) Where a civil miscellaneous appeal is rejected as incompetent, S. 107 (2) read with O. 7, Rule 11 C. P. C. will bring it within definition of decree under Section 2 (2) and an appeal will lie from it. AIR 1961 Andh Pra 112 (113): (1960) 2 Andh WR 4.

**9. Inherent powers.** — (1) Every Court trying civil causes has inherent jurisdiction to take cognizance of questions cutting at the root of the subject-matter in controversy. (1912) 35 Mad 607 (612): 39 Ind App 218 (PC).

(2) An appellate Court has inherent power to add, as a party respondent, a person who was not a party to the suit. (1910) 6 Ind Cas 912 (918) (DB) (Cal).

(3) An appellate Court has inherent power to allow to figure as an appellant a person who was not a party to the suit. AIR 1918 Mad 409 (410, 411) (DB).

(4) Two suits disposed of by lower Court by common judgment — Appeal filed only in one such suit — Appellate Court cannot claim jurisdiction under inherent powers to pass order in connection with the other suit in which there is no appeal before it. AIR 1965 Manipur 24 (26). (Counter suits by A and B disposed of by one judgment — Appeal filed by A alone — No appeal filed by B as he had been prevented by the fact that the Court did not draw up a separate decree in his suit — Appellate Court allowing A to amend the plaint in his own suit and also his written statement in B's suit — Held, the order allowing the amendment of the written statement was without jurisdiction.)

(5) Records of Court lost in appeal — Appellate Court has inherent power to reconstruct the records. 1967 Cur LJ 781: ILR (1968) 1 Punj 314. (It remains duty of unsuccessful party to displace judgment appealed from and to lead secondary evidence with regard to matters on which he places reliance, since

**Section 107 — Note 9 (contd.)**
successful party cannot be deprived of fruits of decree from which appeal is taken.)

**10. Interference with the discretion of the Court below.** — (1) Ordinarily a Court of appeal will not interfere with the exercise of discretion by the lower Court and substitute for it its own discretion. AIR 1958 Bom 253 (255): ILR (1958) Bom 360 (DB) * AIR 1957 Pat 131 (133) * AIR 1957 Punj 312 (314): ILR (1957) Punj 1454 (DB) * AIR 1953 Kutch 52 (53) * AIR 1953 Mys 137 (137): ILR (1953) Mys 165 * AIR 1952 Nag 16 (17) * AIR 1952 Punj 368 (371) * AIR 1917 PC 116 (118): 42 Bom 380: 45 Ind App 61 * AIR 1916 Cal 564 (566) (SB) * AIR 1922 PC 71 (72): 48 Ind App 280: 44 Mad 656 * ILR (1965) 2 All 71 * AIR 1959 Pat 384 (387, 388): 1958 BLJR 447.

[See also AIR 1968 J and K 2 (7): 1967 Kash LJ 392 (DB). (Assessment of damages — No error in principle — Appellate Court will not interfere.) * AIR 1967 Mad 201 (204): 78 Mad LW 681. (When discretion was exercised by trial Court against arbitration appellate Court should not lightly interfere with it.)]

(2) Though ordinarily, the discretion exercised by the trial Judge is not interfered with in appeal, that rule is not an absolute one and it has its exceptions. AIR 1960 Cal 582 (589): 64 Cal WN 861 (DB). (Where the order of the trial Judge was very brief and contained no discussion and no reason for variation and modification of the order of interim injunction granted previously:

**Held,** that having regard to the form of the order the case fell within the exception.)

(3) The Appellate Court cannot lay down any rules with a view to indicate the particular groove in which the discretion of the lower Court should run. AIR 1928 Pat 630 (633): 8 Pat 235 (DB).

(4) This power of interference should not be exercised lightly, or except for preventing gross mischief or miscarriage of justice, but, subject to that, the appellate court's power in this behalf is wide, ample and unrestricted and may and always should be exercised to relieve the aggrieved party. AIR 1960 Cal 47 (51): 63 Cal WN 717 (DB).

(5) A Court of appeal would not interfere with the exercise of discretion by Court below, if the discretion has been exercised in good faith after giving due weight to relevant matters and without being swayed by irrelevant matters. AIR 1964 All 534 (535): 1964 All LJ 353 (FB).

(6) An interference will be justified in the following cases:

(a) where the lower Court acts arbitrarily or perversely or capriciously. AIR 1947 Lah 76 (78) * AIR 1957 Punj 312 (314): ILR (1957) Punj 1454 (DB) * AIR 1942 Mad 487 (493): ILR (1942) Mad 562 (DB) * AIR 1917 PC 116 (118): 42 Bom 380 (389): 45 Ind App 61 * AIR 1925 Cal 711 (713) (DB) * AIR 1967 Bom 382 (387): 69 Bom LR 559 * 1961 All LJ 726: ILR (1961) 2 All 409. (Where the discretion vested in the Original Court is not exercised on recognised judicial and equitable principles, the impugned order cannot be sustained and must be set aside.) * AIR 1960 Mys 59 (64): 37 Mys LJ 358 (DB).

[See also AIR 1968 Bom 267 (272): 69 Bom LR 848 (DB). (Where damages assessed appear to be wholly inadequate, then the appellate Court must do its duty of determining of what should be the correct amount of damages.)]

(b) where the lower Court acts in disregard of sound legal principles. AIR 1949 Lah 121 (123): Pak LR (1948) Lah 202 (DB) * AIR 1917 PC 116 (118): 42 Bom 380 (389): 45 Ind App 61 * AIR 1925 Cal 1027 (1029) (DB) * AIR 1935 Mad 280 (282) (DB) * 1969 Lab IC 767 (769) (Andh Pra) * AIR 1968 Cal 532 (536) (DB) * (1967) 69 Punj LR 578 (585) * AIR 1966 Madh Pra 239 (243): 1966 MPLJ 464 (DB) * (1965) 67 Punj LR 887 * AIR 1963 Andh Pra 353 (357): (1963) 1 Andh WR 124 (DB) * (1963) 14 STC 947 (Mad) (DB) * AIR 1962 Andh Pra 435 (437): (1962) 1 Andh WR 218 (DB) * AIR 1960 Cal 47 (51): 63 Cal WN 717 (DB). (It is clearly the duty of the Court to interfere in such cases.) * AIR 1959 Cal 150 (153): 63 Cal WN 201 (DB).

(c) where the discretion has been exercised where it ought not to have been exercised. (1911) 12 Ind Cas 139 (139) (DB) (Mad) * (1965-66) 70 Cal WN 199.

(d) where the Judge misdirects himself by wrongly assuming that there is no general rule to guide him in the exercise of his discretion. AIR 1917 PC 156 (159): 45 Cal 94 (107): 44 Ind App 218.

(e) where the discretion which is vested in the Judge and which he ought in law to exercise has not been exercised at all. AIR 1922 Pat 47 (48): 6 Pat L Jour 444 (DB) * AIR 1926 Lah 223 (224) * (1963) 5 Orissa JD 213: ILR (1963) Cut 351 * 1961 Jab LJ 469 (470).

(f) Where the exercise of discretion by lower Court is manifestly wrong. AIR 1964 All 534 (535) : 1964 All LJ 353 (FB).

[See 1963 Ker LT 362 : 1963 Ker LJ 338. (It is for the appellant to show that the decision of the trial Court is wrong.)]

[See also AIR 1966 Mad 308 (309) : (1965) 2 Mad LJ 548.]

(7) The mere possibility of the appellate Court coming to a different conclusion on the same facts and evidence will not justify interference. AIR 1949 Lah 121 (123, 124) : Pak LR (1948) Lah 202 (DB) * AIR 1949 Nag 256 (256) : ILR (1948) Nag 989 (DB) * AIR 1927 Cal 830 (831)

**Section 107 — Note 10 (contd.)**
(DB) * AIR 1928 Mad 489 (491) (DB) * AIR 1916 All 181 (182) (DB) * AIR 1920 PC 132 (136) * AIR 1968 Delhi 26 (28) : 1968 Lab IC 24 (DB) * AIR 1964 All 534 (535): 1964 All LJ 353 (FB) * AIR 1963 Madh Pra 323 (326): 1963 MPLJ 325 (DB) * AIR 1960 Cal 47 (51): 63 Cal WN 717 (DB).

(8) An interference will not be justified in the following cases.

(a) Where lower Courts decision is based on judicious considerations. AIR 1967 Punj 152 (153).

(b) Where the lower Court has applied correct standard in computing damages. AIR 1960 Raj 224 (235) : 1960 Raj LW 284 (DB).

[See also AIR 1959 Pat 490 (499).]

(c) Where questions of fact alone arise. AIR 1960 Raj 224 (235) : 1960 Raj LW 284 (DB) * AIR 1960 Bom 418 (422): 61 Bom LR 1549. (Reversed on facts in AIR 1964 SC 40.)

(d) Conclusion arrived at by first Court based on firm premises. AIR 1960 Madh Pra 73 (75, 76): 1960 MPLJ 281. (1950 SCJ 583, Followed.)

(9) Lower appellate Court, relying on a certain document in preference to other commits no error of law — Interference with the findings by High Court therefore not permissible. AIR 1967 All 278 (279).

(10) Final order passed by High Court in exercise of revisional or appellate jurisdiction — Finality cannot be upset in exercise of powers under Art. 226 of the Constitution. AIR 1963 All 532 (534).

(11) Mere errors of law can be reached and corrected by authorities constituted under Statutes in exercise of appellate and revisional jurisdiction vested in them. AIR 1968 Goa 105 (116).

**11. Powers in matters of evidence.**— (1) An Appellate Court will not interfere with the decision of the lower Court as to admissibility of evidence. (1892) 19 Cal 438 (442) : 19 Ind App 79 (PC) * (1904) 26 All 581 (587) : 30 Ind App 217 (PC) * AIR 1952 Madh B 95 (95, 96) * AIR 1965 Pat 73 (75) : ILR 44 Pat 825 (DB).

[But see AIR 1926 All 537 (537) * AIR 1914 Mad 473 (474) : 37 Mad 455 (457) (DB).]

(2) The decision of the lower Court as to the admissibility of evidence will be interfered with to prevent a clear miscarriage of justice. (1892) 19 Cal 438 (442) : 19 Ind App 79 (PC) * AIR 1952 Madh B 95 (95, 96) * AIR 1926 Mad 1003 (1004) (DB) * (1968) 2 Andh WR 567 * AIR 1961 Andh Pra 361 (367) (DB). (Original document not lost or destroyed — No steps taken to recover original or to produce it before Court — Allegations of fabrication of original. Trial Court entertaining great doubts about its execution — Held it would be miscarriage of justice to admit secondary evidence.)

(3) The question of the relevancy of evidence is always open to reconsideration in appeal. AIR 1928 Cal 512 (512) * AIR 1927 Mad 60 (60) * AIR 1964 Andh Pra 53 (55) : (1963) 2 Andh WR 307 (DB).

**12. Appreciation of evidence by the appellate Court.**—(1) Generally speaking, when a case comes up before the appellate Court, it is the correctness and propriety of the judgment under appeal which is its primary point for consideration. (1955) 59 Cal WN 430 (432, 433) * AIR 1957 All 527 (536) (DB).

[See however AIR 1950 Kutch 67 (67).]

(2) Appraisal of evidence is a function not of revision Court but of appellate Court. (1965) 67 Punj LR 488: 1965 Cur LJ 256.

(3) Where the appreciation of oral testimony is concerned, the Appellate Court has to reconcile two conflicting view points namely, on the one hand, the undoubted duty of the Court of appeal to review the recorded evidence and to draw its own inferences and conclusions and on the other hand, the unquestionable weight which must be attached to the opinion of the Judge of the primary Court who had the advantage of seeing the witnesses and noticing their look and manner. AIR 1949 PC 32 (33) : 75 Ind App 252 : ILR (1949) Mad 487 * AIR 1958 Orissa 4 (5) : ILR (1957) Cut 437 * AIR 1957 Andh Pra 744 (750) (DB) * AIR 1951 SC 120 (121) : 1950 SCR 781 * AIR 1956 Orissa 58 (61) : ILR (1956) Cut 42 (DB) * AIR 1954 Pat 53 (54) (DB) * AIR 1954 Trav-Co 10 (17) (DB) * AIR 1951 Pat 356 (359): 28 Pat 447 (DB) * AIR 1950 Nag 71 (75) : ILR (1950) Nag 105 * AIR 1921 Cal 677 (684): 47 Cal 1043 (DB) * AIR 1916 Cal 964 (971) : 43 Cal 833 * AIR 1936 PC 154 (155) * AIR 1966 Him Pra 70 (72) : 1966 Cri LJ 1438.

[See also AIR 1959 All 264 (274) : 1958 All LJ 780 (DB). (The appellate Court has to bear in mind that it has not the advantage the trial judge had in having the witness before him and observing the manner in which they deposed in Court.)]

(3A) When there is an irreconcilable difference between the evidence of the parties and the trial Court has accepted the evidence of the plaintiff and rejected that of the defendants in so far as it was in conflict with the evidence of the plaintiff a Court of review should be slow to differ from the opinion of the trial Judge as to credibility, in respect that he has seen and heard the witnesses and should not differ without convincing reasons. 1961 MPLJ 992: ILR (1960) MP 117. (AIR 1931 PC 265, AIR 1936 PC 60 and AIR 1951 SC 120, Rel. on.)

(4) On questions of fact largely depending on oral testimony the conclusions of the trial Judge will not be lightly interfered with. AIR 1951 SC 120 (121) : 1950 SCR 781 * AIR 1958 Cal 434 (436) (DB) * AIR 1958 Madh Pra 48 (51) (DB) * AIR 1958 Pat 211 (214) : 37 Pat 88 (DB) * 1957 Ker L Tim 521 (524) (DB) * AIR 1950 FC 21 (30, 35) : 1949 FCR 441 * AIR 1949 PC 32

**Section 107 — Note 12 (contd.)**

(33) : 75 Ind App 252 : ILR (1949) Mad 487 * AIR 1948 PC 20 (21, 22) * AIR 1950 Trav-Co 55 (55) (FB) * AIR 1956 Nag 225 (228) (DB) * AIR 1955 Mad 542 (543) * AIR 1954 Orissa 67 (68): ILR (1953) Cut 682 (DB) * AIR 1954 Orissa 17 (18) : ILR (1953) Cut 558 (DB) * AIR 1967 Andh Pra 64 (65, 66) : (1967) 1 Andh LT 104 * AIR 1967 Goa 88 (91) (DB) * ILR (1966) 1 Cal 216 (DB) * (1961) 63 Punj LR 117. (Appellate Court is slow to interfere with finding of fact.) * AIR 1962 Guj 197 (199) : (1962) 3 Guj LR 492 (DB). (Question is one of fact—Appellate Court has no jurisdiction to enquire into it.) * (1962) 28 Cut LT 506 : (1962) 4 OJD 269.

[See however AIR 1918 PC 10 (11) : 21 Oudh Cas 104.]

(5) When there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate Court should not interfere with the finding of the Trial Judge on a question of fact. AIR 1959 All 264 (274) : 1958 All LJ 780 (DB) * AIR 1964 Madh Pra 137 (144) : 1963 MPLJ 498 (DB) * AIR 1961 Orissa 22 (26) : ILR (1960) Cut 512 (DB) * AIR 1961 Punj 288 (290): ILR (1961) 1 Punj 751 (DB). (When after considering all the circumstances the appellant can only show some nicely balanced calculations which lead to the equal possibility of the judgment on either side being correct, he cannot be held to have discharged the burden.) * AIR 1961 Punj 181 (183): ILR (1960) 1 Punj 579 * AIR 1960 Punj 422 (425): 62 Punj LR 127. (No nicely-balanced calculation can ordinarily justify reversal at the decision of the Court on facts.)

(6) The duty of the appellate Court is to see whether the evidence taken as a whole can reasonably justify the conclusion arrived at or whether there is an element of improbability arising from proved circumstances which in the opinion of the Court outweighs such finding. AIR 1951 SC 120 (121, 123) : 1950 SCR 781 * AIR 1958 Pat 211 (214) : 37 Pat 88 (DB) * 1957 Ker L Tim 521 (524) (DB) * AIR 1954 Orissa 44 (47) : ILR (1953) Cut 630 (DB) * AIR 1952 Punj 147 (151) (DB) * (1961) 27 Cut LT 353 (355, 360) * AIR 1960 Punj 117 (119) (DB).

[See also AIR 1963 SC 1728 (1736, 1737): (1963) 3 SCR 722. (Uuse of unduly strong words in expressing conclusions or adoption of intemperate or extravagant criticism, against contrary view to be avoided).]

(7) The rule that on a question of fact the conclusion of the trial Judge will not be interfered with should not be treated as having a too general application. AIR 1949 PC 207 (222) : 76 Ind App 17 : ILR (1949) All 531 * AIR 1952 Punj 120 (122) * AIR 1915 Cal 225 (231) (DB) * AIR 1922 Cal 260 (267) : 49 Cal 132 (DB) * AIR 1936 All 537 (544) (DB) * AIR 1936 Rang 399 (400) (DB) * AIR 1963 All 194 (198) * AIR 1962 Punj 180 (182, 183). (The rule that an appellate Court should not disturb a finding of fact is not a universal—Rule of law.)

(8) An Appellate Court is entitled to interfere with questions of fact in the following cases:

(a) Where the conclusions of the trial Judge depend on inferences from facts and not on the credibility of oral evidence of such facts. AIR 1950 PC 90 (94) : 77 Ind App 76 : ILR (1950) Bom 606 * AIR 1957 Madh Pra 222 (222) * AIR 1945 PC 111 (113) : ILR (1945) Kar PC 256 * AIR 1945 PC 35 (37) : ILR (1945) Kar PC 174 * AIR 1954 Mad 713 (724) (DB) * AIR 1915 Cal 225 (231) (DB) * AIR 1960 SC 115 (118) : (1960) 1 SCR 663 * AIR 1963 Pat 229 (231) (DB) * AIR 1961 Orissa 22 (26) : ILR (1960) Cut 512 (DB) * AIR 1961 Punj 521 (524) : 63 Pun LR 446 * AIR 1960 Bom 418 (422) : 61 Bom LR 1549. (Reversed on facts in AIR 1964 SC 40) * AIR 1959 Assam 200 (203) : 19 Elec LR 175.

[See also AIR 1967 SC 868 (874) : (1967) 1 SCR 227.]

(b) Where an important fact of which the Appellate Court is in possession was not known to the trial Judge. AIR 1921 PC 93 (97) : 42 All 487.

(c) Where the Judge giving the judgment did not examine the witnesses himself or the bulk of the evidence was taken on commission. AIR 1928 Sind 179 (185): 23 Sind LR 97 (DB) * AIR 1932 PC 13 (19) : 6 Luck 556 : 59 Ind App 1.

(d) Where the finding of the lower Court is manifestly erroneous. AIR 1928 PC 122 (126) * AIR 1952 Trav-Co 445 (445) (DB) * AIR 1918 Pat 1 (35) : 3 Pat L Jour 633 (FB) * AIR 1936 PC 60 (61) * (1963) 2 Andh LT 59. (No interference in appeal unless it is shown to be palpably unrelated to the wastage normally caused.) * 1963 Mys LJ (Supp) 368 (375). (There was difference of opinion between the lower Courts regarding the amount of damages. High Court interfered with lower appellate Court's decision in the interest of justice.) * ILR (1960) 10 Raj 1256 (1257) (DB). (Finding of fact by trial Court, reversed in appeal by ignoring principles — Appellate judgment is not in accordance with law — Finding cannot be sustained in second appeal.)

[See also AIR 1966 Mad 67 (71) : 78 Mad LW 352.]

(e) Where the finding of the lower Court is not safe. AIR 1941 PC 16 (20): ILR (1941) 1 Cal 468 : ILR (1941) Kar (PC) 54 : 68 Ind App 34.

(f) Where the finding is based on no evidence. AIR 1948 PC 7 (8) * AIR 1958

**Section 107 — Note 12 (contd.)**
Pat 211 (214) : 37 Pat 88 (DB) * AIR 1951 Madh B 92 (94).

(g) Where the Judge has misdirected himself by applying wrong standards of probability or has committed an error in procedure. AIR 1949 PC 207 (222) : 76 Ind App 17 : ILR (1949) All 531 * AIR 1953 Madh B 180 (180) * AIR 1926 PC 29 (30, 31) : 4 Rang 513.

(h) Where there is a deliberate suppression of evidence by one party. AIR 1929 PC 95 (98, 99).

(i) Where the finding is opposed to experience of life and course of business. AIR 1915 PC 50 (51).

(j) Where the case is one of conflicting evidence and the conduct of parties, effect of documents or the weight of probabilities reduce the value of the opinion of the Judge. AIR 1923 Mad 103 (104) (DB) * AIR 1918 PC 10 (11) : 21 Oudh Cas 104 * (1909) 31 All 116 (127, 135) : 36 Ind App 9 (PC) * AIR 1969 SC 395 (399): (1969) 1 SCJ 786 * (1968) 81 Mad LW 618. (AIR 1951 SC 120 and AIR 1960 SC 115, Foll.) * AIR 1963 Pat 362 (369) : ILR 44 Pat 502 (DB). (Assessment mostly dependent upon an incorrect view taken of the documentary evidence on the record.)

(9) In appreciating evidence generally, discrepancies on material points should not be disregarded. AIR 1914 PC 38 (40) : 36 All 187 (194).

(10) The failure of the Appellate Court to tackle the crucial question between the parties and consider the evidence in the case amounts to a substantial error of procedure. AIR 1920 Pat 359 (362).

(11) Appreciation of evidence— Powers and duties of appellate Court — Court comparing evidence of both parties and coming to its own conclusion — Failure to write elaborate judgment is no error in procedure — No interference in second appeal. AIR 1963 Assam 184 (185, 186): ILR (1963) 15 Assam 325.

(12) While considering the evidence of both parties it is not incumbent upon the appellate Court to consider each and every circumstance separately which has been considered by the trial Judge. If the appellate Court has applied its mind to the evidence properly and has given reasons which are cogent and which can be sustained on the evidence, the judgment of the appellate Court cannot be assailed simply because some of the reasons given by the trial Judge either have not been considered or have escaped the notice of the appellate Court, especially when, even if those reasons stood, there will be no difference in the decision. AIR 1957 Pat 64 (64).

**13. Powers regarding court-fee.** — (1) An Appellate Court cannot deal with the appeal until the court-fee payable on the memorandum of appeal is paid. AIR 1954 Ajmer 15 (15) * AIR 1954 Bom 43 (45) : ILR (1953) Bom 1176 (DB) * (1912) 16 Ind Cas 46 (47) (DB) (Cal).

(2) An Appellate Court cannot in the generality of cases, award an amount in excess of that in respect of which the appeal is brought and court-fee paid. (1903) 30 Cal 516 (519, 526) * (1911) 11 Ind Cas 198 (200) (DB) (Lah).

(3) In view of Section 107, the appellate Court has the duty to see whether the appeal memorandum is properly valued and duly stamped and in case the court-fee paid is insufficient it should fix a reasonable time for payment of the deficit. AIR 1952 Trav-Co 5 (6) : ILR (1951) Trav-Co 275 (DB) * AIR 1957 Pat 111 (112).

(4) Section 149 C. P. C. read with Section 107 gives discretion to the Court to permit making up the deficit in the court-fees on the memorandum. But the discretion has to be exercised judicially. AIR 1968 Bom 309 (310) : 70 Bom LR 50. (Negligence of the party his counsel or his clerk — No good reason for exercise of discretion in his favour.)

**14. Power to direct stay of proceedings grant interim injunctions and pass interlocutory orders.** — (1) An Appellate Court having seisin of an appeal has power to pass all such interlocutory orders as are necessary in the interest of justice, such as an order granting an interim injunction. (1904) 14 Mad L Jour 471 (473, 474) (FB).

(2) An Appellate Court has power of appointing a temporary guardian in a pending appeal from an order of appointment under the Guardians and Wards Act. (1906) 3 Cal L Jour 29 (36) (DB).

(3) An Appellate Court has the power to stay further proceedings or proceedings in execution. (1907) 34 Cal 1037 (1049) (FB) * AIR 1956 Raj 49 (50) : ILR (1955) 5 Raj 175.

(4) Under Section 62 of the Madras Hindu Religious and Charitable Endowments Act, 19 of 1951, the original Court has no power to stay the Commissioner's order during the pendency of the suit. The prohibition will continue till the disposal of the appeal. AIR 1958 Andh Pra 156 (157).

(5) An injunction is a discretionary relief and ordinarily a Court of Appeal will be slow to interfere with the exercise of discretion by a trial Court, but this principle will not hold good if it be found that the trial Court has 'clearly acted on some wrong principle, committed some error of law or failed to consider matters which demanded consideration'. (1965) 69 Cal WN 369 : (1965) 1 Comp LJ 112.

(6) Appointment of guardian or next friend of a person who is incapable of protecting his interests— Enquiry as to, can be held even at appellate stage. AIR 1968 Mad 346 (347) : (1968) 2 Mad LJ 150.

**15. Power to refer to arbitration.**— (1) The word "Court" as defined in the Arbitration Act of 1940 does not include an appellate Court and, therefore, sub-section (2) of Section 107 will not apply to pro-

**Section 107 — Note 15 (contd.)**
ceedings under the Act and consequently, there is nothing in the Act which empowers the Appellate Court to refer the matters in dispute to arbitration. AIR 1947 Cal 93 (95): ILR (1946) 2 Cal 492 (DB) * (1949) 2 Sau LR 44 (47) (DB) * AIR 1952 Him Pra 48 (50).

[But see AIR 1954 Pat 106 (107): 32 Pat 417 (DB) * AIR 1957 Raj 278 (279): ILR (1957) 7 Raj 581 (DB) * AIR 1955 All 353 (359, 360): ILR (1955) 1 All 500 (FB). (AIR 1947 All 304 (307) : ILR (1947) All 227, Overruled.) * AIR 1955 Mad 693 (693, 694) : ILR (1956) Mad 204.]

**16. Duties of the appellate Court.**— (1) Before an Appellate Court reverses the finding of the lower Court it should apply its mind to a consideration of the whole of the evidence in the case. AIR 1942 Cal 498 (504) (SB) * AIR 1917 Mad 689 (690) (DB) * 1967 Ker LT 773. (Appellate Court must refer to the reasoning of trial Court on findings of facts for reversing them.)

(2)Where the appellate Court differs from the conclusions of the trial Court it can enter its own findings and reverse the decree. It has to go into the evidence on record to see if it justfied the conclusions of the trial Court. If the conclusion was right, even if the reasoning given therefor was not satisfactory, the appellate Judge ought to accept the decision giving its own reasons therefor. A total refusal, however, to advert to the evidence on record by the Court of first appeal is an abdication of its function and duty. 1963 Ker LT 362 : 1963 Ker LJ 338.

(3) The Appellate Court should bring on the record all the necessary parties, to the appeal. AIR 1916 Mad 828 (829) (DB).

(3A) It is the duty of the Appellate Court to apply correct principles of law. AIR 1916 Pat 363 (363, 364) (DB) * AIR 1915 Cal 618 (619) : 42 Cal 451 (454) (DB) * AIR 1968 Mad 311 (315) : (1968) 1 Mad LJ 174 (DB).

(4) The Appellate Court should give clear findings of fact. AIR 1919 Cal 360 (360) (DB).

(5) The directions given by the Appellate Court should be free from doubt. (1907) 31 Mad 28 (32) (DB).

(6) The appellate Court should rectify the errors of the lower Court. AIR 1946 Nag 336 (340): ILR (1946) Nag 334 * AIR 1926 Pat 159 (160).

(7) It is the duty of the Appellate Court to decide an appeal according to law, giving findings on all the issues decided by the lower Court against the appellant, however, small the subject-matter of the appeal may be. AIR 1917 Lah 210 (210).

(8) Where the appellant waives his objection to the findings against him, the Appellate Court should accept those findings. AIR 1916 PC 14 (15, 16): 38 All 440: 43 Ind App 179.

(9) An Appellate Court is not entitled to call for a private report from the trial Court for its own information. The Appellate Court can only act in the manner provided by the Code. AIR 1940 Pat 54 (54, 55): 18 Pat 649 (DB).

(10) The first and foremost principle of modern appellate procedure is that in the absence of an error on the face of the record the Appellate Court should proceed on the assumption that the lower Court has acted wholly within law. Secondly, an Appellate Court should be slow to interfere with an order of the trial Court when the error complained of has not resulted in a miscarriage of justice. Minor and technical errors of procedure should be disregarded particularly when a judgment is right on the law and facts and the error does not affect the substantial rights of the parties. Thirdly, a decision right in result should not be set aside on the ground only that the reasons which form the basis of the decision are not correct. AIR 1957 Punj 312 (314): ILR (1957) Punj 1454 (DB).

(11) It is not only the law but the duty of every Court, including the Appellate Court, to see that its procedure, if it is found defective does not harm a litigant. AIR 1958 Madh Pra 257 (259) (DB) * (1964) 2 Andh LT 421 (DB). (Filing of additional written statement by way of amendment.)

(12) Lower Appellate Court not bound to give a list of documents considered by it — Overall impression that findings of lower Court are based on a consideration of evidence, documentary as well as oral in the case, is enough. AIR 1967 All 278 (279).

(13) When appellate Court agrees with trial Court's view of evidence, it need not restate effect of evidence or reiterate reasons given by trial Court — Expression of general agreement is generally enough. AIR 1967 SC 1124 (1129) : (1967) 1 SCR 93 * AIR 1967 Pat 157 (160) : 1966 BLJR 386* AIR 1966 All 367 (369) : 1965 All LJ 549.

(14) Appeal against an order of the District Judge — High Court holding the appeal not tenable. It is unnecessary for the High Court to make observation about the merits of the order of the District Judge. AIR 1968 Madh Pra 196 (197): 1968 MPLJ 356 (DB).

(15) When an appeal from ex parte order fails on merit the appellate Court cannot direct the lower Court to allow the party to proceed under O. 9, R. 13 because after the appeal fails there remains nothing in that order to be set aside by the primary forum whose order it was. (1967) 71 Cal WN 262 (268).

(16) Court will not pass an order which would lead to the anomalous result of requiring the party to go to the same Court for the same relief which he has already got. Courts are meant to do substantial justice and not to put complications in

**108. Procedure in appeals from appellate decrees and orders.**—The provisions of this Part relating to appeals from original decrees shall, so far as may be, apply to appeals—

(a) from appellate decrees, and

(b) from orders made under this Code or under any special or local law in which a different procedure is not provided.

[1882, 1877, Ss. 587 and 590; 1859, S. 366; Cf. O. 42, R. 1 and O. 43, R. 2.]

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**Section 107 — Note 16 (contd.)**
the way of a suitor. AIR 1966 All 234 (236): 1965 All LJ 651.

## SECTION 108

**1. Appeals from appellate decree.**— (1) By virtue of this section and O. 42, R. 1, a Court of second appeal has indirectly all the powers of a Court of first appeal (so far as may be.) (1904) 14 Mad L Jour 471 (473) (FB).

(2) A Court of second appeal can remand a case for finding on an issue. (1913) 20 Ind Cas 35 (36) (DB) (Cal) * AIR 1917 Cal 233 (234) (DB) * AIR 1920 Pat 642 (643).

(3) A Court of second appeal has the power to entertain a ground of objection not taken in the grounds of appeal (1890) 12 All 461 (464) (FB).

(4) A Court of second appeal has the same powers with respect to the dismissal of an appeal for default as a Court of first appeal. (1893) 15 All 359 (361, 362) (DB).

(5) With regard to the documents to accompany a memorandum of appeal, a Court of second appeal is governed by the same rules as a Court of first appeal. (1908) 32 Bom 14 (24) (FB) * (1882) 4 Mad 419 (420) (FB).

(6) A Court of second appeal has the power to entertain objections as to misjoinder of causes of action. (1905) 2 Cal L Jour 602 (607, 609) (DB).

(7) A Court of second appeal can entertain cross-objections. (1899) 21 All 297 (300).

(8) A Court of second appeal enjoys the same powers as the Court of first appeal with regard to the bringing on record of the legal representatives of the deceased parties. (1907) 29 All 535 (536) (DB) * (1905) 28 Mad 498 (499).

(9) The expression "so far as may be" makes it clear that the provisions relating to first appeals can be applied only subject to the principles governing the entertainment and disposal of second appeals. (1855) 7 All 765 (768, 769) (FB) * (1884) 7 Mad 52 (54) (DB) * (1886) 9 All 26 (30, 31) (DB).

(10) No appeal against any decree passed on the basis of the consent of the parties is competent under this section read with Section 96 (3). AIR 1968 Guj 301 (304) : 10 Guj LR 61.

(11) The general description of the powers of the appellate authority in the rules is not such as to take away the effects of this section. (1967) 10 Law Rep 392 : (1967) 2 Mys LJ 132.

(12) Parties agreeing to have their claim instituted in one of two Courts having jurisdiction — Orders of District Judge completely overlooked this condition of the valid contract — The orders being under the Arbitration Act which does not prescribe a different procedure for appeals against such an order. S. 108 applies to an appeal against such an order. AIR 1964 Mys 147 (155, 156): (1963) 2 Mys LJ 513 (DB).

**2. Appeals from orders.** — (1) It is not open to the Appellate Court in an appeal from an order of remand under O. 41, R. 23 to enter into the merits of the whole case as in a regular appeal. (1885) 7 All 136 (138) (DB).

(2) An appellate Court has inherent jurisdiction to grant an interim injunction pending an appeal from an order refusing temporary injunction. (1904) 14 Mad L Jour 471 (473) (FB).

(3) The procedure as to appeals from original decrees is not applicable to appeals from orders under the Provincial Insolvency Act, as a special procedure is provided for such matters. (1886) 12 Cal 628 (634) (DB). (By Section 73 of Provincial Insolvency Act.) * (1893) 17 Bom 334 (340) (DB).

(4) Where an interlocutory order is followed only by an appealable final order and not a decree Section 108 does not permit, by the application of Section 105, challenge being made to the interlocutory order in the appeal against the final order. AIR 1944 Pesh 33 (34).

(5) By Section 29 of the West Bengal Premises Tenancy Act of 1956 all final orders of the Rent Controller have been made appealable to specified authorities and Section 29 (3) provides that such appeals will be dealt with according to the procedure applicable to apeals from orders under C. P. C. AIR 1968 Cal 170 (173) : 1968 Cri LJ 478.

(6) Neither the Defence of India Act, 1939 or rules framed thereunder prescribe any spcial procedure for disposal of appeals under Section 19(1)(f) of that Act. Appeals under that Act have to be disposed of in the same manner as other appeals to the High Court. AIR 1968 SC 384 (386, 387) : (1968) 1 SCR 372.

(7) By virtue of this section provisions of Section 105 will apply to the case of an appeal against final order also. (1968) 2 Mad LJ 266 : 81 Mad LW 387.

## APPEALS TO THE [SUPREME COURT]°

**109. When appeals lie to [Supreme Court.]°**—[a][Subject to the provisions in Chapter IV of Part V of the Constitution and such rules] as may, from time to time, be made by [b][the Supreme Court] regarding appeals from the Courts of [c][India], and to the provisions hereinafter contained, an appeal shall lie to [b][the Supreme Court]—

(a) from any [d][judgment, decree or final order] passed on appeal by a High Court or by any other Court of final appellate jurisdiction;

(b) from any [d][judgment, decree or final order] passed by a High Court in the exercise of original civil jurisdiction; and

(c) from any [e][judgment, decree or final order] when the case, as hereinafter provided, is certified to be a fit one for appeal to [b][the Supreme Court].

[1882, 1877, S. 595; See O. 45 and Cl. 39 of the Letters Patent.]

°There is no specific adaptation by substitution of the words "Supreme Court" for the words "King in Council" in A. L. O., 1950 but this is an obvious oversight. In S. 110 such substitution has specifically been made.

[a] Substituted for "subject to such rules" by A. L.O., 1950 [26-1-1950].

[b] Substituted for "His Majesty in Council," ibid.

[c] Substituted by S. 3 of the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), for "the States" which words were substituted by A. L. O., 1950 for "the Provinces."

[d] Substituted for "decree or final order" by A. L. O., 1950 [26-1-1950].

[e] Substituted for "decree or order" by the Code of Civil Procedure (Amendment) Act, 1956 (66 of 1956), S. 11 [1-1-1957].

### SECTION 109 — SYNOPSIS

See also Constitution of India, Article 132.

1. Scope.
2. "Judgment".
3. "Decree," meaning of.
4. "Final order", meaning of.
5. "Order passed on appeal".
6. "Any other Court of final appellate jurisdiction".
7. Orders passed by the High Court in the exercise of original civil jurisdiction.
8. Certificate of fitness — Clause (c).
9. Appeal in proceedings for contempt of Court.

### TOPIC INDICATOR

Appeal against industrial award — See Note 1.
Bar of appeal under the Code not applicable to the Privy Council appeals — See Notes 3 and 6.
Cases where no appeal lies — See Note 2.
Extra-judicial decisions — See Note 2.
Form of certificate — See Order 45, Rule 3.
Income-tax appeal — See Note 1.
Insolvency Acts — Appeal under — See Note 2.
Interlocutory orders — See Note 8.
Leave to appeal in forma pauperis — See Note 2.
Order by District Judge on appeal under Section 75 — Provincial Insolvency Act — See Note 6.
Preliminary decree — Appeal against — See Notes 1 and 3.
This section and Article 133 of the Constitution — See Note 1.
Remand order — See Note 4.

**1. Scope.** — (1) Section 109 does not apply where the decision is not that of a "Court". (1906) 33 Cal 219 (254, 255): 33 Ind App 1 (PC) * (1905) 32 Cal 1 (4, 5): 31 Ind App 239 (PC).

(2) Section 109 does not apply where the decision of the Court is an extra judicial one. AIR 1919 Pat 279 (280): 4 Pat L Jour 423 (DB) * (1846) 4 Moo Ind App 220 (221) (PC).

(3) An order of the High Court in its administrative and disciplinary jurisdiction as for instance, against legal practitioners, is an extra judicial act and not within section 109. AIR 1914 Cal 557 (559): 41 Cal 734 (DB) * (1908) 32 Bom 106 (107) (DB) * AIR 1922 Mad 440 (441) (FB) * AIR 1930 Rang 150 (150, 151): 8 Rang 40 (DB) * (1884) 6 All 163 (164) (FB).

(4) No appeal would lie under Section 109 from a consent decree passed by the High Court. AIR 1920 Pat 721 (722): 5 Pat L Jour 383 (DB) * AIR 1932 PC 251 (251, 252).

(5) Where the suit itself has become non-existent, no appeal would lie under Section 109. AIR 1925 PC 174 (175). (Order of the High Court on review set

**Section 109 — Note 1 (contd.)**

aside by the Privy Council and suit dismissed — No more appeal to the Privy Council.)

(6) No appeal would lie from an order by the High Court on review if it is not appealable under Order 47, Rule 7. AIR 1926 Oudh 17 (18) (DB).

(7) Section 109 would not affect any special law or any special jurisdiction conferred by any other law for the time being in force. AIR 1932 Oudh 163 (164) (DB).

(8) Appeals from orders passed under Section 66 of the Income-tax Act cannot be regulated by Sections 109 and 110. AIR 1941 Pat 225 (226): 20 Pat 561 (SB) * AIR 1955 Mad 624 (624) (DB) * AIR 1962 Andh Pra 391 (392): (1962) 1 Andh WR 184 (DB).

(9) The expression "so far as may be" in Section 66 (3) of the Income-tax Act would not attract the provisions of Sections 109 and 110, Civil P. C. It is only in cases where a certificate of fitness is granted by the High Court under Section 66-A (2) and in no other case would an appeal lie to the Supreme Court against the decision on a reference under Section 66 of the Act. AIR 1962 Andh Pra 391 (393): (1962) 1 Andh WR 184 (DB).

(10) Finding of fact by Income-tax Tribunal is final and no reference to High Court would lie. Supreme Court will not interfere. AIR 1967 SC 401 (404): (1967) 1 SCR 784.

(11) The provisions of Sections 109 and 110 are not confined to suits only. AIR 1949 FC 60 (62): 1948 FCR 228: ILR (1949) 2 Cal 496.

(12) Where the petitioner prima facie satisfies the conditions prescribed by this section leave to appeal must be granted. The chance of success of the appellant in the proposed appeal is immaterial. AIR 1932 Mad 46 (52) (DB).

(13) Clauses (a) and (b) of this section provide for an appeal as of right but Clause (c) provides for an appeal in the discretion of the High Court. AIR 1950 Nag 177 (184, 186): ILR (1950) Nag 532 (FB) * AIR 1953 Madh B 209 (213): ILR (1952) Madh B 536 (FB).

(14) A person who satisfies the High Court that his case is a fit one for appeal under Section 109 (c) has the same right of appeal to the Supreme Court as a person who satisfies the High Court that he has complied with the provisions of Section 110. AIR 1952 Punj 103 (108, 109): ILR (1951) Punj 395 (FB) * AIR 1952 Pat 341 (346): 31 Pat 446 (SB).

(15) The provisions of the section are subject to the privisions in Chapter IV of Part V of the Constitution and hence the section is to be read subject to Article 133 of the Constitution though both deal with the same subject-matter. AIR 1955 Orissa 71 (72): ILR (1955) Cut 25 (DB) * AIR 1957 All 28 (32, 33) (DB) * AIR 1957 Raj 173 (173): ILR (1956) 6 Raj 327 (DB) * AIR 1953 Mad 79 (83): ILR (1953) Mad 862 (DB) * AIR 1960 Cal 77 (80): 64 Cal WN 52 (DB).

(16) In case of conflict between Article 133 of the Constitution and Section 109, Civil P. C. the former alone will prevail. Where there is no right of appeal under Article 133, the Civil P. C. cannot be read as a supplementary enactment conferring such a right of appeal. AIR 1962 Mad 508 (509, 510): (1963) 1 Mad LJ 127 (DB).

(17) A point which was not raised at the hearing of the appeal from which leave for appeal is sought cannot be considered as a ground for allowing leave under this section. AIR 1953 Assam 101 (102) (DB) * AIR 1953 Assam 70 (73) (DB).

(18) Neither Section 109 nor Section 110 contemplates a right to file cross-appeal or cross-objection and there would be no justification to introduce into those provisions this right. AIR 1957 Andh Pra 352 (354): ILR (1957) Andh Pra 144 (DB).

(19) The Special Appellate Tribunal Constituted under Madras Act 30 of 1956 cannot be called a Court of final appellate jurisdiction within meaning of Sections 109 and 110. AIR 1962 Mad 508 (510): (1963) 1 Mad LJ 127 (DB).

(20) Appeal against an industrial award brought by special leave is not an appeal as of right. AIR 1967 SC 1175 (1179): (1967) 2 SCR 463.

(21) An appeal against an industrial award by special leave is not intended to be an appeal on every ground of fact and law unless the Supreme Court considers it fit to examine the matter from any special angle. AIR 1967 SC 1175 (1179): (1967) 2 SCR 463.

(22) Applicants wanted to withdraw their application under Secs. 109 (b) and 110 for leave to appeal to the Privy Council. No notice to opposite parties. The application for leave was accordingly dismissed. As there was no decision on merits the order of dismissal did not create any bar to subsequent suit. ILR (1964) 2 All 191 (345, 346) (DB). (Reversed in AIR 1969 SC 135 on another point.)

(23) Concurrent findings of fact based on appreciation of evidence — Supreme Court will not interfere. AIR 1967 SC 1044 (1045, 1046): (1967) 2 SCR 618.

(24) Contention not raised at any earlier stage before the Tribunal on the High Court cannot be urged before the Supreme Court for the first time. AIR 1967 SC 1131 (1134): (1967) 1 SCR 627.

(25) A petition asking for a certificate under Article 133, in addition to statement of grounds of appeal must contain a prayer stating clearly the provision or provisions of that Article under which the certificate is asked for. AIR 1959 All 572 (573) (FB).

**2. "Judgment".** — (1) The word 'judgment' in this section must be differentiated

**Section 109 — Note 2 (contd.)**
both from 'decree' and 'final order'. AIR 1951 Cal 300 (302) (DB) * AIR 1951 Punj 412 (413): ILR (1950) Punj 447 (DB).

(2) To be appealable under this section the 'judgment' must be final. AIR 1953 Sau 166 (168) (FB) * AIR 1958 All 800 (802) (DB) * AIR 1957 All 116 (117) (DB) * AIR 1951 Pat 29 (37, 38): 30 Pat 174 (FB) * AIR 1956 Ajmer 16 (16) * AIR 1956 Andhra 159 (159) (DB) * AIR 1955 Raj 203 (213): ILR (1955) 5 Raj 711 (DB) * AIR 1954 Cal 424 (429) (DB) * AIR 1954 Pat 241 (241, 242): 32 Pat 880 (DB) * AIR 1954 Raj 127 (128): ILR (1954) 4 Raj 646 (DB) * AIR 1952 Bom 479 (481): ILR (1953) Bom 549 (DB) * AIR 1951 Punj 412 (413): ILR (1950) Punj 447 (DB).

(3) A judgment which the High Court pronounces under Section 21 (5) of the Bihar Sales Tax Act (6 of 1944) in regard to questions of law referred to it by the Revenue Authorities is not a judgment within the meaning of this section. AIR 1951 Pat 29 (37, 38): 30 Pat 174 (FB).

(4) The words "judgment, decree or final order" occurring in Sections 109 and 110 as adopted must be read as a judgment, decree or final order made after the adaptation other than those in respect of which a vested right of appeal existed before the adaptation and which were preserved by the Adaptation Order of 1950. AIR 1957 SC 540 (556): 1957 SCR 488.

(5) The reversal by the High Court of the decision of the trial Court on the plea of limitation does not come within the purview of the term "judgment". AIR 1957 Raj 173 (174): ILR (1956) 6 Raj 327 (DB).

(6) The decision of the High Court in the appeal under Section 19 (1) (f) of the Defence of India Act, 1939, is not a judgment, decree or order within Sections 109 and 110. AIR 1958 SC 947 (952).

(7) Each of the words "judgment", "decree" or "final order" has a different connotation. But all of them have reference to adjudication, determination or disposal of a proceeding, suit or rights of the parties. AIR 1957 Punj 117 (122): ILR (1957) Punj 255 (FB).

(8) 'Judgment' in Article 133 of the Constitution contemplates:

(1) It should terminate the proceedings in the High Court.

(2) It should determine the rights and liabilities of the parties on merits and should be final and conclusive so as to cover the entire range of substantive rights and liabilities of the parties. AIR 1961 All 245 (260): 1960 All LJ 897 (FB).

(9) 'Judgment' meaning of — Adjudication should put an end to a suit or proceeding so far as the Court before which it is pending — High Court reversing decision of lower Court and remanding case for fresh disposal — Proceeding in High Court terminated so far as that Court is concerned — Order passed is judgment within the ambit of Letters Patent (Madras), Clause 15. AIR 1963 Andh Pra 9 (11) (DB).

**3. "Decree", meaning of.**— (1) Determination of an incidental question is not a decree. AIR 1949 East Punj 222 (224) (DB).

(2) The word "decree" will include a preliminary decree. AIR 1956 Madh B 151 (151, 152): ILR (1956) Madh B 171 (DB) * AIR 1942 Cal 537 (538) (DB) * AIR 1922 PC 237 (238): 49 Ind App 108: 49 Cal 560.

(3) The word "decree" will not include an act of State. (1905) 32 Cal 1 (4, 5): 31 Ind App 239 (PC) * AIR 1967 All 51 (58): 1966 All LJ 698 (FB).

(4) A judgment given in execution proceedings cannot be split up so as to treat the findings on some of the points, namely, of limitation and jurisdiction, as decrees and those on objections to publication and conduct of sale as mere orders. AIR 1943 Lah 140 (143) (FB).

(5) A decision given by the High Court under Section 21 (5) of the Bihar Sales Tax Act is not a decree. AIR 1951 Pat 29 (35): 30 Pat 174 (FB).

(6) The determination by the Court of the plea of limitation in a suit does not amount to a decree. AIR 1957 Raj 173 (174): ILR (1956) 6 Raj 327 (DB).

**4. "Final order", meaning of.**— (1) The words "final order" in the section are used in contradistinction to the words "interlocutory orders". AIR 1939 FC 43 (48): ILR (1940) Lah 400: ILR (1939) Kar FC 132 * AIR 1956 All 457 (458): ILR (1956) 1 All 593 (FB) * (1901) 23 All 220 (227): 28 Ind App 28 (PC) * (1877) 1 Cal L Rep 354 (357, 358).

(2) The Privy Council did not, as a rule, interfere with interlocutory orders. AIR 1934 Lah 26 (26) (DB).

(3) An order is final if it finally disposes of the rights of the parties. AIR 1920 PC 86 (87): 47 Cal 918: 14 Sind LR 191: 47 Ind App 124 * AIR 1958 All 800 (802) (DB) * AIR 1958 Mad 151 (154): ILR (1958) Mad 117 (DB) * AIR 1958 Punj 213 (313) (DB) * AIR 1957 Andh Pra 538 (539) * AIR 1960 Cal 77 (79, 80): 64 Cal WN 52 (DB).

(4) The finality, must be a finality in relation to the suit. If after the order the suit is still a live suit in which the rights of the parties have still to be determined no appeal lies against it under Section 109 (a). The fact that the order decides a matter and even a vital issue is by itself not material unless the decision puts an end to the suit. AIR 1933 PC 58 (60): 11 Rang 58: 60 Ind App 76 * AIR 1958 Punj 313 (313) (DB) * AIR 1961 Andh Pra 402 (404): (1961) 1 Andh

**Section 109 — Note 4 (contd.)**
WR 71 (DB) * AIR 1961 Mys 98 (99): 38 Mys LJ 1035 (DB).

[See also AIR 1962 Cal 417 (420): 1962 (1) Cri LJ 321 (DB). (Criminal case under Article 134 (1) of Constitution.)]

(5) The decision of a cardinal point may in many cases finally dispose of the rights of the parties in the suit; but the test to find out whether an order is a final one is not whether the point decided thereby is a cardinal one, but whether the rights of the parties in the suit are finally disposed of by it. AIR 1950 FC 77 (79): 1949 FCR 842 * AIR 1949 FC 1 (5): 1947 FCR 180: 49 Cri L Jour 625 * AIR 1956 All 457 (458): ILR (1956) 1 All 593 (FB) * AIR 1953 Sau 166 (168) (FB) * AIR 1956 Andhra 126 (128) (DB) * AIR 1955 Nag 287 (288): ILR (1955) Nag 675 (DB) * AIR 1955 Orissa 71 (72): ILR (1955) Cut 25 (DB) * AIR 1954 Pat 241 (241, 242): 32 Pat 880 (DB) * AIR 1952 Bom 479 (481): ILR (1953) Bom 549 (DB) * AIR 1949 East Punj 222 (224, 225) (DB) * AIR 1949 Mad 220 (221): ILR (1949) Mad 584 (DB) * AIR 1943 Lah 140 (145, 146) (FB).

(6) If in substance no rights of the parties are outstanding to be decided in the suit, a mere pendency of a suit on the file of a Court will not deprive the otherwise final adjudication of the rights of the parties by the High Court of its finality. AIR 1956 Andhra 126 (128) (DB).

(7) The finality of an order depends upon the effect of the order that is actually made and not of the one that might or is sought to be made. AIR 1958 Punj 313 (313) (DB) * 1962 Jab LJ 599.

(8) The mere fact that an order decides one issue on the rights of the parties does not make it a final order if there are other issues left to be decided later on. AIR 1916 All 243 (243, 244): 38 All 150 (FB) * AIR 1942 Cal 537 (539) (DB) * AIR 1942 Oudh 283 (284) (DB) * AIR 1939 FC 43 (44): ILR (1940) Lah 400: ILR (1939) Kar FC 132 * AIR 1933 PC 58 (60): 11 Rang 58: 60 Ind App 76 * AIR 1968 Delhi 240 (243): (1968) 70 Pun LR (D) 277 (DB) * AIR 1968 Punj 81 (83): 69 Pun LR 93 (DB) * AIR 1964 All 49 (51, 52) (DB). (1960 All LJ 244(DB), held impliedly overruled by AIR 1933 PC 58.)

[But see 1960 All LJ 244 (245): 1960 All WR (HC) 177 (2) (DB). (**Note:** Held impliedly overruled in AIR 1964 All 49 (DB) by AIR 1933 PC 58.)]

(9) Where an order merely gives direction as to procedure or where it does not dispose of the suit or proceeding but reserves some further question for further determination, it is only an interlocutory and not a final order. AIR 1956 Andhra 159 (159) (DB) * AIR 1955 Raj 208 (213): ILR (1955) 5 Raj 711 (DB) * AIR 1951 Pat 619 (621): 30 Pat 853 (DB) * AIR 1950 Mad 215 (216) (DB) * AIR 1925 All 263 (263, 264): 47 All 335 (DB) * AIR 1961 SC 794 (796): (1961) 3 SCR 754 * ILR (1961) Cut 128 (DB).

(10) An order of remand under Order 41, Rule 23, which decides an important issue but leaves the suit alive to be tried in the ordinary way, is not a final order. AIR 1950 FC 83 (93): 1949 FCR 849 * AIR 1957 Raj 173 (175): ILR (1956) 6 Raj 327 (DB) * AIR 1953 Sau 166 (168, 169) (FB) * AIR 1954 Cal 424 (432) (DB) * AIR 1952 Ajmer 15 (16) * AIR 1951 Cal 300 (301) (DB) * AIR 1949 Mad 220 (221): ILR (1949) Mad 584 (DB) * AIR 1945 All 401 (404, 405): ILR (1945) All 443 (DB) * AIR 1933 PC 58 (60): 11 Rang 58: 60 Ind App 76 * (1901) 23 All 220 (227): 28 Ind App 28 (PC).

(11) If all the material issues have been decided and there is nothing more to be done after remand by the trial Court except to pass a decree, the order of the appellate Court is a final order. AIR 1956 Andhra 126 (128) (DB) * AIR 1967 All 51 (56): 1966 All LJ 698 (FB) * AIR 1964 All 25 (26): 1963 All LJ 279 * AIR 1961 All 245 (253): 1960 All LJ 897 (FB).

(12) Where the Appellate Court held that a certain award was not binding on the persons against whom it had been set up and remanded the case to the lower Court for the investigation of their claims it was held that this was a "final order" as it finally disposed of the rights of such persons to prosecute their claims in the suit. AIR 1938 Rang 333 (334, 335): 1938 Rang LR 330 (DB).

(13) The following orders are all interlocutory orders and are not appealable under Section 109:

(a) An order granting leave to sue in forma pauperis. (1904) 8 Cal WN 296 (297) (SB).

(b) An order setting aside an order granting leave to sue in forma pauperis. AIR 1952 Vind Pra 31 (32).

(c) An order refusing leave to sue in forma pauperis. AIR 1942 Oudh 422 (423) (DB) * (1935) 157 Ind Cas 39 (39) (Rang) * AIR 1927 Pat 175 (176): 6 Pat 67 (DB) * AIR 1925 Oudh 548 (549) (DB).

(d) An order refusing to restore an appeal dismissed for default of prosecution. AIR 1956 All 457 (459, 460): ILR (1956) 1 All 593 (FB).

(e) An order extending time for presenting an appeal under Section 5, Limitation Act. AIR 1926 Pat 102 (102) (DB).

(f) An order granting a review for rehearing an appeal. AIR 1923 Mad 57 (57) (DB) * AIR 1932 All 318 (318): 54 All 401 (DB) * AIR 1961 Mys 98 (99, 101): 38 Mys LJ 1035 (DB).

(g) An order rejecting an application by a legal representative to be brought on record. AIR 1914 Bom 6 (8): 38 Bom 421 (DB).

**Section 109 — Note 4 (contd.)**

(h) An order refusing to interfere in revision with an order allowing a co-decree-holder to join in executing the decree. AIR 1922 Pat 611 (613) (DB).

(i) An order directing the lower Court to proceed with the execution and determine the questions in dispute in execution. AIR 1943 Lah 140 (145, 146) (FB) * AIR 1953 Madh B 45 (46): ILR (1953) Madh B 5 (DB) * AIR 1951 Assam 73 (74) (DB) * AIR 1951 Mad 1051 (1053, 1054): ILR (1953) Mad 65 (DB).

(j) An order granting stay under Section 34, Arbitration Act. AIR 1951 Pat 619 (621): 30 Pat 853 (DB).

(k) An order in appeal against an order directing appointment of receiver. AIR 1956 Andhra 159 (159) (DB) * AIR 1955 Orissa 71 (72): ILR (1955) Cut 25 (DB).

(l) An order appointing or refusing to appoint provisional liquidator. AIR 1949 East Punj 261 (261, 262) (DB).

(m) An order holding that an appeal was not barred by time and directing that the printing of the record be proceeded with. AIR 1958 Punj 313 (313) (DB).

(n) Remand of case for retrial under Section 151, Civil P. C. AIR 1961 SC 794 (796): (1961) 3 SCR 754.

(o) Order passed on petition for setting aside sale remitting matter for finding out whether property was sold for inadequate price on account of material irregularity in execution proceedings. AIR 1967 Mad 75 (76): (1966) 2 Mad LJ 494 (DB).

(p) 'Judgment', or 'Final order' — Order of High Court in appeal setting aside order of trial Court recording compromise — Order is neither final order nor judgment. AIR 1961 All 245 (248, 261): 1960 All LJ 897 (FB).

(14) Where an application to set aside an ex parte decree is rejected and on appeal the order is set aside, the appellate order is a "final order" within this section. AIR 1933 All 15 (17): 54 All 941 (DB).

(15) A decision that a suit is not barred by res judicata or by limitation is a "final order" where the question as to bar by res judicata or limitation disposes of the rights of the parties in the suit. AIR 1919 Oudh 256 (257): 21 Oudh Cas 336 (DB) * AIR 1921 Cal 177 (178) (DB).

(16) A decision given by the High Court under Section 21 (5) of the Bihar Sales Tax Act (6 of 1944), is not a final order. AIR 1951 Pat 29 (35): 30 Pat 174 (FB).

(17) Where in proceedings seeking writs against order of income-tax authorities, the High Court held that the proceedings under Article 226 of the Constitution were not appropriate because the applicant had an alternative remedy, it was held that the order of the High Court was neither a judgment nor a final order. AIR 1958 All 800 (803) (DB) * AIR 1968 Punj 81 (83): 69 Pun LR 93 (DB).

(18) An order allowing amendment of decree by reducing decretal amount in accordance with formula under Section 4 of U. P. Zamindars' Debt Reduction Act 1953 is a final order, as only routine work was left over in implementation of the order. AIR 1967 All 51 (56, 57): 1966 All LJ 698 (FB).

(19) Letters Patent Bench affirming in appeal order of lower appellate Court remanding case to be decided on merits — No finality attached to such judgment — Judgment is interlocutory in nature. 1968 Cur LJ 123 (Punj).

**5. "Order passed on appeal."**— (1) An order cannot be deemed to have been passed "on appeal" unless it is an order by a superior Court reversing, modifying or confirming the order of an inferior Court. (1911) 10 Ind Cas 444 (445) (DB) (Cal) * AIR 1925 Mad 243 (243, 244) (DB).

(2) The words "final order passed on appeal" are not equivalent to "final order passed in the exercise of final appellate jurisdiction" but imply orders disposing of an appeal at the hearing. ILR (1948) 2 Cal 202 (207, 208) (DB) * AIR 1946 Oudh 101 (103): 21 Luck 43 (DB) * AIR 1942 Oudh 362 (365) (DB) * AIR 1936 Pat 465 (467): 15 Pat 659 (DB).

(3) Where A applies to the High Court to review its decision in an appeal before it and the High Court passes an order refusing the application for review, the order is not one "passed on appeal." AIR 1946 Cal 10 (11) (DB) * AIR 1914 Oudh 41 (42): 16 Oudh Cas 264 (DB).

(4) An order of the High Court refusing stay of execution of a decree is not an order passed on appeal. (1911) 10 Ind Cas 444 (445) (DB) (Cal).

(5) An order refusing to restore an appeal dismissed for default cannot be held to be an order passed on appeal. AIR 1917 All 313 (313) (DB) * AIR 1937 All 566 (566, 567): (DB).

(6) An order refusing to set aside an ex parte appellate decree is not one passed on appeal. AIR 1942 Mad 357 (357) (DB).

(7) An order rejecting an application for amendment of an appellate decree is not an order passed on appeal. (1903) 30 Cal 679 (681) (DB).

(8) An order dismissing an appeal for non-prosecution is not a final order passed on appeal. AIR 1942 Oudh 362 (365) (DB).

[But see AIR 1948 All 375 (377): ILR (1949) All 49 (DB) * 1962 Jab LJ 599.]

(9) Where A applied to the High Court to pass a final decree according to the preliminary decree of the Privy Council, the order of the High Court on such application, it was held, was not one "passed on appeal." AIR 1925 Mad 187 (187) (DB) * AIR 1932 Bom 90 (91 to 93): 55 Bom 785 (DB).

(10) Where the Privy Council remanded the case to the High Court with a direc-

**Section 109 — Note 5 (contd.)**

tion that certain accounts be taken on a certain footing and the Division Bench of the High Court took the accounts and made a final decree it was held that appeal lay to the Privy Council from the decree of the Division Bench. (1905) 32 Cal 963 (965) (DB).

(11) A applies to the High Court for leave to appeal in forma pauperis and the application is dismissed. He subsequently files another aplication to be allowed to deposit the Court-fees and that is also dismissed. The last order of dismissal is not an order "passed on appeal." AIR 1919 All 331 (331) (DB).

(12) An order rejecting an appeal for failure to furnish security for costs under Order 14, Rule 10 is not an order passed "on appeal." AIR 1914 All 54 (54): 36 All 325 (DB) * (1910) 13 Oudh Cas 59 (61): 5 Ind Cas 940 (941) (DB).

[But see AIR 1932 All 312 (314): 54 All 390 (DB).]

(13) An order refusing to admit an appeal after the period of limitation under Section 5 of the Limitation Act is not an order passed 'on appeal.' AIR 1942 Mad 357 (357) (DB) * ('08) 32 Bom 108 (109) (DB) * AIR 1936 Oudh 110 (112): 11 Luck 599 (DB) * ILR (1948) 2 Cal 202 (205) (DB) * AIR 1921 Cal 415 (416) (DB) * AIR 1926 Pat 102 (102) (DB). (Obiter.) * AIR 1917 Lah 448 (448).

(14) An order passed by the High Court in the exercise of its powers of revision under Section 115 of the Code is not one passed on appeal. AIR 1946 Oudh 101 (104): 21 Luck 43 (DB) * AIR 1944 Sind 220 (221, 222): ILR (1944) Kar 216 (DB) * AIR 1934 All 198 (201) (DB) * AIR 1936 Pat 466 (468): 15 Pat 659 (DB) * AIR 1939 Pesh 26 (27) (SB) * AIR 1963 All 191 (192, 193).

[But see (1911) 9 Ind Cas 183 (186, 187) (DB) (Cal).]

(15) Section 109 (c) is wide enough to cover an order passed under Section 115 of the Code. AIR 1949 PC 239 (241): 76 Ind App 131: ILR (1950) 1 Cal 446 * AIR 1953 Nag 145 (146): ILR (1953) Nag 243 (DB).

(16) Article 133 (1) (a) of the Constitution is wider in scope than Clause (a) of this section. The words "passed on appeal" are omitted from Article 133. An appeal under that article from an order passed by the High Court in the exercise of its revisional jurisdiction is, therefore, competent. AIR 1955 Nag 287 (288, 289): ILR (1955) Nag 675 (DB) * AIR 1952 Pat 450 (451): 30 Pat 1274 (DB).

[But see AIR 1952 Ajmer 15 (15).]

**6. "Any other Court of final appellate jurisdiction."**— (1) An order passed by the District Court on appeal under Sec. 75 of the Provincial Insolvency Act is not the order of a Court of final appellate jurisdiction within the meaning of Cl. (a) of this section. AIR 1937 Mad 930 (932, 934).

(2) It is not correct to say that Section 109 gives a right of appeal in civil proceedings which originate in a suit; the word 'suit' is not used in the section but instead the words 'final appellate jurisdiction' are used. They certainly exclude orders passed in exercise of the revisional jurisdiction, but they are the only orders excluded from the scope of Section 109. AIR 1957 All 28 (33) (DB).

**7. Orders passed by the High Court in the exercise of original civil jurisdiction.**— (1) Where the High Court refused to issue a writ of certiorari to the Board of Revenue against enhancement of rent under the Madras Estates Land Act, it was held that the order was one passed under the original jurisdiction of the High Court and came under Clause (b) of this section. AIR 1938 Mad 722 (722, 723): ILR (1938) Mad 816 (DB).

(2) The proceedings for the issuing of a writ of certiorari are original civil proceedings as opposed to criminal proceedings and leave to appeal to the Supreme Court can be granted under Section 109 (b) against an order dismissing an application under Article 226 of the Constitution for a writ in the nature of certiorari against the Income-tax Officer. 1955-28 ITR 392 (393) (DB) (Punj).

(3) If the proceedings taken establish or negative a man's office or would affect his right to property of any kind it is a civil proceeding. AIR 1963 Cal 364 (367) (DB).

**8. Certificate of fitness — Clause (c).**— (1) An order by the High Court made in revision may come under this clause. AIR 1949 PC 239 (241): 76 Ind App 131: ILR (1950) 1 Cal 446.

(2) This clause is intended to meet special cases such as those in which the point in dispute is not measurable in money though it may be of great public or private importance. ILR (1951) Mys 423 (425) (DB) * AIR 1943 Oudh 266 (268) (DB) * AIR 1941 All 211 (212): ILR (1941) All 364 (DB) * AIR 1968 Delhi 83 (85) (DB).

[But see AIR 1953 Raj 42 (44): ILR (1952) 2 Raj 755 (FB) * AIR 1953 Assam 101 (102) (DB) * AIR 1947 Lah 304 (305): ILR (1947) Lah 696 (FB).]

(3) The grant of a certificate is in the discretion of the Court. AIR 1957 All 28 (36, 37) (DB) * AIR 1953 Mad 66 (69): 1953 Cri L Jour 256 (DB) * Madh BLJ (1954) HCR 896 (898) (DB).

(4) The discretion to grant a certificate must be judicially exercised. AIR 1953 Mad 66 (69): 1953 Cri L Jour 256 (DB) * AIR 1957 All 28 (37) (DB) * Madh BLJ 1954 HCR 896 (898) (DB) * (1911) 10 Ind Cas 444 (445) (DB) (Cal) * AIR 1964 Raj 277 (278): 1964 Raj LW 220 (DB).

(5) The discretion to grant a certificate under Clause (c) must be sparingly used.

**Section 109 — Note 8 (contd.)**

AIR 1953 Mad 66 (69): 1953 Cri L Jour 256 (DB) * Madh BLJ 1954 HCR 896 (898) (DB) * AIR 1940 All 38 (40): ILR (1940) All 11 (DB) * AIR 1933 All 4 (6): 54 All 459 (DB). (23 All 227, Followed.)

(6) The exercise of discretion in granting a certificate under Clause (c) is not final and is open to review by the Privy Council (now Supreme Court) if necessary. (1901) 23 All 415 (420): 28 Ind App 182 (PC) * (1901) 23 All 227 (231, 232): 28 Ind App 11 (PC).

(7) The mere assent of the respondent to an appeal does not justify the grant of an erroneous certificate. (1901) 23 All 227 (232): 28 Ind App 11 (PC) * AIR 1932 Rang 189 (190): 10 Rang 499 (DB).

(8) Fitness of the case for an appeal to the Supreme Court must be considered with regard to the points that will arise for determination before the Supreme Court and not with regard to the points which may arise in the Courts below if on a disagreement with the decision of the High Court the Supreme Court were to remand the case. AIR 1954 Him Pra 24 (25, 26).

(9) The test to determine whether a case is a fit one to be certified under Clause (c) is to see :

(a) whether the point involved is of great public or private importance. AIR 1953 Raj 42 (45): ILR (1952) 2 Raj 755 (FB) * 1955-28 ITR 392 (393) (DB) (Punj) * AIR 1952 All 548 (550): ILR (1952) 2 All 354 (DB) * AIR 1952 Punj 191 (194) (DB) * AIR 1942 Cal 498 (505) (SB) * AIR 1964 Raj 277 (279): 1964 Raj LW 220 (DB).

(b) whether it is of such a nature that a decision thereon might result in a precedent governing numerous cases. AIR 1953 Raj 42 (45): ILR (1952) 2 Raj 755 (FB) * AIR 1954 Madh B 150 (150) * AIR 1951 Punj 313 (318): ILR (1950) Punj 377 (DB) * ILR (1951) Mys 423 (425) (DB) * ILR (1950) Punj 363 (365) (DB) * AIR 1943 Nag 76 (77): ILR (1943) Nag 580 (DB) * AIR 1942 All 258 (259): ILR (1942) All 753 (DB) * AIR 1923 Mad 125 (126) (DB).

(c) whether there are any other exceptional circumstances justifying the grant of a certificate. AIR 1954 Madh B 150 (150) * ('39) 181 Ind Cas 947 (948) (FC).

(d) whether the award is defective by reason of an excess of jurisdiction or of a substantial error in applying the law or some settled principle or of some gross and palpable error occasioning substantial injustice. AIR 1967 SC 1175 (1179): (1967) 2 SCR 463.

(10) Where there are several suits in which the same question is involved and the grant of a certificate in some only of those cases would result in contradictory decrees, a certificate should be granted. AIR 1946 All 184 (187, 189): ILR (1946) All 221 (DB) * AIR 1944 Sind 190 (192): ILR (1944) Kar 163 (DB) * AIR 1919 Cal 118 (119, 120) (DB).

(11) The fact that a point was of general importance was not enough to support the grant of a cerificate under this clause if it had been settled by the Privy Council. AIR 1945 All 401 (405): ILR (1945) All 443 (DB) * AIR 1944 Oudh 238 (239) (DB) * AIR 1940 All 38 (40): ILR (1940) All 11 (DB) * AIR 1929 All 339 (340, 341) (DB). (Question of cow sacrifice.) * AIR 1929 Mad 780 (781) (DB).

(12) If a point has been settled by the Full Bench of the High Court concerned, no certificate will be granted even if the question is of general importance. AIR 1928 Mad 448 (450) (DB) * (1913) 18 Ind Cas 305 (306) (DB) (All) * AIR 1937 Sind 217 (218) (DB).

(13) Where point is already settled by Supreme Court, certificate cannot be granted. AIR 1968 Punj 216 (217) (FB).

**(14)** While granting a certificate the Court must keep in view the consideration that litigation is not made oppressively expensive and the elucidation of the real issues in the case by a trial of the suit is not unduly postponed or delayed. AIR 1947 Lah 304 (305, 306): ILR (1947) Lah 696 (FB) * AIR 1945 Oudh 241 (241, 242): 20 Luck 259 (DB) * AIR 1936 Mad 311 (313) (DB).

(15) A question will be one of public importance if it affects not merely the parties to the case but also large bodies of persons or communities. AIR 1954 Madh B 150 (151) * AIR 1953 Mad 66 (69): 1953 Cri L Jour 256 (DB) * AIR 1952 Him Pra 14 (16) * AIR 1964 Raj 277 (279): 1964 Raj LW 220 (DB).

(16) The mere existence of a substantial question of law is not sufficient for granting a certificate. AIR 1953 Raj 42 (45): ILR (1952) 2 Raj 755 (FB) * AIR 1954 Him Pra 24 (25) * AIR 1954 Madh B 150 (150) * AIR 1953 All 129 (131) (DB) * AIR 1953 Assam 21 (22) (DB) * AIR 1953 Mad 66 (69): 1953 Cri L Jour 256 (DB) * AIR 1952 Punj 379 (380) (DB) * AIR 1951 Pat 439 (1) (439) (DB) * AIR 1949 Mad 741 (742) (DB) * AIR 1946 Cal 10 (12) (DB) * AIR 1945 Oudh 241 (241): 20 Luck 259 (DB).

(17) A question of private importance means private importance to both parties to the litigation and not merely to one of them. AIR 1954 Madh B 150 (150) * AIR 1953 Mad 79 (84): ILR (1953) Mad 862 (DB) * AIR 1953 Mad 66 (69): 1953 Cri L Jour 256 (DB) * AIR 1952 Punj 379 (380) (DB) * ILR (1951) Mys 423 (425) (DB) * AIR 1943 Oudh 266 (268) (DB) * AIR 1923 Mad 232 (234) (DB) * AIR 1924 Mad 231 (231, 232) (DB) * AIR 1922 Mad 34 (35) (DB).

(18) The fact that the question raised affects third parties is no ground of fitness. AIR 1953 Mad 66 (69): 1953 Cri L Jour 256 (DB) * AIR 1929 Mad 696 (698) (DB).

(19) The following questions have been held to be of public importance :

**Section 109 — Note 8 (contd.)**

(a) Right of procession claimed by Mahomedans against Hindus. AIR 1930 All 121 (122): 52 All 329 (DB).

(b) Construction of an agreement between two rival temples affecting rights of great importance. AIR 1924 Mad 231 (232) (DB).

(c) The nature of the constitution of a community and whether the constitution amounts to a trust. AIR 1928 Nag 202 (203) (DB).

(d) The nature of the resolution to be passed by a company for the alteration of its memorandum of association. (1903) 27 Bom 415 (418) (DB).

(e) Whether certain kinds of permanent tenures in Malabar carry with them the incident of forfeiture on alienation. AIR 1923 Mad 443 (444) (DB).

(f) The extent of control acquired by one who has built a Parsi Fire Temple. (1905) 6 Bom LR 286 (287) (DB).

(g) The status and legal position of one who has collected the debts of a deceased person in relation to the beneficiaries and others by virtue of his holding a succession certificate. AIR 1916 All 253 (253): 38 All 188 (DB).

(h) The necessity or otherwise for registration of documents containing an option of re-purchase. AIR 1927 Bom 9 (20, 21): 50 Bom 753 (DB).

(i) The burden of proof of family necessity for a debt contracted by the manager of joint Hindu family and the liability of the mortgagor's share alone for such debts. (1913) 18 Ind Cas 305 (305, 306) (DB) (All).

(j) Whether the fraud of the mortgagor alone in registration proceedings would affect the mortgagee's right of suit. AIR 1919 All 34 (35): 42 All 176 (DB).

(k) Whether a suit by a Hindu widow is one of a representative character. AIR 1934 All 198 (201) (DB).

(l) The form of ritual in an important public temple. AIR 1939 Mad 847 (848): ILR (1939) Mad 967 (DB).

(m) The question of jurisdiction of a Civil Court. AIR 1939 Mad 95 (95) (DB).

(n) The question whether in a suit for partition, the value for purposes of appeal to the Privy Council was the value of the entire property or the value of the share claimed. AIR 1935 Pat 266 (267) (DB).

(o) The question of the validity of Section 20 of the U. P. Zamindari Abolition and Land Reforms Act, 1 of 1951. AIR 1957 All 116 (118) (DB).

(p) When an appeal to vote in favour of a candidate or to refrain from voting in favour of the other can be said to be an appeal made on the ground of religion or community; (2) whether Mahatma Gandhi's photograph can be called a national symbol and (3) whether the omission by the candidate himself to keep and maintain accounts as provided by Sec. 77, Representation of the People Act, was a corrupt practice. AIR 1959 All 607 (611): 1959 All LJ 727 (DB).

(q) Hindu widow remarrying according to 'Kerwa' form of marriage — Question whether she can be regarded as 'widow' after such marriage fit for grant of leave to appeal, under Section 109 (c). AIR 1965 Punj 32 (33): ILR (1964) 1 Punj 844.

(19-A) The questions raised in the following cases were held not sufficient to justify the grant of a certificate under this clause:

(a) Where it would not be right to call upon a party whose financial interest in the matter is too small to incur the risk of the costs of the appeal. AIR 1923 Mad 232 (233, 234) (DB) * (1909) 3 Ind Cas 786 (787) (DB) (Cal).

(b) Where the question is merely a matter of practice, such as an order for the inspection of documents. (1872) 9 Bom HCR 398 (401, 402) (SB).

(c) Where the question is merely the sufficiency of evidence in proof of a particular fact. AIR 1942 Mad 368 (369) (DB) * AIR 1919 All 97 (98) (DB) * AIR 1929 Nag 85 (87).

(d) Where the case merely rests upon evidence and there are concurrent findings of fact. AIR 1949 East Punj 370 (371) (DB) * AIR 1941 PC 106 (109) * AIR 1916 Lah 87 (88): 1916 Pun Re No. 64 (DB) * (1889) 16 Cal 753 (755): 16 Ind App 125 (PC) * (1891) 18 Cal 23 (30): 17 Ind App 122 (PC) * (1902) 25 Mad 215 (219, 220): 29 Ind App 38 (PC) * (1901) 24 All 174 (177, 178): 29 Ind App 40 (PC).

(e) Whether the non-joinder of certain parties is fatal to the suit or appeal. AIR 1919 All 104 (104) (DB).

(f) Whether a valid acknowledgment was given for the purpose of Article 1 of Schedule 1 of the Stamp Act. AIR 1924 Mad 616 (617) (DB).

(g) Where the discretion of the High Court was properly exercised in refusing to excuse the delay of the appellant. AIR 1921 Cal 94 (95) (DB).

(h) The right of a party to open windows in a loft. AIR 1929 Bom 341 (343): 53 Bom 552.

(i) Whether a suit to set aside a fraudulent decree could be brought by a person not a party to the decree. (1912) 14 Ind Cas 626 (626) (Low Bur).

(j) Whether a suit is maintainable to set aside a decree on the ground that it was obtained by perjured evidence. AIR 1920 Pat 119 (121) (DB).

(k) Whether a certain interpretation of a decree by a Court operates as res judicata between the parties. (1911) 8 Ind Cas 485 (485) (DB) (All).

(l) Whether a receiver should be appointed in a particular case. AIR 1950 Mad 215 (216) (DB) * (1911) 10 Ind Cas 439 (441) (DB) (Cal) * AIR 1933 Pat 293 (295): 12 Pat 723 (DB).

(m) Failure to record reasons for granting a review. (1900) 27 Cal 333 (335): 27 Ind App 79 (PC).

**110. Value of subject-matter.**—In each of the cases mentioned in clauses (a) and (b) of Section 109, the amount or value of the subject-matter of the suit in the Court of first instance must be [a][twenty thousand] rupees or upwards, and the amount or value of the subject-matter in dispute on appeal to [b][the Supreme Court] must be the same sum or upwards,

or the [c][judgment, decree or final order] must involve, directly or indirectly, some claim or question to or respecting property of like amount or value,

and where the [c][judgment, decree or final order] appealed from affirms the decision of the Court immediately below the Court passing such [c][judgment,

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**Section 109 — Note 8 (contd.)**

(n) The construction of a section of an Act (the Tenancy Act) not directly affecting persons other than the parties. AIR 1921 Pat 33 (34): 6 Pat L Jour 125 (DB).

(o) An order reversing the decision of the lower Court refusing to set aside a dismissal for default. AIR 1914 Oudh 223 (225) (DB).

(p) The dismissal of an appeal in a suit for defamation. AIR 1928 Rang 187 (188): 6 Rang 43 (DB).

(q) The interpretation of a document which is not of general or public importance. AIR 1953 Assam 21 (22) (DB) * AIR 1934 All 58 (60): 56 All 277 (DB).

(r) Whether Article 142 or Article 144 of the Limitation Act of 1908 applies to a particular case. ILR (1961) Cut 128 (DB).

(s) Validity of an order of High Court declaring the Andhra Pradesh Buildings Control Act (1960) to be valid. (1967) 2 Andh WR 135 (140) (DB).

(20) In the case of orders suspending advocates from practice, the practice of the Allahabad High Court has been to grant leave to appeal under Clause (c). AIR 1934 All 898 (901): 56 All 702 (DB) * AIR 1933 All 18 (18) (DB) * AIR 1933 All 225 (226): 55 All 246 (DB) * AIR 1937 All 167 (168) (DB).

(21) The construction of Clause (c) of Section 109 cannot be bodily imported into the construction of sub-clause (c) of Article 134 (1) of the Constitution. AIR 1957 Andh Pra 871 (873): ILR (1956) Andh Pra 441: 1957 Cri L Jour 1213 (DB).

(22) Certificate should not be granted unless the High Court was of the view that the decision to be appealed against constituted a judgment, decree or final order. AIR 1967 All 51 (55): 1966 All LJ 698 (FB).

(23) Proceedings arising out of election petition are proceedings of a civil nature and High Court can issue certificate for appeal to Supreme Court. AIR 1959 All 607 (610): 1959 All LJ 727 (DB).

(24) Pecuniary value of joint mutavaliship or joint trusteeship is incapable of valuation. Question relates only to the appeal and not to the properties involved. Leave to appeal cannot be granted. AIR 1966 Mad 313 (314, 315): (1965) 2 Mad LJ 482 (DB).

(25) Suit for eviction against the tenant — Subject-matter in dispute is the tenancy and not the demised property — Test for granting certificate is the value of its tenancy. AIR 1968 Cal 316 (321, 322) (DB).

(26) Question whether lease money paid to Government for land taken on lease in connection with lime business amounted to capital expenditure or revenue expenditure within Section 10 (2) (x), Income-tax Act (1922) — Held a serious question of law was involved and certificate should be granted. AIR 1964 Raj 277 (279): 1964 Raj LW 220 (DB).

**9. Appeal in proceedings for contempt of Court.**— (1) Where certain persons were fined by the High Court for contempt of the High Court in having published an article in a newspaper which contained an "unwarranted and defamatory aspersion on the character and ability of a number of Judges of the High Court" and those persons applied for leave to appeal to the Privy Council it was held that no leave could be granted. AIR 1935 All 811 (813): 57 All 910 (DB).

(2) Section 109 does not apply to orders in contempt proceedings and an order refusing to punish a person for contempt of Court could not be appealed against to the Privy Council. AIR 1941 All 211 (212): ILR (1941) All 364 (DB).

(3) A committal for a finding of contempt for breach of an injunction is not criminal in its nature and is properly dealt with under the Civil Procedure Code and hence, there could be an appeal to the Privy Council in such cases under the Civil Procedure Code. AIR 1938 PC 295 (298): 17 Pat 770: ILR (1939) Kar 42. (1913 App Cas 417, Followed.)

## SECTION 110 — SYNOPSIS

See also Constitution of India, Art. 133.

**1. Scope of the section.**
**2. Valuation of the subject matter in the Court of first instance.**
**3. Mesne profits, interest and costs after date of suit.**
**4. Sum actually at stake may not represent the true value.**
**5. Valuation of subject-matter in dispute on appeal.**
**6. Several appeals from a single decree.**
**7. "Or the judgment, decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value."**
**8. Appeal from decree of affirmance must**

decree or final order], the appeal must involve some substantial question of law.

[1882, 1877, S. 596; See O. 45, Rr. 3, 4 and 5.]

[a[ Substituted for "the thousand" by A. L. O., 1950 [26-1-1950].

[b] Substituted for "His Majesty in Council," ibid.

[c] Substituted for "decree or final order," ibid.

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**Section 110 — Synopsis (contd.)**

**involve a substantial question of law.**

**9. Affirmance — Meaning of.**

**9-A. Doctrine of merger.**

**10. "Involve."**

**11. Substantial question of law.**

**12. "Court immediately below", meaning of.**

**13. "Judgment, decree or final order".**

**TOPIC INDICATOR**

"Claim or question" in futuro. See Note 7.

Consolidation of appeals for valuation. See Order 45, Rule 4.

Costs, Supreme Court practice as to. See Section 112.

Execution matters. See Note 1.

Form of application for leave. See Order 45, Rules 2 and 3.

Powers of High Court subsequent to granting of leave. See Order 45, and Section 112.

Section 110, how far governs Section 109. Clause (c). See Section 109.

Subject-matter being not capable of valuation. See Note 1.

Subject-matter of suit, meaning of. See Note 2.

This section and Article 133 of Constitution of India. See Note 1.

Valuation — Alteration and estoppel. See Note 2.

Valuation — Variation pendente lite. See Note 5.

Value — Costs, if part of. See Note 3.

Value — Meaning of. See Note 4.

Word "and" in first paragraph — Meaning of. See Note 1.

**1. Scope of the section.**— (1) The section does not confer any right of appeal but merely lays down further conditions in the case of appeals mentioned in Clauses (a) and (b) of Section 109. AIR 1946 Nag 424 (425, 426): ILR (1946) Nag 482 (DB) * AIR 1968 Andh Pra 239 (248): (1968) 2 Andh WR 301 (FB). (Subject-matter incapable of valuation — Leave to appeal to Supreme Court cannot be asked as a matter of right but only under specific provisions for granting leave.)

(2) The subject-matter in dispute must be of the appealable value both in the Court of first instance and on appeal to the Supreme Court. (1901) 24 All 174 (177): 29 Ind App 40 (PC) * AIR 1931 PC 125 (126, 127) * AIR 1954 Nag 267 (268) (DB) * AIR 1952 Assam 134 (137) (DB).

(3) The terms of this section must be strictly construed., AIR 1925 PC 159 (160): 52 Cal 650: 52 Ind App 207 * AIR 1932 Mad 46 (47, 52) (DB) * (1901) 23 All 415 (419): 28 Ind App 182 (PC) * (1903) 31 Cal 57 (74): 30 Ind App 238 (PC) * (1903) 31 Cal 305 (310): 31 Ind App 24 (PC).

(4) "Subject-matter of the suit" must be deemed to include proceedings other than suits which may result in an appealable decree or order. AIR 1949 FC 60 (62): 1948 FCR 228: ILR (1949) 2 Cal 496 * (1881) 3 All 633 (635) (FB) * AIR 1956 All 735 (735, 736): ILR (1957) 1 All 258 (DB).

(5) Once a proceeding reaches the High Court further rights of appeal are governed by the provisions of the Code and if the requirements of Section 109 and this section are satisfied a further appeal will lie. AIR 1949 FC 60 (62): 1948 FCR 228: ILR (1949) 2 Cal 496.

(6) When there is a conflict between the provisions of this section and the provisions of Article 133 of the Constitution the latter will prevail. AIR 1952 Pat 450 (452): 30 Pat 1274 (DB) * AIR 1957 All 28 (32, 33) (DB).

(7) Where the suit is instituted before the date of the Constitution the parties thereto have from the date of institution of the suit a vested right of appeal upon terms and conditions then in force. Such a vested right of appeal is a matter which does not fall within Article 133 of the Constitution. AIR 1953 Nag 313 (313): ILR (1953) Nag 822 (DB) * AIR 1957 SC 540 (564): 1957 SCR 488. (AIR 1954 SC 355. Dist., AIR 1951 Mad 1051; AIR 1953 Mad 878 (FB); AIR 1954 Cal 289; AIR 1956 All 321; AIR 1956 All 638 and AIR 1956 Punj 228, Overruled.) * AIR 1952 Bom 303 (305): ILR (1952) Bom 906 (DB) * AIR 1959 All 249 (250): 1958 All LJ 845 (DB).

(8) Where an application for leave to appeal has been filed before the Constitution came into force, Art. 133 of the Constitution has no application and the right of appeal would be governed by the provisions of Sections 109 and 110 as they stood on the date of the application. AIR 1952 Mad 81 (82): ILR (1952) Mad 1 (FB) * AIR 1951 Orissa 141 (142): ILR (1950) Cut 663 (DB) * AIR 1950 Nag 222 (223): ILR (1950) Nag 830 (DB).

(9) Section 110 provides for an appeal to the Supreme Court only from appellate order of High Court and not against a revisional order. AIR 1963 All 191 (193) (DB).

**Section 110 — Note 1 (contd.)**

(10) The requirements of Section 110 are embodied in Clauses (a) and (b) of Article 133 and the concluding sentence of Article 133 (1). AIR 1959 All 572 (573): 1959 All LJ 358 (FB).

**2. Valuation of the subject-matter in the Court of first instance.**— (1) In order that an appeal may lie to the Supreme Court under the first paragraph of this section, the value of the subject-matter of the suit in the Court of first instance should be Rs. 20,000 or upwards. AIR 1953 Madh B 209 (216): ILR (1952) Madh B 536 (FB) * AIR 1954 Him Pra 81 (81).

(2) The value must be the value at the date of the suit and not a future increase or decrease thereof. AIR 1954 Nag 266 (269) (DB) * AIR 1951 Cal 409 (410) (DB) * AIR 1916 Mad 985 (987): 39 Mad 843 (DB) * AIR 1931 PC 125 (127).

(3) The value must be the market value as ascertained by ordinary commercial standards, of the property or of the detriment to the applicant's interests if the right claimed is negatived. (1880) 4 Bom 515 (527) (FB) * AIR 1919 Pat 305 (307): 4 Pat L Jour 415 (DB) * (1903) 31 Cal 301 (304) (SB) * AIR 1918 Mad 632 (633, 634) (DB) * (1939) 43 Cal WN 432 (434) (DB) * AIR 1937 Bom 181 (182): ILR (1937) Bom 705 (DB).

(4) A sues for partition and possession of his one-third share of certain joint property worth Rs. 15,000. The value of the subject-matter of the suit is the market value of the plaintiff's share of the properties, i.e., Rs. 5,000. AIR 1944 PC 65 (66): 71 Ind App 142: ILR (1941) Kar (PC) 235: ILR (1944) Bom 745 * AIR 1925 Bom 137 (138): 49 Bom 149 (DB) * AIR 1920 Bom 418 (419): 44 Bom 104 (DB).

(5) The applicant for leave to appeal is not bound by the fiscal standards under the Court-fees and Suits Valuation Acts, by which he has valued the suit, but is entitled to show the actual or market value of the claim made. AIR 1949 Mad 739 (740): ILR (1950) Mad 10 (FB) * AIR 1957 Orissa 109 (111): ILR (1957) Cut 215 (DB) * AIR 1956 Raj 169 (170): ILR (1956) 6 Raj 531 (DB) * ILR (1954) Hyd 964 (967) (DB) * AIR 1949 Pat 91 (93): 26 Pat 614 (DB) * AIR 1933 All 15 (16): 54 All 941 (DB) * AIR 1932 Mad 125 (127): 55 Mad 106 (DB) * (1904) 31 Cal 301 (303) (SB) * ILR (1964) 2 Mad 517 (518). (It would be open to the party to go behind the valuation adopted in the plaint or in the memorandum of appeal and show the real value there of.)

(6) Where the applicant has once valued the claim at its market value, or where he, having a discretion to value his claim in alternative ways, chooses to value his claim in a particular way, he cannot, thereafter, be allowed to show that such value did not represent that real value. AIR 1954 Cal 289 (294) (DB) * AIR 1954 Orissa 114 (115) (DB) * AIR 1923 Mad 125 (126, 128) (DB) * AIR 1934 Cal 809 (810) (DB).

(7) A valuation of the property by the plaintiff which is admitted or is not objected to by the defendant, cannot be questioned by him subsequently for the purpose of securing admission of an appeal to the Supreme Court, or of opposing an application for leave to appeal to the Supreme Court. AIR 1950 Nag 226 (228): ILR (1950) Nag 336 (DB) * AIR 1950 Pat 305 (306) (DB) * AIR 1927 Mad 862 (862) (DB) * AIR 1923 Oudh 93 (96): 26 Oudh Cas 24 (DB) * AIR 1941 Pat 269 (270): 20 Pat 459 (SB) * AIR 1955 Punj 144 (144) (DB) * AIR 1968 Delhi 83 (84) (DB) * AIR 1962 Orissa 159 (161).

[But see AIR 1961 Mad 511 (518): (1962) 1 Mad LJ 65 (FB). (Valuation adopted in plaint and accepted for appeal by defendant — Party applying for certificate can show higher and real value of subject-matter — He is not precluded from doing so by provisions of Section 11, Order 7, Rule 1, Order 8, Rule 1, Order 8, Rule 2 or Order 41, Rule 1 (2), C. P. Code or Section 115 of Evidence Act because statutory right of appeal cannot be curtailed by erroneous statement as to valuation. S. C. Petn. Nos. 7 and 8 of 1958 (Mad.), Overruled.)]

(8) Under Article 133 of the Constitution the relevant value is not the value of the subject-matter of the suit but the value of the subject-matter of the dispute. The language of Article 133 appears to be more appropriate and accurate. AIR 1954 Cal 289 (292) (DB) * AIR 1958 Cal 189 (190) (DB) * (1955) 59 Cal WN 681 (683) (DB).

[See AIR 1961 Him Pra 27 (30).]

(9) Suit for eviction against the tenant — Subject-matter of the suit is tenancy and not demised property — Value of subject-matter is value of tenancy — Unless the tenant's interest is of value more than Rs. 20,000 certificate cannot be granted. AIR 1968 Cal 316 (318) (DB).

(10) The value of the subject-matter in a suit for specific performance of a contract for sale or purchase of property is value of property and not the difference between actual market price and contract price. AIR 1966 Cal 205 (211, 212): ILR (1966) 1 Cal 237 (FB).

(11) Question of joint mutavalliship — Subject-matter is incapable of pecuniary valuation — Question relates to office and not wakf-properties — Petition for leave to appeal to Supreme Court is not maintainable. AIR 1966 Mad 313 (314, 315): (1965) 2 Mad LJ 482 (DB).

(12) The expression 'subject-matter of suit,' refers in a money suit to the amount claimed and in a suit relating to property, to plaintiffs right or title alleged to have been infringed. In a case in which a plaintiff has the option to value the relief

**Section 110 — Note 2 (contd.)**
at any amount such value may also be considered to be the value of the subject-matter of the suit. AIR 1963 Him Pra 9 (10 to 12).

**3. Mesne profits, interest and costs after date of suit.** — (1) Neither interest nor mesne profits after the date of suit can be included for the purpose of ascertaining the value of the subject-matter of the suit under Section 110. AIR 1930 PC 44 (44, 45): 53 Mad 167: 57 Ind App 56 * AIR 1916 Mad 985 (989): 39 Mad 843 * AIR 1954 Cal 289 (293) (DB) * AIR 1937 All 169 (170): ILR (1937) All 405 (DB).

(2) The costs of the suit ought not to be added to the subject-matter in order to bring the valuation up to the appealable amount. AIR 1942 Pesh 6 (7) (DB) * AIR 1941 Pat 255 (258): 20 Pat 481 (FB) * (1892) 15 Mad 237 (240) (FB).

**4. Sum actually at stake may not represent the true value.** — (1) The sum of money actually at stake may not represent the true value. The proceeding, may, in many cases, raise the entire question of the contract relations between the parties and that question may, settled one way or the other, affect a much greater value, and its determination may govern rights and liabilities of a value beyond the limits. AIR 1922 PC 257 (258): 45 Mad 475: 49 Ind App 211.

**5. Valuation of subject-matter in dispute on appeal.** — (1) The amount or value of the subject-matter in dispute on appeal to the Supreme Court must be Rs. 20,000 or upwards. Such amount or value is the amount or value of the subject-matter in dispute at the date of the decree of the High Court under appeal. AIR 1932 Lah 526 (527) (DB) * (1967) 1 SCWR 328 (329). (When the amount or value is Rs. 20,000 or upwards and the judgment is of reversal the appellant is not required to show that appeal raises a substantial question of law.) * AIR 1964 Mad 314 (317): (1964) 1 Mad LJ 7 (DB) * AIR 1964 Tripura 23 (25). (Value of subject-matter in dispute in Judicial Commissioner's Court not material.) * AIR 1959 All 249 (251): 1958 All LJ 845 (DB).

(2) The true test as regards the amount or value of the subject-matter in dispute on appeal is, what is really at stake in the appeal itself. It does not mean the amount or value of the subject-matter of all disputes between the parties. AIR 1953 Cal 509 (512) (DB) * AIR 1966 Madh Pra 92 (95): 1965 MPLJ 787. (Application for leave to appeal to Supreme Court by purchaser from mortgagee — Mortgage amount less than twenty thousand — Purchase price of purchaser more than 20 thousand — It is the value of property in dispute to purchaser of mortgage that must be considered.) * AIR 1965 Andh Pra 13 (16): (1964) 1 Andh LT 305 (DB). (Portion of subject-matter in relation to which no prejudice suffered cannot be taken into account.)

(3) Where an appeal is sought to be filed against a decree allowing a claim for money or mesne profits against the appellant, interest or mesne profits up to the date of the decree should be taken into account in calculating the value of the appeal. But interest or mesne profits after the date of the decree cannot be taken into account. AIR 1941 Pat 255 (256): 20 Pat 481 (FB) * AIR 1951 Pat 612 (613): 30 Pat 438 (DB) * AIR 1926 Bom 265 (265): 50 Bom 160 (DB) * AIR 1918 Mad 1178 (1178) (DB).

(4) Where a suit is decreed by the trial Court but dismissed by the High Court in appeal and the plaintiff seeks to appeal to the Supreme Court, interest after the decree of the trial Court cannot be taken into account in valuing the appeal to the Supreme Court. AIR 1942 Mad 535 (538): ILR (1942) Mad 618 (DB) * AIR 1941 Pat 255 (259): 20 Pat 481 (FB).

(5) Where a suit is decreed by the trial Court and dismissed by the High Court on appeal, in valuing a proposed appeal by the plaintiff to the Supreme Court the costs awarded by the trial Court cannot be taken into consideration. AIR 1942 Pesh 6 (7) (DB).

(6) Suit for compensation on breach of contract — Compensation claimed in the shape of loss of profits — Necessary expenses must be deducted from gross profits for valuation of subject-matter. AIR 1965 Andh Pra 13 (16): (1964) 1 Andh LT 305 (DB).

**6. Several appeals from a single decree.** — (1) Where, in a suit to set aside different alienations by a Hindu widow, the plaintiff reversioner obtained a decree in his favour in the first Court and on separate appeals being filed by the alienees, the High Court drew up one decree and the plaintiff applied for leave to appeal to His Majesty in Council, it was held that the application must be considered as if a separate decree had been passed in each appeal, and that, accordingly, leave could be granted only in those appeals in which the subject matter was over Rs. 10,000 in value. AIR 1919 Mad 275 (275): 42 Mad 228 (DB) ** (1902) 6 Cal WN 41 (42, 43) (DB)** AIR 1916 Mad 943 (944) (DB).

[But see AIR 1936 All 832 (833): ILR (1937) All 105 (DB).]

(2) A wife sued to set aside several alienations in favour of several defendants on the ground that they were made by her husband when he was of unsound mind and under undue influence. The High Court decreed the suit on appeal. Some of the alienees applied for leave to appeal. The aggregate value of the properties conveyed to these alienees being above Rs. 10,000, the High Court granted leave in spite of the fact that the value of the property transferred to each of them was

**Section 110 — Note 6 (contd.)**
below Rs. 10,000. It was held by their Lordships of the Privy Council that leave was rightly granted by the High Court inasmuch as there was indeed but one matter in dispute in appeal. AIR 1948 PC 97 (98): 75 Ind App 153: ILR (1949) Mad 211.

**7. "Or the judgment, decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value".** — (1) Where the value of the subject-matter of the suit in the Court of first instance or the value of the subject-matter in dispute on appeal to the Privy Council is less than Rs. 10,000, a certificate can be granted even in such a case under the second paragraph of the section if the decree or final order involves some claim or question to or respecting property of the amount or value of Rs. 10,000 or upwards. AIR 1938 Mad 352 (353) (SB)** AIR 1958 Pat 26 (27)** AIR 1956 All 348 (349) (DB)** AIR 1939 Mad 742 (743): ILR (1939) Mad 838 (DB).

[See however AIR 1960 Andh Pra 286 (292): (1961) 1 Andh WR 82 (FB). (In execution of a money decree for Rs. 10,000, objection to attachment of property having failed a suit under Order 21, Rule 63 C. P. C. was filed — It was decreed in part but on appeal the High Court gave full decree — On application under Section 110, filed by the decree-holder alleging the property to be worth Rs. 20,000, it was held that the subject-matter of suit or of appeal was not property attached and the decree-holder was not entitled to invoke Section 110, Para. 2. AIR 1937 All 169 and AIR 1948 All 51 and AIR 1941 Pat 288, Dissented from.)]

(2) The words "some claim or question to or respecting property" must be interpreted to mean "some claim or question to or respecting, property additional to, or other than, the actual subject-matter in dispute in the appeal. AIR 1956 All 348 (349) (DB) * AIR 1955 Hyd 209 (211): ILR (1955) Hyd 478 (DB) * AIR 1953 Pat 377 (378) (DB) * AIR 1953 Raj 36 (37): ILR (1951) 1 Raj 832 (DB) * AIR 1916 Mad 985 (988): 39 Mad 843 (DB) * AIR 1930 PC 44 (45): 55 Mad 167: 57 Ind App 56 * AIR 1962 Orissa 154 (156): 28 Cut LT 159 (DB). (Suit for ejectment barred by rent control legislation and dismissed by High Court — Total valuation on calculation of rent far below Rs. 20,000 — Leave to appeal to Supreme Court could not be granted.)

(3) A claim or question to or respecting other property cannot be said to be involved under this paragraph unless the decree or order has the effect of estopping, either by the rule of res judicata or otherwise, a party from claiming rights in or agitating the same question in respect of such other property. AIR 1932 Mad 125 (128): 55 Mad 106 (DB) * AIR 1922 Pat 611 (613) (DB) * AIR 1923 Cal 451 (452) (DB) * (1907) 31 Cal 466 (469) (DB).

[But see 1904 Pun Re No. 75, p. 255 (257).]

(4) A claim or question which is not essential or relevant for the decision or is too remote or is in gremio futuri and may never materialise cannot be said to be involved directly or indirectly in the decree or order. AIR 1950 All 242 (244): ILR (1951) All 157 (DB) * AIR 1952 Punj 379 (380) (DB) * AIR 1925 PC 159 (160): 52 Cal 650 (654): 52 Ind App 207 * (1938) 42 Cal WN 298 (300) (DB) * AIR 1950 East Punj 195 (201) (DB) * (1902) 24 All 236 (238) (DB) * AIR 1933 All 8 (10): 54 All 431 (DB).

(5) A sues for partition and possession of his share in family property. The decision in the suit does not involve a claim or question to or respecting the other shares. AIR 1920 Bom 418 (419): 44 Bom 104 (107) (DB) * AIR 1957 Him Pra 9 (11) * AIR 1938 Mad 666 (666, 667): ILR (1938) Mad 923 (DB) * AIR 1944 PC 65 (66): 71 Ind App 142: ILR (1944) Bom 745: ILR (1944) Kar (PC) 235. (Impliedly overrules AIR 1933 All 177 and 3 Cal LJ 257.) * AIR 1956 All 321 (322) (DB) * (52) AIR 1952 Raj 11 (12): ILR (1951) 1 Raj 358 (DB).

(6) Second paragraph of this section was intended to apply to cases where the subject-matter of the dispute was not a sum of money or a specific piece of property but was something which was incapable of a precise or arithmetical valuation and which therefore, fell outside the ambit of the first paragraph. AIR 1956 Raj 169 (170): ILR (1956) 6 Raj 531 (DB) * AIR 1953 Pat 377 (378) (DB) * AIR 1968 Delhi 83 (85) (DB).

[But see AIR 1957 Orissa 109 (111): ILR (1957) Cut 215 (DB).]

(7) Where the prayer in the petition for leave is limited to a certificate under Section 109 (c) the petitioner cannot be allowed to state, at the stage of argument, that the appeal fulfils the requirements of second paragraph of this section, particularly when the petition contains no allegation as to the value of the property at the date of the decree of the High Court. AIR 1953 Assam 21 (22) (DB).

(8) Petition under Article 226 questioning validity of Act dismissed — Subject-matter of dispute cannot be said to have value in terms of money — Held application was not maintainable. (1967) 2 Andh WR 135.

**8. Appeal from decree of affirmance must involve a substantial question of law.** — (1) Where the judgment, decree or final order appealed from is one of affirmance, there must exist a substantial question of law in addition to the requirements as to value mentioned in the first and second paragraphs of the section. AIR 1954 Orissa 114 (115) (DB) * (1912) 34 All 455 (463):

**Section 110 — Note 8 (contd.)**
39 Ind App 156: 15 Oudh Cas 271 (PC) * (1901) 23 All 227 (231): 28 Ind App 11 (PC) * (1901) 23 All 415 (418, 419): 28 Ind App 182 (PC) * AIR 1914 Oudh 41 (42): 16 Oudh Cas 264 (DB) * (1902) 25 Mad 215 (219): 29 Ind App 38 (PC) * AIR 1938 PC 165 (166): 65 Ind App 182: ILR (1938) All 601: 32 Sind LR 531.

(2) The affirmance of a "decision" means the affirmance of the decree and not necessarily of the judgment. AIR 1956 Pat 325 (328): 35 Pat 499 (FB) * AIR 1924 Pat 468 (470) (DB) * (1903) 25 All 109 (114): 30 Ind App 35 (PC) * AIR 1935 All 374 (377): 57 All 873 (FB).

[See however AIR 1951 Punj 313 (316, 317): ILR (1950) Punj 377 (DB).]

(3) Where the decree of the Court below is affirmed by the decree or final order appealed from, the latter will be a decree of affirmance even though it is based on grounds different from those adopted by the lower Court or even where the appeal has been dismissed without any hearing as for example, for default, non-prosecution, etc. AIR 1956 Pat 325 (328): 35 Pat 499 (FB) * AIR 1949 Bom 134 (135) (DB) * (1903) 25 All 109 (114): 30 Ind App 35 (PC) * AIR 1933 Pat 703 (704) (SB) * AIR 1948 All 375 (381): ILR (1949) All 49 (DB) * (1898) 20 All 367 (368, 369) (DB) * (1912) 16 Ind Cas 486 (486) (DB) (Mad) * AIR 1915 All 327 (327) (DB). (Dismissal for default.)

[But see (1889) 16 Cal 287 (299).]

**9. Affirmance — Meaning of.** — (1) The affirmance must be as regards the subject-matter of the suit dealt with by the Court below. AIR 1927 Pat 379 (381) (DB) * AIR 1915 All 327 (327) (DB) * AIR 1936 Mad 881 (883): ILR (1937) Mad 121 (DB).

(2) Where there is such affirmance of a decree of the Court below, a reversal or variation merely on a matter which is not the subject-matter of the suit will not take the appellate decree out of the class of decrees of affirmance. AIR 1955 All 680 (682, 683) (DB) * AIR 1944 Mad 269 (271): ILR (1944) Mad 890 (DB).

(3) A variation of the lower Court's decree in the matter of costs or grant or extension of time for payment of the amount decreed or the correction of an error in the lower Court's decree due to oversight does not prevent the appellate decree from being a decree of affirmance. AIR 1953 SC 521 (523): 1954 SCR 506: ILR (1954) 1 All 168 * AIR 1956 Madh B 145 (150): ILR (1956) Madh B 192 (DB) * AIR 1943 All 358 (360): ILR (1943) All 840 (DB) * AIR 1928 Pat 190 (191) (DB) * AIR 1927 Pat 379 (381) (DB) * AIR 1956 Hyd 145 (145): ILR (1956) Hyd 377 (DB) * AIR 1961 SC 1795 (1804): (1962) 2 SCR 452. (Variation as to costs.)

(3-A) Unlike the order of costs which is entirely in the discretion of the Court, an order as to interest under Section 34, forms part of the dispute between the parties, and if a variation is made in regard to it, it is an integral part of the decision or the decree and would affect the character of the appellate decree. AIR 1961 SC 1795 (1804): (1962) 2 SCR 452.

(3-B) Any variance with reference to extraneous matters or on matter consequential on the final order therein will not be sufficient to take the case out of the class of orders of affirmance. AIR 1965 Mad 478 (479, 480): 77 Mad LW 439. (The directions as to the disposal of the matter by the Appellate Tribunal on the quashing are extraneous to the subject-matter of the writ proceedings and relate to the consequences of the quashing.)

(3-C) In determining whether the appellate decree passed by the High Court is one of affirmance, the appellate decree must be considered as a whole in relation to the decision of the trial Court similarly considered as a whole. That is the proper approach in applying the test of affirmance. If there is a variation made in the appellate decree it is not a decree of affirmance and this is not affected either by the extent of the variation made or by the fact that the variation is made in favour of the intending appellant and not against him. AIR 1961 SC 1795 (1797, 1801): (1962) 2 SCR 452 * AIR 1962 Mad 490 (492): 75 Mad LW 480 (DB).

(4) Law prior to AIR 1961 SC 1795 which must be treated as impliedly overruled after the S. C. decision — Where the decree of the Court below comprises different matters and the decree of the High Court affirms the lower Court's decree in respect of some of these matters and varies or reverses such decree in respect of other matters, then, if the proposed appeal to the Supreme Court is in respect of a matter in regard to which the lower Court's decree has been affirmed, the case would come within the third paragraph of this section and no leave for appeal to the Supreme Court can be granted unless such appeal involves a substantial question of law. AIR 1952 All 942 (951): ILR (1952) 2 All 605 (FB). (AIR 1946 All 262: ILR (1946) All 328, Overruled.) * AIR 1952 Mad 771 (774, 776): ILR (1953) Mad 1 (FB) * AIR 1956 Madh B 145 (147): ILR (1956) Madh B 192 (DB) * AIR 1955 Hyd 216 (218): ILR (1955) Hyd 39 (DB) * AIR 1953 Nag 249 (249, 250): ILR (1953) Nag 784 (DB) * AIR 1944 Lah 458 (460): ILR (1945) Lah 242 (FB). (AIR 1944 Lah 329: ILR (1945) Lah 156 (FB), Reconsidered and approved.) * AIR 1935 Cal 146 (146): 62 Cal 257 (DB).

[But see AIR 1956 Pat 325 (329. 338, 340): 35 Pat 499 (FB). (AIR 1936 Pat

**Section 110 — Note 9 (contd.)**
553: 15 Pat 637, Overruled.) * 54 Cal WN 538 (539) (DB) * AIR 1948 Lah 1 (4) (DB) * AIR 1943 Pesh 45 (46) * AIR 1941 Pat 269 (276): 20 Pat 459 (SB). (AIR 1936 Pat 553: 15 Pat 637, Overruled.) * AIR 1935 Oudh 489 (490): 11 Luck 320 (DB). (Note: These cases, after the decision in AIR 1961 SC 1795, must be treated as good law.)]

(5) Law prior to AIR 1961 SC 1795 which must be treated as impliedly overruled after the S. C. decision — Where the appeal to the Supreme Court involves also the matters in regard to which the lower Court's decree has been reversed or varied, the third paragraph of this section will not apply and no substantial question of law need be shown to be involved in the appeal. AIR 1952 All 942 (951): ILR (1952) 2 All 605 (FB) * AIR 1952 Mad 771 (774, 776): ILR (1953) Mad 1 (FB) * AIR 1950 Mad 124 (128, 134, 135): ILR (1950) Mad 381 (DB) * AIR 1946 Mad 539 (541, 542): ILR (1947) Mad 6 (FB). (AIR 1926 Mad 1024, Overruled.)

[See however AIR 1957 Punj 117 (120, 121): ILR (1957) Punj 255 (FB). (AIR 1951 Punj 313, Overruled. Note: These cases, after the decision in AIR 1961 SC 1795, must be treated as good law.)]

(6) The plaintiff sues the defendant for Rs. 20,000 on a promissory note. The lower Court passes a decree in favour of the plaintiff for Rs. 8000 disallowing his claim for the balance, viz., Rs. 12,000. The High Court on appeal varies the decree by enhancing the amount decreed to Rs. 9000. The plaintiff wants to appeal to the Privy Council on the ground that he is entitled to the balance of the amount also viz., Rs. 11,000. The High Court's decree cannot be said to be one of affirmance of the lower Court's decree. AIR 1925 PC 60 (60): 51 Ind App 319: 51 Cal 969 * AIR 1941 All 66 (68): ILR (1941) All 180 (FB) * AIR 1956 Hyd 145 (145): ILR (1956) Hyd 377 (DB) * AIR 1932 Nag 118 (120): 28 Nag LR 142 (DB) * AIR 1961 SC 1795 (1797, 1798, 1802): (1962) 2 SCR 452. (8 Cal WN 294, Overruled.)

(7) Where the appellate Court makes a variation in the decision of the trial Court either because a concession has been made in that behalf or the variation has been obtained by parties by consent or a part of the subject-matter covered by the decree has been withdrawn, such variation does not affect the character of the appellate decree. Variation or affirmance by the appeal Court should be an act of adjudication. AIR 1961 SC 1795 (1804): (1962) 2 SCR 452.

(8) The expression of a different view in appeal as to consequences flowing from particular adjudication on merits between parties in writ petitions cannot make decision in appeal one of variance with that of first Court as required under Article 133 (1) (c). Thus where the High Court quashes the orders of the Tribunal in a writ appeal and there is a reference in the judgment that all the appeals before the Tribunal will get revived, such reference will not make the decision in the writ appeal one of variance on the ground that even the appeals from which no writ appeals were filed would get revived. AIR 1965 Mad 478 (479, 480): 77 Mad LW 439 (DB).

**9-A. Doctrine of merger.. —** (1) Where there are two orders, one by the inferior authority and the other by a superior authority, passed in an appeal or revision the question whether there is a fusion or merger of the two orders by the application of the doctrine of merger depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction. AIR 1967 SC 681 (683): (1967) 1 SCR 732.

[See also AIR 1963 Mad 337: 76 Mad LW 313. (Appeal — Merger of lower Court's order — Appeal merely rejected as not maintainable — No merger.)]

(2) See also Notes under Sections 11, 38, 96, 115 and 148.

**10. "Involve". —** (1) Where there are concurrent findings of fact and no question of law would arise unless the findings of fact are also re-opened, no question of law can be said to be involved in the appeal. (1901) 23 All 94 (98) (DB) * (1894) 16 All 274 (275, 276) (PC) * (1891) 18 Cal 23 (30): 17 Ind App 122 (PC).

(2) The mere circumstance that a question of law is raised in a case would not justify the inference that the proposed appeal involves a substantial question of law unless it is necessary to decide the question of law for a proper decision of the case. AIR 1950 Madh B 81 (82) (DB) * AIR 1949 All 632 (634): 50 Cri L Jour 958.

(3) The mere fact that a question of law seems to arise in the appeal is not sufficient for granting leave under the section. It must definitely and clearly arise. AIR 1943 Mad 67 (69) (DB) * (1902) 25 Mad 215 (219, 220): 23 Ind App 38 (PC).

**11. Substantial question of law. —** (1) It is not enough if a mere question of law is involved. It must be a substantial one. AIR 1951 Punj 313 (315): ILR (1950) Punj 377 (DB) * AIR 1957 All 28 (36) (DB) * AIR 1949 Bom 134 (135) (DB) * AIR 1923 Mad 30 (31) (DB).

(2) Proper test for determining whether a question of law is substantial would be whether it is of general public importance or whether it directly and substantially affects the rights of the parties. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is mere question of applying those principles or that the plea raised is palpably absurd, the question would not

**Section 110 — Note 11 (contd.)**
be a substantial question of law. Thus a construction of document of title or of document which is the foundation of rights of parties necessarily raises a question of law. AIR 1962 SC 1314 (1318): (1962) Supp 3 SCR 549.

(3) The function of the Privy Council being one to declare the law and not to alter it, a question of law which has been definitely settled by the Privy Council, the Supreme Court or the High Courts or on which there is or may be no difference of opinion is not substantial question of law. AIR 1917 PC 71 (76): 40 Mad 793: 44 Ind App 261 * AIR 1951 Mad 969 (973): ILR (1952) Mad 264 (FB) * AIR 1956 Madh B 145 (149): ILR (1956) Madh B 192 (DB) * AIR 1952 Madh B 149 (151) (FB) * AIR 1956 Pat 526 (527) (DB).

(4) Although a point has not been directly decided by Courts, if the principles clearly applicable to the case are well established, the question is not a substantial question of law, and the difficulty in the application of such principles to the case cannot render it substantial. AIR 1951 Mad 969 (973): ILR (1952) Mad 264 (FB) * AIR 1956 Him Pra 65 (68) * AIR 1952 Punj 191 (193) (DB) * AIR 1949 Bom 134 (135) (DB) * AIR 1948 Mad 111 (113) (DB) * AIR 1964 Him Pra 17 (19).

(5) The words 'substantial question of law' mean a substantial question of law as between the parties in the case involved, and not merely a question of general importance. AIR 1953 SC 521 (523): 1954 SCR 506: ILR (1954) 1 All 168 * AIR 1951 Mad 969 (972): ILR (1952) Mad 264 (FB) * AIR 1927 PC 110 (110): 2 Luck 93: 54 Ind App 126 * AIR 1928 PC 172 (173): 55 Cal 944: 55 Ind App 235.

(6) The mere appreciation of the effect of documentary evidence or the meaning of entries and terms in a document do not raise substantial questions of law. (1895) 22 Cal 600 (617, 618): 22 Ind App 59 (PC) * AIR 1952 Raj 11 (12): ILR (1951) 1 Raj 358 (DB) * AIR 1928 PC 243 (245): 55 Ind App 380 * AIR 1926 Nag 245 (245) (DB) * ('28) AIR 1928 All 19 (20) (DB).

(7) The existence of a custom or the nature of a tenure may under proper conditions involve substantial questions of law. AIR 1917 PC 33 (39): 40 Mad 709 (721): 44 Ind App 147 * AIR 1926 Nag 215 (215, 216) (DB) * (1909) 36 Cal 1 (18): 35 Ind App 195 (PC) * AIR 1923 Mad 443 (444) (DB) * AIR 1917 Cal 496 (496): 44 Cal 119 (125, 129).

(8) A question whether a testamentary disposition by a Hindu in favour of female heir confers on her only a limited estate in the absence of evidence that he intended to confer on her an absolute interest in the property is a substantial question of law. AIR 1954 SC 355 (357): 1955 SCR 51.

(9) Questions relating to ordinary items of accounting in the taking of accounts between a principal and agent do not form proper subject-matter for an appeal to His Majesty in Council. AIR 1945 PC 35 (36, (38): ILR (1945) Kar (PC) 174.

(10) Question as to the inclusion or exclusion of the ordinary items of accounting in the taking of a partnership account do not involve any question of principle and are not proper subject-matter for an appeal to His Majesty in Council. AIR 1944 PC 87 (87, 88): 71 Ind App 149: ILR (1945) Kar (PC) 10 * AIR 1957 All 28 (36) (DB).

(11) Question whether certain items should be allowed on one side or other in taking accounts of partnership is pure question of fact. AIR 1942 PC 61 (62): ILR (1942) Kar (PC) 157.

(12) When the entirety of the claims of one party against the other was actually referred to the arbitrators the question whether the items of claim which were included later for consideration by the arbitrators fell within the scope of this entirety was more or less a question of fact. There was no substantial question of law involved. AIR 1968 Cal 391 (394) (DB).

(13) Whether a contract is in the nature of a wagering contract depends upon the facts and circumstances of each case and is largely a question of fact. The principle on which an inference of wager can be based are well settled and does not involve a question of general importance. 1961 Raj LW 490: ILR (1961) 11 Raj 735.

(14) Right of High Court to act in revision and to cancel the permission given by the lower Court to sue in forma pauperis is not a question of public importance and therefore, not a substantial one. AIR 1952 Vin Pra 31 (32). (AIR 1942 Oudh 422, Rel. on.)

**12. "Court immediately below".** — (1) The test for determining the right to appeal to Supreme Court is not whether the judgment appealed from is of a Court subordinate but whether the judgment is of a Court immediately below. AIR 1963 SC 1279 (1287): (1964) 1 SCR 270.

(2) A single Judge of the High Court hearing either a proceeding as a Court of original jurisdiction or in exercise of appellate jurisdiction is a Court immediately below the Division Bench of the same High Court which hears an appeal against his judgment under Letters Patent. Appeal with certificate under Article 133 (1) (a) and (b) is therefore competent. (Difference in meaning of expressions "Court immediately below" and "subordinate Court" explained.). (AIR 1944 Lah 458 and AIR 1962 Andh Pra 346, Overruled.; AIR 1962 Mad 490 (492) (DB), Impliedly overruled.). AIR 1963 SC 1279 (1288): (1964) 1 SCR 270 * AIR 1963 SC 1322 (1323): (1964) 1 SCR 475 * 1962 Jab LJ 253.

**111. Bar of certain appeals.**—[Omitted by the Adaptation of Laws Order, 1950 [26-1-1950].]

**111A. Appeals to Federal Court.**—[Omitted by the Federal Court Act XXI of 1941, Section 2 [w. e. f. 1-9-1942].]

**112. Savings.**—[a][(1) Nothing contained in this Code shall be deemed—

(a) to affect the powers of the Supreme Court under Article 136 or any other provision of the Constitution, or

(b) to interfere with any rules made by the Supreme Court, and for the time being in force, for the presentation of appeals to that Court, or their conduct before that Court.]

(2) Nothing herein contained applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts.

[1882, 1877, S. 616; See O. 45.]

[a] Sub-section (1) was substituted by A. L. O., 1950 [26-1-1950].

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**Section 110 (contd.)**

**13. "Judgment, decree or final order".**—(1) Order of remand passed by the High Court where the principles finally determining the substantive rights of the parties are laid down is final within the meaning of Section 110. The mere fact that the implementation of such order of remand is to be done by the lower Court will not militate against its finality. AIR 1967 All 51 (56): 1966 All LJ 698 (FB).

(2) High Court in appeal upholding award and making it a rule of Court and directing decree to be prepared in accordance with it —Order amounts to judgment or a final order. AIR 1964 All 25 (27): 1963 All LJ 279 (DB).

(3) Order of High Court in appeal setting aside order of trial Court recording compromise — Order is neither "final order" nor "judgment". AIR 1961 All 245 (254, 260): 1960 All LJ 897 (FB).

(4) References answered by High Court under Income-tax Act — Decision on, is not judgment. AIR 1962 Andh Pra 391 (392): (1962) 1 Andh WR 184.

(5) Order on application under Sec. 34, Arbitration Act is not judgment, decree or final order. AIR 1961 Mys 98 (100): 38 Mys LJ 1035 (DB).

(6) Order dismissing writ petition in limine is not a final order. AIR 1968 Punj 81 (83): 69 Pun LR 93.

(7) Decision rendered by High Court under Section 19 (1) (f) of the Defence of India Act 1939 is not decree, judgment or final order — Provisions of Article 133 not attracted. AIR 1968 SC 384 (388): (1968) 1 SCR 372.

**Section 112 — Note 1**

(1) The Supreme Court will not ordinarily interfere with concurrent findings on pure questions of fact and review the evidence for the third time unless there are exceptional circumstances justifying a departure from this normal practice. AIR 1956 SC 446 (455): 1956 SCR 325: 35 Pat 573 * AIR 1954 SC 743 (745) * AIR 1957 SC 286 (293): 1956 SCR 889: ILR (1957) Punj 819 * AIR 1954 SC 601 (602) * AIR 1954 SC 579 (580): 1955 SCR 86 * AIR 1954 SC 505 (509): 1955 SCR 467 * AIR 1953 SC 235 (238): 1953 SCR 789 * AIR 1951 SC 214 (217): 1951 SCR 332: ILR (1952) 2 Cal 91 * AIR 1951 SC 288 (293): 1951 SCR 534: 30 Pat 931 * AIR 1951 SC 177 (179): 1951 SCR 277: 30 Pat 673 * AIR 1968 SC 859 (865): (1968) 2 SCR 211. (Calculation of house tax on basis of Carpet area — Question is one of fact.) * AIR 1967 SC 569 (571): (1967) 1 SCJ 830 * AIR 1964 SC 818 (821): 1963 Supp 2 SCR 995 * AIR 1963 SC 1719 (1721): (1964) 2 SCR 165. (Appeal from award of Industrial Tribunal.) * AIR 1963 SC 1756 (1758): (1964) 2 SCR 104. (Question whether the workman is a protected workman or not — Finding of Labour Court will be accepted as conclusive.)

(2) Though an appeal under S. 116-A. Representation of the People Act (1951) is an appeal as of right and is open both on facts and law, still the practice of the Court has uniformly been to give the greatest assurance to the assessment of evidence made by the judge who hears the witnesses and watches their demeanour and judges of their credibility in the first instance. AIR 1969 SC 395 (399): (1969) 1 SCJ 786. (Ground of credibility of witnesses — Appellate Court is at a disadvantage.)

(3) Where the findings have been reached by the Court below on extraneous considerations or by violating rules of procedure or by committing any breach of some provision of law, the Supreme Court will interfere with the concurrent findings of fact. AIR 1954 SC 601 (602) * AIR 1953 SC 235 (239): 1953 SCR 789 * AIR 1950 SC 172 (179): 1950 SCR 391.

(4) Closure of undertaking within the meaning of Section 25-FFF, Industrial Disputes Act, 1947 — Essence of matter is factum of closure by whatever reasons motivated — Question regarding closure

**Section 112 — Note 1 (contd.)**

not considered by industrial tribunal in proper manner — Decision set aside by Supreme Court. AIR 1969 SC 90 (98, 99): (1969) 1 SCJ 671.

(5) The question whether from the Wajib-ul-arz entries an inference of surrender or relinquishment of a sovereign right by Government can be properly drawn is not a pure question of fact and therefore, the Supreme Court can examine the entries and consider their true scope and legal effect. AIR 1957 SC 286 (293): 1956 SCR 889: ILR (1957) Punj 819.

(6) Where the value of the claim in the trial Court as well as before the Supreme Court is more than Rs. 20,000 and the judgment of the High Court under appeal has reversed the decree of the trial judge, the appellants are entitled to agitate both questions of fact and of law in the Supreme Court. AIR 1958 SC 512 (514): 1959 SCR 213.

(7) According to the practice of the Supreme Court, a point not raised in the lower Courts will not ordinarily be allowed to be raised before it. AIR 1952 SC 205 (207): 1952 SCR 775 * AIR 1958 SC 255 (263): 1958 SCR 895 * AIR 1958 SC 239 (244): 1958 SCR 1067 * AIR 1955 SC 298 (302): 1955 SCR 1311 * AIR 1954 SC 263 (266) * AIR 1954 SC 139 (143): 1954 SCR 842: ILR (1954) Cut 398 * AIR 1968 SC 1281 (1292): (1968) 3 SCR 512. (Appellants submitting to jurisdiction of revisional authority under U. P. Sales Tax Act on the question of validity of certain provisions of that Act — They cannot in the appeal before Supreme Court raise the question of jurisdiction.) * AIR 1967 SC 1131 (1134): (1967) 1 SCR 627 * AIR 1967 SC 276 (278): 1967 Cri LJ 285: (1966) Supp SCR 473 * AIR 1967 SC 844 (846): (1967) 2 SCR 7 * AIR 1966 SC 605 (613): (1966) 1 SCR 758 * AIR 1959 SC 488 (490): (1959) Supp (1) SCR 922. (Objection as to admissibility of evidence — Not allowed.) * AIR 1959 SC 135 (138): 1959 SCR 1350. (Point conceded in appeal before High Court — Cannot be raised in Supreme Court.)

(8) There is nothing to preclude a question, if it is purely one of law, being reopened, although previously abandoned, before the Supreme Court with its leave when it happens to be one of considerable importance. AIR 1955 SC 817 (819); (1955) 2 SCR 541 * AIR 1967 SC 465 (468): (1967) 1 SCR 489 . (Question as to rate of interest payable under Section 28, Land Acquisition Act is a pure question of law.) * AIR 1964 SC 907 (910, 911): (1964) 1 SCR 495. (Question of limitation raised not one purely of law but a mixed question of fact and law — Leave refused.) * AIR 1959 SC 559 (562): 1959 Supp (1) SCR 769. (Plea that by reason of illegality in contract of partnership the members can have no remedy against each other raises a pure question of law.)

(9) Where the contentions, though not specifically urged in the High Court or in the statement of case filed by the appellant in the Supreme Court, will still be allowed by the Supreme Court to be argued, if they are necessarily involved in the question which is the subject-matter of the appeal. AIR 1959 SC 135 (142): 1959 SCR 1350.

(10) Where the determination of the question raised required evidence in regard to the same, it would not be legtimate to allow those questions to be agitated for the first time in the Supreme Court. AIR 1958 SC 239 (245): 1958 SCR 1067.

(11) Disputed questions are decided on basis of affidavits and it is within discretion of High Court whether to allow a person who has sworn affidavit before it to be cross-examined or not — Exercise of discretion by High Court would not be lightly interfered with while hearing appeal by Special Leave. AIR 1967 SC 295 (300, 301): 1966 Supp SCR 311.

(12) Where the respondent's attitude was not bona fide and the main pleas taken by him were rejected by the Courts and the ground on which he succeeded was taken for the first time in appeal, the Supreme Court ordered the parties to bear their own costs throughout. AIR 1958 SC 512 (518): 1959 SCR 213.

(13) Where the employer failed to make out a claim for deduction of one of the items constituting a prior charge substantially as a result of the previous awards passed in its favour, the Supreme Court remanded the case to allow the employer an opportunity to make out a specific claim in respect of that item and lead evidence in support of the said claim. AIR 1958 SC 928 (933).

(14) New point raised before Supreme Court — Question raised one of construction of surety bond — All facts on which the appellant seeks to rely upon to be found only in the order sheet and there cannot be any facts outside the record — Remand in such a case would serve no useful purpose — Further, where the respondent also had not contended before the lower Court that he had sources other than the order sheet to prove his case he would not be prejudiced by allowing the appellant to raise the question for the first time in the Supreme Court. AIR 1964 SC 859 (862): (1964) 2 SCR 152.

(15) Delay in making application for preparation of list under Rule 394 of Rajasthan High Court Rules — High Court can condone delay in proper cases under Order 12, Rule 3 of Supreme Court Rules — Order 12, Rule 3 even overrides provisions of Civil P. C. by virtue of Section 112 of the Code. ILR (1961) 11 Raj 30.

(16) The High Court has a discretion in a proper case to extend the time even beyond the limit provided by Order 45, R. 7, because of the provisions of Order 12, R. 3 of the Supreme Court Rules, read with Section 112 of the Code of Civil Procedure.

## PART VIII

## REFERENCE, REVIEW AND REVISION

**113. Reference to High Court.**—Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit.

[a][Provided that where the Court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation or of any provision contained in an Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court, the Court shall state a case setting out its opinion and the reasons therefor, and refer the same for the opinion of the High Court.

Explanation.—In this section, "Regulation" means any Regulation of the Bengal, Bombay or Madras Code or regulation as defined in the General Clauses Act, 1897, or in the General Clauses Act of a State.]

[1882, 1877, S. 617; 1861, S. 28; See Order 46.]

[a] Added by the Codes of Civil and Criminal Procedure (Amendment) Act (24 of 1951), S. 2 (i) [1-5-1951].

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**Section 112 — Note 1 (contd.)**
AIR 1958 Pat 236 (237) (DB) * AIR 1956 Tripura 20 (21).

(17) Section 112 read in conjunction with Article 135 of the Constitution makes it clear that the power of review conferred by the Civil P. C. cannot be allowed to interfere with the Rules made by the Supreme Court. AIR 1951 Punj 43 (44): ILR (1951) Punj 265 (DB).

(18) Supreme Court Rules (1950) O. 12, Rule 3 and Orders 33 and 45 — Cancellation of leave to appeal to Supreme Court — Neither review of order nor fresh application for leave is competent. AIR 1962 Andh Pra 245 (246): (1962) 1 Andh WR 242.

### SECTION 113 — SYNOPSIS

**1-A. Scope.**
**1. "Court," meaning of.**
**2. Proviso.**
**3. New plea and new case.**

### TOPIC INDICATOR

Case involving question of validity of notification. See Note 2.

Case involving question of interpretation of Constitution. See Note 2.

Reference under Section 18, Land Acquisition Act.

**1-A. Scope.**— (1) A reference under Section 18 of the Land Acquisition Act (1894) cannot be equated with a reference under Section 113 of Civil P. C., because the latter has to be made by the Courts below under certain specified circumstances enumerated in that section. Therefore even if a reference under the Code does not abate, it would have no relevancy for deciding as to whether a reference under Section 18 of Land Acquisition Act would abate or not. ILR (1963) 2 Punj 442 (DB).

**1. "Court," meaning of.**— (1) The Deputy Commissioner of Oudh is not a Court within the meaning of Section 113. AIR 1928 Oudh 485 (485) (DB).

(2) A Collector hearing an application under the Bombay Mamlatdars' Courts Act is not a "Court" within the meaning of this section and cannot state a case for the opinion of the High Court. (1912) 14 Ind Cas 782 (783) (DB) (Bom) * 1896 Bom PJ 217 (217).

(3) The Tribunal under U. P. Town Improvement Act VIII of 1919 is a Court within the meaning of Section 113 of the Code of Civil Procedure. AIR 1959 All 513 (514): 1959 All LJ 133 (DB). (AIR 1932 Cal 660, Rel. on.)

(4) Election Commissioner under Madras Village Panchayats Act (10 of 1950) is not a 'Court' and cannot make reference. 1960 Andh LT 793: ILR (1961) 1 Andh Pra 531.

(5) Munsiff not being a Court of appeal or revision over a Magistrate any order of the Magistrate contrary to law and unsatisfactory should be brought to the notice of the High Court. AIR 1968 Orissa 82 (84): 1968 Cri LJ 646: 34 Cut LT 181.

(6) Sections 113 and 115 of the Code make it clear that "the Court immediately below" in Article 133 (1) of the Constitution as well as in Section 110 of the Code has reference to the Court only subordinate to the High Court. AIR 1962 Mad 490 (492) (DB).

**2. Proviso.**— (1) A reference under the proviso can only be made as to the validity of an Act, Ordinance or Regulation. AIR 1953 Hyd 52 (53): ILR (1952) Hyd 1039 (FB) * AIR 1954 Raj 233 (234): ILR (1954) 4 Raj 1 (DB) * AIR 1952 Raj 10

## STATE AMENDMENTS

**Andhra Pradesh**

In the Explanation, after the words "any Regulation of the Bengal, Bombay or Madras Code" insert "or any Regulation of the Madras Code in force, in the State of Andhra as it existed immediately before the 1st November, 1956."

—Andhra A. L. (Second Amendment) Order, 1954 [w. r. e. f. 1-10-1953] and Andh. Pra. (Amendment) Order, 1957 [w.r.e.f. 1-11-1956].

**Tamil Nadu**[a]

In the Explanation, after the words "any Regulation of the Bengal, Bombay or Madras Code" insert the words "or any Regulation of the Madras Code in force in the territories specified in the Second Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959 (LVI of 1959)."

—Mad. (Added Territories) A. L. O., 1961 [1-4-1960].

[a] Jurisdiction of the High Court of Madras has now been extended to the Union Territory of Pondicherry by the Pondicherry (Administration) Act, 1962 (49 of 1962) [16-9-1962].

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**Section 113 — Note 2 (contd.)**

(11): ILR (1951) 1 Raj 308 (DB) * AIR 1968 Bom 439 (442, 443): 70 Bom LR 100 (DB). (Important issue of law relating to merits of case must arise.) * (1967) 2 Andh WR 135 (DB).

(2) The opinion of the Court cannot be sought under this proviso about the validity of a notification issued under the provisions of an Act or its continued existence. AIR 1954 Raj 233 (234): ILR (1954) 4 Raj 1 (DB).

(3) A reference cannot be made under the proviso upon the validity of a custom. AIR 1952 Raj 10 (11): ILR (1951) 1 Raj 308 (DB).

(4) The absence of the reference and not the form in which the lower Court frames the question must be considered in order to see whether the reference relates to the validity of an Act. Ordinance or Regulation or to a notification. AIR 1954 Raj 233 (234): ILR (1954) 4 Raj 1 (DB).

(5) The proviso requires that the Court should also express its opinion on the question whether the Act is valid or invalid. If the Court does not express any opinion on the point, the reference would not be regarded as properly made. AIR 1953 Hyd 52 (53): ILR (1952) Hyd 1039 (FB) * AIR 1958 Mad 412 (413).

[See also AIR 1968 Bom 439 (443): 70 Bom LR 100 (DB). (Unwarranted reference by Judge questioning jurisdiction of District Judge to make an administrative order under Section 37, Bombay Civil Courts Act, 1869 — Plaintiff appearing by counsel to resist reference — Direction to referring Judge to pay personally costs of plaintiff's counsel made.)]

(6) An opinion is to be sought when the Court itself feels some doubts about the question and not when the Court has formed an opinion and acted upon it and that opinion is disagreed with by another Court. AIR 1959 All 659 (659): 1959 All LJ 592 (DB).

(7) The fact that the decree in the suit is subject to appeal and hence a reference will not lie under Order 46, Rule 1 will not bar a reference in a case which is strictly covered by this proviso. AIR 1954 Him Pra 23 (24) * AIR 1954 Raj 233 (234): ILR (1954) 4 Raj 1 (DB).

(8) Where the specific remedy under this section or Article 228 of the Constitution is open to a party, the High Court should not interfere under its extra-ordinary jurisdiction under Article 226 of the Constitution. ILR (1953) 3 Raj 1025 (1027) (DB).

(9) The question contemplated by the proviso to Section 113 is as to the validity of an Act or a provision in it while Article 228 of the Constitution has in view a question as to the interpretation of the Constitution. A question may, however, come within the proviso as also Article 228, as where the validity of a provision in an Act is challenged on the ground that it contravenes an article of the Constitution. AIR 1958 SC 293 (295): 1958 SCR 1150: ILR (1958) 1 All 506.

[See also AIR 1968 Pat 414 (414). (Question involving interpretation of Constitution — Application under Section 24, C. P. C. and Article 228 of Constitution found to be premature — Recourse to Section 113, C. P. C. is open to Court and parties.)]

(10) The object of the proviso seems to be that the Acts of legislature should be interpreted by the highest Tribunal in the State. AIR 1957 Andh Pra 567 (568): 1957 Cri L Jour 1066.

**3. New plea and new case.**— (1) New plea of estoppel by acquiescence cannot be taken in reference. (1964) 15 STC 335 (All). (Reference under Section 11 (1) of U. P. Sales Tax Act, 15 of 1948.)

(2) Where a case is stated and a question is referred by subordinate Tribunal to the High Court for decision and a new aspect of law touching that question has arisen subsequent to such reference. The High Court is justified in answering that question with reference to the new aspect of law provided it will not require the investigation of and finding on any facts out-

**114. Review.**—Subject as aforesaid, any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed by this Code, or

(c) by a decision on a reference from a Court of Small Causes,

may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.

[1882, 1877, S. 623; 1859, S. 376; See O. 47.]

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**Section 113 — Note 3 (contd.)**

side those in the statement of the case before the High Court. AIR 1967 Cal 338 (341, 342): 18 STC 379 (DB). (Case under Bengal Finance (Sales Tax) Act (6 of 1941), Section 21 (1).)

## SECTION 114 — SYNOPSIS

**1. Scope.**

**2. "May apply to the Court which passed the decree etc."**

**3. Powers of the Court of review.**

### TOPIC INDICATOR

Decree in Letters Patent Appeal. See Note 1.

Order in proceedings under Article 226 of the Constitution. See Note 1.

Recall of manifestly erroneous or invalid order. See Note 1.

Restoration proceedings and review. See Note 1.

Review of award under Land Acquisition Act. See Note 1.

**1. Scope.**— (1) Section 114 applies to decrees in appeals under the Letters Patent. AIR 1927 Bom 232 (233) * 1957 MPLJ 811 (814) (DB) * AIR 1953 Punj 106 (107): ILR (1953) Punj 379 (DB) * AIR 1917 Mad 670 (670): 40 Mad 651 (DB).

[But see (1904) 1 All L Jour 509 (511) * AIR 1931 All 242 (249): 53 All 535 (FB).]

(2) A review lies against an order refusing an application for leave to sue as a pauper. AIR 1956 Hyd 41 (42): ILR (1956) Hyd 143 (DB).

(3) The company law does not affect the power of review which is otherwise vested in a Court. AIR 1937 Lah 82 (83).

(4) Where an application for review of a preliminary decree was not disposed of on merits, it was held that a fresh application for review could be maintained. AIR 1957 Andh Pra 981 (987) (DB).

(5) The High Court does possess the power to recall and correct an invalid or manifestly erroneous order passed by it in the exercise of its jurisdiction under Article 226 in respect of the enforcement or vindication of civil rights. This power is derived not from Section 114 and Order 47 but from Section 151 of the Code. The aggrieved party is entitled to choose between coming to the original Court under Section 151, or going up in appeal, and its right to adopt the course it chooses cannot be abridged. AIR 1960 All 152 (153, 154): 1959 All LJ 798.

(6) The words 'appeal allowed by this Code' in Section 114, C. P. Code do not refer to the appeal the judgment in which is sought to be reviewed. The requirement of Clauses (a) and (b) of Section 114 is that that prospective appeal is one which is allowed by the Code (but not preferred), or one which is not allowed by the Code. What is really to be seen for the application of Section 114 is whether the decree or order which followed the judgment was or was not appealable under the Code. If it was, the additional condition required to be fulfilled was that no appeal should actually have been preferred. AIR 1961 All 381 (383, 385): 1961 All LJ 172 (FB).

[See also 1967 Cur LJ 234 (240): 1967 Pun LJ 140. (Case under Punjab Tenancy Act Section 82.)]

(7) In considering the question whether or not review lies under Section 114 a reference to the jurisdiction in exercise of which the judgment sought to be reviewed is made is not relevant. That jurisdiction may or may not have been derived from the Code. AIR 1961 All 381 (383, 385): 1961 All LJ 172 (FB).

(8) Though the power to review is given to every Court under Section 114 and Section 47, C. P. C., this is not any special power. The power is exercised by the Court where it has jurisdiction whether an original or appellate (including second appellate jurisdiction) to deal with the matter. AIR 1968 Raj 179 (181): 1968 Raj LW 190 (DB) * AIR 1961 All 381 (383, 386): 1961 All LJ 172 (FB). (Where, therefore, no appeal has been preferred, a decision given by the High Court in a special appeal is open to review.)

(9) Kerala Agriculturists Debt Relief Act (31 of 1958), (as amended by Act 2 of 1961), Section 22 (2) (a) — Application under — Court could review its decision under Section 114, C. P. C. (1963) 1 Ker LR 44 (46).

(10) Review is a remedy to be sought for and applied under special circumstances. The jurisdiction or power to review cannot be assumed or imported in the absence of any specific provision therefor or of even indication of the conditions for the exercise of it. AIR 1953 Mys 156 (159): 32 Mys LJ 12 (FB) * AIR 1966 All 26 (32): ILR

**Section 114 — Note 1 (contd.)**

(1965) 1 All 739 (DB). (Power of review must be specifically granted by statute.) * (1962-63) 23 FJR 453 (455) (Punj). (Employees' Insurance Court has no power of review.)

[See also 1967 Cur LJ 151 (155) (Punj). (Deputy commissioner held not to have power to review as it was not conferred on him by any provision of Punjab Gram-panchayat Act.)]

[See however 1966 Ker LT 290 (291): 1966 Ker LJ 454. (Original order passed by the Director of Public Instruction in violation of natural justice — Director of Public Instruction had no power to hear appeal from his order — If these contentions are correct a review application may be maintainable.)]

(11) Order refusing leave to file Letters Patent Appeal — Review lies. AIR 1963 Andh Pra 18 (20): (1962) 2 Andh WR 328.

(12) In a proper case an application for review would lie from an order passed in proceedings under Article 226 of the Constitution. The procedure will be such as is laid down in C. P. C. or the Rules framed by the High Court. AIR 1962 Cal 346 (348) * AIR 1960 Mad 177 (178, 179): 73 Mad LW 16. (Review granted as necessitated by special circumstances due to change in law in exercise of inherent powers — It was not strictly speaking a review within Order 47, Rule 1.)

(13) When a Court exercise its powers of review under Section 114 and Section 47 it acts in the exercise of the same jurisdiction in which it has passed its previous order or judgment under review. AIR 1968 Raj 179 (181): 1968 Raj LW 190 (DB).

(14) The fact that a person is given a right under Section 232 of Andhra Gram-panchayat Act (2 of 1964) to move the Government to call for records and examine the Orders passed by authorities specified in Clauses (b), (c) and (e) does not necessarily confer any right on him to have the orders reviewed. (1968) 1 Andh WR 278 (283) (DB).

(15) The provisions of C. P. C. relating to review are not applicable to the exercise of the power of review by Revenue Officers under Section 82 of the Punjab Tenancy Act. In the absence of any rules and any statutory provisions the general principles for exercise of review of jurisdiction will apply to proceedings for review by Revenue Officers. 1967 Cur LJ 234 (240): 1967 Pun LJ 140.

(16) An award under the Land Acquisition Act as amended in 1921 is deemed to be a decree. The provisions of review to the extent it is allowed by the Civil Procedure Code will be applicable as a review is not prohibited by the Land Acquisition Act. (1966) 1 Mad LJ 302 (304): 79 Mad LW 132.

(17) An order cancelling a certificate to file an appeal to the Supreme Court is passed under Order 12, Rule 3 of the Supreme Court rules the High Court cannot review the order as the Supreme Court rules do not permit such a course. Section 114 of C. P. C. does not apply to such a case by virtue of Section 112 and Section 4, C. P. C. AIR 1962 Andh Pra 245 (246): (1962) 1 Andh WR 24 (25) (DB).

(18) There cannot be inherent power, in all quasi-judicial tribunals to vary on the merits all quasi-judicial orders without regard to time and without adverting to the nature of the error or infirmity attaching to those orders. Such a proposition might come into conflict with the settled rule which attaches finality to orders. Correction of accidental slips or omissions or clerical or arithmetical mistakes or mistakes inadvertently made might well fall within the inherent power of Courts and quasi-judicial tribunals. AIR 1963 Punj 92 (94, 95): 64 Punj LR 884.

(19) Revisional and appellate powers — Directed at correcting errors of inferior Court — Power of Review — Directed towards correction of its own errors — Review can be made not only when there is error on the face of the record but also where new evidence has been discovered. Powers under S. 21 S. T. Act are akin to the power of review. (1968) 22 STC 26 (39) (DB) (All).

(20) A restoration proceeding and an application for review are essentially different. A review application cannot be considered in a broader sense to include restoration application. AIR 1964 Orissa 205 (209): ILR (1963) Cut 723.

(21) There can be a review of only a part of judgment — Order refusing leave to file letters patent appeal is only a part of the judgment of the second appellate Court. The judgment as a whole may be subject to review. AIR 1969 Mad 227 (231).

(22) Where an error is discovered by way of a wrong recital in the judgment by the party concerned, he may file an application for review for rectifying the error. 1968 Pat LJR 529 (532): 1959 BLJR 662 (DB).

**2. "May apply to the Court which passed the decree etc."**— (1) Lower Court holding that Section 7 (iv) (c) Court-fee's Act applies to the case—Judicial Commissioner coming to the same finding — Petition to the Lower Court to review its finding — Petition in effect, is of review of judgment of Judicial Commissioner which is final — Lower Court not competent to entertain such petition. AIR 1968 Manipur 1 (2).

(2) The power to review a prior order is principally the power vested in an officer to review an order previously made by himself and not by anybody else. AIR 1967 Bom 356 (360): 68 Bom LR 474 (DB).

(3) Under Section 114, C. P. C. the Court can act only on an application by

**115. Revision.**—The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such Subordinate Court appears—

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit.

[1882, 1877, S. 622; 1861, S. 35. See also S. 224 of the Government of India Act of 1935.]

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**Section 114 — Note 2 (contd.)**

the aggrieved party and not suo motu. AIR 1967 Bom 355 (360): 68 Bom LR 474 (DB).

(4) Power of review which the Board of Revenue had, stood transferred under Section 4 of the Revenue Appellate Tribunal Act to the Revenue appellate Tribunal on the abolition of the Board of Revenue — Application for review prosecuted to the Board of Revenue before its abolition pending can be decided by the Revenue Appellate Tribunal. (1962) 40 Mys LJ 986 (989) (DB).

(5) High Court dismissing revision application against appellate Order of District Judge — Appellate order merges with the order dismissing revision — Appellate order cannot be reviewed by District Judge. 1967 Raj LW 548.

**3. Powers of the Court of review.**— (1) Where, in a case under Land Acquisition Act, an error in awarding compensation had been introduced only by reference to something held in another case extraneous to the present record, and the judgment was substituted by an entirely new judgment passed in review because the Tribunal was dissatisfied with its previous judgment.

**Held,** that assuming that Tribunal had jurisdiction to review its own order, it had in this case travelled outside the limits of its jurisdiction and powers under Sec. 114 or Order 47, Rule 1, C. P. Code. The order upon the review application was, therefore, liable to be set aside. AIR 1959 All 214 (216): 1958 All LJ 768 (DB).

## SECTION 115 — SYNOPSIS


1. Scope of the section.
2. "May call for the record."
3. "Any case which has been decided."
4. Interlocutory orders.
5. "Subordinate Court."
6. "And in which no appeal lies thereto."
7. Other remedy open.
8. Jurisdiction.
9. "Exercised a jurisdiction not vested in it by law."
10. "Failed to exercise a jurisdiction so vested."
11. Exercise of jurisdiction illegally or with material irregularity.
12. Error of law or fact.
13. Error of procedure.
14. Wrong decision of lower Appellate Court as to the jurisdiction of the trial Court.
15. "May make such order in the case as it thinks fit."
16. Laches in making the application.
17. Application in revision treated as appeal.
18. Appeal treated as an application in revision.
19. Revision in cases of discretionary and final orders.
20. Orders under Sections 152 and 153.
21. Orders under Section 73.
22. Orders in claim cases.
23. Orders setting aside or refusing to set aside sales.
24. Orders under Order 33.
25. Decisions as to court-fee, whether revisable.
26. High Court's revisional powers under other Acts.
27. Appeal and review.


**1. Scope of the section.** — (1) Section empowers the High Court, in cases where no appeal lies, to satisfy itself on three matters: (a) that the order made by the Subordinate Court is within its jurisdiction; (b) that the case is one in which the Court ought to exercise its jurisdiction (c) that in exercising the jurisdiction the Court has not acted illegally, that is, in breach of some provision of law or with material irregularity that is by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. AIR 1959 SC 492 (496, 497, 498): (1959) Supp (1) SCR 733 * AIR 1962 Cal 597 (600) (DB).

(2) Where the conditions in the section are not satisfied the High Court cannot interfere on the ground of expediency. AIR 1956 Raj 113 (116): ILR (1956) 6 Raj 388 * AIR 1958 Raj 287 (291): ILR (1958) 8 Raj 113 * AIR 1957 All 450 (451) (DB) * AIR 1957 Mad 207 (209) * 1952 Raj LW 174 (176) * AIR 1947 Bom 462 (463): ILR (1947) Bom 461 (DB) * AIR 1936 Oudh 22 (24): 11 Luck 529 (FB) * (1962) 3 Guj LR 529 * AIR 1959 J and K 122 (123).

(3) It is not proper for the High Court to entertain an appeal in the guise of a

**Section 115 — Note 1 (contd.)**

revision. AIR 1953 SC 23 (28): 1953 SCR 136 * AIR 1953 Raj 90 (91): ILR (1952) 2 Raj 608 (DB) * 1968 Cri LJ 988 (991): 70 Pun LR (D) 142.

(4) The maintainability of a revision application is not affected by the fact that the grounds are so couched as if they are grounds of appeal and not grounds of revision. It is the substance of the attack with which the Court is concerned and where the main ground of attack is that the order in question is illegal and untenable the Court will not stay its hand because of the fact that the revision petition was initially drafted as an appeal. AIR 1967 Punj 241 (244).

(5) The powers under this section are intended to be exercised with a view to subserve and not to defeat the ends of justice. AIR 1954 Trav-Co 178 (184): ILR (1953) Trav-Co 1170 (FB) * 1957 All L Jour 53 (55) * AIR 1948 All 244 (252): ILR (1947) All 812 (FB) * (1956) 69 Mad LW 246 (248) * AIR 1969 Mys 77 (77): (1968) 2 Mys LJ 200 * (1968) 2 Mad LJ 164: 81 Mad LW 64 * ILR (1964) Mys 314 * AIR 1964 Pat 542 (543) (DB).

[See also AIR 1964 Pat 509 (510). (Filing of award into Court — Notice of, not served on opposite party — Ex parte decree on award is without jurisdiction — Remedy of opposite party is not under Order 9, Rule 13 or by way of appeal under Section 17 Arbitration Act — Court wrongly setting it aside under Order 9, Rule 13 and not in exercise of its inherent power — High Court would not be justified in interfering in revision.)]

(6) Powers under Section 115 are discretionary where the order passed is just and not without jurisdiction, the High Court will not interfere. 1961 All LJ 399. (Execution sale through auctioneer — Auctioneer by agreement entitled to one per cent commission on sale price — Sale set aside — Auctioneer is not entitled to any commission — Court allowing only actual expenses of holding sale — Order is not without jurisdiction.) * 1964 All WR (HC) 577. (Even though the Court should not ordinarily review and modify the order of his predecessor, in suitable circumstances High Court will not interfere with the order passed on review.) * AIR 1960 All 730 (732): 1960 All LJ 220. (Although a mistake committed by a party does not confer jurisdiction on a Court, that circumstance has to be taken into consideration in deciding whether the High Court should interfere in revision or not.) * AIR 1959 All 463 (465): 1959 All LJ 536 (DB).

(7) Order on appeal under Section 17 of Payment of Wages Act — Though revision under the section lies, it is not as a matter of right and the order can be challenged by writ petition. AIR 1967 Andh Pra 370 (376): (1966) 2 Andh WR 55 * 1969 Lab IC 609 (610): 1968 All LJ 510 (DB). (Illegal orders of Authority under Payment of Wages Act — Remedy by way of revision under Section 115, Civil P. C., is not such a remedy as to oust the jurisdiction of High Court to issue a writ.)

(8) Where, substantial justice has been rendered by the order of the lower Court, the High Court will not interfere in revision notwithstanding the fact that the reasons for the order are not correct. AIR 1955 Cal 448 (450) (DB) * 1957 Andh LT 332 (335) * (1957) 59 Pun LR 449 (450) * AIR 1955 Hyd 255 (256): ILR (1955) Hyd 602 (DB) * AIR 1952 Assam 46 (46): ILR (1951) 3 Assam 43 (DB) * AIR 1949 All 606 (608): ILR (1950) All 58 (DB) * AIR 1968 Delhi 104 (107) * AIR 1968 Pat 181 (184) * (1968) 2 Mad LJ 164: 81 Mad LW 64 * AIR 1965 Mys 313 (315): (1965) 1 Mys LJ 232. (Even though the order suffers from an illegality or irregularity.) * AIR 1965 Punj 331 (333): 67 Pun LR 477 * AIR 1963 Ker 51 (51, 52): 1962 Ker LT 319. (No interference if decree is found to be correct.) * AIR 1962 Punj 470 (473): 1962 Cur LJ 316. (Objection to territorial jurisdiction taken at early stage but failure of justice not proved — Objection cannot be allowed by revisional Court.) * AIR 1962 Punj 168 (170). (Leave to defend granted upon furnishing security — Order not disclosing grave injustice or irreparable injury but substantial justice — Revisional powers will not be invoked by High Court, merely because, it would not itself have imposed terms.)* AIR 1962 Raj 12 (18): ILR (1961) 11 Raj 76.

(9) The High Court cannot in the exercise of its revisional powers under this section attack findings of fact of the subordinate Court or substitute its own appreciation of evidence for that of the primary Court. AIR 1953 Trav-Co 535 (536): ILR (1953) Trav-Co 729 (FB) * ILR (1959) Bom 238 (241) * 1957 All L Jour 544 (547) * 1957 Andh LT 399 (401) * 1958 Andh LT 157 (160) * AIR 1958 Andh Pra 427 (435) (DB) * AIR 1958 Andh Pra 371 (375): ILR (1958) Andh Pra 421 (DB) * AIR 1957 Mad 630 (630, 631) * 1957-1 Mad L Jour 158 (159) * AIR 1957 Raj 11 (14): ILR (1956) 6 Raj 926 (DB) * AIR 1952 Mad 323 (328): ILR (1952) Mad 741 (FB) * AIR 1951 Madh B 118 (119, 120) (FB) * AIR 1956 All 377 (381) (DB) * AIR 1956 Bom 607 (608) * 1956 Andh WR 1079 (1080) * AIR 1935 Mad 246 (247) * AIR 1936 Nag 140 (143): ILR (1936) Nag 188 * AIR 1967 SC 1853 (1857): (1967) 3 SCR 343. (Concurrent finding of trial Court as well as appellate Court.) * (1968) 2 SCWR 424. (It is immaterial whether the trial Court and the appellate Court had concurred or differed in their conclusions.) * AIR 1969 SC 579 (583): (1968) 2 SCWR

**Section 115 — Note 1 (contd.)**

448. (Revision under Section 392, M. B. Municipal Corporation Act — Even if powers of High Court under that section are wider than under Section 115 Civil P. C., they do not extend to determine questions of fact.) * AIR 1966 SC 153 (155, 156): (1966) 1 SCR 102 * AIR 1964 SC 1336 (1338, 1339): (1964) 3 SCR 495 * AIR 1969 Mad 5 (8): 81 Mad LW 190 * AIR 1969 Manipur 29 (30) * AIR 1969 Orissa 140 (142) * AIR 1969 Orissa 63 (65): 34 Cut LT 1258. (Finding that sale proclamation was not published at the site.) * (1968) 9 Guj LR 1087 * (1968) 1 Mys LJ 56: 13 Law Rep 53 * (1968) 70 Pun LR 1053: 1968 Cur LJ 935 * (1968) 70 Pun LR 649 * (1968) 70 Pun LR 118: ILR (1968) 1 Punj 550 * 1968 Raj LW 358 * AIR 1967 Cal 185 (187) * AIR 1967 Delhi 61 (62): 69 Pun LR (D) 29 (DB) * AIR 1967 Ker 181 (182): 1966 Ker LT 891. (Concurrent finding regarding quantum of maintenance.) * 1967 KLR 600 (602) * AIR 1967 Mad 306 (310): (1966) 2 Mad LJ 538. (Finding of fact can be reviewed by Court of revision on limited grounds.) * AIR 1967 Mad 293 (294): (1966) 2 Mad LJ 340 * AIR 1966 All 247 (248): 1965 All LJ 1182. (Creditor living in Lahore held to be displaced person — Finding is one of fact.) * 1966 All LJ 765: 1966 All WR (HC) 470 * 1966 All LJ 308: 1966 All WR (HC) 10. (High Court cannot enter into facts.) * AIR 1966 Cal 213 (213): 69 Cal WN 416 * AIR 1966 Him Pra 48 (49) * (1966) 1 Mad LJ 130: 79 Mad LW 133 * AIR 1966 Orissa 66 (70): 32 Cut LT 194. (Presumption of fact — Question of its rebuttal is also a question of fact.) * AIR 1966 Orissa 41 (42): 31 Cut LT 1092. (Whether there was sufficient cause under Order 9, Rule 13 is pure question of fact.) * AIR 1966 Orissa 24 (26): 31 Cut LJ 769 * AIR 1966 Pat 263 (265): 1966 BLJR 283 (DB) * (1966) 68 Pun LR (D) 117 * 1965 All LJ 363: 1965 All WR (HC) 299. (Finding with regard to determination of profits from the land mortgaged usufructuarily, is a pure finding of fact.) * (1965) 69 Cal WN 346. (Questions of disputed facts —Questions cannot be decided in revision.) * AIR 1965 Mys 156 (161): (1965) 1 Law Rep 564 * AIR 1965 Mys 12 (14): (1964) 1 Mys LJ 114 * AIR 1965 Ori 221 (222): 32 Cut LT 399 * AIR 1965 Orissa 180 (183): 1965 (2) Cri LJ 525: 31 Cut LT 1036 * AIR 1965 Pat 509 (510) * AIR 1965 Pat 367 (367, 368) * (1965) 67 Pun LR 974: 1965 Cur LJ 638 * AIR 1964 All 477 (480): 1964 All LJ 15 (DB). (Question whether there is a dispute or not is a question of fact.) * AIR 1964 All 246 (247, 248): 1963 All LJ 112. (Concurrent finding on question whether arbitrator was guilty of misconduct.) * AIR 1964 Guj 122 (125): (1964) 5 Guj LR 515. (Concurrent findings of fact — No interference.) * (1964) 5 Guj LR 941 * 1964 Ker LT 616: 1964 Ker LJ 407. (Concurrent finding of fact.) * AIR 1964 Mad 238 (239): (1964) 1 Mad LJ 60 * (1964) 2 Mad LJ 147. (Finding as to bona fide requirement.) * AIR 1964 Mys 179 (180). (1963) 2 Mys LJ 416. (Concurrent finding of fact.) * (1964) 1 Mys LJ 8 * AIR 1963 Him Pra 9 (12) * AIR 1963 J and K 59 (60): 1963 Ker LJ 133 * (1963) 1 Kel LR 56 (58) * (1963) 29 Cut LT 495: ILR (1963) Cut 709 * 1963 Raj LW 358: ILR (1963) 13 Raj 659. (Finding as to standard rent.) * AIR 1961 Assam 154 (156): (1962) 2 Lab LJ 211 (DB). (Question as to interpretation of notification — No interference in absence of patent mistake of law or error of jurisdiction.) * (1962) 3 Guj LR 182. (Finding of fact by Court below — Nothing beyond bare word of plaintiff in support of finding — High Court will not interfere in revision.) * (1962) 1 Mad LJ 295 * AIR 1961 Assam 47 (47, 48) (DB). (Unless some material irregularity, or defect of jurisdiction vitiating it, is established.) * AIR 1961 Manipur 24 (25) * ILR (1961) Mys 537 * AIR 1961 Punj 131 (132, 133) * AIR 1961 Raj 93 (95): 1960 Raj LW 397 * AIR 1961 Raj 43 (44): 1960 Raj LW 176. (Finding that cancellation of stamps is effective is one of fact.) (Overruled on another point in AIR 1965 Raj 114.) * ILR (1960) 1 Cal 643 * AIR 1960 J and K 22 (23) * ILR (1959) Bom 437: (1958) 60 Bom LR 1359. (Finding that there was no sub-letting.) * 1959 Andh LT 214 * (1959) 1 Andh WR 363. (Revision under Section 21, Hyderabad Houses (Rent, Eviction and Lease) Control Act.) * AIR 1959 Punj 553 (554): 60 Pun LR 136 * (1956) 60 Cal WN 988: ILR (1957) 3 Cal 418.

[See also (1968) 70 Bom LR 252: 1968 Mah LJ 494. (Revisional powers of Collector under Section 23, Bombay Mamlatdars' Courts Act, (1906.)]

[See however AIR 1963 Guj 148 (150): (1963) 4 Guj LR 540. (Finding of fact erroneous on admitted facts can be interfered with.)]

[But see AIR 1943 Bom 42 (43) : ILR (1943) Bom 33 (DB).]

(10) Basing findings or conclusions upon facts which have no bearing or connection with them, is a material defect of procedure. Where there is only a show of reaching conclusions upon the facts of the case, there is a material irregularity in exercise of jurisdiction. AIR 1960 Andh Pra 540 (544).

(11) An appeal is a continuation of the proceedings, in effect the entire proceedings are before the appellate authority and it has power to review the evidence subject to the statutory limitation prescribed. But in the case of a revision, whatever powers the revisional authority may or may not have, it has not the power to review the evidence unless the statute expressly confers on it that power.

**Section 115 — Note 1 (contd.)**

AIR 1965 SC 1585 (1587): (1965) 1 SCR 601. (Revision under Section 12, Mad. Gen. Sales Tax Act, 1939.) * AIR 1963 SC 698 (701): 1962 Supp (1) SCR 933.

[See also (1968) 22 STC 26 (All) (DB) * 1960 Ker LT 498 (501, 502): 1960 Ker LJ 509. (Unlike appeal refusal to exercise revisional powers does not confirm order of lower Court.)]

(12) Per Hidayatullah, J. — The power which Section 115 confers is clearly of the nature of a proceeding on a writ of certiorari. But it differs from that power in many ways. The power is clearly limited to the keeping of the Subordinate Courts within the bounds of their jurisdiction. It does not comprehend the power exercisable under the writ of Prohibition or Mandamus. AIR 1964 SC 497 (505): (1964) 4 SCR 409.

[See also AIR 1968 Pat 476 (480): 1968 BLJR 692 (DB).]

(13) Though the scope of Art. 227 of the Constitution of India is wider than Section 115, it is limited. A mere erroneous decision which error not being apparent on the face of the record cannot be corrected either under Section 115 or under Article 227 — High Court cannot assume appellate powers to correct every mistake of law. AIR 1960 SC 137 (142): (1960) 1 SCR 890 * AIR 1969 Bom 49 (52): 70 Bom LR 224. (Petitioner aggrieved by a decree against him can invoke the jurisdiction of the High Court under Article 227 if there is an error apparent on face of record though it may not be a jurisdictional error entitling him to file a revision under S. 115, C. P. C. AIR 1966 SC 1361, Foll.)

(14) Power of interference under Article 227 of the Constitution is wider than that under Section 115, though of course that power has to be invoked sparingly and only in cases of grave dereliction of duty. An order passed without jurisdiction can be interfered with under Article 227. Where the impugned order is not revisable under Section 115 being appeable, it can be set aside under Article 227. AIR 1968 All 119 (124) (DB). (Ex parte decree following order under Order 11, Rule 21 without jurisdiction.) * AIR 1960 Punj 375 (375): 62 Pun LR 359 (DB).

(15) The High Court, in the exercise of revisional jurisdiction, can look into the evidence with a view to determine whether a subordinate Court has assumed a jurisdiction which it had not or declined to exercise a jurisdiction which it had, or acted illegally or with material irregularity in the exercise of its jurisdiction. AIR 1950 Assam 214 (214): ILR (1950) Assam 140 (DB) * AIR 1915 Cal 49 (53) (DB) * AIR 1920 All 359 (359) (DB) * AIR 1965 Guj 131 (135): (1965) 6 Guj LR 99 (DB) * AIR 1960 All 590 (593): 1960 All LJ 514 (DB).

(16) A party cannot be allowed to obtain in revision what he will not be able to obtain in appeal. AIR 1952 Orissa 173 (174) (DB) * AIR 1927 Mad 859 (860) (DB).

(17) A party will not be allowed to take in revision a point which he could have taken but did not take in the subordinate Court. AIR 1956 Bom 241 (243): ILR (1956) Bom 369 * 1958 Andh LT 543 (544) (DB) * 1956 All L Jour 264 (267) * AIR 1956 Punj 249 (250) * 1956-2 Mad L Jour 475 (475) * AIR 1955 Assam 9 (12) (DB) * AIR 1922 Bom 149 (150): 46 Bom 56 (DB) * AIR 1925 Pat 461 (461) * AIR 1969 All 162 (165). (Question as to age of minor plaintiff — Defendant not raising any objection in Court below to admissibility of certified copy of application filed by minor's mother under Guardians and Wards Act and to certificate of guardianship.) * AIR 1969 Punj 256 (257): 71 Pun LR 177. (Point about proof of document.) * 1968 BLJR 957: 1968 Pat LJR 612 * AIR 1967 Delhi 61 (62): 69 Pun LR (D) 29 (DB) * (1966) 1 Andh WR 102: (1966) 1 Andh LT 14 * 1965 All LJ 1116 * (1965) 2 Mad LJ 502. (Plea of misjoinder of causes of action.) * (1965) 2 Mad LJ 236: 78 Mad LW 380. (Question of want of notice under Section 106, T. P. Act.) * AIR 1964 Raj 84 (85): 1964 Raj LW 19. (Whether executing Court applied its mind to terms of sale proclamation is question of fact and cannot be raised for first time in revision.) * AIR 1963 All 89 (90). (Objection as regards valuation of relief.) * AIR 1963 Guj 305 (307, 308). (Ground of objection taken in Court of appeal — New arguments in support of ground can be considered in revision against decision of appellate Court.) * (1963) 4 Guj LR 432. (Grounds raised at proper stage —Any number of arguments may be urged in their support.) * AIR 1963 Punj 514 (515): 65 Pun LR 918 * (1962) 3 Guj LR 529 * (1961) 3 Fac LR 500 (All) * AIR 1961 Pat 306 (306): 1960 BLJR 370 (DB) * (1960) 2 Mad LJ 147 (DB). (Revision under S. 12-B (1), Mad. General Sales Tax Act (9 of 1939)) * AIR 1960 Punj 131 (132): 61 Pun LR 893 * AIR 1959 Punj 553 (554): 60 Pun LR 136 * (1959) 61 Punj LR 82.

[See AIR 1964 All 231 (232).]

[See however AIR 1953 Orissa 75 (76) * AIR 1928 Mad 528 (531): 51 Mad 672 (DB) * AIR 1927 Rang 134 (134) * (1964) 5 Guj LR 941: ILR (1965) Guj 1. (Court's judgment showing that plea was put forward at hearing of suit and was contested— Held, plea though not appropriately pleaded in written statement could be permitted to be rasied in revision.) * (1964) 68 Cal WN 179 (DB). (Rule issued on a particular ground — Court finding that Rule could succeed on some other ground is not barred from granting relief on that ground.) * (1964) 1 Mys LJ 8 * AIR 1962 Punj 423 (424):

**Section 115 — Note 1 (contd.)**
64 Pun LR 438. (Point apparent on face of record though not clearly taken in written statement — But point taken in grounds of revision — Point considered and allowed.)]

(18) The High Court is not bound to allow even a point of jurisdiction to be raised for the first time in revision although it can allow such point to be raised. AIR 1953 Him Pra 29 (31) * AIR 1937 Mad 644 (645) * AIR 1936 Pat 428 (429) * (1955) 57 Bom LR 547 (551) * AIR 1942 Oudh 289 (289): 17 Luck 725 (DB) * AIR 1969 Madh Pra 56 (58): 1968 MPLJ 693 (DB). (Objection to jurisdiction of Court can be taken in appeal or revision.) * AIR 1969 Madh Pra 44 (45): 1968 MPLJ 698 (DB) * AIR 1965 Guj 131 (135): (1965) 6 Guj LR 99 (DB). (Inherent lack of jurisdiction — Question could be raised in revision.) * AIR 1965 Manipur 52 (53) * AIR 1964 All 136 (138). (Questions of law or jurisdiction — Position under Section 115, C. P. C., and Article 226 of Constitution compared.)

[See AIR 1962 All 248 (251): 1961 All LJ 991 (DB). (Question as to power of civil Court to remit an issue to Revenue Court for determination — Question even if raised for first time (in second appeal) should not only be permitted to be raised but should be determined — AIR 1954 SC 340, Foll.; AIR 1960 All 573, Overruled.)]

(19) Normally High Court will not, in revision, admit additional evidence. Case must be decided on evidence already adduced and on admissions made by parties. AIR 1966 All 247 (248): 1965 All LJ 1182.

(20) Revision against interlocutory order — Objection as to its maintainability not taken — Case remanded and lower Court taking some decision — Second revision on same grounds — Objections to its maintainability cannot be taken as two conradictory findings may be recorded. AIR 1968 J and K 35 (36): 1968 Kash LJ 33.

(21) Having regard to the general principle that a Court or a Tribunal is entitled to take note of subsequent events, the High Court can take additional evidence in revision, when that evidence was not available during trial. (1967) 2 Andh WR 216.

(22) Contention that Railway Amendment Act (38 of 1961) came into effect on 1-1-1962 and hence applies to case though not raised in lower Court taken in revision petition — Judicial notice can be taken of law in force on any particular relevant date and such law alone is to be applied irrespective of whether any party referred to it or not. AIR 1968 Andh Pra 327 (328).

(23) The limitations to govern the exercise of the revisional jurisdiction are those in force at the time when such a jurisdiction is attempted to be exercised and not those that were in force at the time when the exercise of that jurisdiction was invited by the presentation of the revision petition or at the time when the order sought to be revised was passed. AIR 1954 Trav-Co 178 (184, 186): ILR (1953) Trav-Co 1170 (FB).

[See also AIR 1963 Guj 143 (144): (1963) 4 Guj LR 152. (Change in law after decision of Subordinate Court — Change not affecting powers of High Court in revision — Change cannot be considered by High Court in revision. AIR 1954 Trav-Co 178 (FB), Dist.)]

(24) Though the High Court will not disturb a finding of fact in revision, yet when the finding is based on a wrong approach to relevant statutory provisions, the High Court can and will interfere under Section 115, C. P. Code. 1958-1 Mad L Jour 73 (76) * 1957-2 Mad L Jour 123 (125) * AIR 1959 Madh Pra 26 (27): 1958 MPLJ 253.

(25) Though in a revision petition the finding of the lower Court is not expected to be disturbed but if the lower Court has given that finding on evidence which was not legal then interference in the interest of justice would be called for. 1961 Jab LJ 544: 1961 MPLJ 448.

(26) Whereas an appeal confers statutory vested right on a litigant which accrues the moment the proceedings in question are instituted the right of revision is merely a discretionary power to be exercised by the revisional Court according to the circumstances of the case or exigencies of the situation. A person cannot as a matter of right claim the proceedings to be revised. AIR 1964 J and K 32 (33): 1963 Kash LJ 234 (DB). (AIR 1962 Punj 94, Rel. on.)

(27) Revisional powers of the Commissioner under Section 3 (3), U. P. (Temporary) Control of Rent and Eviction Act, 1947, is not exactly similar to the jurisdiction conferred on the High Court under Section 115, Civil P. C. AIR 1966 SC 893 (898): (1966) 2 SCR 553. (Commissioner can interfere if the District Magistrate has acted (i) illegally or (ii) with material irregularity or (iii) has wrongly refused to act.)

(28) Under Cl. (d) of the section as it obtains in the State of Jammu and Kashmir the High Court has power to interfere in revision if it appears that the order of the Subordinate Court has caused a failure of justice. AIR 1962 J & K 21 (23) * AIR 1968 J and K 32 (34) : 1967 Kash LJ 426 * AIR 1967 J and K 11 (13) : 1966 Kash LJ 410. (Failure to give hearring to party causes failure of justice.)

(29) The fact that the petitioner did not go in revision against the impugned order will not disentitle him from filing a writ petition, where the lower Court ex facie had not exercised its jurisdiction accord-

**Section 115 — Note 1 (contd.)**

ing to law. AIR 1968 All 42 (44) : 1967 All LJ 469.

(30) A revision petition filed under Section 35, Delhi and Ajmer Rent Control Act is in no sense a petition for the exercise of High Courts revisional jurisdiction either under Section 44 of the Punjab Courts Act or Section 115 Civil P. C. as the scope of the High Courts power under the former Act is vastly different from its power under the latter Acts. AIR 1962 Punj 378 (379) : ILR (1962) 2 Punj 93 (DB).

(31) Opinion of Court on question of law, stated as special case by arbitrator — No appeal lies — Revision also is not maintainable — Opinion of Judge in special case on point of law not being a judgment, jurisdiction of High Court under Section 115 (c) to correct errors in mere opinion cannot be invoked. AIR 1960 Andh Pra 346 (349) : (1960) 1 Andh WR 198 (DB).

(32) Principles governing appeals — No bar to its applicability to revision — Party can be added at the time of hearing revision. AIR 1966 Pat 173 (178, 179).

(33) It is the settled practice of the Patna High Court that a party aggrieved by two distinct matters decided by one order must file separate revision applications challenging each of the two matters and if he has not done so he would ordinarily be called upon to confine his application to only one of the matters. AIR 1967 Pat 326 (326, 327).

(34) Question of fact which is not decided by Courts below cannot be allowed to be canvassed in revision. AIR 1967 Ker 228 (233) : 1967 Cri LJ 1511 : 1966 Ker LT 1010.

(35) The Arbitration Act does not expressly provide for a revision against an appellate decision but there is nothing in the Act which deprives the High Court of its powers under S. 115. (1963) 1 Ker LR 56 (57).

(36) Unlike Sections 100 and 115 of Civil P. C., the power of revision under the Criminal P. C., is not so rigidly circumscribed, within the rule requiring clear question of law or of jurisdiction, as to exclude the High Couts' jurisdiction to interfere whether the conclusions of the Court below are grossly erroneous and even though grave injustice may have resulted therefrom. 1968 Cri LJ 988 (991) : 70 Pun LR (D) 142.

(37) Where the order sought to be revised is superseded by the subsequent decree of the Court leading to the dismissal of the suit the revision becomes infructuous. (1964) 66 Pun LR 1170. (Death of plaintiff—Person appointed legal representative withdrawing suit and suit dismissed — Revision against order appointing LR by other claimants not competent.)

(38) An order passed by a civil Court sitting as an appellate Court under Section 476-B Criminal P. C. is revisable under Section 439 Criminal P .C. and not under Section 115 Civil P. C. AIR 1968 Pat 100 (104, 105 and 106) : 1968 Cri LJ 354 : 1967 BLJR 941 (FB). (AIR 1948 Pat 225 (FB) Overruled; 40 Cal 477 (FB) and AIR 1940 Mad 465 (FB) and 28 All 554 (FB), Dissented from.)

(39) Civil Court does not cease to be a Civil Court while considering application under S. 476, Criminal P. C. Consequently order on application under Section 476 can be revised only in Civil revision under Section 115. AIR 1959 Mad 107 (108) : 1959 Cri LJ 482 : (1958) 2 Mad LJ 182.

(40) Order refusing application under Section 479-A Cr. P. Code for filing complaint on basis of finding in the judgment — Criminal revision lies and not civil revision — It cannot be treated as civil criminal revision. (1963) 29 Cut LT 631.

(41) It cannot be said that wherever there are two orders, one by an inferior authority and the other by a superior authority passed in an appeal or revision, there is a fusion or merger of two orders irrespective of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute. AIR 1967 SC 681 (684).

(42) Complaint under Section 195 (1) (c), Cri P. C. for alleged forgeries in documents detected after property was delivered in execution proceedings — Appeal against order dismissed — Proceedings being of a Civil nature person aggrieved by such complaint can file a revision under Section 115. AIR 1968 Pat 88 (89).

**2. "May call for the record."** — (1) The High Court will not take a technical view and necessarily interfere in every case where an order has been made irregularly or even improperly unless grave injustice or hardship would result from a failure to do so. AIR 1956 Madh B 125 (126) * 1956 All LJ 856 (858) * AIR 1955 Cal 448 (450) (DB) * Madh BLJ 1955 HCR 11 (14) * ILR (1953) 3 Raj 884 (891) (DB) * AIR 1957 Mad 210 (212) * ILR (1955) Patiala 187 (201, 202) * AIR 1943 Lah 65 (70, 71): ILR (1943) Lah 357 (FB) * AIR 1931 Rang 136 (137, 138): 9 Rang 71 * AIR 1968 Bom 98 (100) : 69 Bom LR 502. (Revision held was not called for.) * (1966) 68 Bom LR 409: 1966 Mah LJ 690. (Reasons for summary dismissal of appeal not given — Merely on that account High Court is not bound to interfere in every case.) * AIR 1965 Guj 181 (203, 204) : (1965) 6 Guj LR 49. (Proceedings for appointment of trustee of a public trust — No notice to Charity Commissioner — No grievance as to person appointed — Held interference in revision was not necessary.) * AIR 1962 Raj 12 (18) : ILR (1961) 11 Raj 76.

(2) Where interference in any particular case is found necessary, the High Court may of its own motion call for the record

**Section 115 — Note 2 (contd.)**
without an application by a party. AIR 1954 Mad 864 (870) : ILR (1954) Mad 834 (FB) * AIR 1958 All 720 (728) : ILR (1958) 1 All 614 (DB) * AIR 1954 Trav Co 178 (184) : ILR (1953) Trav-Co 1170 (FB) * AIR 1956 Madh B 125 (126) * AIR 1954 Pat 61 (63) * AIR 1954 Raj 191 (193): ILR (1954) 4 Raj 613 (DB) * AIR 1932 Mad 714 (716) * (1901) 28 Cal 680 (684) (DB) * (1906) 33 Cal 757 (769, 770) (FB) * AIR 1938 All 456 (458) : ILR (1938) All 702 (FB) * (1968) 2 Mad LJ 164 : 81 Mad LW 64 * AIR 1968 Pat 112 (113). (Petitioner not having locus standi—Court interfered suo motu.) * (1964) 66 Pun LR 916 : ILR (1965) 1 Punj 265 * AIR 1962 Punj 94 (100) * AIR 1959 Mys 158 (161) : 1959 Cri LJ 746 : 37 Mys LJ 30.

[See however AIR 1945 All 47 (48): ILR (1945) All 15.]

[But see (1881) 7 Cal L Rep 191 (192).]

(3) The proceedings for revision if started suo motu must not be based on a mere conjucture and there should be some ground for invoking the revisional powers. Once those powers are invoked, the actual interference must be based on sufficient grounds and if it is considered necessary that some additional inquiry should be made to arrive at a proper and just decision, there can be no bar to the revising authority holding a further enquiry or directing such an enquiry to be held by some other appropriate authority. AIR 1968 SC 843 (846): (1968) 2 SCR 492. (1961-12 STC 663 (AP) Overruled.)

(4) Where a party applies for revision, the mere fact that a non-party has also joined is no bar to the High Court entertaining and disposing of the application. (1901) 28 Cal 574 (579).

(5) Death of party pending revision — Does not affect High Court's powers of revision for under Section 115, the High Court can even suo motu call for the records and dispose of the case after examining and satisfying itself that the lower Court's order does not suffer any infirmity specified in the section. AIR 1966 Andh Pra 384 (384): ILR (1967) Andh Pra 915 (DB).

(6) The mere fact that an applicant for revision has obeyed the order will not disentitle him from filing an application for revision of the order. AIR 1956 Mad 679 (679) * AIR 1954 J and K 45 (46) : 12 J and K LR 122 * AIR 1948 Mad 315 (316).

[But see Madh BLJ 1954 HCR 1099 (1104).]

(7) Person who is not aggrieved by an order cannot apply in revision against that order. AIR 1957 Mad 296 (296) * AIR 1967 Madh Pra 3 (4) : 1966 Jab LJ 284 * AIR 1965 Punj 331 (332) : 67 Pun LR 477 * AIR 1964 Madh Pra 297 (299) : 1964 MPLJ 435. (Agent of disclosed principal cannot file.) * AIR 1962 All 485 (486) : 1962 All LJ 586 * ILR (1962) 2 Punj 431. (Permission to sue in forma pauperis granted — No revision at defendants instance.) * AIR 1957 Madh Pra 92 (93) : 1957 Jab LJ 94 * AIR 1953 Bhopal 28 (29) * AIR 1949 Mad 415 (416): 1948 2 Mad LJ 523 * AIR 1943 Nag 333 (334) : 1943 Nag LJ 510.

(8) In a revision against the order of the lower court setting aside ex parte proceedings on payment of costs, the order of the lower Court was kept intact. The defendants who had also undertaken to produce their evidence in the lower Court failed to produce it after the return of the record and asked for further time, which was ganted subject to payment of costs. On revision against the subsequent order.

Held (i) that the ex parte proceedings remained subsisting and the defendants had no locus standi to go in revision against the subsequent order.

(ii) That the High Court in subsequent revision could not revise or review the order passed in the previous revision. 1964 Kash LJ 121.

(9) Neither the Code of Civil Procedure nor the Saurashtra Agricultural Debtor's Relief Act requires that an order made either on an application for adjustment of debts or in an appeal from any such application should be drawn up. But once an order is drawn up, the petitioner is required by Rules 5 and 6 of Ch. V of the High Court Rules to file a certified copy of the formal order along with the revision application filed in the High Court. AIR 1962 Guj 64 (66) : (1962) 3 Guj LR 129.

(10) Revision by employer against an order by Authority in application by Labour Inspector under S. 20(2), Minimum Wages Act—Employees not parties to revision — Labour Inspector being authorised under Statute to move authority under Section 20 can very well represent the employees in the revision proceedings — Opportunity of hearing to each individual employee is not necessary. AIR 1968 Pat 90 (92) : 1968 Lab IC 338 (DB).

(11) It has been held that the presentation of a petition for revision without a copy of the judgment is no valid presentation. AIR 1954 Madh B 18 (19).

[See also AIR 1962 Guj 64 (66).]

(12) Court cannot throw out a revision on the ground that it was not properly presented, after the revision has been admitted, entertained and listed for final hearing. AIR 1962 All 485 (486).

**3. "Any case which has been decided."**— (1) The word 'case' has a wider meaning than the word 'suit' or 'appeal'. AIR 1953 Him Pra 89 (89) * AIR 1958 Pat 22 (24) (DB) * AIR 1951 All 564 (565) (DB) * AIR 1921 All 1 (2) : 43 All 564 (FB) * (1885) 7 All 661 (665) (FB) * AIR 1917 PC 71 (74) : 40 Mad 793 : 44 Ind App 261 * AIR 1958 Guj 236 (238): 8 Guj LR 649 (DB). (It includes an issue or

**Section 115 — Note 3 (contd.)**

part of suit or proceeding.) * AIR 1963 Guj 195: (1963) 4 Guj LR 698. (Words "case decided" include order relating to some error of procedure.) * (1962) 3 Guj LR 1013. (Revision under S. 29 of Bombay Act 57 of 1947 allowed and case remanded for further trial — Order held amounted to case decided — AIR 1942 Oudh 334, Dissented from.) * AIR 1961 All 371 (372): 1961 All LJ 435.

(2) The expression 'case' includes civil proceedings other than suits, and is not restricted by anything contained in the section to the entirety of the proceeding in a civil Court. The expression 'case' includes a suit, but in ascertaining the limits of the jurisdiction of the High Court there would be no warrant for equating it with a suit alone. AIR 1964 SC 497 (500): (1961) 4 SCR 409. (AIR 1921 All 1 (FB). Overruled.) * AIR 1969 Goa 37 (38) (AIR 1966 Goa 1 (FB), Foll.)

(3) Where by an order any right of a party has been determined and such determination cannot be re-agitated at any other stage or in appeal, then the decision made would amount to a 'case decided' within the meaning of Section 115. AIR 1961 All 371 (372) : 1961 All LJ 435. (Order determining creditors, entitled to rateable distribution under S. 73, amounts to 'case decided.) * AIR 1969 Guj 213 (219). (Conroversy between parties in regard to right or obligation in relation to inspection of documents — Decision of Court thereon held would amount to 'case decided.')

(4) Proceedings of a District Judge under the Charitable and Religious Trusts Act (XIV of 1920) are open to revision by the High Court under this section. AIR 1929 All 581 (583, 584): 51 All 957 (DB) * AIR 1957 Ker 171 (172): ILR (1957) Ker 381 (DB) * AIR 1936 All 411 (411).

(5) An order dismissing an application under S. 19, Madras Agriculturist's Relief Act, 1938, although consequent on the withdrawal by the petitioner is nonetheless a 'case decided'. AIR 1943 Mad 617 (626) (DB).

(6) Arbitration proceedings without intervention of Court — Order refusing to record award — It is case decided. AIR 1961 All 173 (174).

(7) Reference to Civil Court under Section 146 (1), Criminal P. C. — Civil Court refusing to summon deponent of affidavit filed before Magistrate for being cross-examined — It is "case decided" in Civil Court subordinate to High Court. AIR 1969 All 82 (88) : 1968 All LJ 325. (Decision directly affects Court's jurisdiction and is revisable.)

(8) Kerala Buildings (Lease and Rent Control) Act (2 of 1965) — Order passed by District Court under Section 20(1) on revision is a case decided by subordinate Court — High Court has jurisdiction under Section 115, Civil P. C. to revise order. AIR 1969 Ker 103 (108) : 1968 Ker LT 583 (FB). (1960 Ker LT 1248, Overruled.)

(9) Order staying proceedings for restitution under Section 144 till the disposal of an application for temporary injunction in another suit is a case decided and is open to revision. (1965) 1 LR 763 (767, 768) (Mys). (AIR 1964 SC 497, Relon.)

(10) The jurisdiction exercised by a Court which proceeds to give an opinion on a case stated by an arbitrator under Section 13(b), Arbitration Act is consultative. An advisory opinion cannot be regarded either as a judgment or as an order, for it does not finally determine the case. It is not the exercise of judicial function. An opinion given by a Court in its executive or administrative capacity cannot fall within the ambit of the expression 'case decided'. AIR 1959 Punj 61 (62, 63) : 60 Pun LR 294.

(11) The expression 'case' is not restricted by any thing contained in this section to the entirety of the proceeding in a Civil Court. 1965 All LJ 1060 (1062).

**4. Interlocutory orders.** — (1) An interlocutory order is not 'a case decided', within the meaning of this section. AIR 1955 All 309 (312, 313) : ILR (1955) 1 All 295 (FB) * AIR 1958 All 683 (686) : ILR (1957) 2 All 537 (DB) * 1957 All L Jour 53 (55) * 1957 All WR (HC) 157 (158) * 1957 All WR (HC) 73 (74) * 1956 All L Jour 525 (525) * AIR 1921 All 1 (4, 5) : 43 All 564 (FB) * AIR 1934 All 620 (622): 57 All 17 (FB) * AIR 1956 Bom 608 (608)* AIR 1956 Bom 251 (251) * AIR 1932 Bom 81 (82) (DB) * AIR 1954 Hyd 66 (71) : ILR (1953) Hyd 762 (FB) * AIR 1930 Sind 265 (269) : 24 Sind LR 277 (FB) * AIR 1933 Oudh 345 (345) (DB) * (1909) 12 Oudh Cas 405 (413) (DB) * AIR 1936 Oudh 22 (28) : 11 Luck 529 (FB) * AIR 1943 Pesh 8 (9) (DB) * AIR 1933 Pesh 48 (49) (DB). * 1963 Ker LT 1105 : (1964) 1 Ker LR 37. (Order allowing or refusing an application for stay of proceedings is not a case decided.) * 1960 All LJ 124 : 1960 All WR (HC) 111. (Order deciding that the Court has jurisdiction to try the suit.)

[But see AIR 1964 Cal 439 (440).]

(2) The word "case" is wide enough to include the decision on any substantial question in controversy between the parties affecting their rights even though such order is passed in the course of the trial of the suit. AIR 1943 Lah 65 (79): ILR (1943) Lah 257 (FB). (Overruling AIR 1924 Lah 425 (FB).) * AIR 1957 Andh Pra 530 (531) * AIR 1944 Lah 323 (324): ILR (1945) Lah 513 (DB) * AIR 1956 Bom 608 (609) * AIR 1941 Bom 361 (363) : ILR (1941) Bom 658 (DB) * AIR 1935 Bom 222 (225) : 59 Bom 437 * AIR 1937 Bom 167 (168) : ILR (1937) Bom 623 * AIR 1946 Sind 36 (37) : ILR (1945) Kar 347 (DB) * AIR 1917 Oudh 389 (390) (DB) * AIR 1964 SC 497 (500) : (1964) 4 SCR 409. (This is so irrespective of the fact that an appeal lies from the ultimate decree or order in the suit — AIR 1953 Raj 137

**Section 115 — Note 4 (contd.)**

(FB) and AIR 1953 Raj 90, Overruled.) * 1963 All LJ 109: 1968 All WR (HC) 103 (FB.) (Order under O. 6, R. 17 allowing an amendment or refusing to allow an amendment would be a case decided as it fulfils the test. AIR 1936 All 686 (FB), Overruled.) * AIR 1967 Punj 389 (392) : 68 Pun LR 54 (FB). (Decision in an interlocutory order that plaintiff's suit is not maintainable.) * AIR 1969 Goa 37 (38). (Suit for possession under Section 6 of Specific Relief Act (1963) filed before Subordinate Judge — Judge coming to conclusion that sanction of Administrative Tribunal under Section 9 of Code of Comunidades (1961) was necessary before such suit was entertained — Revision remedy held not barred.) * AIR 1969 J and K 50 (50) * AIR 1968 Guj 236 (238) : 8 Guj LR 649 (DB) * AIR 1966 Mad 321 (322) : 79 Mad LW 180. (Issue relating to res judicata involves question of jurisdiction and therefore comes within ambit of the word "case"). * AIR 1965 Bom 28 (29) : 66 Bom LR 569. (Though High Court is not bound to interfere.) AIR 1963 Guj 195 (197) : (1963) 4 Guj LR 698 * AIR 1960 Punj 407 (412) : ILR (1960) 2 Punj 54 (DB). (Reversed on another point in AIR 1961 SC 493.)

[See AIR 1963 Guj 198 (202). (Order refusing to dismiss appeal on ground that it is barred by res judicata —Order is case decided.)]

[See also (1963) 4 Guj LR 705. (Appellate Court setting aside decree of trial Court and remanding case — It is case decided — Observation to contrary in 25 Bom LR 452, held obiter and dissented from.)

[But see AIR 1947 Pesh 53 (54) (DB) * AIR 1944 Pesh 1 (2) (DB) (Overruling AIR 1934 Pesh 37 — AIR 1943 Lah 65 (FB), Foll.)]

(3) Proceeding before a suit is commenced, or after a suit has ended and proceedings for which the Legislature has provided an independent remedy or a different procedure, are not interlocutory proceedings and will therefore be open to interference in revision. AIR 1955 All 309 (312) : ILR (1955) 1 All 295 (FB) * AIR 1957 All 820 (821) (DB) * AIR 1952 All 535 (537) (FB) * AIR 1934 All 620 (622, 623) : 57 All 17 (FB) * AIR 1961 Guj 92 (93): (1961) 2 Guj HCR 90. (Application to consolidate suits for purpose of hearing evidence is not interlocutory application in suit.) * AIR 1959 Cal 613 (614) (DB).

(4) Order impounding document under S. 33, by Civil Court is final and amounts to "case decided" — Revision can be entertained. 1964 All LJ 783. (Observations to contrary in AIR 1926 All 478, Held obiter and not foll. AIR 1949 All 214 and AIR 1953 Mad 698, Rel. on.)

(5) The disposal of an application to set aside an ex parte decree or to restore a suit dismissed for default is 'a case decided.' AIR 1925 All 610 (611) : 48 All 175 (FB) * AIR 1931 All 294 (301) : 53 All 612 (FB) * AIR 1956 All 216 (217). (Dismissal for default.)

(6) Application for restoration under O. 21, R. 105 (2) of application under O. 21 R. 2 — Imposition of terms for restoration Order not final and not appealable — Revision lies. (1968) 1 Andh LT 321.

(7) An order under S. 10 is a case decided. AIR 1955 All 309 (317) : ILR (1955) 1 All 295 (FB). (AIR 1920 All 197 (2) : 42 All 409; ('10) 32 All 623; AIR 1939 All 957 and AIR 1934 All 520; AIR 1955 All 384, Overruled.)

(8) Application under O. 1, R. 10 is a separate and independent proceeding. AIR 1948 Oudh 44 (45) * (1910) 13 Oudh Cas 109 (112) (DB) * AIR 1938 Oudh 10 (10): 13 Luck 625 (DB).

[But see AIR 1939 Oudh 102 (103) : 14 Luck 447 (DB).]

(9) An order allowing or refusing an amendment of a pleading is of an interlocutory nature. AIR 1961 Punj 60 (66): 63 Pun LR 516.

[See however 1968 All LJ 109: 1968 All WR (HC) 103 (FB). (AIR 1964 Cal 439, AIR 1948 Nag 258 (FB), AIR 1963 Guj 195, AIR 1955 Mys 141 and AIR 1956 Andh Pra 138, Foll. AIR 1936 All 686 (FB), **OVERRULED.**)]

(10) An order refusing to file an award and directing the suit to proceed is interlocutory. (1936) 58 All 946 (947) (DB) * 1958 All WR (HC) 66 (67) * AIR 1938 All 557 (559, 560) : ILR (1938) All 805 (FB). (AIR 1931 All 721 and AIR 1929 All 743: 51 All 1010, Overruled.)

(11) An order setting aside an award in a pending suit and directing the suit to proceed in the ordinary way is interlocutory. (1939) 183 Ind Cas 837 (838) (DB) (Oudh).

[But see AIR 1949 All 771 (773) : ILR (1950) All 686 (DB).]

(12) A revision against an order passed on appeal under S. 39 of the Arbitration Act is competent. AIR 1956 All 377 (379) (DB) * AIR 1948 Lah 50 (51) (DB).

(13) An issue which arises out of the pleadings does not amount to case decided if the decision on that issue does not result in the termination of the suit and the passing of a decree. AIR 1955 All 309 (313) : ILR (1955) 1 All 295 (FB) * AIR 1955 All 673 (675) (DB) * AIR 1953 Hyd 297 (297) : ILR (1953) Hyd 601.

(14) It cannot be said that by determining certain issues under O. 14, R. 2 as preliminary issues, the Court has decided a case. AIR 1955 All 307 (309) (DB) * AIR 1957 All 339 (340) * AIR 1956 Bhopal 25 (25) * 1951 All L Jour 240 (241) (DB).

(15) Where a plea which does not constitute a defence to the suit is made a matter in issue, an order thereon is a case decided. AIR 1955 All 309 (313) : ILR (1955) 1 All 295 (FB).

(16) As to whether disposal of an application for leave to sue as pauper, is a 'case decided", See Note 24.

**Section 115 — Note 4 (contd.)**

(17) In the under mentioned cases revision against an interlocutory order was held maintainable. AIR 1956 Cal 311 (312) (DB) * 1955-2 Mad LJ 326 (328) * AIR 1944 Mad 315 (316) : ILR (1944) Mad 626 (FB). (AIR 1928 Mad 416 and AIR 1928 Mad 396, Affirmed; AIR 1939 Mad 380, Overruled.) * AIR 1948 Nag 258 (268): ILR (1948) Nag 16 (FB) * AIR 1937 Pat 550 (552) : 16 Pat 600 (SB) * AIR 1938 Pat 22 (25, 26) : 16 Pat 766 (FB) * 1955 Madh BLJ HCR 1550 (1553) * AIR 1955 Mys 141 (143) : ILR (1955) Mys 422 * AIR 1955 Pepsu 113 (116) : ILR (1956) Patiala 41 (DB) * ILR (1951) 1 Raj 645 (649, 650) (DB). (AIR 1951 Raj 82, Overruled.) * AIR 1954 Sau 66 (70) (FB) * AIR 1956 Ajmer 9 (10) * AIR 1969 J and K 50 (51). (Word 'case' includes part of case also—Order under O. 14, R. 5 revisable.) * AIR 1968 Cal 48 (49) (DB). (Order under S. 28 (2), to Special Marriage Act (1954) refusing affidavit evidence.) * AIR 1968 J and K 32 (34): 1967 Kash LJ 426. (Order admitting or rejecting document in evidence — Revision lies if order goes to very root of matter.) * 1967 Cur LJ 488 (Punj). (Decision of trial Court rejecting claim of privilege of State to certain documents.) * AIR 1966 Him Pra 4 (5) * 1966 Ker LT 916 (918). (Application for condonation of delay in filing appeal dismissed under S. 5 Limitation Act — Dismissal of appeal in consequence though amounts to decree and is appealable as such proper remedy is to file revision against order dismissing application because if the order is not justified, subsequent orders will have no effect in law. 1960 KLT 1361 and 1961 KLT 3, Rel. on.) * AIR 1965 Orissa 72 (73) * AIR 1964 Cal 439 (440, 441) (DB). (Order refusing to amend a pleading is revisable.) * AIR 1963 Guj 195 (197) : (1963) 4 Guj LR 698 * (1963) 1 Mys LJ 170. (Order for issue of commission is revisable.) * (1962) 64 Pun LR 387: 1962 Cur LJ 175 * AIR 1961 Ker 112 (113): 1960 Ker LT 993 * AIR 1961 Madh Pra 169 (171) : 1961 MPLJ 1124. (Order refusing or allowing amendment.) * AIR 1960 Raj 20 (21) : 1959 Raj LW 579. (Order determining nature of document for Stamp Act.) * AIR 1959 Mad 155 (156) : (1959) 1 Mad LJ 151.

(18) In the undermentioned cases revision against interlocutory order was held not maintainable. Madh BLJ 1955 HCR 714 (717) (DB) * AIR 1955 Him Pra 8 (8) * AIR 1955 Ajmer 60 (61).

(19) Where an interlocutory order does not decide a case finally, no revision would lie against it. AIR 1955 Assam 111 (112) (DB) * AIR 1956 Ajmer 32 (32, 33).

(20) A revision against the order passed by the Court allowing the plaintiff to cross-examine one of the witnesses treating him as hostile held not entertainable. (1968) 1 Andh WR 307.

(21) In the case of interlocutory orders, assuming such orders are revisable, the High Court will not interfere except where the non-interference will cause a denial of justice or irremediable harm. AIR 1956 Pat 244 (247) (DB) * AIR 1954 Him Pra 36 (38) * AIR 1948 Nag 258 (271) : ILR (1948) Nag 16 (FB) * AIR 1936 Pat 85 (86) : 15 Pat 340 (DB) * AIR 1961 Ker 200 (200, 201) : 1960 Ker LT 1361. (Refusal by appellate Court to allow transposition of parties — High Court interfered in revision to prevent miscarriage of justice as a result of wrong order.)

(22) An interlocutory order which is appealable to the High Court as an order under Section 104 or Order 43, R. 1 is not revisable under Section 115. AIR 1955 All 309 (312) : ILR (1955) 1 All 295 (FB) * AIR 1948 Nag 258 (268) : ILR (1948) Nag 16 (FB).

(23) Under Article 227 of the Constitution, the High Court has larger powers of interference with the orders of the subordinate Courts even where interference under Section 115 is not justifiable. AIR 1954 Kutch 53 (54) * AIR 1955 Assam 61 (62) : ILR (1954) 6 Assam 548 (DB) * AIR 1953 Trav-Co 41 (43) (DB) * AIR 1964 Cal 439 (441) (DB * AIR 1960 Punj 407 (412) : ILR (1960) 2 Punj 54 (DB). (Reversed on another point in AIR 1961 SC 493).

[See also (1961-62) 20 FJR 270 (Punj). (Power under Art. 227 though wider than it is under S. 115, Civil P. C. does not enable High Court to assume appellate powers to correct every mistake of law.)

(24) Section 115, C. P. C. or Art. 227 of the Constitution do not exclude from their operation interlocutory orders passed in the course of arbitration proceedings started with the intervention of Court, where no suit is pending. (1963) 65 Pun LR 318: 1963 Cur LJ 125. (Revisional powers not barred by S. 23 Arbitration Act.)

(25) Where an application under O. 1, R. 10 filed during the pendency of petition under S. 33, Arbitration Act was dismissed it was held that the powers of High Court to entertain a petition in revision against the order of dismissal was not taken away by anything in Ss. 39 and 41 of the Arbitration Act. 1968 Cur LJ 10: (1968) 70 Pun LR 98.

(26) Where for failure to pay the adjournment cost within the time stipulated, the defence of the defendant is struck out then so far as the defendant is concerned, the case is practically at an end. The High Court will entertain a revision application against the order of the lower Court, even though a decree has not been passed. AIR 1958 All 330 (331) * AIR 1960 J and K 128 (129).

(27) Condonation of delay refused on misreading of Supreme Court judgment— It is failure to exercise jurisdiction — Revision against refusal to condone is maintainable and does not become infructuous even though decree is passed. AIR 1964 All 190 (192).

**Section 115 — Note 4 (contd.)**

(28) Order refusing to review order passed in final decree proceeding — Revision against order refusing review — Pending revision final decree lawfully passed and becoming final — Review of order passed in final decree proceeding cannot be ordered in revision. (1966) 2 Andh WR 139 : (1966) 2 Andh LT 118.

**5. "Subordinate Court."**.—(1) The word 'Court' does not include any person acting in an administrative capacity nor a person acting as a persona designata. AIR 1957 All 495 (500) * AIR 1932 All 568 (569) : 54 All 1085 (SB) * AIR 1968 Andh Pra 22 (27) : (1968) 2 Andh WR 343. (District Munsif exercising power under S. 22, A.P. Gram Panchayat Act, 2 of 1964 is not persona designata but Court subordinate to High Court. 1962-1 Andh WR 296, Doubted but followed.) * AIR 1968 Mys 38 (40, 42) : (1967) 1 Mys LJ 87. (City of Bangalore Municipal Corporation Act (69 of 1949. S. 412—District Judge entertaining application under acts as a persona designata and not as a Civil Court.) * AIR 1968 Pat 510 (511) : 1969 BLJR 74 (DB). (Bihar Hindu Religious Trusts Act (1 of 1951), S. 43 — Authority appointed under S. 43 is a Court subordinate to High Court within meaning of S. 115, Civil P. C.) * 1966 Ker LT 392 : 1966 Ker LJ 341 (346). (A Munsif to whom election disputes are referred under Ss. 22 and 24 of Kerala Panchayats Act acts as a persona designata and not as a court subordinate to High Court.) * 1966 Ker LT 1060: ILR (1966) 2 Ker 676 (DB). (Subordinate Judge acting under Section 102 of the Kerala Land Reforms Act 1963 (1 of 1964) acts as persona designata.) * AIR 1965 Guj 181 (184, 186, 187, 196): (1965) 6 Guj LR 49. (Deliberate use of expression "District Court" in place of "District Judge" as appointing authority — District Court means 'Court of law' and not District Judge as persona designata.) * (1962) 1 Andh WR 296 : (1962) 2 Andh LT 18. (Munsif Magistrate exercising powers under S. 19, Hyderabad Gram Panchayat Act does not act as persona designata but as a Court and a petition under S. 115 is maintainable.) * AIR 1960 Pat 164 (166, 167). (District Judge hearing appeal under S. 70(2)(b) of Bihar Hindu Religious Trusts Act, 1950 acts as persona designata.)

[See however AIR 1941 Pat 65 (68) : 20 Pat 373 (FB).]

[But see AIR 1933 Rang 2 (3) : 10 Rang 517 (SB) * AIR 1931 Bom 582 (586, 587): 55 Bom 544 (DB).]

(2) Expression 'Persona designata' connotes a person appointed by name or other personal description in contradistinction to one whose identity is to be ascertained by the office he holds. Where a person is indicated in the statute not by name but by an official designation, the question always arises whether the intention was to single him out as a 'persona disignata' i.e. as an individual, the designation being merely his further description, or, was that he would cease to be the person so indicated on losing his official designation. If he is a judicial officer and is intended by the statute not to act otherwise than in judicial capacity he cannot come within the expression persona designata so that, he may, irrespective of his continuance in office perform the duty. Whether the intention is one or the other has to be gathered from the words used the nature of the functions to be performed and the objects and purport of the statute. (1962) 1 Andh WR 296: (1962) 2 Andh LT 18. (Munsif-Magistrate exercising powers under S. 19, Hyderabad Gram Panchayats Act, 1950, does not act as persona designata.)

(3) Person indicated in statute or legal instrument not by name but by official designation — Determination of question whether intention is to single him out as persona designata — Test applicable is to find out — Whether the person who is named as an individual or is designated by his office is the person who is selected to exercise the power by excluding others from exercising of such power. If the answer is in the affirmative, then such person becomes persona designata. AIR 1968 Andh Pra 22 (27) : (1968) 2 Andh WR 343.

(4) Where it is provided that a matter is to be decided by a certain Court, the presiding officer of such Court will act as a Court but where it is provided that a certain "Judge" is to decide a matter, the entire provisions of the statute will have to be looked into for the purpose of determining whether the judicial officer acts as a Court or as a persona designata. AIR 1949 Lah 131 (161, 162, 165): Pak LR (1949) Lah 215 (FB) * AIR 1963 Madh Pra 218 (219) : 1963 MPLJ 270. (Court of District Judge acting under S. 12, M. P. Accommodation Control Act.) * AIR 1963 Madh Pra 25 (26) : 1962 MPLJ 437 (DB). (District Court acting as appellate Court under S. 17. Payment of Wages Act.) * 1961 MPLJ 450 : 1961 Jab LJ 253. (The Court of the District Judge hearing appeals under S. 12, M. P. Accommodation Control Act is a court subordinate to the High Court.)

(5) In order to constitute a Tribunal a persona designata what has to be seen is whether the powers given to that Tribunal are merely an extenuation of the powers which it had already possessed, if the power is given to a regularly established Court, or whether that particular work has been given to an individual Judge holding that office in his personal capacity and not in his capacity as a Court. AIR 1967 All 576 (577, 588) : 1967 All LJ 11 (DB).

(6) Tribunal under Punjab Town Improvement Act, 1922 — Not Court 'subordinate to High Court' within S. 115 — Orders of Tribunal not revisable by High Court. AIR 1964 Punj 455 (456) : 1964 Cur

**Section 115 — Note 5 (contd.)**

LJ 311 (DB).

(7) The absence of the State Government's revisional jurisdiction over an order under S. 7-E, U. P. (Temporary) Control of Rent and Eviction Act, 1947, is more consistent with its being an order of a Court, than with its being an order of a persona designata. Thus a Munsif exercising jurisdiction under S. 7-E acts as a Court and not as a persona designata. His order is, therefore, revisable by the High Court. AIR 1964 All 562 (565, 566): 1964 All LJ 256 (FB). (AIR 1957 All 484 (FB), Rel on; S. A. No. 1889 of 1955 dated 18-8-1961, (All). Approved; Civil Revn. No. 1034 of 1955 dated 15-2-1962 (All) and Civil Revn. No. 992 of 1958 D/- 6-4-1962 (All) and Civil Revn. No. 1212 of 1955 dated 20-4-1961 (All), Overruled.)

(8) While judicial functions are essential for a Court, the mere fact that a person exercises judicial functions is not sufficient to constitute him a 'Court'. AIR 1949 PC 129 (133) * AIR 1950 All 80 (81): ILR (1951) 1 All 121 (FB) * AIR 1924 Mad 442 (445) : 47 Mad 357 (FB).

[See also AIR 1967 Pat 153 (154) : 1966 BLJR 632. (Authority prescribed under S. 28 of Bihar Shops and Establishments Act — Will be deemed to be a Court — Any person or authority entrusted with responsibility of judicial functions to be exercised in judicial manner will be taken to be a Court.) * 1962 All WR (HC) 450. (Consolidation officer functioning under S. 12 U. P. Consolidation of Holdings Act is a 'Court' within meaning of S. 22 (2) of the Act.)

(9) The Tribunal appointed under Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, is only a persona designata and could not in any sense be construed as a Court. Even if a District Judge is appointed as the Tribunal, he cannot be considered as a Court subordinate to the High Court. The mere fact that the procedure contained in the Code of Civil Procedure is also to be followed by a Tribunal cannot be considered as the postulate for conferring upon a Tribunal the status of a Court subordinate to the High Court. AIR 1961 Andh Pra 498 (499) : (1961) 1 Andh WR 227.

(10) It is only Courts that are subject to the authority of the High Court that can answer the description of 'Courts' indicated in S. 115. The section would not take in Tribunals empowered to discharge quasi judicial functions. AIR 1960 Andh Pra 49 (51, 52): (1959) 2 Andh WR 264 (DB).

(11) The Tahsildar and the Revenue Divisional Officer on whom certain powers are conferred to decide certain disputes betwen the landlord and the tenant as indicated in S. 16 of the Andhra Tenancy Act, are administrative tribunals empowered to discharge functions of a quasi-judicial nature. AIR 1960 Andh Pra 49 (51, 52) : (1959) 2 Andh WR 264 (DB).

(12) Administrative Officers constituted as revenue Courts are Courts acting judicially — Not limbs of executive branch of State. 1968 Raj LW 376.

(13) The mere fact that a statute provided an appeal to a Court from a particular body does not necessarily constitute that body a Court. AIR 1952 Mad 45 (46): ILR (1952) Mad 719 * AIR 1949 Bom 188 (193) : ILR (1948) Bom 865 (DB).

[See however AIR 1944 Cal 247 (248) : ILR (1943) 1 Cal 69 (DB).]

(14) A Court will be said to be subordinate to the High Court only when it is subject to its appellate jurisdiction though, as a matter of fact in any particular case, an appeal may not lie to the High Court. AIR 1949 Lah 131 (161, 162, 165) : Pak LR (1949) Lah 215 (FB) * AIR 1951 Assam 88 (89) (DB) * AIR 1942 Pat 1 (10, 20) : 21 Pat 1 (FB) * AIR 1934 All 260 (263): 56 All 656 (FB).

(15) The expression 'subordinate to such High Court' in S. 115, refers to territorial jurisdiction of the High Court. In view of Art. 227 of the Constitution which confers on the High Court a superior and superintending jurisdiction over all Courts and tribunals within its jurisdiction, every Court exercising jurisdiction within the territorial limits over which the High Court exercises jurisdiction is subordinate to the High Court. AIR 1963 Andh Pra 37

[See also AIR 1962 Mad 490 (492) : 75 Mad LW 480 (DB). (Section 115 makes it clear that 'Court immediately below' in Article 133 (1) of Constitution refers to Court which is subordinate to High Court.)]

(16) Tribunal constituted under Section 4 of Displaced Persons (Debts Adjustment) Act 1951 is a Court subordinate to High Court — Revision from decision of the Tribunal lies to High Court. AIR 1964 All 504 (509, 513, 516): 1964 All LJ 358 (FB). (AIR 1957 All 352; AIR 1962 All 378 and AIR 1957 All 495, Overruled.)

[But see AIR 1960 Raj 235 (236): 1960 Raj LW 526. (Tribunal appointed under Displaced Persons Debts Adjustment Act is not Court subject to revisional jurisdiction of High Court.)]

(17) A single Judge of the High Court is not a Court subordinate to the High Court. Madh BLJ (1955) HCR 1108 (1108) (DB) * (1893) 17 Bom 514 (519) * AIR 1916 Cal 973 (973): 43 Cal 90 (94) (DB) * AIR 1935 Oudh 72 (75) (DB).

(18) The Rent Controller and the Appellate Authority appointed under several Rent Control Acts are not subordinate to the High Court. AIR 1950 East Punj 181 (183, 188): ILR (1949) East Punj 606 (FB) * AIR 1966 J and K 121 (122): 1966 Kash LJ 5 * (1960) 62 Punj LR 161 (164): ILR (1960) Punj 664. (Rent Controller and District Judge acting under Delhi and Ajmer-Merwara Rent Control Act (19 of 1947) are persona designata.)

**Section 115 — Note 5 (contd.)**

[See also (1969) 1 Mad LJ 413: 81 Mad LW 592. (An order of the Rent Controller holding that he was competent to act under Section 476, Cr. P. Code and lay a complaint is not subject to revision by the High Court under Section 115, C. P. Code as the Rent Controller is not a civil Court.)]

(19) In exercising revisional power under Section 20 (1), Kerala Buildings (Lease and Rent Control) Act (2 of 1965) the District Court functions as a Court and not as a persona designata and the ordinary incidents of the procedure of that Court including any right of appeal or revision will attach to that decision unless there is an express provision to the contrary. There is nothing in that Act which excludes the revisional jurisdiction of High Court under Section 115 and therefore an order under Section 20 would be revisable. AIR 1969 Ker 103 (107): 1968 Ker LT 583 (FB). ((1960) Ker LT 1248, Overruled.) * 1960 Ker LT 895 (896): (1960) 2 Ker LR 353.

(20) The mere fact that a Court has exclusive jurisdiction over a matter under a certain Act does not affect the revisional jurisdiction of the High Court unless such revisional jurisdiction has otherwise been expressly or impliedly ousted. AIR 1951 Nag 443 (444): ILR (1951) Nag 741: 1952 Cri L Jour 1 (FB) * AIR 1950 Cal 536 (542, 543): ILR (1951) 1 Cal 68 (DB) * AIR 1945 Bom 60 (63): ILR (1944) Bom 558 (DB) * AIR 1942 Oudh 291 (297): 18 Luck 1 (FB).

(21) A Collector dealing with an application under Section 18, Land Acquisition Act, 1894, does not act as a Court subordinate to the High Court. AIR 1946 Cal 508 (516, 517): ILR (1946) 2 Cal 573 (FB) * AIR 1938 Cal 250 (252) (DB).

(22) A Court constituted under the Land Acquisition Act is subject to the revisional jurisdiction of the High Court. AIR 1954 Assam 92 (93) (DB).

(23) District Court dealing with an appeal under Section 8 of the Bombay Land Requisition Act (33 of 1948) acts as a Court subordinate to the High Court. (1963) 4 Guj LR 660.

(24) An Authority under the Payment of Wages Act is not a Court subordinate to the High Court so as to attract this Court's revisional jurisdiction under Section 115. ILR (1965) 2 Punj 485 * AIR 1964 Punj 242 (243): (1964) 1 Lab LJ 671 (DB). (Petition can be treated as one under Article 227 of the Constitution.) * AIR 1961 Punj 154 (156): (1961) 2 Lab LJ 62 * 1961 Raj LW 241: (1961) 3 Fac LR 32.

(25) District Court hearing appeal under Section 17, Payment of Wages Act, 1936, acts as a civil Court subordinate to High Court and not as a persona designata. AIR 1967 All 576 (577-578): 1967 All LJ 11 (DB) * 1964 Ker LT 616: 1964 Ker LJ 407 * AIR 1963 Mys 128 (134, 135): 40 Mys LJ 968.

(26) Authority appointed under the Minimum Wages Act (1948) is subject to the revisional jurisdiction under Section 115. AIR 1960 Assam 123 (125) (DB) * (1962-63) 23 FJR 547 (Punj).

[But see 1969 Lab IC 225 (226): 1968 Ker LT 610. (Authority under Section 20, Minimum Wages Act, is tribunal and not Civil Court — Its orders are not revisable under Section 115.)]

(27) Commissioner under Workmen's Compensation Act is Court subordinate to High Court. AIR 1960 Bom 387 (388): 62 Bom LR 195.

(28) A Collector acting under Section 13 of the Madras Hereditary Village Offices Act and the appellate authority acting under Rule 38 of the Rules framed under the Act are Courts subordinate to High Court. AIR 1963 Andh Pra 37 (40).

(29) Under the Rent Acts the right of revision to the High Court has been either expressly or impliedly excluded. In all such cases, there will be no right of revision under this section. AIR 1926 All 398 (399) (FB). (Practically overruling AIR 1926 All 113: 48 All 104, under the Agra Tenancy Act.) * AIR 1932 All 273 (277): 54 All 573 (FB) * AIR 1929 Oudh 389 (390): 4 Luck 539 (FB). (AIR 1928 Oudh 214: 3 Luck 150, Approved; AIR 1923 Oudh 18 and 14 Oudh Cas 38 must be taken to be Overruled.) * AIR 1928 Mad 1032 (1037, 1038) (FB) * AIR 1966 J and K 121 (122): 1966 Kash LJ 5 * AIR 1966 Madh Pra 7 (8): 1965 MPLJ 415. (Order passed by District Judge in appeal against order under Section 5, Public Premises (Eviction of Unauthorised Occupants) Act, 1958 — District Judge acts as persona designata — Revision is excluded by Section 10 of that Act.)

[But see (1896) 23 Cal 723 (728) (FB).]

(30) Where there is no exclusion of the right of revision under the local Acts, Section 115 will apply. AIR 1944 Bom 91 (92) * AIR 1944 Mad 139 (144): ILR (1944) Mad 595 (DB) * AIR 1938 All 635 (636) (DB) * ILR (1963) Madh Pra 347. (M. P. Accommodation Control Act.)

(31) Revenue Court cannot question the jurisdiction of the civil Court in making reference to it under Section 125 (1) of the Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act, 1958. Proper remedy for the aggrieved party is to move against the order of Civil Court itself by way of revision. ILR (1962) Bom 413.

(32) For further illustrations as to what are and what are not Courts Subordinate to High Court, see the undermentioned cases. AIR 1966 Mad 327 (329): (1966) 1 Mad LJ 105 (DB). (Revenue Divisional

**Section 115 — Note 5 (contd.)**
Officer for purpose of Section 6 (B) of the Madras Cultivating Tenants Protection Act (25 of 1955) is a Court subordinate to High Court.) * AIR 1968 Goa 78 (81). (Claims Tribunal under Motor Vehicles Act is not a civil Court though he can be regarded as a tribunal for purposes of supervisory jurisdiction under Article 227 of the Constitution — Orders passed by the Tribunal are not revisable under S. 115 (c), Civil P. C.) * AIR 1966 Mys 5 (7 to 10). (1965) 1 Mys LJ 223. (Courts of the Mamlatdar, Collector, Assistant Collector, Deputy Collector or Assistant Commissioner which are deemed to be Courts under S. 23 (3), Bombay Mamlatdars Courts Act (2 of 1906) are civil Courts subordinate to the High Court. AIR 1946 Bom 200, Dissented from.) * AIR 1960 Mad 353 (357): (1960) 1 Mad LJ 38. (Madras Village Panchayats Act (10 of 1950), Section 19 (1) election petition — District Munsif enquiring into election petition acts as persona designata.) * 1959 Pat LR 297 (298). (Claims officer under the Bihar Land Reforms Act, 1950 is a Court subordinate to the High Court within Section 115.) * AIR 1957 All 495 (498, 499, 500) : 1958 All W R (HC) 330. (Compensation officer taking proceedings under Section 48, U. P. Zamindari Abolition and Land Reforms Act is not a Court subordinate to the High Court Overruled on another point in AIR 1962 All 315 (FB).)

(33) The expression "Court Subordinate" in Section 115 has a different meaning from that of the expression "Court immediately below" in Article 133 (1) of the Constitution of India. A Court is subordinate to the High Court if it is subject to its superintendence while Court immediately below" means the Court from the decision of which the appeal is filed. (1968) 1 SCWR 232: 1968 SCD 374.

**6. "And in which no appeal lies thereto."** — (1) Where an appeal lies to the Subordinate Court and not to the High Court, the High Court's power of revision would not be excluded by the language of Section 115 of the Civil P. C. which confers that power with regard to all cases in which no appeal lies to the High Court. 1961 Ker LT 927: (1961) 2 Ker LR 54 * AIR 1967 Cal 627 (628) (DB) * AIR 1967 Ker 135 (143): 1967 Ker LT 777 * 1967 Ker LT 210: 1967 Ker LJ 292 * AIR 1967 Mad 313 (315): (1966) 1 Mad LJ 427 * AIR 1966 Mad 370 (371): (1966) 1 Mad LJ 451 * AIR 1964 Pat 438 (439) * AIR 1962 Ker 261 (262): 1961 Ker LT 946 * 1961 Ker LT 930.

(2) The word 'appeal' includes a second appeal. AIR 1953 Raj 137 (142): ILR (1953) 3 Raj 483 (FB) * ILR 1955) Andh 624 (628) * AIR 1943 Cal 177 (179) (DB) * AIR 1931 All 294 (296): 53 All 612 (FB) * AIR 1928 Mad 794 (795) * AIR 1969 Orissa 28 (29) * AIR 1968 Manipur 4 (6). (AIR 1933 Rang 64, held not good law in view of AIR 1964 SC 497.) * (1968) 70 Pun LR 649 * 1967 KLT 210: 1967 Ker LJ 292 * (1966) 32 Cut LT 628: ILR (1965) Cut 823 * AIR 1963 Cal 428 (430): 67 Cal WN 638 * (1963) 29 Cut LT 594.

[But see 1949 Bur LR (HC) 498 (501) * AIR 1933 Rang 64 (67): 11 Rang 134.]

(3) Revision under Section 115 lies when a case has been decided by any Court Subordinate to a High Court and in which no appeal lies to the High Court. AIR 1963 Guj 117 (118): (1963) 4 Guj LR 520. (Order appealable under Section 47 to District Court — Revision against order maintainable.)

(4) Where, first appeal or second appeal lies to the High Court from the case sought to be revised the High Court has no jurisdiction to interfere in revision. AIR 1952 Mad 86 (87): ILR (1952) Mad 77 (FB) * AIR 1956 Madh B 208 (208) * AIR 1956 Mad 684 (684) * ILR (1948) 2 Cal 494 (495) * AIR 1946 All 89 (90, 96): ILR (1946) All 413 (FB) * AIR 1962 Punj 218 (219, 220): 64 Pun LR 189 (FB) * AIR 1969 Pat 256 (257): 1969 BLJR 106. (Court recalling its own order appointing receiver.) * AIR 1969 Orissa 28 (29). (Amendment of preliminary decree in pursuance of order directing fresh drawal of the decree — Revision against order incompetent.) * AIR 1968 Mad 222 (222): (1967) 2 Mad LJ 502 * (1968) 70 Punj LR (Delhi) 67 * (1968) 70 Pun LR 167 * AIR 1967 Cal 627 (628) (DB) * AIR 1967 Mad 313 (315): (1966) 1 Mad LJ 427 * (1967) 33 Cut LT 1091: (1968) 2 Lab LJ 326 * AIR 1966 All 188 (189). (Dismissal of application under Order 21, Rule 90 is appealable under Order 43, Rule 1 (j).) * (1966) 70 Cal WN 156 (DB) * 1966-2 Mys LJ 86 (89): (1966) 7 Law Rep 227 * AIR 1965 Mad 376 (378, 379): 77 Mad LW 640 (DB) * AIR 1962 All 299 (300): 1961 All LJ 996 (DB). (Suit for recovery of Rs. 1,700 filed in 1956 in Court in U. P. — Decree passed after 1-1-57 — Second appeal and not revision lies. ILR (1961) 1 All 287: AIR 1961 All 320 :1961 All LJ 4, Overruled.) * AIR 1962 Ker 233 (234): 1962 Ker LT 181 (DB). (Order against garnishee under O. 21, R. 46-C by Small Cause Court — Not appealable under Order 21, Rule 46-I — Revision alone maintainable. 1961 Ker LT 126: AIR 1962 Ker 26, Overruled.) * AIR 1962 Pat 410 (413): (1962) BLJR 16.

(5) Orders and decisions amounting to decrees and which are open to a second appeal to the High Court, cannot be revised under this section. AIR 1949 Pat 133 (137): 27 Pat 873 (FB) * (1886) 8 All 109 (111) (FB) * AIR 1968 Orissa

**Section 115 — Note 6 (contd.)**

163 (165): 34 Cut LT 549. (Order rejecting plaint for non-payment of deficit court-fee.) * 1967 BLJR 973 (974, 975). (Decision under Section 47.) * AIR 1966 Mys 112 (115): (1965) 1 Mys LJ 786 * AIR 1965 Mad 376 (378, 379): 77 Mad LW 640 (DB) * AIR 1965 Orissa 193 (194): 31 Cut LT 105. (Order dismissing appeal as time-barred.) * AIR 1965 Orissa 102 (106): ILR (1964) Cut 674 (DB). (Order of dismissal of memorandum of appeal on ground of limitation.) * (1966) 32 Cut LT 393: ILR (1965) Cut 943 * (1963) 29 Cut LT 594. (Order of Munsif in execution of decree contrary to direction in decree.) * AIR 1960 Mad 349 (350): (1960) 1 Mad LJ 330.

(6) High Court can interfere in revision with a decision where no first or second appeal lies to it against that decision. (1966) 32 Cut LT 383: ILR (1966) Cut 102 ** AIR 1968 SC 366 (371): (1968) 1 SCR 362. (Civil Revn. Nos. 294 and 295 of 1962 D/- 7-1-1963 (Bom. at Nag.) Affirmed.) * AIR 1969 Orissa 144 (1945): 35 Cut LT 287. (Order under Section 151.) * AIR 1969 Raj 109 (111): 1969 Raj LW 113 * (1967) 2 An WR 432: (1967) 2 An LT 114. (Order returning plaint for presentation to proper Court is not a decree — Revision lies.) * AIR 1967 Cal 627 (628) (DB) * (1967) 71 Cal WN 298 * AIR 1967 Mad 313 (315): (1966) 1 Mad LJ 427 * AIR 1967 Orissa 19 (23): 31 Cut LT 294 * (1966) 1 Andh WR 47 (DB). (Order under section 151.) * (1966) 70 Cal WN 1137 * AIR 1966 Raj 118 (120): 1965 Raj LW 495. (Reference under Section 18 Land Acquisition Act rejected as time-barred.) * AIR 1964 Orissa 156 (156): 32 Cut LT 76. (Remand order under Section 151.) * AIR 1964 Orissa 134 (139): ILR (1964) Cut 18 (DB). (Order under Order 22, Rule 5 — Revision lies.) * AIR 1964 Orissa 86 (87): 29 Cut LT 598. (Rejection of memorandum of appeal under Order 41, Rule 3 or Order 7, Rule 11 read with Section 107 (2).) * AIR 1963 Orissa 61 (64): 28 Cut LT 635. (Order rejecting plea of limitation and remanding suit to lower Court with direction to proceed with proceedings for final decree.) * AIR 1963 Pat 30 (32): 1962 BLJR 813 (DB). (Order not appealable under Section 54 of Land Acquisition Act — Revision maintainable.) * (1963) 65 Pun LR 1092. (Order rejecting objection to sale proclamation on the ground that it does not state certain incumbrances.) * AIR 1962 Cal 455 (456): 66 Cal WN 388. (Order under Section 24, Hindu Marriage Act granting maintenance pendente lite and expenses of proceedings — Order is not appealable.) (Held, overruled by 68 Cal WN 316 as interpreted in 70 Cal WN 633.) * AIR 1962 Cal 88 (91): 65 Cal WN 786. (Order under Section 151 rejecting application for stay of further proceedings in matrimonial action under the Hindu Marriage Act.) * ILR (1962) Cut 818. (Order dismissing memorandum of appeal as time-barred — Revisable — Overruled on another point in AIR 1965 Orissa 102.) * AIR 1962 Raj 109 (111): 1961 Raj LW 527. (Order dismissing suit under O. 23, Rule 1 (i) with a direction as to costs — Order not a decree.) * AIR 1961 Mad 262 (263): 74 Mad LW 261 * AIR 1961 Manipur 35 (37) * AIR 1960 Bom 315 (317): 62 Bom LR 47. (Order granting interim relief under Section 24, Hindu Marriage Act (1955).) * ILR (1960) Cut 118. (Order of remand without determining rights of parties.)

(7) Under Section 28, Hindu Marriage Act, 1955 only decree and orders such as are appealable under Section 104 and Order 43, of Civil P. C. are appealable — Order directing parties to be present for examination is revisable and not appealable. AIR 1965 J and K 88 (89): 1965 Kash LJ 11 (DB).

(8) Subordinate Judge vested with Small Cause Courts powers of Rs. 500 only — Money suit for Rs. 570 tried as regular suit — No second appeal lies to High Court in view of Section 102 but a revision lies. 1960 BLJR 455 (456).

(9) An order passed on an application for restoration of a holding under Section 52 of Malabar Tenancy (Amendment) Act (33 of 1951) is neither a decree nor an appealable order and therefore is resivable under S. 115. 1962 Ker LJ 517.

(10) "In which no appeal lies" means appeal from the order direct and not appeal from final order. AIR 1964 SC 497 (502): (1964) 4 SCR 409. (AIR 1953 Raj 137 and AIR 1953 Raj 90, Overruled.)

(11) Where an application for permission to prosecute the suit as a legal representative of the deceased is disallowed, the applicant has a right of assailing the order and this right will not be taken away merely because a subsequent decree has been passed which decree he cannot appeal against without getting the order passed on his application under Order XXII, Rule 3 reversed. Hence an application to the High Court in revision under Section 115 is competent. AIR 1961 Punj 184 (187): 63 Punj LR 372.

**7. Other remedy open.** — (1) The special and extraordinary powers under this section will not be exercised in favour of interference where the applicant has another remedy open to him which he has not pursued. AIR 1959 Mad 14 (14) * AIR 1958 Manipur 20 (22) * AIR 1958 Punj 437 (440): ILR (1958) Punj 663 (DB) * AIR 1958 Raj 287 (291): ILR (1958) 8 Raj 113 * AIR 1957 All 558 (559) * 1957 Jab LJ 268 (270) * AIR 1957 J and K 17 (17) * 1957-2 Mad L Jour 623 (624) * ILR (1955) Andhra 624 (629) * (1968) 70 Punj LR

Section 115 — Note 7 (contd.)
649 * (1965) 2 Mys LJ 712: (1966) 18 STC 94 * AIR 1965 Mys 300 (301, 302): (1965) 1 Mys LJ 297 * (1963) 2 Mys LJ 325 * AIR 1959 Manipur 23 (24).

[See however AIR 1941 Mad 262 (265) (DB).]

(2) Though ordinarily the High Court would not interfere in revision if another convenient remedy is open to an applicant, it cannot be laid down as a general proposition. Each case must be considered on its own merits and where an important question of law is involved the discretion should be exercised in favour of the applicant and he should not be driven to a more circuitous remedy by way of separate suit. 1964 All LJ 602. (Rejection of application for rateable distribution not in accordance with law. Though remedy by way of suit was available under Section 73 (2), the High Court interfered under Section 115 — AIR 1936 Oudh 185 and 2 All LJ 370, Not foll.) * AIR 1968 Andh Pra 33 (34) * (1967) 2 Andh WR 432: (1967) 2 Andh LT 114 * (1965) 67 Bom LR 210 (212): 1965 Mah LJ 473. (AIR 1936 Cal 786, AIR 1944 Cal 309 and AIR 1938 All 22, Rel. on.) * AIR 1963 Guj 117 (118, 119): (1963) 4 Guj LR 520 * 1960 All LJ 79: 1960 All WR (HC) 63. (Order on objection under Order 21, Rule 58 is revisable, though suit under Order 21, Rule 63 is maintainable.) * AIR 1960 Andh Pra 540 (542). (Order clearly without jurisdiction — High Court will interfere, even though appeal lies to lower appellate Court.) * AIR 1959 Cal 621 (623): 63 Cal WN 361. (Availability of remedy by way of suit under O. 21, R. 103.)

(3) It would be proper to interfere in revision where the existence of the alternative remedy is doubtful, or where the alternative remedy is inconvenient or is not efficacious or is barred, or where non-interference will lead to multiplicity of proceedings and unnecessary expense and dealy, or results in grave injustice. AIR 1960 Andh Pra 540 (542) * AIR 1962 Assam 23 (24): (1960) 1 Assam LR 243 (DB). (Court holding that Section 145 (c) applied — Order is covered by Section 47 and is appealable— Prayer for revision included — Court will exercise revisional powers.)

(4) Where the applicant could have appealed against the decision complained against and has not done so a revision will not ordinarily be entertained. AIR 1948 PC 12 (14): 74 Ind App 264: ILR (1948) Mad 505: ILR (1947) Kar (PC) 410 * AIR 1957 J and K 12 (13) (DB) * AIR 1952 Mad 86 (87): ILR (1952) Mad 77 (FB) * AIR 1958 Him Pra 42 (43) * Madh BLJ 1955 HCR 1803 (1805) * AIR 1968 Ker 282 (283): 1968 Ker LT 70 * (1968) 70 Pun LR 649. (Order made by Senior Subordinate Judge in exercise of Insolvency Jurisdiction.) * AIR 1967 Ker 135 (143): 1967 Ker LT 777 * (1965) 16 STC 534: 67 Pun LR 155 * AIR 1965 Mad 376 (378, 379): 77 Mad LW 640 (DB) * AIR 1963 Andh Pra 193 (197): (1963) 1 Andh WR 45 (DB). (Award set aside under Section 30 (c), Arbitration Act — Appeal under Section 39 (1) (vi) of the Arbitration Act is proper remedy.) * AIR 1962 Raj 157 (160): 1961 Raj LW 262 * ILR (1960) Mys 664 (667). (Order falling under Order 40, Rule 1 (d) is appealable under Order 43, Rule 1 (s).) * 1960 Raj LW 153: ILR (1960) 10 Raj 823. (Plaintiff failing to comply with order for supply of better particulars — Dismissal of suit — Order amounts to decree and is appealable — No revision lies. AIR 1941 Nag 223, Rel. on.) * AIR 1959 Mad 191 (194): (1959) 1 Mad LJ 181 * AIR 1959 Tripura 6 (6).

(5) Where an interlocutory order can be questioned in an appeal against the final decree in the suit under Section 105 of the Code, the High Court will not ordinarily interfere in revision. AIR 1954 Raj 83 (83): ILR (1953) 3 Raj 1003 (FB). (AIR 1951 Raj 79 and ILR (1951) 1 Raj 645, Overruled.) * AIR 1953 Raj 137 (143): ILR (1953) 3 Raj 483 (FB) * AIR 1956 Pat 244 (250) (DB) * (1883) 7 Bom 341 (372) (FB) * AIR 1968 Pat 187 (188) * (1965) 1 LR 684 (686) (Mys) * AIR 1963 Raj 193: 1963 Raj LW 183 (DB).

[See however AIR 1960 Raj 196 (198): ILR (1959) 9 Raj 614. (Civil Court holding that it has jurisdiction to try suit — Revision is competent as such objection even if raised before High Court in appeal from decree would be infructuous in view of Section 205, Rajasthan Tenancy Act.)]

(6) Where the first appellate Court had not only remanded the case with fresh issue which covered the issues already framed by the trial Court, but it had also directed the trial Court to transfer the case to a Revenue Court, the appeal from the Revenue Court would never come to the High Court and so a revision against such order of remand was maintainable. ILR (1960) 10 Raj 346.

(7) Where the aggrieved party could bring a separate suit to challenge the order sought to be revised, the High Court will not, as a rule, interfere in revision. AIR 1951 Madh B 79 (79) * AIR 1948 Nag 183 (189): ILR (1947) Nag 538 * (1888) 10 All 119 (122) * (1885) 7 All 407 (410) (DB) * (1909) 3 Ind Cas 780 (782) (Bom) (DB) * 1898 Pun Re No. 21, p. 58 (59) (FB) * AIR 1965 Mad 122 (127): 77 Mad LW 387 (DB) * AIR 1965 Punj 412 (412, 413): 66 Pun LR 1032 * AIR 1964 Pat 504 (505) (DB). (Remedy of suit under O. 21, R. 63.)

[But see AIR 1955 Pepsu 113 (120): ILR (1956) Patiala 41 (DB).]

**Section 115 — Note 7 (contd.)**

(8) An order under Order 21, Rr. 98, 99 or 101 will not be interfered with in revision. AIR 1952 Cal 9 (9) (DB) * 1952 Raj LW 454 (455, 456) * AIR 1930 Cal 348 (348) * AIR 1915 Mad 744 (744).

[But see (1884) 6 All 172 (173) (DB).]

(9) Order under Order 21, Rule 58 releasing property from attachment passed without jurisdiction — Revision lies, even though the aggrieved party has alternative remedy by way of suit under O. 21, R. 63. AIR 1962 All 9 (12).

(10) A decision under Section 9 of the Specific Relief Act, 1877, will not be interfered with in revision. AIR 1953 Assam 158 (159): ILR (1952) 4 Assam 316 * (1908) 30 All 331 (333) (DB) * AIR 1934 All 541 (542) * AIR 1926 Nag 290 (291): 22 Nag LR 30 * AIR 1966 Madh Pra 282 (284): 1966 MPLJ 192.

[But see AIR 1969 Mad 191 (201): ILR (1968) 3 Mad 335 * AIR 1965 Mad 122 (127): 77 Mad LW 387 (DB).]

(11) If a civil Court commits a material irregularity in the exercise of jurisdiction even in the course of summary, proceedings, the High Court will interfere in revision, although there may be an alternative remedy. AIR 1963 Guj 147 (148). (The principle that the High Court will not interfere in revision if there is an alternative remedy, which may apply to revenue proceedings, need not be applied to the proceedings of a civil Court.)

(12) The filing of a review petition does not take away parties' right to invoke the Court's power under S. 115. AIR 1960 Orissa 153 (153): 26 Cut LT 106.

**8. Jurisdiction.** — (1) The word 'jurisdiction' has been used in this section in its broad legal sense as meaning the power of administering justice according to the means which the law provides and subject to the limitations imposed by that law upon the judicial authority. (1885) 7 All 345 (350) (DB) * ILR (1957) Ker 401 (407) * AIR 1914 Cal 388 (390, 391); 41 Cal 326 (DB).

(2) The Section applies to jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it. The section is not directed against the conclusions of law or fact in which the question of jurisdiction is not involved. AIR 1917 PC 71 (74): 40 Mad 793: 44 Ind App 261 * AIR 1957 Cal 135 (136) (DB) * AIR 1966 SC 153 (155, 156): (1966) 1 SCR 102 * AIR 1964 SC 1336 (1338, 1339): (1964) 3 SCR 495 * AIR 1964 SC 497 (505): (1964) 4 SCR 409 * AIR 1963 SC 698 (701): 1962 Supp (1) SCR 933. (Revision under Section 35, Delhi and Ajmer Rent (Control) Act, 1952, is not however thus limited — Revision extends to errors of law and fact if there is miscarriage of justice.) * (1968) 1 Andh LT 321 * (1967) 1 Andh WR 241: (1967) 1 Andh LT 373 * AIR 1967 Mad 306 (310): 79 Mad LW 411 (416) * (1966) 2 Andh WR 159 * (1964) 5 Guj LR 941 * AIR 1960 Mys 297 (299): 38 Mys LJ 232.

(3) High Court's revisional power — Question as to whether a matter has to be referred to arbitration — Matter is one affecting Court's jurisdiction — Erroneous decision can be corrected by High Court in revision. AIR 1967 Punj 241 (244).

(4) The matter of addition of parties does not raise any question of initial jurisdiction of the Court. It may sometimes involve a question of jurisdiction in the limited sense in which it is used in Section 115. AIR 1958 SC 886 (891, 895) * (1968) 2 Mys LJ 243: 15 Law Rep 727 * (1963) 1 Mys LJ 465.

[See also (1966) 1 Andh LT 286. (Court exceeding its jurisdiction in disposing of the case on merits after elaborate enquiry not strictly called for — High Court is not prevented from reopening the matter when it is clearly of the view that the conclusions drawn by lower Court is not consistent with evidence on record.)]

(5) Question of construction of a provision in an enactment involves question of jurisdiction of Court and therefore can be entertained in revision. AIR 1967 Bom 191 (194): 65 Bom LR 412 (DB).

**9. "Exercised a jurisdiction not vested in it by law."**—(1) When a Court has no legal authority to decide the cause at all but nevertheless under an erroneous construction of the law or of a misapprehension of facts proceeds to do so as if it had such authority, it exercises a jurisdiction not vested in it by law. AIR 1956 SC 391 (399): 1956 SCR 125: ILR (1956) Punj 1075: 1956 Cri L Jour 781 * AIR 1958 All 636 (638) (DB) * AIR 1958 Pat 486 (488) * AIR 1958 Pat 27 (29) (DB) * 1957 Andh LT 534 (536) * AIR 1957 Ker 41 (42): ILR (1957) Kerela 340 * AIR 1957 Madh B 135 (136) * AIR 1957 Madh B 122 (124) * AIR 1957 Nag 97 (100) (DB) * AIR 1967 Assam and Nagaland 1 (2): ILR (1966) 18 Assam 65 * 1966 All LJ 518. (Application under Section 8 Arbitration Act not maintainable but entertained — It is exercise of jurisdiction not vested in Court.) * ILR (1966) 18 Assam 56. (Civil Court assuming jurisdiction, which it has not, and entering into examination of validity of either requisition or acquisition under Assam Land (Requisition and Acquisition) Act, 1948.) * AIR 1966 Orissa 59 (60): 31 Cut LT 1011. (Time barred application under Order 9, Rule 13 — Court instead of dismissing it restoring suit.) * AIR 1966 Tripura 16 (17). (Refusal to produce documents under Order 11, Rule 14 —

**Section 115 — Note 9 (contd.)**

Order 11, Rule 21 is not attracted — Order dismissing suit is without jurisdiction.) * (1964) 66 Pun LR 490: 1964 Cur LJ 176 * AIR 1963 Punj 104 (109): ILR (1962) 2 Punj 597. (Granting temporary injunction in case where perpetual injunction can neither be claimed nor granted. Amounts to reckless assumption of jurisdiction.) * AIR 1962 Punj 470 (472): 1962 Cur LJ 316 * (1961) 1 Andh WR 320 * (1961) 1 Ker LR 434 (436). (District Court directly entertaining revision under Section 20 Kerala Act 16 of 1959 from order of Rent Control Court acts without jurisdiction.) * AIR 1959 Andh Pra 432 (433): (1959) 2 Andh WR 229. (Final order of suspension by District Judge against legal practitioner.) * AIR 1959 Mysore 158 (161): 1959 Cri LJ 946: 37 Mys LJ 30. (Notice served under Section 2 of Administration of Evacuee Property Act, alleged to be defective — Defect not being such as to vitiate jurisdiction of authority, not sufficient for divesting jurisdiction of authority: AIR 1950 SC 222, Rel. on.)

(2) Every tribunal or authority has jurisdiction to decide a case rightly or wrongly. When such authority acts in excess of jurisdiction given to it or abuses the authority or acts in an arbitrary way, its action can be challenged by an appropriate action in civil Court. A civil Court can interfere only when a clear case is made out there the action taken by authorities is in excess of their jurisdiction. AIR 1964 Bom 241 (243): 66 Bom LR 38. (AIR 1950 SC 222, Rel. on.)

(3) Where a Court entertains a suit or appeal which it has no jurisdiction to entertain the High Court will interfere. 1956 Raj LW 195 (197) * AIR 1933 Rang 185 (186): 11 Rang 337 (FB) * 1966 All LJ 308: 1966 All WR (HC) 10 * AIR 1966 Madh Pra 286 (293): 1966 MPLJ 335 (DB) * AIR 1966 Punj 165 (169): ILR (1966) 1 Punj 657 * 1962 Raj LW 188 (192). (Court entertaining a suit instituted not in conformity with S. 92 (1), C. P. C.) * AIR 1961 Tripura 16 (17). (Entertaining suit barred by limitation.) * 1960 Ker LJ 183: 1960 Ker LT 281. (Entertaining suit barred under Section 47.)

[But see AIR 1924 Nag 17 (18): 19 Nag LR 179 * AIR 1927 Nag 164 (165).]

(4) A High Court itself acts in excess of its jurisdiction where it exercises a jurisdiction not conferred on it by Section 115. AIR 1953 SC 23 (28): 1953 SCR 136.

(5) The omission to apply the provisions of an enactment or of the Constitution, while deciding the matter within the jurisdiction of the Court or officer, cannot be said to result in complete absence of jurisdiction to decide it. If a decision is given in ignorance of a piece of legislation, the decision cannot be said to be completely without jurisdiction. AIR 1958 All 154 (157): ILR (1957) 2 All 88 (DB).

(6) Court must not grant relief not prayed for — Applicant under Order 21, Rule 58 and Section 47, asking that the execution be dismissed — Court cannot order release of the amount attached, which relief had not been prayed for — Court granting relief not prayed for — It is a case for revision. AIR 1962 All 9 (11, 12).

(7) Claimant should prove that he had interest in attached property on date of attachment — Such interest arising after attachment — Property released— Court exceeds its jurisdiction — Revision lies. AIR 1962 All 9 (12).

(8) A perverse decision is also a decision without jurisdiction. AIR 1968 Cal 528 (531).

(9) Suit in forma pauperis — Appeal from decree based on same cause of action pending — Stay of suit — Application for — Order refusing stay of enquiry into pauperism — Court cannot be said to have acted without jurisdiction or with illegality or material irregularity. AIR 1962 Punj 16 (17).

(10) Order of trial Court refusing to grant temporary injunction in proper exercise of its discretion — Appellate Court has no jurisdiction to interfere with order — Appellate Court granting temporary injunction exercises a jurisdiction not vested in it — High Court would interfere in revision and restore the order of the trial Court. ILR (1965) 2 All 71 (81).

(11) Stay of proceedings by superior Court — Further proceedings by lower Court after stay are without jurisdiction. AIR 1962 Pat 357 (360).

(12) The bar under Clause (a) of the section must be one imposed by some provision of law and not by a contract or by other act of parties even if that contract be enforceable in law. 1961 Ker LT 379. (AIR 1937 Nag 334, Dissented from.)

(13) If the Act requires certain requirements to be satisfied and if the trial Court does not give a finding that those requirements are satisfied, then the order passed by the trial Court would be without jurisdiction. (1962) 3 Guj LR 920.

**10. "Failed to exercise a jurisdiction so vested."** — (1) Where a Court having jurisdiction to decide a matter, thinks erroneously under a misapprehension of the law or of the facts that it has no such jurisdiction, and declines to exercise the same, there is a failure to "exercise the jurisdiction vested in it." AIR 1949 PC 239 (242): 76 Ind App 131: ILR (1950) 1 Cal 446. (AIR 1927 All 358 and 9 Bom 432, Overruled.) * AIR 1958 SC 507 (512): 1959 SCR 1 * AIR 1958 Mad

**Section 115 — Note 10 (contd.)**

365 (366) * AIR 1958 Pat 486 (488) * AIR 1958 Pat 22 (24) (DB) * 1957-2 Andh WR 152 (155) * (1957) 100 Cal L Jour 146 (148) * AIR 1957 Him Pra 59 (61) * AIR 1957 Mad 679 (680) * ILR (1955) 1 Cal 25 (28) (DB) * AIR 1965 SC 540 (543): (1964) 4 SCR 69. (Court erroneously holding that Section 4 of Bengal Regulation V of 1799 did not apply and that application was barred by limitation and on these grounds refusing to exercise jurisdiction under Section 4 of Regulation.) * AIR 1965 SC 498 (502): (1964) 7 SCR 197. (Court took an erroneous view of law that it has no jurisdiction to exercise discretion refusing to do so.) * AIR 1968 MP 196 (199): 1968 MPLJ 356 (DB) * (1968) 81 Mad LW 15 (17, 18): (1968) 1 Mad LJ 390. (Refusal to allow amendment of written statement by filing additional statement.) * (1968) 1 Mys LJ 129: 13 Law Rep 94 * AIR 1968 Pat 188 (190). (Misapplying Supreme Court ruling.) * AIR 1967 All 161 (162). (Application, though maintainable, rejected as 'misconceived.') * AIR 1967 Guj 124 (125) : 7 Guj LR 970 * (1966) 7 Guj LR 589 : ILR (1966) Guj 660. (Court erroneously holding that amendment of plaint was barred under S. 80 Civil P. C.) * 1966 MPLJ 905: 1966 Jab LJ 500 * AIR 1965 All 409 (410). (Munsiff failing to exercise jurisdiction vested in him under law by holding that suit was not maintainable under S. 9, Specific Relief Act — High Court can substitute his order by suitable order in revision.) * (1965) 2 ITJ 740 (All) * (1965) 1 Mys LJ 342 : (1965) 1 Law Rep 653 * AIR 1965 Orissa 17 (20) : ILR (1964) Cut 685. (Court acting under misconception of law as to applicability of doctrine of waiver and estoppel.) * AIR 1964 Orissa 136 (138) (DB). (Adoption by widow — Court not deciding question as to who was legal representative of deceased plaintiff, under O. 22, R. 5, C. P. Code — Order liable to be set aside under S. 115 (b).) * (1964) 30 Cut LT 63 : ILR (1963) Cut 957. (Application for examination of an essential witness present in Court rejected by Court in ignorance of provisions of O. 16, R. 7.) * 1962 MPLJ 872: 1963 Jab LJ 52. (Preliminary decree for partition — Private sale held by Commissioner under direction of Court for division of sale proceeds — Order is appealable under O. 43, R. 1 — Order dismissing appeal as not competent — Revision lies.)* (1961) 1 Andh WR 320 * (1961) 1 Andh WR 100: 1961 Andh LT 169. (Debt Settlement Board failing to exercise jurisdiction under S. 41, Hyderabad Jagirdars Debt Settlement Act and also exceeding jurisdiction under S. 45 of the Act.) * AIR 1960 Bom 485 (486): 62 Bom LR 722. (Review application dismissed on erroneous view that Court had no power.) * AIR 1960 Pat 285 : 1960 BLJR 99. (Refusal to transfer execution case on a wrong view of law.) * (1957) 61 Cal WN 789 (DB). (Failure to draw decree — Only remedy is to file revision.)

[See also (1964) 5 Guj LR 786. (Land used for agricultural purposes for benefit of commercial undertaking — Question whether suit land was exempted from Bombay Tenancy and Agricultural Lands Act — Civil Court held had jurisdiction to decide — Before deciding that question Civil Court referring issue as to whether defendant was tenant under Tenancy Act to Mamlatdar — Civil Court held failed to exercise its jurisdiction.)]

(2) Where the Court rightly assumes jurisdiction but decides against the rights of a party under an error of law, there is no failure to exercise judisdiction but only an erroneous conclusion arrived at in the exercise of it. AIR 1949 All 744 (745) (DB) * AIR 1945 PC 170 (172) : ILR (1945) Kar (PC) 335 * AIR 1935 Pat 201 (202) * (1964) 5 Guj LR 1035 : ILR (1964) Guj 1167 * (1964) 5 Guj LR 941.

(3) In the following cases a Court will be deemed to have failed to exercise a jurisdiction vested in it by law.

(a) Where it refuses to entertain or it rejects a plaint, application, or memorandum of appeal on the erroneous view that it has no power to entertain or deal with it. AIR 1956 Assam 85 (95) : ILR (1956) 8 Assam 51 (DB) * AIR 1955 Raj 51 (52, 53) : ILR (1954) 4 Raj 900 (DB) * AIR 1967 Punj 389 (392) 68 Pun LR 54 (FB) * 1968 Pat LJR 232. (Eviction suit against tenant — Other parties added to avoid future objections — Plaintiff applying to delete some defendants against whom he had no claims — Trial Court refusing to delete names of other parties.

**Held** trial Court failed to exercise jurisdiction.) * AIR 1967 Orissa 152 (153): 31 Cut LT 1131 * AIR 1966 Orissa 240 (240) : 32 Cut LT 205 * 1966 Cur LJ 805 (Punj) * 1965 All LJ 741 : 1965 All WR (HC) 374 * (1965) 7 Orissa JD 322: (1965) 31 Cut LT 294. (Rejection of application under O. 11, Civil P. C. on the erroneous view that O. 11 does not apply in proceedings under S. 24, Hindu Marriage Act, 1955.) * 1961 Jab LJ 469 * 1959 Raj LW 88.

[See however 1961 Ker LT 379 (380). (Return of plaint on finding that suit is maintainable elsewhere due to binding contract between parties —There is no failure to exercise jurisdiction.)]

(aa) Declining by District Judge to exercise revisional jurisdiction under Sec. 25. Provincial Small Cause Courts Act against decision of Small Cause Judge which is not according to law. 1965 All LJ 1132: 1965 All WR (HC) 596.

Section 115 — **Note 10 (contd.)**

(b) The erroneous rejection of an application under O. 21, R. 89, or R. 90 on the ground that the applicant had no locus standi to apply, is a failure to exercise jurisdiction. AIR 1941 Mad 653 (653, 654) * AIR 1921 Mad 157 (163): 44 Mad 554 (FB). (Overruling AIR 1914 Mad 46, Doubtful if AIR 1917 Mad 76 is good law.) * (1895) 22 Cal 767 (783) (FB). [But see AIR 1936 Pat 119 (121) * AIR 1919 Mad 183 (184).]

(c) When it refuses to pass an order on the ground that it has no power to do so. AIR 1949 Bom 359 (361) : ILR (1949) Bom 449 (DB) * AIR 1969 Andh Pra 236 (237).

(d) Where it misunderstands its own duties or its powers and thus, in substance declines jurisdiction. AIR 1955 Vind Pra 39 (40) * AIR 1969 Orissa 52 (53). (Ex parte decree against minor upon non-appearance of guardian — Court failing to appoint guardian for minor — Decree against minor can be set aside in revision even if petition is not filed by minor.) * AIR 1968 Orissa 94 (95) : 34 Cut LT 173 * (1967) 1 Mad LJ 453 : 80 Mad LW 239. (Omission to give finding on necessary issue.) * AIR 1966 Orissa 53 (55) : 32 Cut LT 563 * AIR 1966 Orissa 44 (45) : 31 Cut LT 757 * 1965 MPLJ 171 : 1965 Jab LJ 98. (Application for rateable distribution — Dismissal of application under misconception of law or on ground that counsel did not appear to argue case amounts to refusal to exercise jurisdiction.) * (1965) 2 Mad LJ 107 : 78 Mad LW 250. (Application under S. 5, Limitation Act (1908) — Lower court not exercising jurisdiction to see whether there was 'sufficient cause' or not.) * AIR 1964 Orissa 94 (96) : 30 Cut LT 386. (Erroneous order asking plaintiff to deposit court-fee before final decree — Order set aside on application by plaintiff — Second order recalling it as without jurisdiction — Order held amounted to refusal to exercise jurisdiction to review the erroneous order.) * (1963) 4 Guj LR 387. (Failure to refer issues to competent authorities under S. 85-A of Bombay Act 67 of 1948). * 1961 Jab LJ 1122 * AIR 1960 Ker 69 (74) : 1959 Ker LT 642.

(e) Court passing order under O. 7, Rule 11, instead of under O. 7, R. 10. 1965 All WR (HC) 604.

(f) Refusal to grant temporary injunction without assigning any reasons. (1965) 1 LR 748 (Mys.)

(g) Where on the facts found there had been negligence on the part of the next friend of the minor, the lower Courts fell into the error that it would not constitute sufficient cause within the meaning of O. 9, R. 9, C. P. Code. (1961) 1 Andh WR 320.

(h) Where the District Judge in appeal under S. 17 of the Payment of Wages Act, 1936, from an order under Section 15 wrongly holds that the provisions of the Act did not apply to the claim for wages made in those proceedings. AIR 1959 Assam 13 (15) (DB).

(i) Failure of the Courts below to apply and give effect to the provisions of S. 35, Stamp Act. AIR 1964 Assam 138 (140) : ILR (1964) 16 Assam 54.

(4) Finding that case is not fit for exercise of inherent power is not refusal to exercsise jurisdiction. 1966 All LJ 811.

(5) Suit for possession against tenant brought on two grounds — Decree confirmed by appellate Court on one ground Finding on other ground not given as not necessary — No interference in revision. AIR 1963 Guj 143 (144) : (1963) 4 Guj LR 152.

**11. Exercise of jurisdiction illegally or with material irregularity.**— (1) It is only when a Court decides a case perversely that it can be said to act illegally or with material irregularity in the exercise of its jurisdiction and other errors on questions of law or procedure are outside this clause. AIR 1915 Mad 1223 (1233): 39 Mad 195 (FB) * (1894) 17 Mad 410 (414, 415) (FB) * (1896) 1 Cal WN 617 (625, 626) (DB) * AIR 1968 Cal 528 (531) * AIR 1967 Cal 133 (136).

(2) Though a Court may have jurisdiction to make an order, if the effect of the order is finally to shut out a trial when it ought never to have been so shut out, then such an error must be regarded as a material irregularity although it may not be palpable or gross. AIR 1938 Nag 122 (126): ILR (1938) Nag 106 (FB). (Overruling AIR 1933 Nag 107: 29 Nag LR 125 (FB).)

(3) Where the law has prescribed the manner in which a Court shall exercise its jurisdiction and the Court acts in disregard of these provisions, it acts illegally or irregularly in the exercise of jurisdiction. AIR 1948 Nag 258 (271): ILR (1948) Nag 16 (FB) * AIR 1958 Madh Pra 25 (26) * AIR 1958 Madh Pra 6 (7) * AIR 1957 Andh Pra 378 (380) * 1957 Jab LJ 234 (238) * 1957 MPC 580 (581) * ILR (1957) Punj 1551 (1553) * ILR (1955) 1 Cal 119 (120) * AIR 1956 Madh B 98 (99): ILR (1956) Madh B 80 * AIR 1968 Guj 236 (240): 8 Guj LR 649 (DB) * AIR 1968 Pat 110 (112). (Court has no power to invoke its inherent powers, after plaintiff's right to apply for restoration of suit has become barred by time. Order restoring suit in such case is bad in law and Court commits an illegality in exercise of its jurisdiction in passing order.) * AIR 1968 Pat

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47 (47). (Court granting interim injunction — Court must consider whether injunction would continue till disposal of suit or in what terms — Court refusing to do so commits an error of jurisdiction.) * AIR 1969 Guj 213 (221). (Court ignoring provisions of Rules 18 and 20 of Order 11 in ordering inspection of documents.) * AIR 1966 Guj 302 (304): (1966) 7 Guj LR 405 * AIR 1966 Mad 89 (95): ILR (1965) 1 Mad 274 * (1964) 5 Guj LR 1035: ILR (1964) Guj 1167 * AIR 1963 Pat 286 (287): 1963 BLJR 445 (DB) * AIR 1961 Guj 92 (93):(1961) 2 Guj HCR 90. (Issues in two suits different — Parties not common — Consolidation of suits for hearing evidence in common without consent of parties held illegal.) * AIR 1962 Pat 63 (63): 1961 BLJR 687. (Giving permission to withdraw suit under Order 23, Rule 1 (2) without sufficient cause.) * AIR 1960 All 184 (186). (Consolidation of suits in violation of provisions of Section 10.) * AIR 1959 Ker 277 (279): 1959 Ker LT 161. (Issue of temporary injunction without considering essential aspects amount to material irregularity.)

(4) Where the Court exercises its jurisdiction in the manner prescribed but arrives at a conclusion or decision which is erroneous in law or fact, it does not act illegally or with material irregularity but decides erroneously in the proper exercise of jurisdiction. AIR 1956 Bom 323 (325) * AIR 1956 Pat 290 (293) * AIR 1955 All 666 (667) (DB) * AIR 1969 Goa 53 (55) * AIR 1968 Bom 279 (280): 69 Bom LR 796 * (1964) 5 Guj LR 941 * (1964) 66 Pun LR 1170 * AIR 1961 Mad 158 (159): (1960) 2 Mad LJ 274 * AIR 1960 All 590 (593): 1960 All LJ 514 (DB) * AIR 1959 All 574 (576): 1958 All LJ 550.

(5) Where the Judge ignored the nature of the proceedings before him and on the scanty material before him he thought it proper to indulge in inferences and conclusions which could not be held to be justified, and further failed to exercise his jurisdiction, interference under Section 115, Civil P. Code, is not only amply justified but really required. 1960 All LJ 79: 1960 All WR (HC) 63.

(6) It would be difficult to formulate any standard by which the degree of error of subordinate Courts can be measured. AIR 1949 PC 156 (158):76 Ind App 67: ILR (1950) Mad 1. (1 Cal WN 617 and AIR 1931 Cal 27, Disapproved.) * AIR 1953 SC 23 (28): 1953 SCR 136.

(7) The words "acting illegally" mean acting in breach of some provision of law and the words "acting with material irregularity" mean committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. AIR 1949 PC 156 (158): 76 Ind App 67: ILR (1950) Mad 1 * 1957 Pab LR 253 (255) * AIR 1953 SC 23 (28): 1953 SCR 136 * AIR 1964 Sau 66 (70) (FB) * AIR 1969 Goa 53 (55) * AIR 1968 Guj 236 (240): 8 Guj LR 649 (DB) * 1967 Ker LR 600 (603) * (1965) 1 Law Rep 738 (Mys). (AIR 1963 Guj 147, Dissented.) * ILR (1964) Guj 1167: (1964) 5 Guj LR 1035. (Illegality contemplated is procedural illegality and material irregularity must also be material irregularity relating to procedure.) * AIR 1963 Guj 195 (197, 198): (1963) 4 Guj LR 698 * (1962) 3 Guj LR 529.

(8) Application for permission to sue in forma pauperis — Pendency of — Permission granted — Application still remains pending though it is deemed plaint — Meaning of 'deemed' — Stay order till disposal of pauper application, continues to be in force — Confirmation of sale though after grant of pauper application amounts to breach of provisions of law — Revisional power can be exercised. AIR 1967 All 161 (162).

(9) The erroneous decision must pertain to the exercise of jurisdiction i.e., to a procedure and the error must amount to an illegality or material irregularity. Where it is possible for the Subordinate Court to exercise jurisdiction in more than one manner, it cannot be said that it had wrongly exercised the jurisdiction or followed a wrong procedure when it applied the rule which may not be considered to be most appropriate. That will not amount to an illegality or material irregularity in the exercise of jurisdiction. AIR 1960 All 590 (593): 1960 All LJ 514 (DB).

(10) Where, in appeal from decision of a Munsif without Small Cause Court's powers in a small cause suit tried as a regular suit under Section 35 of Provincial Small Cause Courts Act, the point as to jurisdiction was not raised before the appellate Court, in not deciding that point the appellate Court had not acted in the exercise of his jurisdicion illegally or with material irregularity. AIR 1964 All 420 (424). (AIR 1960 All 573 and AIR 1964 All 136, Diss. from.)

(11) The following are all illustrations of the classes of cases in which High Courts have interfered under this caluse, on the ground of illegality or material irregularity in the exercise of jurisdiction :

(a) Where the lower Court decides a case without considering the materials placed before it or in disregard of the evidence. AIR 1956 Pat 429 (432) (DB) * AIR 1957 Assam 120 (122): ILR (1955) 7 Assam 560 (DB) * AIR 1969 Andh Pra 196 (198) (DB) * AIR 1969 Raj 9 (10): 1968 Raj LW 345. (Statement of plaintiff wrongly excluded from evidence on ground that it was recorded after the record of evidence of witness.) * (1967) 2 Mad LJ 616: 80 Mad LW 477. (Refusal to condone delay in filing appeal — Revision is competent if re-

**Section 115 — Note 11 (contd.)**

fusal is not based on acceptable evidence.) * (1966) 70 Cal WN 807 (DB). (Findings based on no evidence and unsupported by facts.) * 1965 Cur LJ 60 (Punj). (Decision based on no evidence.) * AIR 1964 All 302 (306, 307) * (1963) 29 Cut LT 607 * AIR 1960 Andh Pra 540 (544). (Basing findings or conclusions upon facts which have no bearing or connection with them is material defect of procedure.) * AIR 1960 J and K 22 (22).

[See however AIR 1966 Him Pra 48 (49). (Dispute over land — Entries in Khasra Girdawari not considered — Exclusion not affecting case on merits — Court cannot be said to have acted with any material irregularity.) * AIR 1960 All 534 (535). (Failure of the trial Court to consider any part of the evidence at the time of writing or preparing its judgment is not a procedural error or a material irregularity, though it may be an error of law within the scope of Section 100. AIR 1953 SC 23 and AIR 1959 SC 492, Rel. on.)]

(b) Where it decides on evidence not legally taken or without considering the question of its admissibility. AIR 1953 Nag 135 (136) * (1877) 3 Ind App 259 (286) (PC) * AIR 1926 All 161 (162) * (1894) 18 Bom 369 (373) (DB) * (1894) 18 Bom 614 (616) (DB) * (1894) 18 Bom 745 (747) (DB) * (1968) 2 Mad LJ 490: 81 Mad LW 464. (Total absence of legal evidence for a finding.) * AIR 1960 Orissa 66 (68): 25 Cut LT 532 * AIR 1956 Hyd 31 (31): ILR (1955) Hyd 732 (DB).

[But see AIR 1926 Pat 29 (30) * AIR 1935 Mad 105 (106).]

(bb) Where it decides without giving reasons for its judgment. (1963) 1 Mys LJ 549 * (1963) 4 Guj LR 783. (Rejection of application under Order 11, Rule 12, Civil P. C. without stating any of the grounds mentioned therein.) * AIR 1961 Madh Pra 199 (200): 1960 MPLJ 1368. (Order staying suit under Section 29, Provincial Insolvency Act not indicating reasons.)

[See also AIR 1969 Pat 181 (181). (Amendments not changing controversy and necessary for determination of real questions allowed without giving reasons — Though not interfered with yet disapproved.)]

(bc) Where the Court merely gives a finding and does not decide the suit in accordance with that finding. AIR 1963 Andh Pra 232 (234): (1962) 2 Andh WR 462.

(c) Where it disregards and does not apply its mind to, or misapplies the provisions of any law, or invents a fanciful rule and acts on its basis. AIR 1956 Assam 85 (95): ILR (1956) 8 Assam 51 (DB) * AIR 1956 Bom 249 (250) * AIR 1956 Madh B 98 (99, 100): ILR (1956) Madh B 80 * AIR 1955 Trav-Co 201 (204): ILR (1955) Trav-Co 411 * AIR 1969 Guj 159 (164) * AIR 1969 Guj 149 (150). (Return of document by Court without following procedure under O. 13, Rule 9 and without allowing it to be proved.) * AIR 1969 Pat 248 (250). (Appointment of arbitrator by Court in pending suit — Order appointing one arbitrator under misconception of law where the agreement required the appointment of two.) * AIR 1969 Orissa 10 (11): 34 Cut LT 971. (Court not following provisions of Order 33, Rule 2.) * 1968 MPLJ 176: 1968 Jab LJ 469 * AIR 1968 Mys 329 (332): (1968) 1 Mys LJ 557 * AIR 1968 Orissa 126 (128): 34 Cut LT 373 * AIR 1968 Raj 237 (240): 1968 Raj LW 401. (Order under Order 39, Rule 2 by trial Court — Interference by appellate Court in disregard of well-known principles — Illegality in exercise of jurisdiction by appellate Court — Interference in revision valid.) * AIR 1967 Orissa 203 (204) * AIR 1967 Orissa 58 (59): 33 Cut LT 65. (Suit heard and posted for judgment — Munsif suo motu suggesting and allowing plaintiff to amend plaint in order to keep evidence on par with pleadings — Order allowing amendment is illegal and without jurisdiction.) * AIR 1967 Punj 385 (387) * 1967 Raj LW 109. (Court commits material irregularity in determining rent under S. 11 (3), Rajasthan Act (17 of 1950) merely on basis of general rise in prices ignoring other relevant consideration altogether.) * AIR 1966 Guj 302 (304): (1966) 7 Guj LR 405. (Order directing additional evidence to be taken in disregard of provisions of Order 41, Rule 27 (1) (b).) * (1966) 32 Cut LT 383: ILR (1966) Cut 102. (Commission to follow Supreme Court Ruling amounts to material irregularity.) * (1966) 32 Cut LT 864: ILR (1966) Cut 13 * ILR (1965) Guj 1: (1964) 5 Guj LR 941 * ILR (1965) Cut 562: 32 Cut LT 501. (Setting aside order of dismissal against defendants without applying mind to question of limitation.) * (1965) 78 Mad LW 618 (619): ILR (1966) 1 Mad 427. (Order in disregard of provisions of Order 23, Rule 1.) * AIR 1964 Orissa 134 (139): ILR (1964) Cut 18 (DB) * AIR 1962 All 108 (110) * (1962) 28 Cut LT 591. (Allowing claim of privilege under Section 124, Evidence Act ignoring necessary conditions.)

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* AIR 1961 Madh Pra 169 (171): 1961 MPLJ 1124 * AIR 1961 Punj 421 (423). (Granting permission to withdraw suit on grounds not warranted by law.) * AIR 1960 Andh Pra 492 (493). (Application under O. 21, R. 58 not in prescribed form — Court rejecting it on wrong view that it has no power to return it or call for a petition on proper form.) * AIR 1960 Madh Pra 288 (289): 1960 MPLJ 525 * 1960 MPLJ 1136. (Section 5, M. P. Accommodation control Act not retrospective — Suit instituted before 1st January, 1959 — Order to deposit rent under Section 5 — Order not legal — Revision under Section 115, Civil P. C. lies.) * AIR 1960 Mys 186 (187). (Decision of Court on first impression without understanding true scope of Section 124, Evidence Act.) * 1957 All LJ 543. (Failure of appellate Court to take changes in law since the decision of the lower Court into account.)

[See also (1965) 2 Mad LJ 102 (103): 78 Mad LW 192. (Prospective of approach of lower authorities erroneous — Lower authorities misdirecting themselves — High Court can interfere in revision.)]

(ca) Where it misapprehends facts. 1960 Raj LW 482. (Executing Court wrongly refusing to accept deposit under Order 21, Rule 85 — Subsequent failure of auction-purchaser to make deposit within time ordered by Court — Order forfeiting deposit to the extent of deficiency on resale is illegal.) * 1965 All LJ 1056. (Order based on wrong facts.)

(d) Where it decides a case in the absence of the party whose rights are affected by such decision or without hearing him, or without giving him an opportunity of being heard, or without giving him an opportunity of obeying the orders of the Court. AIR 1926 PC 142 (144): 54 Cal 338: 53 Ind App 271 * AIR 1929 All 761 (761) (DB) * (1907) 34 Cal 929 (933) (DB) * AIR 1933 All 196 (196) * AIR 1952 Raj 157 (158) * AIR 1951 All 614 (615) * (1886) 8 All 111 (115) (FB) * AIR 1919 Mad 14 (15) (DB) * AIR 1967 J & K 11 (12): 1966 Kash LJ 410. (Restoration of suit dismissed for default without giving notice to defendant.) * ILR (1967) Cut 550: (1967) 33 Cut LT 951. (Order substituting persons in place of deceased party without notice to legal representatives.)

[See also (1964) 5 Guj LR 417. (Application for judicial separation by wife — Order for payment of expenses of suit and alimony pendente lite against husband — Disobedience by husband — Order for striking out defence of husband — Not justifiable under Section 151, C. P. Code — Revision is maintainable.)]

[See however AIR 1921 Bom 219 (219): 45 Bom 360 (DB) * AIR 1920 Pat 82 (84) * (1935) 158 Ind Cas 250 (250) (Pesh) * AIR 1935 Oudh 119 (120): 10 Luck 476 (DB).]

(e) Where it takes a mistaken view of the question at issue, or decides an issue which does not properly arise, or omits to decide issues which properly arise. AIR 1955 Vindh Pra 42 (43) * AIR 1958 Mad 496 (497) * 1957 Jab LJ 271 (272) * AIR 1957 Pat 59 (60) (DB) * AIR 1921 Sind 159 (165): 16 Sind LR 207 (FB) * (1968) 34 Cut LT 524: (1968) 10 OJD 65 * 1967 All WR (HC) 70. (Court not applying its mind to the question whether applicants were evading service before sanctioning special mode of service.) * (1965) 6 Guj LR 402: ILR (1965) Guj 495. (Bombay Court-fees Act (36 of 1959), Sec. 8 — Order under Section 8 directing correct valuation to be put — Plaintiff's case not shown to be case of wrong valuation, which is question of jurisdictional fact — High Court, will be entitled to interfere.) * 1964 All LJ 783. (Order of Judge demanding stamp duty on document which was not a conveyance, as on conveyance and penalty.) * (1964) 6 Orissa JD 53. (Munsiff not applying his mind to facts in pleadings, point at issue and relevancy of interrogatories.) * (1963) 4 Guj LR 432. (Failure to decide questions raised in pleadings.) * ILR (1963) Cut 779 * AIR 1963 Punj 104 (111): ILR (1962) 2 Punj 597 * AIR 1960 Orissa 130.

[See also 1963 Ker LT 500 (502). (Court striking out issues subsequently on request of plaintiff although he had accepted them — Court acts with material irregularity in exercise of its jurisdiction.)]

(ee) Where it gives a finding based on piecemeal adjudication in a perfunctory manner. AIR 1960 Orissa 75 (77): (1959) 1 Orissa JD 633 * AIR 1960 Orissa 77 (79).

(f) Where the lower Court wrongly places the onus of proof. AIR 1957 Pat 145 (147) * 1968 Cur LJ 554 (Punj) * (1967) 1 Andh WR 378: (1967) 1 Andh LT 251 * 1964 Jab LJ 523 (524, 525) * 1960 Raj LW 461: ILR (1960) 10 Raj 394.

[See however AIR 1951 Pepsu 33 (34): 2 Pepsu LR 245 (FB).]

[But see AIR 1954 Raj 83 (83): ILR (1953) 3 Raj 1003 (FB). (AIR 1951 Raj 79 and ILR (1951) 1 Raj 645,

**Section 115 — Note 11 (contd.)**

Overruled.) * AIR 1963 Punj 397 (398): 65 Punj LR 173 (DB). (Order can be challenged only in appeal against decision in the suit.)]

(g) Where it declines to examine the evidence offered in support of a case or to go into the merits. AIR 1954 Madh B 155 (155, 156) * AIR 1953 Madh B 9 (11): ILR (1953) Madh B 104 * (1921) 64 Ind Cas 85 (86) (Cal) * AIR 1923 Pat 530 (531) (DB) * (1912) 15 Oudh Cas 78 (80) * 1888 All WN 126 (126) * AIR 1968 Ker 179 (180): 1967 Ker LT 667 * AIR 1967 Mys 37 (39): (1965) 2 Mys LJ 788. (Order refusing to examine a person as witness is revisable under Section 115: AIR 1950 Cal 326 and AIR 1953 Pat 8, Rel. on.) * 1961 MPLJ 450: 1961 Jab LJ 253. (Appellate Court while disposing of case on ground of waiver rightly considering merits also — But Court while making reference to evidence of plaintiff not referring to defendant's evidence.)

(h) Where the lower Appellate Court decides an appeal on a case not raised in the first Court, or remands a case after framing issues which do not arise or after practically deciding the whole case itself, passes an order of remand which it is incompetent to pass or without setting aside the lower Court's decree. AIR 1955 Raj 127 (128): ILR (1955) 5 Raj 398 * AIR 1956 Him Pra 37 (38) * AIR 1944 Mad 539 (540) * AIR 1924 Rang 177 (178): 1 Rang 656 (DB) * AIR 1918 Bom 157 (158): 42 Bom 363 (DB) * AIR 1960 Manipur 54 (55, 56).

(i) Appellate Court interfering with the judicially exercised discretion of the trial Court. (1965) 2 Law Rep 521 (Mys).

(j) Dismissal of objection under proviso to Order 21, Rule 58, more than two years after notice to decree-holder without deciding case on merits. AIR 1969 All 139 (141): 1968 All LJ 584.

(k) Any error regarding the admissibility in evidence of a document, which tends to prove a fact in issue directly and upon which the claimant bases his claim. AIR 1963 Guj 147 (148). (Errors in regard to the admission in evidence of relevant facts and those in regard to a document which affects a fact in issue directly must be distinguished.) * (1968) 9 Guj LR 1087. (Erroneous conclusion regarding document on which entire suit was based.) * (1965) 6 Guj LR 98: ILR (1964) Guj 1199.

(l) The addition of an issue by the appellate Court for a purpose which is no longer necessary thus reopening a question which has been finally decided. 1959 Andh LT 683.

(12) It cannot be said that where there are two conflicting views on a question of law and the lower Court has accepted the view which was based on the view of the majority of the High Courts, there is any illegality or material irregularity in the exercise of the jurisdiction by the lower Court. AIR 1957 Madh B 178 (179): (1966) 68 Pun LR (D) 325: ILR (1967) 1 Punj 854. (Court holding that arbitration agreement in question showed no intention to fill up vacancy under Section 8 (1) (b), Arbitration Act — Revisional Court would not be justified in setting aside finding of Court even though it did not concur with it.) * (1964) 66 Pun LR 76. (Court deciding to adopt one of two alternatives allowed by law.)

(13) See also the following cases for further illustrations of illegality or material irregularity in the exercise of jurisdiction. AIR 1963 Guj 141 (143): (1963) 4 Guj LR 498. (Suits filed after arbitration agreement — Stay of suit under Section 34, Arbitration Act, and reference to arbitration — Provisions of Ch. II and not Ch. IV are applicable — Resignation by one of arbitrators — Fresh appointment should be made under Section 9 — Order superseding arbitration under Section 25 — Held, there was material irregularity in passing order.) * AIR 1969 SC 37 (39): (1969) 1 SCJ 100. (Suit by landlord against tenant for possession, arrears of rent and mesne profits — In decree passed in such suit, Court giving direction that landlord to render account of over-payments made to him — Court acts illegally and with material irregularity.) * AIR 1969 Orissa 116 (117): 35 Cut LT 150. (Rent suit — Third party claiming to be owner of property in question — Party claiming to be impleaded — Addition of such party wrong and material irregularity.) * AIR 1961 All 96 (97). (Where the Court sets aside ex parte decree without a clear finding as to sufficient cause.)

(14) See the undermentioned case where the exercise of jurisdiction was held not to suffer from material irregularity. AIR 1968 Mys 283 (287): (1967) 1 Mys LJ 414. (Restoration of suit dismissed for default — Appellate Court finding that plaintiff has shown sufficient cause for his non-appearance on date when suit was called for hearing — Also finding evidence of plaintiff trustworthy — Decision held not suffered from material irregularity in exercise of his jurisdiction.) * AIR 1963 Guj 143 (144): (1963) 4 Guj LR 152. (Ordinance passed subsequent to judgment in appeal — Appeallate Court held not acted illegally or with material irregularity in not considering Ordinance.) * (1963) 4 Guj LR 705. (Application by debtor under S. A. D. R. Act — Finding by Board that debts did

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not exceed Rs. 25,000 — Appellate Court taking different view and deciding to apply proviso to S. 16 (2) of Act — Case remanded to Board for deciding matter of applying proviso — Decision of appellate Court to apply proviso and direction to Board to decide matter not material irregularity.)

(15) Expenses of process fee — Order of Court requiring putting in such fees etc., before fixing date to be specified in the summons cannot be said to be unjust, illegal or without jurisdiction so as to call for interference in provision. AIR 1968 Pat 110 (111): 1968 BLJR 155 (DB). (AIR 1939 Pat 160, Overruled.)

(16) Order by subordinate Court in violation of directions of Superior Court — Though conduct of lower Court is improper, it is mere irregularity and adjudication order of lower Court cannot be treated as nullity on that account. AIR 1967 Ker 1 (8): 1966 Ker LT 454 (FB).

**12. Error of law or fact.** — (1) An error of law or fact by which a Court assumes a jurisdiction which it has not, or declines to exercise a jurisdiction which it has, will come under Clauses (a) and (b). AIR 1952 Mad 323 (328): ILR (1952) Mad 741 (FB) * AIR 1958 Bom 307 (309): ILR (1958) Bom 198 * AIR 1955 Punj 108 (109) * AIR 1949 PC 239 (242): 76 Ind App 131: ILR (1950) 1 Cal 446. (AIR 1927 All 358: 49 All 454 and 9 Bom 432, Overruled.) * AIR 1968 SC 1355 (1358): (1968) 2 SCJ 951: 1968 Cur LJ 871. (Suit for declaration that certain contract is void having been obtained by undue influence — Alternative plea of specific performance of the same contract — Plea allowed — Decision of trial Court is on a question of law on which its own jurisdiction to grant relief depended — Decision can be interfered with in revision.) * AIR 1966 SC 1431 (1433): (1966) 3 SCR 474. (Jurisdiction of Revenue Tribunal depending on existence of relationship of landlord and tenant between parties — Decision of Revenue Tribunal on the question — Revision lies to High Court under Section 6-B, Madras Cultivating Tenants Protection Act, 1955 read with Section 115, Civil P. C.) * AIR 1966 SC 153 (155): (1966) 1 SCR 102. (Decision on question of limitation and res judicata concern jurisdiction of Courts.) * AIR 1965 SC 498 (502): (1964) 7 SCR 197. (Court on erroneous view of law that it has no jurisdiction to exercise discretion, refusing to do so — It is refusal to exercise jurisdiction.) * AIR 1962 SC 646 (659): (1962) 2 SCR 947. (Wrong decision of jurisdictional facts and assumption of jurisdiction.) * AIR 1959 SC 492 (496, 497): 1959 Supp 1 SCR 733. (Trial Court wrongly deciding that there was new construction and entertaining suit under Section 5 (4), U. P. (Temporary Control of Rent and Eviction Act).) * AIR 1968 Bom 51 (54): 69 Bom LR 551 (DB). (Jurisdictional question of law or fact — It means collateral question which Court has to decide to ascertain whether it has jurisdiction and has nothing to do with merits of case.) * (1968) 9 Guj LR 727 * 1967 All LJ 343: 1967 All WR (HC) 380. (Question whether any part of cause of action arose at a place to give Court therein jurisdiction is a jurisdictional fact and finding on such a fact is amenable to scrutiny in revision.) * AIR 1967 Guj 124 (125): 7 Guj LR 970 * (1967) 2 Mad LJ 473: 80 Mad LW 406. (Revenue Court assuming jurisdiction by giving a finding not based on acceptable evidence.) * ILR (1967) 1 Punj 448. (Erroneous decision in law on question as to necessity of notice under Section 80, Civil P. C.) * (1966) 7 Guj LR 589: ILR (1966) Guj 660. (Collateral jurisdictional facts on which depends jurisdiction of Court are also open to revision.) * (1965) 6 Guj LR 402: ILR (1965) Guj 495 * AIR 1964 All 190 (192). (Condonation of delay refused on erroneous reading of Supreme Court judgment — Failure to exercise jurisdiction.) * AIR 1962 Cal 597 (600) (DB) * 1960 All LJ 79: 1960 All WR (HC) 63 * AIR 1960 Andh Pra 423 (425): 1960 Andh LT 174 (DB) * AIR 1960 Punj 653 (654): 62 Pun LR 694.

(2) If a point of law arising in the case is materially related to question of jurisdiction and there is error in law then Section 115 could be invoked. (1966) 79 Mad LW 248 (251).

(3) Where in a small cause suit a valid objection is taken to territorial jurisdiction of the Court at an earliest moment, and the objection is overruled on erroneous view of law, revision is maintainable. (1968) 1 Andh WR 424: (1968) 2 Andh LT 173. (There is a "consequent failure of justice" within meaning of Section 21, Civil P. C. — Revision under Section 25, Provincial Small Cause Courts Act.)

(4) A conclusion or decision arrived at in the proper exercise of jurisdiction which is erroneous in law or fact is not a ground for revision. AIR 1949 PC 156 (158): 76 Ind App 67: ILR (1950) Mad 1. (1 CWN 617 and AIR 1931 Cal 27, Overruled.) * AIR 1958 All 506 (510) (DB) * 1958-2 Andh WR 149 (151) * AIR 1958 Manipur 13 (13) * AIR 1958 Tripura 23 (23) * AIR 1958 Tripura 20 (21) * 1957 All WR (HC) 189 (191) * AIR 1957 Andh Pra 774 (775) * AIR 1957 Mad 597 (599) * AIR 1957 Nag 97 (99) (DB) * ILR (1955) Andhra 624 (629) * (1889) 16 Cal 749 (751): 16 Ind App 104 (PC) * AIR 1966 SC 153 (155, 156): (1966) 1 SCR 102. (Construction of a decree, though a point of law has no relation to the jurisdiction of the Court putting on the construction.) ** **AIR 1965 SC 553 (555): (1965) 1 SCJ 265** AIR 1964 SC 1676 (1677, 1678): (1968) 8 SCR 1.** (Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Sections 28, 13 (1)

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(g), 13 (1) (hh) — Question of applicability of Clause (g) or Clause (hh) of Section 13 (1) — Decision is within jurisdiction of trial Court and appellate Court — No revision lies to High Court even if appellate decision were wrong on facts or law.) * AIR 1964 SC 1341 (1347): (1964) 5 SCR 157. (Court erroneously holding that provisions of Section 13 (3) (b) of Bombay R. H. and L. H. R. Control Act were complied with but also holding that readiness and willingness contemplated by Clause (1) were otherwise established — High Court cannot interfere under Section 115, Civil P. C. (1963) 4 Guj LR 282, Overruled.) * AIR 1969 Goa 53 (55) * AIR 1969 Guj 18 (21): 9 Guj LR 873 * AIR 1968 Bom 51 (54): 69 Bom LR 551 (DB). (Erroneous interpretation of section.) * AIR 1968 Guj 236 (240): 8 Guj LR 649 (DB) * (1968) 1 Mad LJ 390: 81 Mad LW 15 * (1968) 70 Pun LR 1076: 1968 Cur LJ 988 * (1968) 70 Pun LR 649. (Fact the right of appeal has become time-barred, held, was not material.) * (1967) 1 Andh WR 280: (1967) 1 Com LJ 133. (Question of sufficient cause under Order 22, R. 9.) * AIR 1967 Cal 25 (29) (DB) * (1967) ILR 46 Pat 1171 (1177) (DB) * (1966) 70 Cal WN 1108 * ILR (1966) 1 Ker 679 (686). (Erroneous construction of statute.) * AIR 1966 Madh Pra 88 (90): 1966 MPLJ 94 * AIR 1966 Mad 23 (24): (1965) 1 Mad LJ 164 * (1966) 32 Cut LT 864: ILR (1966) Cut 13 * 1965 Jab LJ 175: ILR (1964) Madh Pra 966. (Applicant filing draft of agreement of arbitration alleging original to be with opponent — Court holding that agreement existed and calling upon the opponent to file it — Order is within jurisdiction — Revision not maintainable.) * (1964) 5 Guj LR 941 * (1964) 5 Guj LR 130 * AIR 1964 Him Pra 34 (37) * AIR 1963 Mad 305 (307): 76 Mad LW 172 * AIR 1962 Cal 597 (600) (DB) * (1962) 3 Guj LR 529. (Question as to validity of notice under Section 12 (2), Bombay Rents, Hotel and Lodging House Rates (Control) Act — Not a jurisdictional fact — Erroneous decision on — No interference.) * (1962) 3 Guj LR 182 * 1960 All LJ 79: 1960 All WR (HC) 63 * AIR 1960 Punj 182 (186). (Award on arbitration — Interference with award on revision is much more objectionable than on appeal, 29 Cal 167, Foll.) ** AIR 1959 All 463 (465): 1959 All LJ 536 (DB). (However gross the error might be.)

[But see AIR 1933 Mad 496 (496.)]

(5) The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. AIR 1917 PC 71 (74): 40 Mad 793: 41 Ind App 261 * AIR 1953 SC 23 (27): 1953 SCR 136 * AIR 1966 SC 1431 (1433): (1966) 3 SCR 474 * AIR 1966 SC 153 (155, 156): (1966) 1 SCR 102 * AIR 1969 Andh Pra 196 (198) (DB) * AIR 1969 Mad 191 (195): ILR (1968) 3 Mad 335 * (1968) 70 Pun LR (Delhi) 80 * AIR 1967 Goa 151 (152). (Scope of Section 8 (2) (b) of Goa, Daman, Diu (Judicial Commissioner's Courts) Regulation (1963).) * 1968 Ker LT 967: 1968 Ker LR 792. (Where the Court determined the jurisdictional value of the suit land by multiplying the profits by a certain number it was held even if it was assumed that it should have taken the market value into consideration there was only an error which did not impinge upon jurisdiction.) * AIR 1967 Mad 306 (310): 79 Mad LW 411 (416) * (1965) 31 Cut LT 320: (1965) 7 OJD 53 * (1964) 5 Guj LR 941 * AIR 1963 Mad 305 (307): 76 Mad LW 172. **(AIR 1961 SC 1299,** Foll.) * 1962 BLJR 695 * 1961 Ker LT 379. (Wrong decision regarding existence of term of contract involves no question of jurisdiction.) * AIR 1961 Mad 158 (159): (1960) 2 Mad LJ 274 * 1960 All LJ 384: 1960 All WR (HC) 300 * AIR 1959 All 463 (465): 1959 All LJ 536 (DB). (Court allowing withdrawal of suit under Order 23, Rule 1.)

(6) It cannot be suggested that if the question is one of principle, the High Court will be powerless to interpret the provisions of law. AIR 1957 Bom 163 (165): ILR (1957) Bom 790 (DB).

(7) The proposition that an erroneous decision on a question of limitation involves the question of jurisdiction applies to cases in which the law definitely ousts the jurisdiction of the Court to try a certain dispute between the parties and not to cases in which there is no such ouster of jurisdiction under the provisions of any law, but where it is left to the Court itself to determine certain matters as a result of which determination the Court has to pass a certain order and may, if necessary, proceed to decide the dispute between the parties. The distinction between the two classes of cases is that in one, the Court decides a question of law pertaining to jurisdiction. In the other, it decides a question within its jurisdiction. AIR 1964 SC 1336 (1338 to 1340): (1964) 3 SCR 495. (Application under Order 22, Rule 9 (2) for setting aside abatement — Delay — Sufficient cause shown to condone delay — Subordinate Court exercising discretion in favour of applicant — Decision held did not involve question regarding irregular exercise or non-exercise or illegal assumption of jurisdiction.)

(8) An erroneous decision on a question of limitation or of res judicata is not a ground for revision unless, in arriving at such conclusion, the Court has failed to consider all the necessary matters, or has misapprehended the nature of the claim, or has not applied its mind to the question at all. (1884) 11 Cal 6 (8): 11 Ind App 237 (PC) * (1894) 17 Mad 410 (415, 416) (FB) * AIR 1930 All 477 (478) (FB) * 1960 Raj LW 606: ILR (1960) 10 Raj 1324. (Decision on point of limitation — High Court would not interfere especially

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when justice has been done.) * (1959) 61 Punj LR 114.

[See however AIR 1917 Mad 667 (667) * AIR 1918 Mad 1173 (1173) * AIR 1925 Oudh 34 (34) * AIR 1959 All 210 (213). (Wrong finding regarding sufficiency of cause within Section 5, Limitation Act was corrected in second appeal.) * AIR 1966 Mad 321 (322): 79 Mad LW 180. (Issue relating to res judicata involves question of jurisdiction.)]

(9) Although error in a decision of a subordinate Court does not by itself involve that the subordinate Court has acted illegally or with material irregularity so as to justify interference in revision under sub-section (c), nevertheless if the erroneous decision results in the subordinate Court exercising a jurisdiction not vested in it by law or failing to exercise a jurisdiction so vested, a case for revision arises under sub-section (a) or sub-section (b). Where a subordinate Court, by its own erroneous decision on a point of limitation or on a question of res judicata, invested itself with a jurisdiction which in law it did not possess the High Court had power to interfere in revision to prevent such a result. AIR 1949 PC 239 (242): 76 Ind App 131: ILR (1950) 1 Cal 446 * 1957 All L Jour 222 (224) * **AIR 1953 SC 23 (28):** 1953 SCR 136 * AIR 1956 All 237 (239) * AIR 1956 Punj 241 (242) * 1955 All L Jour 152 (153) (DB) * **AIR 1966 SC 153 (155, 156):** (1966) 1 SCR 102 * AIR 1969 Orissa 63 (67): 34 Cut LT 1258. (Order dismissing application under Order 21, Rule 90 as time barred reversed by appellate Court by commiting error of law on question of fraud.) * (1967) 9 Guj LR 1018: ILR (1967) Guj 982 * AIR 1967 Mad 31 (33): (1965) 2 Mad LJ 107. (Failure of Court to see whether "sufficient cause" within Section 5 of Limitation Act existed.) * AIR 1966 All 247 (248): 1965 All LJ 1182 * ILR (1966) 1 Cal 216 (DB) * (1965) 6 Guj LR 194: ILR (1965) Guj 190 * AIR 1965 Orissa 17 (20): ILR (1964) Cut 685 ** AIR 1964 Pat 73 (75): 1965 BLJR 479 (DB) * (1963) 4 Guj LR 167: ILR (1963) Guj 138. (Question of limitation.) * (1963) 4 Guj LR 90: ILR (1963) Guj 1. (Res judicata.) * 1963 BLJR 484. (Court assuming jurisdiction to decide application barred by time after wrongly deciding question of limitation.) * AIR 1961 Tripura 16 (17). (Erroneous decision on issue of limitation — Case comes under Clause (a) or Cl. (c).)

(10) It has been held that the High Court can interfere under Section 115 (a) or (b) if the res judicata refers to the res judicata of the suit as a whole; but if it refers only to an issue and not to the suit as a whole, the High Court can interfere only if the case comes under Section 115 (c) but cannot interfere under Section 115 (a) or (b). AIR 1963 Guj 198 (200).

(11) An erroneous conclusion as to the admissibility or inadmissibility of evidence or an erroneous construction of a document or of the section of an Act, or an erroneous appreciation of evidence, is no ground for revision. AIR 1958 All 659 (659) (DB) * ILR (1957) 1 All 395 (397) * (1903) 30 Cal 397 (400) (SB) * AIR 1968 Guj 236 (240): 8 Guj LR 649 (DB) * (1968) 9 Guj LR 900 * (1968) 34 Cut LT 396. (Appreciation of evidence in relation to question of fact.) * AIR 1966 Orissa 41 (46): 31 Cut LT 1092 * AIR 1963 Guj 241: (1963) 4 Guj LR 1032. (Decision on admissibility in evidence of questions to be put or document — Not a case decided and hence, not open to revision.) * AIR 1961 Mad 158 (159): (1960) 2 Mad LJ 274 * AIR 1960 Cal 538 (539) (DB) * AIR 1959 Punj 609 (610): 60 Pun LR 139 * AIR 1963 Him Pra 29 (30). (Unregistered document required by law to be registered erroneously admitted and considered.)

[See also AIR 1963 Guj 147 (148).]

(12) Where the question of admissibility arises in regard to a document which constitutes the foundation of some right or obligation in controversy between the parties so that the decision of the question of admissibility would, by its direct and immediate consequence, of its own force, determine such right and obligation, it would not be merely a decision of a question under the Evidence Act, but it would amount to a decision of 'a case' within the meaning of Section 115. AIR 1968 Guj 236 (238): 8 Guj LR 649 (DB).

[See also (1968) 9 Guj LR 1087 * (1965) 6 Guj LR 98: ILR (1964) Guj 1199.]

(13) Where on an erroneous interpretation of a document the lower Court holds that it is not valid in the absence of proper stamp and orders stamp duty to be paid as directed even before the stage of its admissibility in evidence is reached, a revision will lie against the order. AIR 1961 Andh Pra 424 (428): (1961) 1 Andh WR 425.

(14) Section 115 does not apply to Himachal Pradesh by reason of sub-paragraph (3) of Paragraph 35 of the Himachal Pradesh (Courts)Order of 1948 which confers wider revisional powers on the Court of the Judicial Commissioner. The powers conferred by that para. are not confined to jurisdiction alone as under Section 115 but can also be invoked in a case (subject to the limitation about the value of the suit) where the subordinate Court has erroneously decided an important question of law or custom. AIR 1967 Him Pra 1 (4).

(15) Erroneous construction put upon a statute does not amount to exercising jurisdiction illegally or with material irregularity. **AIR 1966 SC 439 (441): (1966) 1 SCJ 212.**

(16) The High Court in revision will appraise the evidence itself for coming to

**Section 115 — Note 12 (contd.)**
the conclusion contrary to that arrived at by the Court below, only where the decision of the Court below is tainted with any such infirmity as would justify interference under Section 115. That is the function of the appellate Court which after the Court below has disposed of the suit may be seized of the whole case and come to its own conclusion on evaluating the entire evidence. (1965) 67 Punj LR 488: 1965 Cur LJ 256.

(17) Suit fixed for hearing on a given date — Parties having counter-claims — Plaintiff filing application to withdraw suit — No notice to all parties — Court taking up case earlier than date fixed and dismissing it allowing withdrawal with orders that parties shall bear their own costs — Such order is highly irregular — Irregularity does not constitute mere error of law or procedure — Interference in revision is necessary. AIR 1968 Delhi 181 (183): (1968) 70 Punj LR (D) 43.

13. Error of procedure.— (1) An error of procedure in the exercise of jurisdiction is an irregular exercise of jurisdiction and, if the irregularity is material, may be interfered with in revision. AIR 1956 Him Pra 37 (38) * AIR 1958 Andh Pra 254 (255) * AIR 1958 Mad 461 (462) * AIR 1958 Pat 9 (9): 36 Pat 376 (DB) * AIR 1958 Raj 237 (238): ILR (1958) 8 Raj 295 (DB) * AIR 1957 Madh B 135 (136) * AIR 1957 Nag 97 (100) (DB) * AIR 1957 Pat 720 (721) * ILR (1957) 7 Raj 784 (786) * AIR 1955 Hyd 255 (256): ILR (1955) Hyd 602 (DB) * AIR 1967 Orissa 19 (23): 31 Cut LT 294. (Failure to formulate correct legal position relating to a question within jurisdiction and to apply the same to facts of case amounts to material error of procedure.) * AIR 1966 Mad 89 (95): ILR (1965) 1 Mad 274 * (1966) 32 Cut LT 864: ILR (1966) Cut 13 * AIR 1963 Guj 195 (197, 198): (1963) 4 Guj LR 698. (Refusal to allow amendment of plaint under O. 6, R. 17 — Error held material.) * AIR 1962 Ker 261 (262): 1961 Ker LT 946 * 1961 All WR (HC) 508: 1961 All LJ 631. (No decision on material point — Order vitiated by material irregularity of procedure.) * AIR 1959 All 419 (421): 1959 All LJ 268. (Trial Court bringing on record applicants as legal representatives, even though they were not entitled to be so brought.)

[See AIR 1959 Andh Pra 305 (306) (DB). (Composite order granting review and rehearing case — Held, there was no illegality or material irregularity but a mere irregularity.)]

[But see AIR 1920 Pat 567 (568): 4 Pat L Jour 642 (DB).]

(2) An error of procedure resulting in a failure of justice is a material irregularity within the meaning of Clause (c). AIR 1953 Madh B 9 (11): ILR (1953) Madh B 104 * AIR 1950 Cal 87 (90): ILR (1950) 2 Cal 506 (DB) * AIR 1920 Pat 82 (84) * (1968) 1 Mad LJ 390: 81 Mad LW 15 * AIR 1967 J and K 11 (12): 1966 Kash LJ 410. (Dismissed suit restored to file without notice to defendant — Such an order amounts to exercise of jurisdiction either illegally or with material irregularity.) * AIR 1967 Mad 5 (6): 1966 MPLJ 376 (DB). (Ex parte order passed without declaration of due service under Order 5, Rule 19.) * (1965) 67 Punj LR 643: ILR (1965) 2 Punj 274 * AIR 1963 Him Pra 30 (32). (Application for restoration — Court hearing it and restoring suit without issuing notice to defendants who were present on the day the order of dismissal of suit was made — Court held acted illegally and in any case indiscreetly in restoring suit.) * AIR 1959 All 463 (465): 1959 All LJ 536 (DB). (Madatory procedure not followed — Error resulting in failure of justice.) * AIR 1950 Cal 87 (90, 92): 54 Cal WN 355.

(3) In a revision, the High Court may not take serious notice of irregularities such as misreading of evidence by the lower Courts. But receiving a document and reading it in evidence without proper notice to the defendant or relying on the statement from a document in another case which did not form part of the record of the instant case, is a defect constituting material irregularity in procedure. 1964 All LJ 858.

(4) Where the Court wrongly excludes the evidence of the plaintiff as inadmissible on the sole ground that he was examined after the other witnesses of the plaintiff were examined it commits an error of procedure. AIR 1969 Raj 9 (10): 1968 Raj LW 345.

(5) Suit fixed for hearing on a given date — Parties having counter-claims — Plaintiff filing application to withdraw suit — No notice to all parties — Court taking up case earlier than date fixed and dismissing it allowing withdrawal with orders that parties shall bear their own costs — Such order is highly irregular — Irregularity does not constitute mere error of law or procedure — Interference in revision is necessary. AIR 1968 Delhi 181 (183): (1968) 70 Pun LR (D) 43.

(6) Successor Judge of Court passing the decree having pecuniary jurisdiction for lesser amount has jurisdiction to execute decree for higher amount — But decree-holder following irregular procedure of applying to another Court and latter ordering rateable distribution — No interference in revision. AIR 1960 All 730 (731): 1960 All LJ 220.

(7) Review granted on particular ground — Court may order rehearing of whole case — Matter is in discretion of Court — Failure to give better reasons for such order, is not error in procedure justifying interference. AIR 1964 All 359 (360): 1963 All LJ 527.

**Section 115 (contd.)**

**14. Wrong decision of lower Appellate Court as to the jurisdiction of the trial Court.**— (1) Where the trial Court erroneously thinks that it has, or that it has no jurisdiction to act in a particular manner or to pass a particular order there is either an illegal assumption of jurisdiction or a failure to exercise the jurisdiction which it has. Where in such a case the order of the trial Court as to its own jurisdiction is appealed against and the Appellate Court either confirms such order or reverses it the decision of the Appellate Court is revisable under Section 115. AIR 1930 All 713 (717, 720, 721): 53 All 75 (FB) ** (1886) 8 All 111 (113) (FB) ** AIR 1915 Mad 1223 (1229, 1235): 39 Mad 195 (FB).

[See however 1951 All WR (HC) 199 (202) (DB).]

[But see AIR 1934 Lah 536 (537) * 1886 Pun Re No. 46, p. 87 (88) (DB) * (1913) 19 Ind Cas 237 (238) (DB) (Lah).]

(2) When the appellate Court interferes with the order granting review on the grounds outside the ambit of Order 47, Rules 7 and 4, its decision is without jurisdiction and the High Court can under Section 115 of the Code interfere with that order. AIR 1960 Assam 204 (205, 206): (1960) 1 Assam LR 82 (DB).

(3) The order of the Court of the first instance can itself be revised notwithstanding that it was appealed against. AIR 1941 Nag 278 (279, 281, 282): ILR (1941) Nag 543 (DB) * AIR 1926 All 58 (61): 48 All 168 (DB) * AIR 1932 Nag 70 (71): 28 Nag LR 54.

[See also 1966 All WR (HC) 52 * AIR 1965 Ker 179 (181, 183): 1964 Ker LT 800.]

**15. "May make such order in the case as it thinks fit."**— (1) The exercise of powers under Section 115 is not as a matter of right. It is discretionary with the High Court. Even where the Court acts contrary to law on a question which impinges on the question of jurisdiction the High Court is not bound to interfere if the conduct and the act of the petitioner do not arouse its conscience. AIR 1969 Orissa 28 (29) * AIR 1964 SC 497 (505): (1964) 4 SCR 409. (Per Hidayaytullah J.)

(2) As a general rule, when justice has been done between the parties, the High Court will very rarely interfere with the findings of fact or the orders of the lower Court. AIR 1956 Him Pra 22 (24) * AIR 1956 Mad 344 (348) * AIR 1955 Cal 448 (450) (DB) * AIR 1955 Mad 210 (211). (Order under Order 26, R. 4.) * AIR 1955 Punj 112 (112) * (1923) 73 Ind Cas 873 (873, 874) (Lah) * ILR (1967) 1 Mad 136: 79 Mad LW 395 * 1963 Ker LT 1105: (1964) 1 Ker LR 37. (Wrong order of stay of proceedings — No interference when there is no injustice caused to parties.) * AIR 1963 Guj 148 (150): (1963) 4 Guj LR 540. (Finding of fact erroneous on admitted facts can be interfered with.)

(3) While dealing with an order under Section 115, C. P. C. it is open to the High Court, if it comes to the conclusion that the Order passed by the Court below was without jurisdiction, to make such order in the case on merits as it thinks fit. (1965) 1 Mys LJ 342: (1965) 1 Law Rep 653.

(4) Where the interference is likely to work out in the interests of justice but rather against it, the High Court will not interfere. ILR (1955) Patiala 123 (127) (DB) * AIR 1957 All 825 (826) (DB) * AIR 1952 Pat 338 (339) * AIR 1947 All 343 (345): ILR (1947) All 389 * AIR 1964 Orissa 134 (136): ILR (1964) Cut 18.

(5) Pauper plaintiff successful in part — Court awarding the whole Court-fee payable as costs against defendant — Appeal filed in High Court on the ground that it was excessive and contrary to law — Appeal admitted subject to condition of payment of Court-fees by defendant — Defendant also applying for amendment of decree on same ground which was rejected — High Court refused in revision against order of refusal to stay realization of Court-fee by collector on the ground that the application for amendment and revision amounted to an abuse of process of Court. (1965) 67 Pun LR 499.

(6) Where, a particular order creates an anomalous position or leaves the matter in a muddle the High Court will set it aside in revision. AIR 1955 Him Pra 33 (34) * AIR 1927 Lah 435 (439): 8 Lah 617 * AIR 1933 Bom 245 (250) * AIR 1942 Pat 293 (295) * AIR 1925 All 202 (202) (DB).

(7) Revision against an order of amendment of plaint — Number of opposite parties not served with notice or revision — Revision recorded as dismissed against them — Amendment cannot be challenged in revision as against rest of them as that will lead to inconsistent position. (1962) 28 Cut LT 204.

(8) Normally, and as a general rule, a Court of revision in considering the correctness of the judgment of the Court below is to confine itself to the state of the case at the time when the judgment was given. But in exceptional cases, it may depart from this rule in order to shorten litigation and best attain the ends of justice. ILR (1955) Hyd 253 (255) * AIR 1954 Trav-Co 526 (534) :ILR (1954) Trav-Co 929 (FB) * AIR 1963 Guj 143 (144): (1963) 4 Guj LR 152. (Ordinance passed subsequent to judgment in appeal — Appellate Court not considering Ordinance — No irregularity.)

[See also (1962) 40 Mys LJ 1019 (1023). (Powers of High Court are wide enough to correct error in order of executing Court by directly interfering with it even if appeal to lower Court is barred by time.)]

(9) Where the Court dismisses an application in revision for default simply for

**Section 115 — Note 15 (contd.)**
non-appearance of the petitioner it is not an order covered by Section 115 but it would be an order made under the inherent powers of the Court under Section 151 or under Section 151 read with Order 9 of Civil P. C. The words "may make such orders as it thinks fit" contemplates an order passed by the Court after applying its mind to the order in revision and not a mechanical order like dismissing a case for default. AIR 1967 J and K 93 (94): 1967 Kash LJ 220.

(10) Court acting without jurisdiction in trying suit of small cause nature on regular side — Revision — No reference made under Order 46, Rule 7 — High Court will set aside decree and order its presentation to proper Court and not examine case on merits. AIR 1969 Madh Pra 44 (45): 1968 MPLJ 698 (DB).

(11) An authority on whom revisional power is conferred is entitled to examine the correctness, legality and propriety of the order and to pass such suitable orders as the authority may think fit in the circumstances of the case. When exercising such power authority is entitled to hold an inquiry or direct an enquiry to be held and for that purpose admit additional evidence. AIR 1968 SC 843 (846): (1968) 2 SCR 492. (1961-12 STC 663 (AP), Overruled.)

(12) Revision against refusal to amend the decree — Whole case is open before the Court and it can in its discretion under the section bring the decree in accordance with the law. (1968) 1 Andh WR 308.

(13) In exercising the powers of revision it is to be noted that whatever the powers of the High Court, they have got to be exercised within the four corners of the law as it stands. The inherent jurisdiction the High Court undoubtedly has, but that has also got to be exercised in cases where the lower Court had jurisdiction to deal with a matter and while exercising that jurisdiction had caused injustice to one party or the other. AIR 1961 Bom 254 (257, 258): 63 Bom LR 48. (No relief can be granted when the lower Court itself had no jurisdiction to grant.)

(14) Where the order under revision is set aside the High Court has power to set aside the consequential orders as well. AIR 1961 Mys 197 (198): 39 Mys LJ 338. (Plaintiff claiming larger period of limitation as an agriculturist — Adverse finding on his status vacated in revision — High Court can also set aside order dismissing suit as barred by limitation.) * AIR 1968 Mys 329 (332): (1968) 1 Mys LJ 557. (Application for restoration of appeal to file dismissed as barred by time — High Court while setting aside order under revision also restore appeal to file.) * AIR 1964 Pat 438 (439)

(15) Application under Order 9, Rule 13 dismissed—Recall of dismissal order followed by order allowing the application — Revision against order allowing the application — High Court can interfere even with earlier orders, since the last order allowing the application is the result of the earlier ones. AIR 1967 Pat 399 (400).

(16) Where the Courts below on a wrong view as to the maintainability of the suit and as to the question whether there was injury within the meaning of Order 39, R. 2 have failed to exercise the discretion vested in them by law in the matter of granting temporary injunction.

**Held,** that the High Court would permit the matter to the trial Court for fresh disposal and, to maintain status quo grant a temporary injunction until the disposal of matter by trial Court. AIR 1959 Mys 75 (79): 36 Mys LJ 634.

(17) A lease granted by a Court receiver in favour of a third party in pursuance of the Court's order cannot be annulled by the Court in exercise of its revisional jurisdiction. But the High Court could in the exercise of its revisional jurisdiction direct the lower Court to ask the receiver to terminate the lease in pursuance of the specific condition in the lease. AIR 1960 Raj 192 (195, 196): 1960 Raj LW 334 (DB).

(18) The High Court has under R. 41-B of the Appellate Side Rules read with Order 41, Rule 19 (1) of the C. P. C. the power to restore a civil revision petition which has been dismissed for default, on sufficient cause being shown by the petitioner. AIR 1959 Mad 183 (184): (1958) 2 Mad LJ 515.

(19) Interim order pending revision — Cannot operate after dismissal of the revision petition. AIR 1968 Mys 283 (285): (1967) 1 Mys LJ 414.

(20) The High Court in revision will consider a change in law made after the decision of the subordinate Court only when such change has an effect on the powers of the High Court in revision but not when it affects the rights of the parties only AIR 1963 Guj 143 (144, 145): (1963) 4 Guj LR 152.

**16. Laches in making the application.**— (1) Applications in revision are not governed by any law of limitation. AIR 1956 Bhopal 16 (16) * AIR 1957 Pat 16 (19) (DB) * AIR 1954 Raj 191 (193): ILR (1954) 4 Raj 613 (DB) * AIR 1953 Cal 513 (513): ILR (1953) 1 Cal 249 (DB) * AIR 1950 Assam 6 (9): ILR (1949) 1 Assam 222 (DB) * 1962 Ker LT 117: 1962 Ker LJ 353. (An application cannot be dismissed merely on the ground of delay in filing it.)

(2) Although the legislature has not prescribed any period of limitation within which the revision application should be filed yet it has been the uniform practice of the High Court of Jammu and Kashmir and also of the other Indian High Courts that the revision application should be filed without delay within the period prescrib

**Section 115 — Note 16 (contd.)**

ed for filing an appeal unless some good reasons are shown for the dealy in filing the revision application. AIR 1959 J and K 76 (77).

(3) When there has been a great and unexplained delay or laches in making the application, the Court will refuse to interfere. AIR 1953 Raj 169 (169): ILR (1953) 3 Raj 175 (FB) ** AIR 1954 Him Pra 62 (63) ** AIR 1953 Pepsu 30 (31): ILR (1952) Patiala 636 (DB) * AIR 1936 Oudh 185 (187): 12 Luck 52 (DB) * (1883) 7 Bom 341 (372) (FB) * AIR 1959 J and K 76 (77) ** AIR 1959 Punj 91 (91): ILR (1957) Punj 1856 * AIR 1954 Him Pra 62 (63). (Application presented in time but without the advocate's signature on grounds of revision and without attaching his power to petition — Representation after limitation — Cause for delay not made out — **Held** barred.)

(4) Where the petitioner is not to be blamed for the delay or where there are exceptional circumstances the High Court will not refuse to exercise its powers under the section. ILR (1954) Madh B 478 (482) * AIR 1950 Pat 470 (471) (DB) * AIR 1936 Oudh 185 (187): 12 Luck 52 (DB) * AIR 1952 Him Pra 63 (64) * AIR 1952 Punj 200 (201): ILR (1952) Punj 176 (DB) * AIR 1942 Mad 757 (758) * AIR 1959 Punj 91 (91): ILR (1957) Punj 1856 * AIR 1959 Raj 156 (161): ILR (1959) 9 Raj 362 (DB).

(5) Applications are entertained in revision only if they are filed within three months of the date of the order sought to be revised. AIR 1965 Bhopal 16 (16) ** AIR 1957 Pat 16 (19) (DB) * AIR 1954 Him Pra 29 (30) ** ILR (1954) Madh B 478 (482) * AIR 1953 Cal 513 (513): ILR (1953) 1 Cal 249 (DB) * AIR 1959 Raj 156 (161): ILR (1959) 9 Raj 362 (DB).

**17. Application in revision treated as appeal.**— (1) Where an application for revision is filed in a case in which an appeal lies, the Court may treat the petition as an appeal, provided the same was filed within the time prescribed for filing the appeal and provided the proper Court-fee is paid. (1898) 25 Cal 757 (778) (FB) * AIR 1958 Cal 14 (19) * AIR 1955 Cal 63 (64) * AIR 1952 Kutch 20 (21) * AIR 1943 Cal 177 (179) (DB) ** (1900) 23 Mad LJ 101 (104) (DB) * AIR 1968 Delhi 188 (190) * AIR 1968 Delhi 104 (107) * AIR 1968 Manipur 4 (6) * AIR 1968 Mys 266 (267): (1968) 1 Mys LJ 288 * AIR 1963 Pat 375 (377) (DB) * AIR 1959 Madh Pra 188 (189): 1958 MPLJ 640. (Order falling under Section 47 — Revision against treated as appeal.)

[See also 1960 Ker LT 729 (731): 1960 Ker LJ 649. (Appeal not treated as revision as conditions of Section 115 were not satisfied.)]

(2) An application for revision to the High Court cannot be returned for presentation as an appeal to another Court. AIR 1952 Kutch 20 (21) * AIR 1942 Mad 657 (658) * AIR 1968 Manipur 4 (6).

**18. Appeal treated as an application in revision.**— (1) In cases where no appeal lies but an appeal is wrongly preferred, the Court has a very wide discretion to allow the appeal to be treated as petition for revision, where the conditions of Section 115 are satisfied. AIR 1953 Sau 16 (17) (FB) * AIR 1958 Cal 14 (19) ** AIR 1957 Him Pra 61 (64) * AIR 1957 Ker 18 (19): ILR (1957) Ker 85 (DB) * 1957 BLJR 740 (742) * AIR 1956 Bom 598 (599) * AIR 1935 Mad 842 (847): 58 Mad 972 (FB) * AIR 1938 Nag 122 (126): ILR (1938) Nag 106 (FB) * AIR 1968 Delhi 188 (190) * AIR 1968 Delhi 104 (107) * AIR 1968 Punj 70 (72): ILR (1967) 2 Punj 751 * AIR 1967 Mad 298 (299): (1965) 2 Mad LJ 543 * 1966 All LJ 141: 1966 All WR (HC) 211 * AIR 1966 Andh Pra 152 (153): (1965) 2 Andh WR 481 (DB). (Order under Order 21, Rule 66 for reduction of upset price in sale proclamation — Appeal filed against order treated as revision as it involved a point of law.) * (1966) 1 Andh WR 47 (DB) * AIR 1965 Pat 66 (72) * ILR (1964) Andh Pra 734 (DB) * AIR 1964 Bom 63 (67): 65 Bom LR 599 (DB). (Appellant given opportunity to amend memo. of appeal to convert it into an application either under Article 227 of the Constitution or under Section 115, Civil P. C.) ** AIR 1964 Mys 232 (233): (1964) 1 Mys LJ 101 (DB) ** AIR 1963 Ker 188: 1963 Ker LT 117 (DB) * AIR 1963 Madh Pra 9 (10): 1963 Jab LJ 104 (DB) * AIR 1963 Orissa 186 (187): ILR (1963) Cut 841**ILR (1968) Cut 482**AIR 1962 Andh Pra 271 (272) (DB)**AIR 1960 Andh Pra 131 (132). (First appeal incompetent but entertained — Wrong order by appellate Court must be set aside — Though second appeal technically is not maintainable, High Court will exercise its revisional powers and set aside the order.) * AIR 1959 Madh Pra 384 (386): 1959 MPLJ 1000. (Remand Order under inherent powers — No appeal lies — Revision competent.) ** AIR 1959 Madh Pra 34 (34). 1959 MPLJ 85 (DB). (Judgment and decree passed after stay.)

[See however AIR 1964 Ker 23 (25): 1963 Ker LT 502 * AIR 1939 Sind 360 (360): ILR (1939) Kar 342 (344) (DB).]

(2) Second appeals and civil revision petitions should not be filed in the alternative by way of abundant caution. AIR 1954 Mad 66 (66).

(3) Where in an appeal it is found that it is not maintainable in respect of a part, the appeal in respect of that part cannot be treated as revision. It is not appropriate to deal with a part of the matter as an appeal and another part on the footing that it comes under revision. AIR 1957 Mys 78 (79): ILR (1957) Mys 57 (DB).

**19. Revision in cases of discretionary and final orders.**— (1) Where the lower Court passes an order in the exercise of its discretion the High Court will not in-

**Section 115 — Note 19 (contd.)**

terfere with it in revision. AIR 1956 All 677 (678, 680) (DB) * AIR 1958 Tripura 36 (37) * AIR 1957 Andh Pra 330 (332) * AIR 1957 Mad 597 (599) * ILR (1955) 1 Cal 478 (484) (DB) * AIR 1956 Bom 608 (608) * AIR 1955 Hyd 61 (63): ILR (1955) Hyd 256 (DB) * 1969 MPLJ 54: 1968 Jab LJ 1036. (Amount of compensation under Payment of Wages Act.) * AIR 1968 Goa 78 (81). (Condonation of delay in exercise of discretion — No interference.) * (1968) 34 Cut LT 956: ILR (1968) Cut 358. (Addition of parties under Order 1, Rule 10.) * 1968 Ker LT 692: 1968 Ker LR 457. (Impleading of parties is not ordinarily a matter of jurisdiction but one of judicial discretion.) * 1968 MPWR 745 (748). (Determination of amount of compensation under the Payment of Wages Act.) * AIR 1968 Pat 128 (129) * (1967) 1 Andh WR 280: (1967) 1 Com LJ 133. (Question of sufficient cause under Order 22, Rule 9.) * AIR 1967 Delhi 37 (38): 69 Pun LR (D) 146 * AIR 1967 Pat 360 (361): 1967 BLJR 275. (Condonation of delay under Sec. 5 Limitation Act.) * 1967 BLJR 448: ILR 46 Pat 484 (DB). (Power to commit to civil prison under sub-rule (3) of Rule 2 of Order 39 is absolutely discretionary — Hence no error of law or jurisdiction in lower Court demanding from plaintiff cost for issue of warrant of arrest and subsistence allowance for detaining a person disobeying injunction order.) * (1966) 70 Cal WN 1108. (Temporary injunction.) * AIR 1966 Ker 150 (158): 1966 Ker LT 199. (Discretion exercised by Court in matter of granting time for payment of deficit Court-fee — Defendant cannot move High Court against order in revision.) * AIR 1966 Mad 456 (460): 1966 Cri LJ 1457: (1967) 2 Mad LJ 201 * AIR 1966 Orissa 24 (26): 31 Cut LT 769 * AIR 1964 Assam 81 (85): ILR (1963) 15 Assam 448 (DB) * AIR 1964 Orissa 134 (136): ILR (1964) Cut 18 * AIR 1964 Pat 147 (149). (Refusal to issue commission for examination of a witness on ground that application was not bona fide — No interference.) * AIR 1963 All 537 (541): 1963 All LJ 607 (DB). (Appointment of interim receiver under O. 40, Rule 1.) * AIR 1963 Orissa 126 (127): 29 Cut LT 373 (DB) * AIR 1962 All 52 (58): 1961 All LJ 776 * 1962 Ker LT 731: 1962 Ker LJ 1298. (Refusal to accept additional written statement in exercise of discretion — No question of jurisdiction is involved.) * AIR 1962 Orissa 94 (95): 27 Cut LT 390. (Setting aside abatement.) * AIR 1961 Andh Pra 502 (504, 505): (1961) 1 Andh WR 339. (Order rejecting review petition.) * 1961 Jab LJ 1509. (Awarding of costs.) * 1961 Jab LJ 79 * 1961 MPLJ 151 * AIR 1961 Pat 298. (Refusing to allow amendment of plaint not made in good faith.) * AIR 1961 Punj 60 (66): 63 Punj LR 516. (Order allowing amendment of plaint.) * AIR 1961 Tripura 23 (24). (Order striking out all interrogatories.)** AIR 1959 Ker 379 (380): 1957 Ker LT 932. (Order allowing certain persons to sue under Order 1, Rule 8.)

(2) An improper or wrong exercise of discretion is not a ground for interference. AIR 1956 Orissa 77 (79): ILR (1956) Cut 1** AIR 1955 Him Pra 43 (44)** AIR 1954 Pat 555 (559): 33 Pat 861 (DB)** Madh BLJ 1954 HCR 786 (787)** 1966 Cur LJ 69: 1965 Pun LR (Supp) 470. **(Reversed on another point in AIR 1966 SC 1899.)** ** (1964) 66 Pun LR 404. (Order allowing withdrawal of suit — Order not showing any sufficient grounds.)

[See however AIR 1959 Orissa 4 (4, 5): ILR (1958) Cut 348** AIR 1953 Mad 12 (12).]

(3) Refusal of an authority to exercise discretion on an erroneous view that it has no discretion in the matter amounts to failure to exercise jurisdiction vested in him under the law, justifying interference of the High Court. **AIR 1965 SC 498 (502):** (1964) 7 SCR 197** **AIR 1967 SC 276:** 1967 Cri LJ 285: (1966) Supp SCR 473. (Lower Court making an order wrongly interpreting relevant provision as obligatory instead of discretionary.)

(4) High Court will not interfere with orders made within jurisdiction in exercise of discretion, unless the Court has gone wrong on some vital principle. AIR 1962 Andh Pra 435 (437): (1962) 1 Andh WR 218 (DB).

(5) When the discretion is exercised perversely so as to cause serious prejudice to a party, the High Court will be justified in interfering with it. AIR 1951 All 845 (850): ILR (1952) All 742 (FB)** 1958-1 Mad L Jour 402 (405, 406)** AIR 1958 Punj 409 (410) (DB)** AIR 1958 Raj 322 (324): ILR (1958) 8 Raj 843** AIR 1957 Mad 640 (641)** AIR 1957 Punj 14 (16)** AIR 1956 Bom 608 (608)** AIR 1956 Orissa 65 (66) (DB)** AIR 1955 Mys 64 (64): ILR (1955) Mys 225** AIR 1955 Punj 47 (48): ILR (1955) Punj 55** AIR 1967 Mad 16 (21): (1967) 2 Mad LJ 226** AIR 1967 Punj 385 (387)** AIR 1966 Guj 302 (304): (1966) 7 Guj LR 405. (Appellate Judge ordering that additional evidence should be taken on record — Stage of examining record not reached.)** AIR 1966 Mad 456 (460): 1966 Cri LJ 1457: 1967-2 Mad LJ 201** 1966 Mys 74 (75): (1965) 2 Law Rep 333. (Order granting temporary injunction without considering material point.)** AIR 1966 Orissa 41 (43): 31 Cut LT 1092. (Material witness duly summoned but remaining absent — Refusal of adjournment for examination of the witness — **Held,** refusal amounted to material irregularity.)** AIR 1964 Mys 56 (57, 58): (1963) 2 Mys LJ 263. (Suit on pronote not sufficiently stamped — Amendment of plaint so as to base suit on original cause of action — Amendment resulting in injustice to defendant and depriving him of his main defence.)** (1962) 64 Pun LR

**Section 115 — Note 19 (contd.)**

387: 1962 Cur LJ 175. (Application for stay of execution sale — Court issuing notice to opposite party — Fixing date for hearing after date of sale without restraining opposite party from proceeding with sale — Amounts to material irregularity.)** AIR 1961 Ker 110 (111): 1960 Ker LT 990. (Order allowing amendment of written statement setting up entirely new case which was available to defendant but not pleaded — Fresh suit on amended claim barred on date of application — Order set aside in revision.)** AIR 1961 Pat 152 (156): 1961 BLJR 478. (Refusing to allow one of defendants to file his written statement long after settlement of issues without applying mind to facts of case.)

(6) The question of addition of parties under Rule 10 of Order 1 of the Code of Civil Procedure, is generally not one of initial jurisdiction of the Court, but of judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case, but in some cases, it may raise controversies as to the power of the Court, in contradistinction, to its inherent jurisdiction, or, in other words, of jurisdiction in the limited sense in which it is used in Section 115 of the Code. **AIR 1958 SC 886 (895)**** AIR 1969 Punj 57 (58): 70 Pun LR 451. (Order dismissing application under Order 1, Rule 10 — High Court can interfere in revision if it can find some material irregularity or illegality in order.)** 1965 Raj LW 487 (488): ILR (1966) 16 Raj 74. (Wrong exercise of discretion amounts to material irregularity and can be interfered with in revision.)

[See also AIR 1967 Pat 326 (327).]

(7) Civil P. C., Order 37, Rule 3 — Summary suit — Granting of leave to defend is discretionary — Discretion not to be exercised in arbitrary manner — Order must disclose reasons for it — Reasons not given — Order is liable to be set aside in revision. AIR 1960 Bom 520 (521): 62 Bom LR 592.

[But see AIR 1968 Guj 247 (249): 9 Guj LR 238. (Order is only revisable and hence does not require to state reasons.)]

(8) When lower Court exercises its inherent powers under Section 151, the Court of revision is to see whether inherent powers were exercised in any of the manners prescribed under Section 115 and interfere only where the lower Court had done so — Where the lower Court has rightly exercised its powers, within jurisdiction under Section 151, High Court cannot independently invoke its powers under Section 151 as if there was no original order. AIR 1966 Orissa 58 (58, 59): 32 Cut LT 420** (1965) 67 Pun LR 501.

[See also 1961 Ker LT 431. (Sale in execution — Petition to set aside made beyond limitation — Sale set aside under Section 151 — Order setting aside sale is without jurisdiction — Revision lies.)** 1961 Ker LJ 1272.]

(9) Where the lower Court rejects review petition even though there was an error apparent on the face of the record, it is a case of jurisdiction and High Court will interfere in revision, since the order rejecting review petition is not appealable. AIR 1961 Andh Pra 502 (504, 505): (1961) 1 Andh WR 339.

(10) Where the trial Court has come to a clear finding, that in its opinion, there were sufficient grounds for allowing the plaintiff, under Order 23, Rule 1 (2) (b), to bring a fresh suit, the High Court, in revision, will not go into the question of sufficiency or insufficiency of the grounds as that will not be a matter touching the question of jurisdiction. AIR 1964 J & K 18 (21): (1964) Kash LJ 99 (DB).

(11) Court not allowing P to withdraw offer which he had made and which had been accepted, to abide by oath of J.

**Held,** party could not be allowed to withdraw offer after it had been accepted unless it gave Court adequate reasons and Court permitted to do so and there was nothing in order of lower Court justifying interference in revision. (1967) 69 Pun LR 651: 1967 Cur LJ 497.

(12) Mere fact that an order under a particular statute is made final will not exclude the jurisdiction of the High Court under Section 115. AIR 1965 Ker 284: 1964 Ker LT 965 (FB).

**20. Orders under Sections 152 and 153.** — (1) A Court has no power to vary or amend a decree when it is in conformity with the judgment and an amendment under such circumstances will be open to revision. (1893) 15 All 121 (122) (DB)** AIR 1934 All 100 (101) (DB)** AIR 1911 Cal 387 (387)** AIR 1962 Ker 6 (8): 1961 Ker LT 349.

(2) No revision lies against an order or amendment, and the only remedy of the aggrieved party is to appeal against the amended decree and, if necessary, to invoke the provisions of Section 5, Limitation Act. AIR 1956 Mad 197 (198).

[See however AIR 1940 Mad 538 (539).]

(3) Refusal to correct clerical and arithmetical mistakes caused by accidental slips or omissions in judgments, orders and decrees would amount to a failure to exercise jurisdiction. 1953 Raj LW 379 (380)** AIR 1925 Cal 420 (421) (DB)** AIR 1929 Lah 400 (401)** AIR 1968 Manipur 22 (23).

(4) A successor Judge acts without jurisdiction in setting aside of a decree passed by his predecessor on ground that it was erroneous or inequitable. AIR 1952 Pat 478 (480): 31 Pat 737 (DB).

**21. Orders under Section 73.** — (1) An order determining the creditors who were entitled to rateable distribution under Section 73, amounts to "case decided". AIR 1961 All 371 (372): 1961 All LJ 435.

**Section 115 — Note 21 (contd.)**

(2) The High Court will not generally interfere with a wrong order of rateable distribution. AIR 1954 Mad 201 (202)** AIR 1936 Oudh 132 (133): 12 Luck 19 (DB)** AIR 1932 Lah 96 (97)** AIR 1927 Mad 1030 (1030) (DB)** AIR 1915 Mad 547 (548) (DB).

(3) When Courts have acted in defiance of the terms of Section 73 and thereby assumed a jurisdiction which they did not possess or declined jurisdiction in a proper case, the High Court will interfere to set matters right. AIR 1956 Hyd 65 (73): ILR (1956) Hyd 79 (FB)** AIR 1954 Mad 201 (202)** AIR 1950 Orissa 230 (232): ILR (1950) Cut 208 (DB)** AIR 1931 Pat 405 (408): 11 Pat 250 (DB)** 1964 All LJ 602. (Though remedy of suit under Section 73 (2) is available — AIR 1936 Oudh 185 and 2 All LJ 370, Not foll.)

[But see AIR 1921 Pat 401 (402): 5 Pat L Jour 415 (DB).]

(4) In a revision petition filed against a common order giving rateable distribution to some of the decree-holders and withholding in the case of another it is not necessary that the aggrieved party should file as many revision petitions as there are rateable decree-holders. It is sufficient if the petitioner adopts cause title of the common order and impleads the decree-holders as respondents. AIR 1958 Mad 170 (171).

[See however AIR 1968 Andh Pra 113 (114): (1968) 1 Andh LT 89. (Order directing pari passu distribution of assets amongst all decree-holders — Revision — One of decree-holders not made party. **Held,** revision must fail.)]

(5) Application for rateable distribution of assets wrongly rejected on ground that there was no subsisting execution pending — Though petitioner can pursue his remedy by way of a suit, High Court would interfere in revision. AIR 1966 Mad 406 (408): (1965) 2 Mad LJ 499 (500).

**22. Orders in claim cases.** — (1) No application will ordinarily be entertained to revise an order passed under Order 21 Rule 60, 61 or 62. But this does not bar the High Court's power of interference in exceptional cases. AIR 1953 Pat 34 (35): 31 Pat 198 (DB)** Madh BLJ 1954 HCR 715 (717)** (1885) 8 Mad 484 (493) (FB)** AIR 1955 Assam 234 (235): ILR (1955) 7 Assam 119 (DB).

(2) The provision that a regular suit may be filed under Order 21, Rule 63 after an objection filed under Order 21, Rule 58 has been disposed of does not bar the consideration of the propriety of the decision by the Court under Section 115. 1960 All LJ 79: 1960 All WR (HC) 63** AIR 1962 All 153 (154): 1962 (1) Cri LJ 243. (Order as modified or set aside in revision becomes a final order under Order 21, Rule 58.)** AIR 1962 All 9 (11).

(3) Objection under Order 21, Rule 58 — Issues framed and evidence recorded — But trial Court refusing to go into evidence on ground that document relied on by objector was inadmissible in evidence dismissing objection — Finding against law — Revision — Parties should not be left to remedy under Order 21, Rule 63 — High Court should interfere in its revisional jurisdiction. AIR 1966 Raj 219 (220): 1966 Raj LW 324.

(4) If the lower Court fails to determine the only real question that has to be decided, namely, that of possession, and disposes of the petition on a determination of the question of title which it was not competent to investigate, or allows a claim in express violation of the Code, as for example, after the execution sale or against mortgaged property which was brought for sale, or refuses to entertain a claim on the erroneous view that the decree under execution is a mortgage decree, the High Court will interfere. AIR 1952 Ajmer 3 (4)** AIR 1952 Cal 768 (769) (DB)** AIR 1939 All 117 (120)** AIR 1929 Pat 746 (747)** (1905) 27 All 700 (701) (DB)** AIR 1937 Lah 176 (176).

[See also AIR 1966 Pat 173 (177). (Absence of finding as to possession — Question of title cannot be sole test for deciding the claim.)]

**23. Orders setting aside or refusing to set aside sales.** — (1) No second appeal lies from an order made under Order 21, R. 89 but a revision will lie from those orders passed in appeal and made in disregard of those provisions or in the illegal or irregular exercise of jurisdiction. (1911) 38 Cal 339 (341) (DB)** AIR 1930 Cal 249 (250) (DB) ** AIR 1936 Oudh 172 (172) (DB).

(2) If the judgment-debtor deposits the amount mentioned in the sale proclamation together with the 5 per cent. of the purchase money in time, a refusal to set aside the sale will be an irregular exercise of jurisdiction. AIR 1923 All 315 (317)** AIR 1930 Oudh 9 (10).

(3) When the deposit falls short, due to a mistake of the Court, and is subsequently made good, the Court acts with material irregularity in refusing to set aside the sale. AIR 1930 Cal 249 (250) (DB).

[But see AIR 1920 Cal 392 (392).]

(4) No application for revision will lie from an order dismissing an application under Order 21, Rule 89 on the ground that an application under Rule 90 was previously dismissed. 1898 All WN 138 (149) (DB).

(5) When a Court rejects an application to set aside a sale summarily or without allowing the petitioner an opportunity to substantiate his allegations or without considering the evidence let in by him or by misapplying the law of limitation, there is sufficient ground for interference. AIR 1925 Nag 289 (291)** AIR 1929 All 793 (793): 51 All 1023 (DB)** AIR 1921 Cal 251 (252): 48 Cal 119 (DB).

**Section 115 — Note 23 (contd.)**

(6) An order in appeal on an application under Order 21, Rule 91, setting aside the sale on the ground that the judgment-debtor has no saleable interest is not open to revision. AIR 1947 Bom 119 (120, 122): ILR (1947) Bom 264 (DB).

(7) Fraud of the auction-purchaser in colluding with the execution creditor and purchasing property at a depreciated value is a good ground to set aside a sale and a Court acts with material irregularity in refusing to do so. (1878) 2 Mad 264 (269) (DB).

[See also ILR (1962) 2 Cal 210 (212). (Allegation of fraud due to under-valuation of property — No proper disposal by appellate Court.)]

(8) Execution sale — Application under Order 21, Rule 90, disallowed — Order of confirmation refusing to extend time for payment of decretal dues — Order falls under Order 21, Rule 92 and cannot be split up — Appeal lies under Order 43, Rule 1 (j) — Revision against refusal to extend time — Not maintainable. AIR 1962 Pat 410 (412, 413): 1962 BLJR 16.

(9) Application for release of land from attachment and sale and that for setting aside sale — Dismissal for non-prosecution — Courts below holding that no good case for restoration made out — No interference by High Court in revision under Section 115. AIR 1968 Pat 128 (129).

**24. Orders under Order 33.** — (1) Where the pauper's application is rejected the pauper's case comes to an end and is therefore a "case decided" while where the application is allowed no "case" is decided. AIR 1942 All 319 (319): ILR (1942) All 859 (DB). (An order rejecting an application for leave to sue in forma pauperis is revisable.)** AIR 1952 All 582 (583) (DB)** AIR 1924 Nag 44 (45): 19 Nag LR 165 (DB).

[But see AIR 1938 Nag 210 (211): ILR (1940) Nag 463** AIR 1926 Mad 958 (958)** AIR 1938 Pat 209 (209) (DB)** AIR 1931 Rang 318 (318, 319)** AIR 1963 All 241 (242): 1963 All LJ 27 (DB). (Order granting application for leave is a case decided.)** AIR 1959 Mad 14 (14): (1958) 1 Mad LJ 97.]

(2) Even applications where leave is refused cannot be revised. AIR 1922 All 1 (1): 44 All 248** AIR 1926 All 446 (446): 48 All 493** AIR 1922 All 208 (208) (DB).

(3) In considering the question of pauperism if a Court wanders from the issue, and enters on a question of the pauper's title or the maintainability of the suit, it would be an exercise of jurisdiction not vested by law. AIR 1923 All 577 (578): 45 All 548 (DB)** AIR 1925 All 275 (276)** AIR 1966 Pat 324 (325). (Application for permission to sue in forma pauperis rejected on extraneous considerations — Cannot be sustained.)

(4) An order granting leave to the next friend to bring a suit in forma pauperis on behalf of an idol on ground that the idol is a pauper will not be interfered with in revision when the finding as to pauperism is based on a consideration of the evidence. In such a case, the question whether the next friend is a pauper or not is immaterial and what has to be seen is whether the plaintiff (idol) is a pauper or not. AIR 1959 Manipur 42 (42).

(5) When the matter is altogether at an end and plaintiff is entirely out of Court the order is not merely an interlocutory one but a "case decided" and so is revisable. AIR 1930 All 758 (760): 52 All 927 (DB)** AIR 1933 All 295 (296): 53 All 216.

(6) An order granting an application for leave to sue in forma pauperis is a "case decided". AIR 1948 All 244 (250): ILR (1947) All 812 (FB) ** AIR 1952 Vind Pra 31 (32).

(7) An order granting or refusing an application for leave to sue in forma pauperis is a "case decided". AIR 1941 Lah 128 (131): ILR (1941) Lah 697 (DB). (1912 Pun Re No. 87, **Overruled.**)** AIR 1926 Lah 642 (643)** AIR 1934 Lah 231 (231)** AIR 1948 All 244 (250): ILR (1947) All 812 (FB). (Application allowed — It is a case decided.)

[See however AIR 1934 Lah 295 (296).]

(8) Application in forma pauperis is itself held to be a "case decided". AIR 1942 Oudh 169 (171): 17 Luck 462 (DB)** AIR 1942 Oudh 361 (362) (DB)** AIR 1940 Oudh 148 (151): 15 Luck 365 (FB)** AIR 1923 Oudh 118 (119)** AIR 1938 Oudh 146 (149): 14 Luck 116 (DB).

(9) When the lower Court, after considering the whole question of pauperism and in the exercise of discretion, comes to a proper decision it will not be interfered with when there is no error of jurisdiction. AIR 1954 Pat 193 (194) (DB)** AIR 1942 Nag 47 (48): ILR (1942) Nag 625** AIR 1925 Cal 990 (991) (DB)** AIR 1930 All 831 (832) (DB)** AIR 1968 Bom 380 (381): 70 Bom LR 251. (Court having jurisdiction to decide question of pauperism.)** AIR 1968 Manipur 27 (29)** AIR 1963 Andh Pra 370 (375): (1962) 2 Andh WR 442 (DB)** AIR 1961 Assam 98 (98). (Proper procedure followed — Finding that applicant is not pauper based on evidence.)

(10) If, the lower Court commits an irregularity in the exercise of jurisdiction as where it declines to give notice to the Government Pleader or to the defendant before disposing of the application, or where it does not properly consider the sufficiency or otherwise of the evidence as to pauperism, or where it enters into the merits of the case and dismisses the application after finding that the claim is unsustainable, the High Court will interfere. AIR 1954 Nag 252 (253): ILR (1955) Nag 79** AIR 1927 Cal 464 (464) (DB)** AIR

**Section 115 — Note 24 (contd.)**
1952 All 582 (583) (DB)** AIR 1950 Pat 364 (364) (DB)** AIR 1932 Bom 584 (586): 56 Bom 585** (1903) 13 Mad L Jour 292 (295) (FB).

(11) High Court will interfere where the Court commits obvious errors of law. AIR 1955 Pat 257 (258)** AIR 1954 Pat 63 (64) (DB)** AIR 1936 Mad 83 (84).

[But see AIR 1960 Mys 140 (140, 141): 38 Mys LJ 102.]

(12) Where the order refusing leave to sue in forma pauperis directs the petitioner to pay court-fee on or before a certain date and on failure of the petitioner to comply with the direction, the Court dismisses the original petition for leave to sue in forma pauperis, such dismissal would not bar revision against the order refusing leave, although no revision or appeal is preferred against the order rejecting the petition. AIR 1955 Mad 467 (468).

[But see AIR 1954 Mad 880 (881).]

(13) Two of the plaintiffs permitted to sue in forma pauperis — Third plaintiff allowed to pay Court-fee on his one third share of property in suit — Revision against such order filed by defendants — The matter involved being not purely of Court-fee but closely connected with pauperism, the petition is maintainable. AIR 1967 Pat 310 (311).

(14) The State being the party mainly interested in the payment of the Court-fee by persons who are able to do so, the High Court will not normally interfere in revision against orders granting leave to sue in forma pauperis at the instance of the parties to the dispute. AIR 1961 Mad 71 (72): (1960) 2 MLJ 313.

**25. Decision as to court-fee, whether revisable.** — (1) An order demanding additional court-fee is revisable under this section. AIR 1954 Mad 258 (261, 262) (DB) * AIR 1957 Madh Pra 173 (174)** AIR 1957 Pat 450 (451) (DB)** AIR 1953 Orissa 89 (89, 90)** AIR 1947 Bom 259 (260) (FB)** AIR 1938 Pat 22 (25): 16 Pat 766 (FB)** AIR 1938 Nag 122 (126): ILR (1938) Nag 106 (FB)** AIR 1967 Punj 389 (392): 68 Pun LR 54 (FB)** AIR 1966 Him Pra 4 (5)** AIR 1966 Madh Pra 330 (331): 1966 MPLJ 958** AIR 1966 Mad 321 (322): 79 Mad LW 180** (1964) 66 Punj LR 916: ILR (1965) 1 Punj 265** AIR 1962 Madh Pra 237 (238): 1961 Jab LJ 1267. (Order rejecting appeal for non-payment of sufficient court-fee** AIR 1960 J & K 34 (34) ** AIR 1959 Mad 155 (156): (1959) 1 Mad LJ 151.

[See however AIR 1952 Mad 86 (87): ILR (1952) Mad 77 (FB)** AIR 1957 All 337 (338): ILR (1956) 2 All 765 (DB).]

[But see AIR 1954 Punj 205 (205)** AIR 1942 Pesh 23 (24).]

(2) A decision holding that the court-fee paid is sufficient, is not subject to the revisional jurisdiction of the High Court. AIR 1954 Trav-Co 178 (185, 188): ILR (1953) Trav-Co 1170 (FB)** AIR 1957 All 339 (340)** AIR 1957 Pat 450 (451) (DB)** AIR 1956 Sau 93 (94) (DB)** AIR 1938 Pat 22 (25): 16 Pat 766 (FB)** AIR 1938 Nag 122 (126): ILR (1938) Nag 106 (FB)** AIR 1961 SC 1299 (1300): (1961) 3 SCR 1015** ILR (1968) Cuttack 270** (1966) 32 Cut LT 434: ILR (1965) Cut 946** AIR 1965 J & K 121 (123)** AIR 1965 Orissa 108 (110): 31 Cut LT 61** (1964) 66 Pun LR 264 (265)** AIR 1962 Ker 84 (85): 1962 Ker LT 825. (Erroneous decision on question of court-fee not affecting jurisdiction of Court to try suit — No revision at instance of defandant. AIR 1961 Ker 146 (FB), held, impliedly overruled in **AIR 1961 SC 1299.)**** 1960 All LJ 124: 1960 All WR (HC) 111.

[But see AIR 1946 Nag 160 (161).]

(3) Question regarding category in which suit fails and not regarding adequacy of Court-fees — Order is revisable. AIR 1961 Ker 142 (143, 144): 1960 Ker LT 1297 ** AIR 1961 Ker 146 (148): 1960 Ker LT 1322 (FB). (In proper cases High Court can exercise its powers under Article 227 of the Constitution.)

(4) Section 12 (2) of the Madras Court-fees and Suits Valuation Act only enables the defendant to raise a contention as to the proper Court-fee payable on a plaint and to assist the Court in arriving at a just decision on that question. There is no provision in the Madras Court-fees Act or any other statute which enables the defendant to move the High Court in revision against the decision of the Court of first instance on the matter of Court-fee payable on a plaint. **AIR 1961 SC 1299 (1300): (1961) 3 SCR 1015.**

(5) Order as to Court-fee — Objection as to Court-fee raised by Court suo motu before defendant served with notice of suit — Service of notice of revision upon all respondents cannot be insisted upon — Matter is between plaintiff and Government — It is only the plaintiff who can file revision against the order of the Court. AIR 1960 Andh Pra 339 (340).

(6) Appeal by defendants — Sufficient Court-fee not paid on appeal — Court also finding that sufficient Court-fee not paid on plaint — Order of the Court rejecting plaint at the outset is revisable under Section. AIR 1968 Manipur 1 (3).

(7) When the petitioner complains that a suit has been accepted without any Court-fees the challenge is directed against the power of the Court to receive a plaint without Court-fees. In such case a revision lies under Section 115. AIR 1958 Mys 132 (134): ILR (1957) Mys 448.

(8) Revisional jurisdiction under Section 6-B, Court-fees Act (as amended in

**Section 115 — Note 25 (contd.)**
U. P.) is much wider than the revisional powers under Section 115. Under the former, the High Court can interfere if it is of opinion that proper Court-fee had not been paid on the memorandum of appeal to which the order under revision relates. AIR 1965 All 298 (300): 1964 All LJ 977.

(9) Lower Court wrongly accepting valuation made by plaintiff for purposes of jurisdiction as well as Court-fee — Jurisdiction exercised irregularly — High Court can revise order. AIR 1963 Guj 207 (209): (1963) 4 Guj LR 836 ** ILR (1968) Cuttack 270.

(10) Order directing amendment of valuation in plaint and payment of ad valorem Court-fee — Revision by defendant — Point as to valuation involving jurisdiction of trial Court raised — Revision maintainable — High Court is satisfied that proper value of suit property would make suit beyond pecuniary jurisdiction of trial Court can interfere in revision and direct trial Court to return plaint for presentation to proper Court which will fix and determine the exact value of the suit property on the evidence which may be adduced before it. 1963 BLJR 123.

(11) Goa, Daman and Diu (Judicial Commissioner's Court) Regulation (10 of 1963), Section 8 (2) (b) — Order directing payment of Court-fee treating part of claim as governed by Portugese Law and part by Indian Court-fees Act which had come into force in meanwhile — Order vitiated by material irregularity in computation of Court-fees — Order set aside in revision AIR 1968 Goa 58 (60).

(12) Plaint rejected for non-payment of Court-fee — Revision against order directing to pay Court-fee filed — Such order of rejection has the character of decree and can be appealed against — In the absence of such appeal, revision is infructuous. AIR 1968 Pat 187 (188).

(13) Point of Court-fee and jurisdiction — Order of trial Court that suit was not undervalued and that that Court had jurisdiction to try it — Revision against order is maintainable. 1963 Raj LW 653 (656): ILR (1963) 13 Raj 1183.

(14) The decision of an appeal preferred under Section 6-A (U. P.) of the Court-fees Act amounts to a case decided. AIR 1960 All 590 (593): 1960 All LJ 514 (DB). (Per Mathur, J.:— After question of Court-fee has been decided by the trial Court, there is no 'case decided'. AIR 1934 All 620 (FB), held still good law even after the change in law. AIR 1952 All 535 (FB), Rel. on).

**26. High Court's revisional powers under other Acts.**— (1) The powers of the High Court under Section 25 of the Small Cause Courts Act are much wider than these given by this section. AIR 1955 Mad 271 (272) ** AIR 1957 Madh Pra 70 (71) (FB) ** AIR 1957 Mad 761 (761) ** AIR 1957 Pat 168 (172): 35 Pat 986 (DB) ** AIR 1945 Bom 197 (199): ILR (1945) Bom 382 (FB) ** AIR 1965 J and K 48 (49): 1964 Kash LJ 302. (J and K Small Cause Courts Act, 1968 (1911 A. D.), Sec. 24 — Scope of Section 24 is wider than that of Section 115, Civil P. C.) ** AIR 1960 Ker 306 (307): 1960 Ker LJ 309 (DB).
[See also AIR 1968 Pat 271 (274).]

(2) A revision against a decree in a Small Cause suit lies to the High Court only and not the District Judge. High Court can act suo motu and an application for revision is not necessary. AIR 1959 Ker 329 (331): 1957 Ker LT 1022.

(3) The powers under Section 25, Provincial Small Cause Courts Act should not however, be so construed as to give the parties a right of appeal. AIR 1960 Ker 306 (307): 1960 Ker LJ 309 (DB).

(4) The provisions of Section 115 of the Code are not a safe guide for the exercise of the powers under Section 25 of the Small Cause Courts Act. (1895) 21 Bom 250 (255) (DB) ** 1904 Pun Re No. 66, p. 186 (189) (DB).

[See however (1893) 15 All 139 (140) ** (1894) 16 All 476 (477) (FB) ** (1899) 21 All 89 (90) (DB) ** AIR 1968 Mad 203 (205, 207): (1967) 2 Mad LJ 475. (Principles governing applications under Sec. 115, C. P. C. in regard to findings of fact equally apply to applications under Section 25, Provincial Small Cause Courts Act.)]

(5) As to circumstances in which the High Court will interfere under Section 25, Provincial Small Cause Courts Act, see under Section 25, Provincial Small Cause Courts Act.

(6) Revisional powers under Section 25, Provincial Small Cause Courts Act are discretionary and High Court will not interfere if no injustice will result if decision of Courts below is allowed to stand. AIR 1959 Ker 356 (358): 1958 Ker LT 573.

(7) An application in revision against an order of a Magistrate under Section 110, Bombay Municipal Boroughs Act, 1925, lies on the civil side of the High Court and not on the criminal side as the subject-matter of the decision is a civil matter, namely, rates and taxes. AIR 1950 Bom 397 (398): ILR (1950) Bom 522: 52 Cri L Jour 1411 (FB). (AIR 1919 Bom 158, **OVERRULED.**)

(8) Revisional jurisdiction under Section 35, Delhi and Ajmer Rent (Control) Act, 1952 is wider than that under Section 115. If there is miscarriage of justice, due to error of law or fact, revision will lie. Jurisdiction is not confined to correct errors of jurisdiction to which Section 115 is limited. Under Section 35, High Court cannot interfere with a plain finding of fact arrived at by the lower Court. It cannot re-assess the value of evidence

**Section 115 — Note 26 (contd.)**

and substitute its own conclusion. **AIR 1963 SC 698 (701): 1962 Supp (1) SCR 933.**

(9) The revisional jurisdiction with which the High Court is invested under Section 29 (2) of the Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947) is wider than under Section 115. C. P. C. and is not merely in the nature of jurisdictional control. It extends to corrections of all errors in the overall decision which would make the decision contrary to law. The legislature further empowers the High Court to pass such order with respect thereto as it thinks fit in order to do complete justice. AIR 1969 Guj 110 (120): 9 Guj LR 729 ** **AIR 1968 SC 1336 (1339): (1968) 3 SCR 623.** (Section 29 (2) does not apply to pending revision under Section 115. Revision has to be decided in accordance with the limitations imposed under Section 115 — ILR (1967) Guj 705, **REVERSED).**

(10) Scope of revisional jurisdiction of High Court under Section 15 (5) of the East Punjab Urban Rent Restriction Act, 1949, is wider than that under Section 115, C. P. Code and is not confined to questions of jurisdiction only. (1962) Supp 3 SCR 952.

(11) Revisional jurisdiction under Section 75, Provincial Insolvency Act is wider than that under Civil P. C. and can be exercised if the decision is not according to law. 1966 All LJ 476.

(12) Order rejecting application for reference under Section 18 of L. A. Act — Revision under Section 115 lies. AIR 1968 Orissa 94 (97): 34 Cut LT 173. (AIR 1952 Orissa 98 and AIR 1961 Orissa 39, Held, not correct in view of Orissa Act 19 of 1948).

(13) Revisional powers of High Court under Section 22, Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960, are wider than those under S. 115, Civil P. C. — Words "Legality, regularity or propriety of the order" in Section 22 of the Act are wide enough to cover both questions of law and fact. AIR 1964 Andh Pra 314 (316): (1962) 2 Andh WR 148.

(14) Powers of High Court under Section 34 Tripura (Courts) Order, are wider than those under Section 115, C. P. C. — Subordinate Court following High Court's decision — High Court subsequently dissenting from earlier decision — Revision against order of subordinate Court is maintainable even if it cannot be said that the subordinate Court committed any illegality. AIR 1969 Tripura 19 (25).

(15) The scope of Section 25 of the Madras Buildings (Lease and Rent Control) Act (18 of 1960) is fairly wide and where facts are all admitted and proved, the question whether the conclusion, reached on those facts is proper, is within the purview of revisional jurisdiction under Section 25. AIR 1967 Mad 421 (422): (1967) 2 Mad LJ 286 ** AIR 1968 Mad 152 (153): (1967) 1 Mad LJ 6. (CRR 1420 of 1954 (Mad) and 1957-1 Mad LJ 158, not followed in view of **AIR 1956 SC 463 and AIR 1960 SC 655)** ** (1968) 1 Mad LJ 435. (S. 25 of Madras Buildings (Lease and Rent Control Act (18 of 1960) and Sec. 115, C. P. C. are mutually exclusive.) ** (1968) 81 Mad LW 577 ** (1965) 2 Mad LJ 109 (111, 112): 78 Mad LW 283. (Finding of fact of subordinate Judge reversed by District Judge in revision — Finding not erroneous — No interference by High Court.)

(16) Section 8 (2) (b) of Goa, Daman and Diu (Judicial Commissioner's Court) Regulation (1963), and S. 115, Civil P. C. are almost pari materia — Decisions of Privy Council and Supreme Court on S. 115, Civil P. C., can be relied on for interpretation of Section 8 (2) (b). AIR 1966 Goa 1 (4, 9) (FB).

(17) Though revision under Section 115, C. P. C., against the order of Rent Tribunal is not barred by Section 29 (2) of the Madras Public Trusts (Regulation of Administration of Agricultural Lands) Act (57 of 1961), the same is barred by Section 58. AIR 1967 Mad 306 (311): (1966) 2 Mad LJ 538.

(18) Order of Revenue Divisional Officer under Section 6 (B) of the Madras Cultivating Tenants Protection Act (25 of 1955), is revisable under Section 115, C. P. C. AIR 1966 Mad 327 (328): (1966) 1 Mad LJ 105 (DB).

(19) Under Section 103 Kerala Land Reforms Act only two grounds are available to High Court for revision viz. (1) erroneous decision (2) failure to decide any question of law. 1967 Ker LT 370 (372): 1967 Ker LJ 440 ** 1966 Ker LJ 1156 (1165). (Section does not oust jurisdiction of High Court under Section 115, C. P. Code.)

(20) Kerala Building (Lease and Rent Control) Act (1959), S. 20 — High Court's revisional powers under Section 20 are wider than those under Section 115, Civil P. C. — Propriety or legality of principles adopted by subordinate Courts for fixation of fair rent can be examined. 1966 Ker LT 1063 (1073): 1966 Ker LJ 569.

(21) Mysore Agriculturists' Relief Act (18 of 1928), Section 4 (2) — Revisional power of High Court — Not confined to question of status — High Court can pass order relating to regularity of proceedings. (1961) 39 Mys LJ 642.

(22) Mysore Rent Control Act (22 of 1961), Section 50 — Provisions are wider than Section 115, Civil P. C. — To determine question of jurisdiction like question of limitation High Court can review facts and law. (1968) 1 Mys LJ 453: 14 Law Rep 212.

(23) Section 12-B (4) of Madras General Sales Tax Act (9 of 1939) gives a wider jurisdiction than Section 115, C. P. C. to the High Court. AIR 1960 Mad 180 (183): (1960) 1 Mad LJ 263 (DB). (Error of law can be interfered with.)

## PART IX
## SPECIAL PROVISIONS RELATING TO THE [a][HIGH COURTS FOR PART A STATES AND PART B STATES]

**116. Part to apply only to certain High Courts.**—This Part applies only to High Courts [b][not being the Court of a Judicial Commissioner.]

[a] Substituted by S. 14 of the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951) for the words "Chartered High Courts". Even though S. 116 itself is adapted later on in 1956, there is no adaptation for these words which occur in the heading.

[b] Substituted by A. L. O. (No 2), 1956 [w. e. f. 1-11-1956] for "for Part A States and Part B States" which words were substituted by A. L. O., 1950 and the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), S. 14 [1-4-1951].

[1882, S. 631.]

**117. Application of Code to High Courts.**—Save as provided in this Part or in Part X or in rules, the provisions of this Code shall apply to such High Courts.

[1882, 1877, S. 632; See Ss. 120, 129 and O. 49, R. 3.]

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**Section 115 — Note 26 (contd.)**

(24) The powers of revision which the Financial Commissioner exercises under Section 84 of the Punjab Tenancy Act are similar to those which vest in the High Court under Section 115, Civil P. C. This power is intended to be exercised for correction of error of jurisdiction committed by subordinate Courts or revenue officer and the purpose behind it is to provide means to the aggrieved party to obtain rectification of a non-appealable order though in exceptional circumstances it is to ensure proper exercise of jurisdiction by the subordinate revenue officers or Court. 1965 Cur LJ 133 (Punj).

(25) Revisional jurisdiction under Section 6-B of Court-fees Act (as amended in U. P.) is much wider than jurisdiction under Section 115, Civil P. C. under the former the High Court can interfere if it is of opinion that proper Court-fee had not been paid on the memorandum of appeal to which the order under revision relates, AIR 1965 All 298 (300): 1964 All LJ 977.

(26) Section 9 (1) Hyderabad Jagirdars Debt Settlement Act enjoins that the Debt Settlement Board shall in all proceedings under the Act, be subject to the control of the High Court and the High Court has power not only under Section 9 (1) of the Act read with Section 115, Civil P. C. but under Art. 227 of the Constitution also to correct an error apparent on the face of the record. (1961) 1 An WR 100: 1961 Andh LT 169.

(27) Revision lies under Section 388 City of Nagpur Corporation Act, against an order of the District Judge in appeal under Section 130 of the Act. The words "whose decision shall be final" in Section 130 do not amount to an express provision barring revision within the meaning of Section 388. (1961) 63 Bom LR 765 (766). ((1965) NLJ 621, Foll.)

(28) Revisional authority vacating illegal order of appellate authority on strength of cross-objection filed in revision which may not be strictly maintainable, High Court would not interfere under Article 226. 1968 Ker LJ 478 (480).

**27. Appeal and review.**— (1) By Cl. 15 of the Letters Patent no appeal lies from an order made in the exercise of revisional jurisdiction or of the powers of superintendence under Section 107 of the Government of India Act, 1915 (now Article 227, Constitution of India) by a High Court. AIR 1955 Mad 287 (287): ILR (1955) Mad 1033 (DB) ** AIR 1953 Cal 636 (638) (DB) ** AIR 1953 Mad 395 (395, 396) (DB).

(2) There can be no review or re-hearing of an application for revision dismissed for default. The proper course is to prefer a second application for revision. AIR 1945 Mad 103 (104) ** 1901 Pun Re No. 54, p. 172 (174) (FB) ** AIR 1937 Lah 685 (686).

[See however 1961 All LJ 143. (Revising authority though entertaining revision dismissing it for default — It can re-consider it on merits.)]

[But see AIR 1969 Mys 77 (77): (1968) 2 Mys LJ 200. (Revision disposed of in absence of respondent — If interests of justice require that matter should be reheard no fetters can be placed on High Courts powers — AIR 1945 Mad 103, **DISSENTED FROM.)** ** AIR 1962 Madh Pra 308: 1962 MPLJ 317. (A revision petition dismissed for default can be restored if there be sufficient ground for non-appearance of the petitioner at the hearing.)

(3) Final order passed by High Court in exercise of revisional jurisdiction — Finality cannot be upset in exercise of powers under Article 226. AIR 1963 All 532 (534).

**Section 117 — Note 1**

(1) This section declares that the provisions of the Code shall apply to Chartered High Courts also save as otherwise provided in Parts IX and X of the Code or in rules. AIR 1928 Mad 385 (386).

**118. Execution of decree before ascertainment of costs.**—Where any such High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs;

and, as to so much thereof as relates to the costs, that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.

[1882, S. 634; See R. 289 of Bombay High Court Rules (O. S.), 1957.]

**119. Unauthorized persons not to address Court.**—Nothing in this Code shall be deemed to authorise any person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its charter authorised him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys.

[1882, 1877, S. 635; See Letters Patent and Advocates Act, 1961, Chap. IV.]

**120. Provisions not applicable to High Court in original civil jurisdiction.—**

(1) The following provisions shall not apply to the High Court in the exercise of its original civil jurisdicton, namely, Sections 16, 17 and 20.

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**Section 117 — Note 1 (contd.)**

(2) Order 9, Rule 5 applies to ordinary original civil jurisdiction of the High Court. AIR 1954 Cal 369 (372).

(3) Appeals from orders passed on applications for review of decrees in appeals under the Letters Patent are governed by the provisions of Order 47, R. 7. (1889) 16 Cal 788 (793) (DB). (Not maintainable.) * (1888) 12 Bom 171 (173) (DB) * (1886) 9 Mad 253 (255, 256) (DB).

(4) By virtue of S. 117, the provisions of Civil P. C., would apply to proceedings before the appellate Bench in Special appeal also. Inasmuch as the provisions of Section 117, make the provisions of O. 41 and S. 151, applicable to the procedings before the Bench, it has the power to remand the case. 1964 All WR (HC) 625 : ILR (1965) 1 All 152 : 1964 All LJ 1049. (AIR 1961 All 381, Foll.)

(5) By virtue of S. 117, in appeals heard by the High Court provisions of Ss. 100 and 101 would become applicable. Where the High Court exercises its jurisdiction as a second appellate Court (in the numerical sense) its jurisdiction could be exercised only in accordance with Sections 100 and 101, Civil P. C. Even where a High Court hears an appeal under Cl. 10 of Letters Patent provisions of Sections 100 and 101 would still govern the exercise of the jurisdiction. (Sinha J. contra.) AIR 1965 Pat 472 (477) : 1965 BLJR 300 (FB). (AIR 1965 Pat 141, **OVERRULED.)**

**Section 118 — Note 1**

(1) No order as contemplated by S. 118 is necessary when a party obtains a decree from a Court duly drawn up and sealed under R. 289 of the Bombay High Court Rules. AIR 1959 Bom 357 (358) : 60 Bom LR 963 (DB).

**Section 119 — Note 1**

(1) The words "the power of the High Court" to make rules concerning "advocates, vakils and attorneys" in this Section are not limited to the power of the High Court under Clauses 9 and 10 of the Letters Patent to make rules for the admission of advocates, vakils and attorneys and to their professional conduct, and that they also include the power of the High Court under the Government of India Act, 1915 (now see the Constitution of India, Article 227 (2) (b)), to make rules regulating the practice of the Court. AIR 1928 Mad 472 (473).

(2) Examining and cross examining of witness is 'acting and not 'pleading' — Recognized agent is, therefore, entitled to examine and cross-examine witness — S. 119 from its language shows that there is a clear distinction between addressing a Court and examining witnesses in Court. AIR 1966 Raj 170 (171): 1966 Raj LW 77.

**Section 120 — Note 1**

(1) Where one only of several defendants resides within jurisdiction, S. 20 will enable a suit to be brought against all the defendants after obtaining leave to sue them. But as this section does not apply to the High Court and as the Letters Patent do not confer jurisdiction on the High Court in such cases, no suit can be brought in the High Court against all the defendants. AIR 1923 Mad 272 (274) (DB).

(2) Although Sections 15 and 21 of the Code are not expressly mentioned in this section, they do not apply to a Chartered High Court in the exercise of its original civil jurisdiction. AIR 1935 Rang 517 (520.)

(3) The expression "ordinary jurisdiction" embraces all such as is exercised in

(2) [Repealed by the Presidency Towns Insolvency Act, 1909 (3 of 1909), S. 127 and Schedule III.]

[1882, 1877, S. 638. As to rules, see O. 49, R. 3.]

## PART X

## RULES

**121. Effect of rules in First Schedule.**—The rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part.

**Section 120 — Note 1 (contd.)**

the ordinary course of law and without any special step being necessary to assume it. It is opposed to "extraordinary jurisdiction" which the Court may assume at its discretion upon special occasions and by special orders. (1889) 13 Bom 525 (533) : 16 Ind App 156 (PC).

(4) Suit against company filed in High Court in its original civil jurisdiction — Section 20 inclusive of Expl. II has no application. AIR 1967 Cal 205 (209) : 71 Cal WN 458.

(5) Section 21 of Civil P. C. is not applicable to Calcutta High Court in the exercise of its original jurisdiction. AIR 1960 Cal 331 (339).

**Section 121 — Note 1**

(1) The re-arrangement of the Code into the "body of the Code" and "Rules is for the purpose of giving a much needed elasticity to judicial procedure, and to enable minor defects to be remedied, as they arise, without resort to the Legislature, AIR 1957 Andh Pra 172 (181) : ILR (1957) Andh Pra 1 (FB) * AIR 1945 Nag 83 (85) : ILR (1944) Nag 561 (DB) * AIR 1942 All 387 (389) : ILR (1942) All 862 (DB).

(2) Export for the fact that the rules in the First Schedule can be amended, annulled or added to by the High Courts such rules have the same force as if enacted in the body of the Code and it is incorrect to say that they are not so imperative as the sections in the body of the Code. AIR 1937 Pat 307 (310).

(3) In order to ascertain the jurisdiction of the Court in a particular case one has to look not merely to the body of the Code but also to the Rules in Sch. I which may have set limits to the jurisdictions apparently created in wide and general terms by the body of the Code. AIR 1949 Cal 690 (694): ILR (1950) 1 Cal 596 (DB).

(4) The rules passed in accordance with the procedure in this Part, are not on the same footing as the circulars in the Manual of Civil Circulars issued by the High Court. Unless the latter is passed under some enactment which gives it the force of law, it would not have the force of law. AIR 1926 Bom 548 (549) : 50 Bom 793 (DB).

(5) The combined effect of Sections 121, 122 and 127 has been held to make Rules in the Civil Rules of Practice part of the Code itself. AIR 1956 Andhra 108 (109) ** AIR 1949 Mad 631 (633).

(6) It is clear from Sections 121, 122 and 127 that the Code contemplates two classes of rules, i.e. rules contained in the First Schedule and other rules like those contained in the Travancore Civil Courts Guide and Civil Rules of Practice in force in the Cochin area which do not form part of the Schedule. It is the latter class that is mentioned in S. 20 (2) of the Code of Civil Procedure (Amendment) Act of 1951. AIR 1954 Trav-Co 526 (531) : ILR (1954) Trav-Co 929 (FB).

(7) The rules contained in Sch. I cannot be divided into watertight compartments, namely, those contained in O. 1 to O. 40 as being applicable to original trials only and those contained in O. 41 to O. 44 as being applicable to appellate Courts only, and unless there are separate specific provisions for appellate Courts or there is anything in the rules to the contrary, such of the rules in Sch. I which are of general application are applicable to all Courts in accordance with the provisions of Section 117 and Section 107. AIR 1947 All 211 (213) : ILR (1947) All 180 (FB).

(8) It is clear from Sections 121 and 128 that the rules contained in the first schedule and the rules framed by the High Courts are in fact outside the "body of the Code". Sections alone comprise the "body of the Code". AIR 1969 All 142 (152, 153): 1968 All LJ 243 (FB).

(9) Form prescribed by Calcutta High Court for purposes of and relating to Order 34, R. 5 for making preliminary mortgage decree final, is a statutory form prescribed under the rule making power possibly under S. 122, and also referred to in O. 48, R. 3 which is a Rule made under S. 121 and as such has effect as part of the Code itself — According to this form, final decree has to be passed after hearing parties. AIR 1961 Cal 534 (536): 65 Cal WN 535 (DB).

(10) Word 'Rules' in S. 40 means rules in first schedule or rules framed under S. 122 — Decree passed in one State — Execution in another — Absence of rules under S. 122 in latter does not bar execution. AIR 1960 Madh Pra 387 (387) : 1960 MPLJ 1179.

**122. Power of certain High Courts to make rules.**—[a][High Courts [b][not being the Court of a Judicial Commissioner] ] [c][*] may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule.

[1882, Cf. S. 652, first para.]

[a] The words "High Courts for Part A States" were substituted by A. L. O., 1950 [26-1-1950] for the words "Courts which are High Courts for the purposes of the Government of India Act, 1935" which were substituted by A. C. A. O., 1948 [23-3-1948], for "High Courts constituted by His Majesty by Letters Patent and the Chief Court of Oudh."

[b] Substituted by A. L. O. (No. 2), 1956 [1-11-1956], for the words "for Part A States and Part B States" the words "Part B States" having been added by the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), S. 15.

[c] The reference to the Chief Court of Sind was omitted under Cl. 5 of the India (Adaptation of Existing Indian Laws) Order, 1947.

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**Section 121 — Note 1 (contd.)**

(11) As rules framed under Sch. I are to be taken as if enacted in the body of the Code O. 21, R. 4 and S. 39 must be read in a harmonious manner without spelling out an inherent conflict between them. (1966) 2 Mad LJ 5 (6) : (1966) 79 Mad LW 269.

(12) Order 37, Rule 1 (d) validly amended by Punjab High Court continues to apply to Courts of District Judges and Subordinate Judges in Union Territory of Delhi even after appointed day i.e. 30-10-1966 — Sections 121 and 127 do not alter this position so long as power to amend under Section 122 is not exercised by Delhi High Court. AIR 1969 Delhi 142 (144) : 71 Pun LR (D) 52 (DB).

**Section 122 — Note 1**

**1. Scope and object.** — (1) The rules made by the High Courts under S. 122 have the force of law. (1909) 1 Ind Cas 163 (164) (All) * (1903) 5 Bom LR 394 (395) (DB) * AIR 1928 Bom 123 (126): 52 Bom 459 (DB) * AIR 1931 All 756 (757) : 53 All 959 (DB).

(2) In making rules under this section the formalities prescribed by the Code should be complied with. AIR 1942 Lah 201 (202) : ILR (1943) Lah 569 (DB) * AIR 1921 Pat 509 (510) (DB) * 1905 All WN 83 (84) (DB).

(3) Where a new rule, viz., R. 122 in O. 21 inconsistent with R. 43 of the same order was introduced by the Allahabad High Court, it was held that the former rule prevailed. AIR 1931 All 567 (567, 568, 572) : 54 All 263 (FB).

(4) Power to make rules is subject to restriction in S. 124. AIR 1961 All 595 (507).

(5) General powers given to the High Court under Section 122 cannot be exercised in contravention of the specific powers conferred on State Government. Rule 15 of High Court Rules and Orders (All.) General Rules making Hindi as official language will not override specific powers of the State Government under S. 137. So a plaint written in English is a valid plaint in spite of R. 15. AIR 1963 All 546 (547): 1963 All LJ 243 (DB).

(6) Rule making power contained in Sections 122 and 129 and under clause 37 of Letters Patent shows that they overlap to a considerable extent, whilst a rule framed under Section 122 for regulating the procedure on the Original Civil Side cannot be inconsistent with the body of the Code, a rule framed under S. 129 could be inconsistent. A rule framed under either can however be inconsistent with rules contained in First Schedule. Mere fact that S. 129 expressly confers the power to frame rules for regulating Original Civil side procedure, it does not mean that such rules cannot be framed under S. 122. AIR 1969 Bom 117 (118) : 70 Bom LR 546.

(7) Under Section 122, every rule in the first schedule relating to procedure can be annulled, altered or added by the High Court. Adding an explanation to O. 33, R. 1 is within the scope of S. 122 and is not ultra vires. No mode or form is prescribed in the Code in which the High Court may make rules. The Code also does not require that when one single rule or any Order in First Schedule is annulled, amended or added to it must be made as a part of and as one of the rules framed by the High Court. (1966) 7 Guj LR 656 (660) (DB). (AIR 1963 Guj 30, **OVERRULED.**)

(8) There is no inconsistency between Section 122 and Article 227 of the Constitution. Section 122 in its entirety continues in force after commencement of the Constitution and no part of it is unconstitutional or ultra vires. AIR 1969 Guj 18 (20): 9 Guj LR 873 (DB).

(9) The rules made by the High Court at Nagpur under Section 122, Civil P. C. (1908) and which were in force in the former State of Madhya Pradesh as it existed before the Reorganisation of States on 1-11-1956, since they have not been adapted under Section 120 of the States Reorganisa-

**Section 122 — Note 1 (contd.)**

tion Act for the other territories of the corresponding new State (that is, the present State of Madhya Pradesh) are not operative and cannot regulate the procedure of the Civil Courts in the territories of the former State of Madhya Bharat.

Section 54 which falls in Part V of the States Reorganisation Act does not apply to such rules. A rule made by a High Court under S. 122, is a piece of delegated or subordinate legislation. It will be governed by S. 119 and not by S. 54 of the States Reorganisation Act. AIR 1960 Madh Pra 130 (131, 132): 1960 MPLJ 850.

(10) Word 'Rules' in Section 40 means rules in first schedule or rules framed under S. 122 — Decree passed in one State — Execution in another — Absence of rules under S. 122 in latter does not bar execution. AIR 1960 Madh Pra 387 (387): 1960 MPLJ 1179.

(11) Rules promulgated by the Madras High Court are with regard to all forms of its jurisdiction, special or otherwise. Being framed under Cl. 37 of the Letters Patent read with S. 122 Civil P. Code, powers of the High Court to grant relief are not restricted even with regard to Income-tax Cases. (1967) 80 Mad LW 595 (597) : (1968) 69 ITR 361 (DB).

(12) It is clear from Sections 121, 122, and 127 that the Code comtemplates two classes of rules i.e. rules contained in the first schedule which may be annulled, altered or added to by the High Court and the other rules which do not form part of the first schedule but will have the same force and effect as if they had been contained in the first schedule. AIR 1954 Trav-Co 526 (531) : 1954 Ker LT 827 (FB).

(13) Per Bose J.:—Rules framed under an Act cannot save the Act. Rules are made by a subordinate authority which is not a legislature. The validity of an Act of a competent legislature cannot be made to depend upon what some subordinate authority chooses to do or not to do. **AIR 1953 SC 252 (268): 1963 SCR 1069 (OVERRULED** on another point in **AIR 1955 SC 661.)**

**2. Extent of High Court's power to make rules.**—(1) The rules framed by the High Court under this Part, though they may annul, alter or add to the rules in the First Schedule, should not be inconsistent with the provisions in the body of this Code. AIR 1942 Lah 201 (202) : ILR (1943) Lah 569 (DB) * AIR 1957 Andh Pra 950 (951): ILR (1956) Andhra 420 (DB).

(2) The rules made under this section should not be inconsistent with the provisions of the Letters Patent. AIR 1926 Rang 1 (2) : 3 Rang 546 (FB) * AIR 1930 All 558 (559) (DB).

(3) The rules made under Section 122 cannot vary the period of limitation fixed by the Limitation Act for any proceeding. AIR 1930 Rang 228 (231) : 8 Rang 380 (FB) * (1908) 32 Bom 14 (24, 25) (FB).

(4) A rule requiring a copy of the trial Court's judgment to be filed along with the memorandum of second appeal will not entitle the appellant to exclude the time requisite for obtaining copy of such judgment. AIR 1918 All 389 (390) : 40 All 1 (FB) * AIR 1923 Lah 96 (96).

(5) A rule dispensing with the necessity of filing a copy of judgment appealed from along with the memoradum of appeal will not disentitle the appellant from excluding the period requisite for obtaining a copy of the judgment. AIR 1928 PC 103 (104, 105) : 6 Rang 302 : 55 Ind App 161.

(6) A rule extending the provisions of Section 5 of the Limitation Act to applications under O. 9, R. 9 or R. 13 of the Code is not ultra vires. AIR 1929 Bom 262 (263, 264) : 53 Bom 453 (DB) * AIR 1925 Mad 14 (17) : 47 Mad 824 (FB) * AIR 1917 Mad 957 (957) : 40 Mad 105.

(7) The rule-making power of the High Court is confined to the regulation of the procedure. AIR 1942 Lah 201 (202) : ILR (1943) Lah 569 (DB) * (1903) 3 Sind LR 171 (172) (DB) * AIR 1937 Rang 419 (420) : 1937 Rang LR 268 (FB).

(8) Section 122 specifically empowers the High Court by rules not merely to annul or alter any of the rules in the First Schedule of the Code but also to add to them. This is a comprehensive power and is sufficient to empower the High Court to make a rule of the kind embodied in Rule 41-A (2) of the Appellate Side Rules of the Madras High Court. Section 128 does not in any way cut down the ambit of Section 122. AIR 1958 Mad 392 (393) : ILR (1958) Mad 824.

(9) Exclusion of time for obtaining copy of judgment and decree or order — Provisions in Cls. (2) and (3) of Section 12 Limitation Act (1963) are a positive direction irrespective of provisions of Civil P. C. or of rules made by Court under Section 122 of Civil P. C. — Such rules if they permit filing of memorandum of appeal without annexing copy of judgment or decree or order, confer privilege on a would-be appellant but do not govern positive direction contained in S. 12. **AIR 1966 SC 1713 (1717): (1966) Sup 2 SCR 46.** (AIR 1952 Bhopal 39 and AIR 1951 Him Pra 67, **OVERRULED;** Appln. No. 254/63/17-8-65 (Cal) **REVERSED:** AIR 1928 PC 103, Rel. on.)

(10) Rule 8 in Chapter 9 of rules framed by Allahabad Court will prevail over O. 42, R. 1, Civil P. C. — Filing of a copy of the finding of a Revenue Court will not be necessary when filing an appeal. 1965 All WR (HC) 22 (27).

(11) The subject-matter of Cl. (b) of the Proviso to O. 21, R. 90 (All) is the provision for deposit of security for defraying the costs of the adversary party and as such is a matter of procedure. In so far as it requires an anticipatory warranty it would be ancillary to a matter of procedure. Therefore, Cl. (b) is not in excess of the rule-making power of the Allaha-

**123. Constitution of Rule Committees in certain States.**—(1) A committee, to be called the Rule Committee, shall be constituted at the town which is the usual place of sitting of each of the High Courts [a][° °] referred to in Section 122.

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**Section 122 — Note 2 (contd.)**

bad High Court. AIR 1962 All 543 (546) : 1962 All LJ 729 (DB). (AIR 1937 Rang 419 (FB) and AIR 1914 Mad 287 (FB) Disting. **HELD OVERRULED** on another point by **AIR 1962 SC 256** in AIR 1964 All 235.)

(12) High Court Rules and Orders — Allahabad High Court — Rules of Court (1952). Ch. IX R. 10 (2) — Provision in R. 10 (2) is mandatory — Special Appeal is not governed by O. 44, R. 1, Civil P. C., and must be duly stamped. AIR 1965 All 79 (80) : 1964 All LJ 283 (DB).

(13) "Code" includes Civil Rules of Practice framed by the Madras H. C. AIR 1956 Andh Pra 108 (109) : 1955 Andh WR 953.

(14) Form prescribed by Calcutta High Court for purposes of and relating to Order 34, Rule 5 for making preliminary mortgage decree final, is a statutory form prescribed under the rule-making power possibly under S. 122 and also referred to in O. 48, R. 3 which is a rule made under S. 121 and has effect as part of the Code itself — According to this form, final decree has to be passed after hearing parties. AIR 1961 Cal 534 (536) : 65 Cal WN 535 (DB).

(15) The Ahmedabad City Civil Court Rules were made by the Gujarat High Court in exercise of its powers under Section 122 and under that Section the Gujarat High Court could make rules so as to annul alter or add to all or any of the Rules in Order 37. If, therefore, any provision in the Ahmedabad City Civil Court Rules conflicts with any Rules contained in Order 37 then to the extent of the conflict the provision in the Ahmedabad City Civil Court Rules would prevail and the Rules in Order 37 would stand abrogated to that extent. But if there is no conflict between a particular provision contained in the Rules in Order 37 and the Ahmedabad City Civil Court Rules the particular provision in the Rules in Order 37 must be held to continue in force and be applicable notwithstanding the promulgation of the Ahmedabad City Civil Court Rules. Rr. 142 to 148 are really by way of amendment of the Rules in Order 37 in so far as the City Civil Court was concerned and they must, therefore, be read not as an independant set of Rules but as amending and consequently forming part of the Rules contained in Order 37. (1965) 6 Guj LR 934 (945) : ILR (1965) Guj 1105 (DB).

(16) Order 20, Rule 11, Sub-rule (1) applies to all suits and it must therefore apply to summary suits unless there is something to be found in the rules prescribing the procedure for summary suits which precludes the applicability of that sub-rule to summary suits. There is nothing in Rules 142 (3), 143 (1) and 144 of the Ahmedabad City Civil Court Rules (1961) made by the High Court in exercise of the powers under Section 122, C. P. Code which in any way takes away the right of the defendant under O. 20, R. 11 (1) or negatives the applicability of O. 20, R. 11 (1) to summary suits. An application to the Court for time for payment of the decretal amount or for instalments in payment of the decretal amount cannot be regarded as part of defence to the suit and no leave to defend the suit is necessary before the defendant can make such an application to the Court. AIR 1964 Guj 253 (256, 258): (1964) 5 Guj LR 369 (DB).

(17) Rules 142 to 148A of Ahmedabad City Civil Court Rules, 1961 are not inconsistent with S. 27 and are not therefore ultra vires the rule making power of the High Court. AIR 1968 Guj 223 (227): 9 Guj LR 177 (DB) ** AIR 1968 Guj 247 (248): 9 Guj LR 238 (DB).

(18) Bombay High Court Appellate Side Manual, Chap. V, R. 7 has not the effect of rule made under C. P. Code. AIR 1968 Mys 329 (330) : (1968) Mys LJ 557.

(19) Proviso 2 to Rule 1 of O. 39 is not ultra vires the rule-making power of High Court under Section 122 — No common law right in respect of temporary injunction. AIR 1962 Orissa 181 (182).

(20) Order 37 Rule 1 (d) as validly amended by Punjab High Court under powers delegated under S. 122, Civil P. C. continues to apply to Courts of District Judges and Subordinate Judges in the Union Territory of Delhi, so long as Delhi High Court does not take any action to amend or alter it under S. 122. AIR 1969 Delhi 142 (144) : (1969) 71 Punj LR (D) 52.

(21) The Courts should not lightly brush aside Rules framed by Calcutta High Court or allow the parties to contravene the rules with impunity. (1959) 63 Cal WN 877 (883) (DB).

(22) High Courts which cannot touch the first part (Act proper) can make rules to annul, alter, add to any of the rules in First Schedule. High Courts have not been slow in exercising this power generously with the result that some of the High Courts seem to have a Code of their own so to say. (1965) 69 Cal WN 242 (244).

**Section 123 — Note 1**

Before making any rules under S. 122 High Court must take the report of Rule

(2) Each such Committee shall consist of the following persons, namely:—

(a) three Judges of the High Court established at the town at which such Committee is constituted, one of whom at least has served as a District Judge or a Divisional Judge for three years,

(b) [b][two legal practitioners enrolled in that Court,]

(c) a Judge of a Civil Court subordinate to the High Court, and

(d) in the towns of Calcutta, Madras and Bombay, an attorney.

(3) The members of each such Committee shall be appointed by the Chief Justice, or Chief Judge who shall also nominate one of their number to be president :

Provided that, if the Chief Justice or Chief Judge elects to be himself a member of a Committee, the number of other Judges appointed to be members shall be two, and the Chief Justice or Chief Judge shall be the President of the Committee.

(4) Each member of any such Committee shall hold office for such period as may be prescribed by the Chief Justice or Chief Judge in this behalf; and whenever any member retires, resigns, dies or ceases to reside in the [c][State] in which the Committee was constituted, or becomes incapable of acting as a member of the Committee, the said Chief Justice or Chief Judge may appoint another person to be a member in his stead.

(5) There shall be a Secretary to each such Committee, who shall be appointed by the Chief Justice or Chief Judge and shall receive such remuneration as may be provided in this behalf [d][by the [e][State] Government].

[a] The words "and of the Chief Court" were omitted by A. C. A. O., 1948 [23-3-1948].

[b] Substituted by the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), S. 16 [1-4-1951], for clauses (b) and (c).
And the old Cls. (d) and (e) were re-lettered as (c) and (d) respectively.

[c] Substituted for "Province" by A. L. O., 1950 [26-1-1950].

[d] Substituted for "by the Governor-General in Council or by the Local Government, as the case may be," by A. O., 1937 [1-4-1937].

[e] Substituted for "Provincial" by A. L. O., 1950 [26-1-1950].

## STATE AMENDMENT

**Assam and Nagaland**

For Cl. (a) of sub-section (2) of Sec. 123 substitute the following clause, namely,—

"(a) three Judges of the High Court established at the twon at which such Committee is constituted, provided that the Chief Justice may appoint only two Judges of the High Court on the Committee if the number of Judges of the High Court does not exceed three."

—Code of Civil Procedure (Assam Amendment) Act, 1953 (Assam Act 8 of 1953), S. 2 [18-4-1953] and State of Nagaland Act, 1962 (27 of 1962) Section 13 (1) (a) [w. e. f. 1-12-1963].

**124. Committee to report to High Court.**—Every Rule Committee shall make a report to the High Court established at the town at which it is constituted on any proposal to annul, alter or add to the rules in the First Schedule or to

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**Section 123 — Note 1 (contd.)**
Committee constituted under S. 123 into consideration. AIR 1961 All 595 (597).

**Section 124 — Note 1**
(1) The Rule Committee referred to in Section 124 is the Rule Committee constituted under Section 123. AIR 1921 Pat 83 (84): 5 Pat L Jour 719 (DB).

(2) A rule framed by the High Court without reference to a Rule Committee, at a time when there was no Rule Committee in existence is not ultra vires. AIR 1921 Pat 83 (84, 85): 5 Pat L Jour 719 (DB).

[But see AIR 1921 Pat 509 (510) (DB).]

make new rules, and before making any rules under Section 122 the High Court shall take such report into consideration.

**125. Power of other High Courts to make rules.**—High Courts, other than the Courts specified in Section 122, may exercise the powers conferred by that section in such manner and subject to such conditions[c] as [a][the [b][State] Government] may determine :

Provided that any such High Court may, after previous publication, make a rule extending within the local limits of its jurisdiction any rules which have been made by any other High Court.

[a] Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937 [1-4-1937] for the words "in the case of the Court of the Judicial Commissioner of Coorg, the Governor-General in Council, and in other cases the Local Government."

[b] Substituted for "Provincial" by A. L. O., 1950 [26-1-1950].

[c] See Ss. 128, 129 and 126.

[a]**126. Rules to be subject to approval.**—Rules made under the foregoing provisions shall be subject to the previous approval of the Government of the [b][State] in which the Court whose procedure the rules regulate is situate or, if that Court is not situate in any [b][State], to the previous approval of the [c][Central Government][d]

[a] Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937 [1-4-1937] for the original section.

[b] Substituted for "Province" by A. L O., 1950 [26-1-1950].

[c] Substituted for "Governor-General," ibid.

[d] In pursuance of Cl. (1) of Art. 239 of the Constitution, the President has directed that subject to his control, the Lieutenant Governor of the Union Territory of Himachal Pradesh shall, in relation to the said territory, exercise the powers of a State Government under Sec. 126 of the Code of Civil Procedure, 1908 (V of 1908) — Vide S. R. O. 3610, D/-12-11-1957, published in Gaz. of Ind., 1957, Pt. II-Sec. 3, p. 2679. On and from 1-5-1967 Jurisdiction of the Delhi High Court has been extended over to Himachal Pradesh which now includes the Lahaul and Spiti districts of former Punjab State and many other territories from that State as well : — see Act 26 of 1966, S. 17 and Act 31 of 1966, S. 5 (1) [1-11-1966]. Similar power has been delegated to the Chief Commissioner of the Union territory Tripura—see S. O. 2059, Gaz. Ind., 3-7-1965, Pt. II, S. 3 (ii), p. 2267.

**127. Publication of rules.**—Rules so made and approved shall be published in the [a][Official Gazette .....], and shall from the date of publication or from such other date as may be specified have the same force and effect,

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**Section 124 — Note 1 (contd.)**

(3) Power to make rules under Section 122 is subject to restrictions contained in Section 124 — High Court must take report of Rule committee constituted under Section 123 into consideration — Section 124 is to this extent in conflict with powers conferred on High Court under Clause 28 of Letters Patent. AIR 1961 All 595 (597).

**Section 125 — Note 1**

(1) A rule requiring a party to file along with his application duly filled up printed forms for processes upon the opposite party is not inconsistent with the body of the Code and is not ultra vires. AIR 1921 Pat 428 (429) (DB).

(2) A rule by a High Court extending within the local limits of its jurisdiction any rules which have been made by any other High Court will be valid only if it has been previously published. Where the rule extending the rules of another High Court is duly published, it is not necessary that the extended rules themselves should be published. AIR 1921 Pat 428 (429) (DB).

**Section 127 — Note 1**

(1) The combined effect of Sections 122 and 127 or any of those provisions separately in not to repeal of Order 41, Rule 23 as passed by the central legislature. The amended rule, does not obliterate the original rule but permits its eclipse only for the State where it has been amended. Section 127 only introdues a legal fiction, that is, that the amended rule will be deemed to be a rule contained in the Code though in fact it is not. The amended rule is effective only in the State where the

within the local limits of the jurisdiction of the High Court which made them, as if they had been contained in the First Schedule.

[a] Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937 [1-4-1937] Para. 4 (1) for "Gazette of India or in the Local Official Gazette, as the case may be." As under Para. 4 (1) the words 'Official Gazette' have to be substituted for "Gazette of India" and also for "Local Official Gazette," the substitution will strictly read "Official Gazette or in the 'Official Gazette' as the case may be." But the last words are omitted as being redundant.

**128. Matters for which rules may provide.**—(1) Such rules shall be not inconsistent with the provisions in the body of this Code, but, subject thereto, may provide for any matters relating to the procedure of Civil Courts.

(2) In particular, and without prejudice to the generality of the powers conferred by sub-section (1), such rules may provide for all or any of the following matters, namely:—

(a) the service of summonses, notices and other processes by post or in any other manner either generally or in any specified areas, and the proof of such service;

(b) the maintenance and custody, while under attachment, of live-stock and other moveable property, the fees payable for such maintenance and custody, the sale of such live-stock and property, and the proceeds of such sale;

(c) procedure in suits by way of counter-claim, and the valuation of such suit for the purposes of jurisdiction;

(d) procedure in garnishee and charging orders either in addition to, or in substitution for, the attachment and sale of debts;

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**Section 127 — Note 1 (contd.)**

High Court framed it. AIR 1969 All 142 (149): 1968 All LJ 243 (FB).

(2) Under Section 127 in matter of any rule under Sch. I the rule framed by the High Court is intended to be as effective as the rules framed by the legislature. High Court's power to change rule is limited by Section 128 only. AIR 1962 Orissa 181 (182).

(3) Order 37 Rule 1 (d) validly framed by Punjab High Court continues to apply to the Courts of District Judges and Subordinate Judges in the Union Territory of Delhi till the same is altered, amended or added to by Delhi High Court. Nothing contained in Section 127 would automatically repeal it or render it ineffective or inoperative. AIR 1969 Delhi 142 (144): (1969) 71 Pun LR (D) 52.

## SECTION 128 — SYNOPSIS

**1. Scope.**
**2. Clause (e) of Sub-s. (2).**
**3. Clause (f) of sub-s. (2).**
**4. Clause (g) of sub-s. (2).**
**5. Clause (l) of sub-s. (2).**

**1. Scope.** — (1) A rule extending Section 5, Limitation Act, to applications under Order 9, Rule 13 is a matter of procedure and is not ultra vires AIR 1925 Mad 14 (17): 47 Mad 824 (FB).

(2) The Lahore High Court amendments introducing a new rule, Rule 23-A in Order 41 and altering Order 43, R. 1 (u) are not ultra vires although the effect of the amendments is to provide for a new right of appeal. AIR 1942 Lah 201 (202, 203): ILR (1943) Lah 569 (DB).

(3) A rule framed under this part must not be inconsistent with the provisions in the body of the Code. AIR 1942 Lah 201 (202): ILR (1943) Lah 569 (DB) * AIR 1921 PC 80 (83): 48 Cal 481: 48 Ind App 76 * AIR 1930 All 558 (560) (DB) * AIR 1934 Mad 692 (694): 58 Mad 285 (DB).

(4) The words "consistent with body of the Code" mean "consistent with the sections of the Code" and not with the rules in the First Schedule which can be altered by the High Court. AIR 1927 Bom 599 (600) (DB).

(5) This section relates only to rules made under the Code by the High Courts with the advice of the Rule Committee constituted under Section 123. It does not affect the validity of rules framed under the previous Code. AIR 1929 Mad 641 (650): 52 Mad 56 (FB).

(6) Section 128 does not in any way cut down the ambit of Section 122. AIR 1958 Mad 392 (393): ILR (1958) Mad 824. (Madras High Court Appellate Side Rules, Rule 41-A (2) is intra vires.)

(7) Per Bose J.:— Rules framed under an Act cannot save the Act. Rules are made by a subordinate authority which is not a legislature. The validity of an Act of a competent legislature cannot be made to depend upon what some subordinate authority chooses to do or not

(e) procedure where the defendant claims to be entitled to contribution or indemnity over against any person whether a party to the suit or not;

(f) summary procedure—

(i) in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising—

on a contract express or implied; or

on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only; or

on a trust; or

(ii) in suits for the recovery of immovable property, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant;

(g) procedure by way of originating summons;

(h) consolidation of suits, appeals and other proceedings;

(i) delegation to any Registrar, Prothonotary or master or other official of the Court of any judicial, quasi-judicial and non-judicial duties; and

(j) all forms, registers, books, entries and accounts which may be necessary or desirable for the transaction of the business of Civil Courts.

**129. Power of Chartered High Courts[d] to make rules as to their original civil procedure.**—Notwithstanding anything in this Code, any High Court [a][not being the Court of a Judicial Commissioner] may make such rules not inconsistent

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**Section 128 — Note 1 (contd.)**

to do. AIR 1953 SC 252 (268): 1953 SCR 1069. (Overruled on another point in AIR 1955 SC 661.)

(8) The subject matter of Clause (b) of the Proviso to Order 21, Rule 90 (All) is reasonably connected with a matter of procedure. Therefore it is not in excess of the rule-making powers of the Allahabad High Court. AIR 1962 All 543 (546): 1962 All LJ 729 (DB).

(9) "Body of Code" — Refers to only sections of the Code and not to First Schedule. AIR 1969 All 142 (153) : 1968 All LJ 243 (FB).

(10) The Court's power to change any rule in the schedule is limited by S. 128, to the extent that the rules made by High Court annulling, adding or altering any rule shall not be inconsistent with the provisions of the Code. AIR 1962 Orissa 181 (182).

**2. Clause (e) of sub-s. (2).** — (1) Under Clause (e) rules may be framed relating to procedure when the defendant claims to be entitled to contribution or indemnity against any person whether a party to the suit or not. AIR 1919 Cal 189 (189): 46 Cal 48.

**3. Clause (f) of sub-s. (2).** — (1) A suit on a negotiable instrument provided for under Order 37 of the Code also falls under the category of suits of the nature referred to in Clause (f). AIR 1927 Sind 90 (92): 21 Sind LR 257.

(2) Rules 142 to 148-A of Ahmedabad City Civil Court Rules 1961 are not inconsistent with Section 27 and are not ultra vires the rule-making powers of the High Court. AIR 1968 Guj 223 (227): 9 Guj LR 177 (DB).

**4. Clause (g) of sub-s. (2)** — (1) Where the disputed facts are complex and involve a considerable amount of oral evidence, an originating summons is not the proper procedure to be taken. AIR 1919 Bom 29 (30).

**5. Clause (i) of sub-s. (2).** — (1) The First Assistant Registrar dealing with execution of decrees will also be a "Court" under Order 1, Rule 4 sub-r. (4) of the Original Side Rules of the Madras High Court. He can issue warrant for sale of any property allached in execution of a money decree. The provisions of the Civil P. C. in this respect stand superseded. (1962) 2 Mad LJ 166 (167) (DB).

**Section 129 — Note 1**

(1) Rules framed under Section 129 need not be consistent with the provisions in the body of the Code but must be consistent with the Letters Patent establishing the High Court. AIR 1954 Cal 369 (371) * AIR 1932 Cal 1 (1, 2): 59 Cal 370 (DB) * AIR 1936 Lah 369 (370).

(2) A rule inconsistent with the provisions of the Code (e.g., Order 41, R. 10)

with the Letters Patent [b][or order] [c][or other law] establishing it to regulate its own procedure in the exercise of its original civil jursidiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code.

[a] Substituted by A. L. O. (No. 2), 1956 [w. e. f. 1-11-1956] for "for a Part A State or a Part B State" which words were substituted by A. L. O., 1950 and the Code of Civil Procedure (Amendment) Act. 1951 (2 of 1951), S. 17 [1-4-1951].

[b] Inserted by A. L. O., 1950 [26-1-1950].

[c] Inserted by the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), Section 17 [1-4-1951].

[d] Words 'Chartered High Courts' are incongruous with the amended wording of the section.

[1882, S. 652, para. 3.]

[a]**130. Powers of other High Courts to make rules as to matters other than procedure.**—A High Court [b][not being a High Court to which Section 129 applies] may, with the previous approval of the [c][State] Government, make with respect to any matter other than procedure any rule which a High Court [d][for a State] might under [e][Article 227 of the Constitution] make with respect to any such matter for any part of the territories under its jurisdiction which is not included within the limits of a Presidency-town.[f]

[a] Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, [1-4-1937] for the original section.

[b] Substituted for "not constituted by His Majesty by Letters Patent" by A. L. O., 1950 [26-1-1950].

[c] Substituted for "Provincial", ibid.

[d] Words "Part A" omitted by A. L. O. (No. 2), 1956 [1-11-1956] from the words "for a Part A State" which were substituted by A. L. O., 1950, for the words "so constituted."

[e] Substituted for "Section 224 of the Government of India Act, 1935," ibid.

[f] Bombay, Calcutta and Madras are the only Presidency towns in India.

**131. Publication of rules.**—Rules made in accordance with Section 129 or Section 130 shall be published in the [a][Official Gazette] and shall from the date of publication or from such other date as may be specified have the force of law.

[] Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937 (1-4-1937) for "Gazette of India or in local Official Gazette, as the case may be.". See also footnote to the text of Section 127.

[1882, S. 652, para 4.]

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**Section 129 — Note 1 (contd.)**

prevails over the latter. AIR 1954 Cal 369 (371) * (1913) 37 Bom 572 (574) (DB) * AIR 1925 Mad 1132 (1133) (DB).

(3) A provision in the Code which had not been either expressly or impliedly denied operation by the rules framed by the High Court should apply side by side with those rules to the proceedings in the ordinary original civil jurisdiction of the High Court. AIR 1934 Cal 369 (372).

(4) The rules made by a High Court under Section 129 need not conform with anything provided in the Civil P. C. Even with such wide powers, no High Court would consider itself entitled to make rules prescribing periods of limitation for the filing of suits on its original side (Rule 17 of Bombay Employees' Insurance Court Rules (1959), held ultra vires). AIR 1967 Bom 472 (478, 479): 69 Bom LR 52 (DB).

(5) Rule-making power contained in Sections 122, 129 and Cl. 37 of Letters Patent show that they overlap to a considerable extent. Whilst a rule framed under Section 122 cannot be inconsistent with the body of the Code a rule framed under Section 129 could be inconsistent with it. The rule-making power under all these provisions is different. AIR 1969 Bom 117 (118): 70 Bom LR 546.

(6) Rules made by a High Court in regard to the Original Civil jurisdiction will need publication in official gazette as provided under Section 129 read with Section 139. AIR 1964 Pat 440 (441): 1965 BLJR 18 (DB).

**Section 131 — Note 1**

(1) Rules made by the High Court under Sections 129 and 130 and published in the Official Gazette have the force

## PART XI
## MISCELLANEOUS

**132. Exemption of certain women from personal appearance.**—(1) Women who, according to the customs and manners of the country, ought not to be compelled to appear in public shall be exempt from personal appearance in Court.

(2) Nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process in any case in which the arrest of women is not prohibited by this Code.

[1882, 1877, S. 640; 1859, S. 21; See O. 26, R. 1.]

**Section 131 — Note 1 (contd.)**

of law from the date of publication or from such other date as may be specified. AIR 1928 All 708 (708): 50 All 865.

(2) Rules made by the High Court which are intended to apply to both original civil or otherwise, and appellate jurisdiction must be published in the Official Gazette before enforcement. AIR 1964 Pat 440 (442): 1965 BLJR 18 (DB).

(3) Non-publication of Rule 25 in the Official Gazette will not affect its validity in so far as it is applicable to matters on the appellate side. AIR 1964 Pat 440 (442): 1965 BLJR 18 (DB).

### SECTION 132

**1. Customs and manners of the country.** — (1) Section 132 applies to women, who according to the customs and manners of the country, ought not to be compelled to appear in public e. g., pardanashin ladies. AIR 1953 Nag 37 (38) * AIR 1927 Mad 524(524) * AIR 1961 Pat 210 (211): 1961 BLJR 322.

(2) The customs and manners of the country mean the customs and manners of the different communities and classes and sections of the people in the country and not the customs and manners of the country as a whole. AIR 1951 Mad 311 (312): ILR (1951) Mad 433 (DB). (AIR 1950 Mad 151, **OVERRULED.**) ** AIR 1957 Madh B 184 (185).

(3) For applying sub-section (1), customs and manners of country prevailing at the time the Courts are called upon to apply it should be the criterion and not the customs and manners which might have prevailed years ago, but which had become completely obsolete. AIR 1951 Mad 311 (312): ILR (1951) Mad 433 (DB) * AIR 1957 Madh B 184 (185).

(4) Even though a lady may have given up the use of the pardah she is entitled to the benefit of the section, if, having regard to her social position and the feeling of her class, the Court is satisfied that she should not be compelled to appear in the witness-box. AIR 1918 Cal 111 (112): 45 Cal 492.

(5) A lady can no longer claim, as of right, the statutory exemption formulated in Section 132, if she has by her change in mode of life ceased to fall within the section. AIR 1951 Mad 311 (313): ILR (1951) Mad 433 (DB) * AIR 1957 Madh B 184 (185) * AIR 1918 Cal 743 (744): 45 Cal 697 (DB) * AIR 1966 Andh Pra 222 (223).

(6) The question whether any woman falls within the category of women mentioned in sub-section (1) is a question of fact. AIR 1951 Mad 311 (312): ILR (1951) Mad 433 (DB).

(7) Where an application for exemption is made, Court should take evidence and ascertain the facts therefrom and should not dispose of the application in a summary manner. The trial Court has to give an opportunity to the parties to prove the customs and manners prevalent in the community of the applicant and the compulsion of women to appear in public. Till evidence is recorded on this point, no final decision can be made by the Judge. AIR 1957 Madh B 184 (185).

(8) In order to determine whether the plaintiff is a pardanashin lady and does not appear in public, a statement made by her husband in another case that his wife sits in the shop and sells goods cannot be made use of by the Court when it is not on the record. AIR 1958 Madh Pra 25 (26).

(9) A commission, ordinarily should issue for the examination of a pardanashin lady unless her application for commission is mala fide, or would amount to an abuse of the process of the Court, or it may result in manifest injustice to any party, or for other valid reasons. The fact that a pardanashin woman does not observe parda in her father's place per se is no ground for refusing to issue commission. AIR 1961 Pat 210 (211): 1961 BLJR 322.

(10) Exemption under this section cannot be denied on the ground that a pardanashin lady once appeared in public. 1961 Ker LT 433: 1961 Ker LJ 502.

**2. "Shall be exempt from personal appearance in Court."** — (1) The exemption from personal appearance is a right which no Court has power to refuse. AIR 1953 Nag 37 (38) * AIR 1958 Madh Pra 25 (26). (Court acts illegally in the exercise of its jurisdiction in compelling her attendance.) * AIR 1952 Mad 80 (80) * AIR 1951 Mad 311 (314): ILR (1951) Mad 433 (DB) * AIR 1928 Cal 814 (815) (DB) * AIR 1933 All 551 (553, 554): 55 All 666 (DB) * 1961 Ker LT 433: 1961 Ker LJ 502.

**133. Exemption of other persons.**—[a][(1) The following persons shall be entitled to exemption from personal appearance in Court, namely:—

(i) the President of India;

(ii) the Vice-President of India;

(iii) the Speaker of the House of the People;

(iv) the Ministers of the Union;

(v) the Judges of the Supreme Court;

(vi) the Governors of States and the Administrators of Union territories;

(vii) the Speakers of the State Legislative Assemblies;

(viii) the Chairmen of the State Legislative Councils;

(ix) the Ministers of States;

(x) the Judges of the High Courts; and

(xi) the persons to whom Section 87B applies.]

(2) [b][ • • • • • ].

(3) Where any person [c][ • • ] claims the privilege of such exemption, and it is consequently necessary to examine him by commission, he shall pay the costs of that commission, unless the party requiring his evidence pays such costs.

[1882, S. 641; 1877, Ss. 641, 93; 1859, Ss. 22 and 23; See O. 26, R. 1.]

[a] Substituted for sub-sec. (1) by the Code of Civil Procedure (Amendment) Act, 1956 (66 of 1956), S. 12 (1-1-1957).

[b] Omitted by the Code of Civil Procedure (Amendment) Act, 1956 (66 of 1956), S. 12.

[c] The words "so exempted" are omitted by the Code of Civil Procedure (Amendment) Act, 1956 (66 of 1956). S. 12.

**134. Arrest other than in execution of decree.**—The provisions of Sections 55, 57 and 59 shall apply, so far as may be, to all persons arrested under this Code.

**135. Exemption from arrest under civil process.**—(1) No Judge, Magistrate or other judicial officer shall be liable to arrest under civil process while going to, presiding in, or returning from, his Court.

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**Section 132 — Note 2 (contd.)**

(2) Exemption applies to parties as well as witnesses. AIR 1933 All 551 (553): 55 All 666 (DB).

(3) The words "personal appearance" used in the section mean "personal attendance" and an exempted person cannot be compelled to attend Court. AIR 1933 All 551 (553): 55 All 666 (DB) * AIR 1942 Cal 143 (144): ILR (1941) 2 Cal 155 * AIR 1951 Mad 311 (313): ILR (1951) Mad 433 (DB).

[But see AIR 1929 Cal 528 (528): 56 Cal 885.]

(4) A woman conveyed to the Court building completely veiled in a burkhah and examined in a private room cannot be said to be making a personal appearance in Court. AIR 1946 Bom 340 (341).

(5) Woman entitled to benefit of section cannot decline to be examined on commission at any place other than of her own choice. AIR 1921 Cal 229 (231): 48 Cal 8.

(6) Requiring an exempted woman who is willing to be examined on commission to attend Court and examining her in the Court or the Judge's chambers after excluding members of the public would not be an infringement of this section. AIR 1951 Mad 311 (314): ILR (1951) Mad 433 (DB) * AIR 1967 Raj 122 (123): 1965 Raj LW 485.

**Section 133 — Note 1**

(1) Unless the conditions laid down in Order 26, Rule 1 or Section 133, Civil P. C., are satisfied, a Court, would have no jurisdiction to delegate the examination of witnesses to a Commission. AIR 1961 Mad 31 (32): (1960) 2 Mad LJ 349.

(2) A Bishop is not entitled to be examined on commission. AIR 1961 Mad 31 (32): (1960) 2 Mad LJ 349 * 1963 Ker LT 3.

(3) Exemption granted to the Bishop from personal attendance under S. 133 of the Travancore Civil P. C. would no longer avail after C. P. C. 1908 is applied to that State. AIR 1961 Mad 31 (32): (1960) 2 Mad LJ 349.

(4) Unless exemption is granted to the Swami of a Muth under Civil P. C., the provisions of Order 26, Rule 1, do not exempt him from personal appearance. (1963) 1 Mys LJ 170.

**SECTION 135 — SYNOPSIS**

**1. Scope and object.**

**2. "While going to or attending such tribunal" etc.**

(2) Where any matter is pending before a tribunal having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties thereto, their pleaders, mukhtars, revenue-agents and recognized agents, and their witnesses acting in obedience to a summons, shall be exempt from arrest under civil process other than process issued by such tribunal for contempt of Court while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal.

(3) Nothing in sub-section (2) shall enable a judgment-debtor to claim exemption from arrest under an order for immediate execution or where such judgment-debtor attends to show cause why he should not be committed to prison in execution of a decree.

[1882 and 1877, S. 642.]

**135A. Exemption of members of legislative bodies from arrest and detention under civil process.**—(1) No person shall be liable to arrest or detention in prison under civil process:

[a](a) if he is a member of a unicameral Legislature or of either [b][House] of a bicameral Legislature [c][continued or constituted under the Constitution], during the continuance of any meeting of such Legislature or [b][House];

(b) if he is a member of any committee of such [d][Legislature or [b][House] ], during the continuance of any meeting of such committee;

[e](c) if he is a member of either [b][House] of such a bicameral Legislature, during the continuance of a joint sitting, meeting, conference or joint committee of the [f][Houses] of that Legislature;

and during the fourteen days before and after such meeting or sitting.

(2) A person released from detention under sub-section (1) shall, subject to the provisions of the said sub-section, be liable to re-arrest and to the further detention to which he would have been liable if he had not been released under the provisions of sub-section (1).

[a] Substituted by A.O., 1937 (1-4-1937) for the original clause.

[b] Substituted for "Chamber" by A.L.O., 1950 (26-1-1950).

[c] Substituted for "constituted under the Government of India Act, 1935", ibid.

[d] Substituted for "Chamber or Council" by A.O., 1937 (1-4-1937).

[e] Substituted by ibid for the original clause.

[f] Substituted for "Chambers" by A.L.O., 1950 (26-1-1950).

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**Section 135 — Synopsis (contd.)**

**3. Arrest of person while in custody or while returning home on release from custody.**

**4. "Tribunal," meaning of.**

**5. Parties.**

**6. Civil process.**

**7. Remedies of exempted person on being illegally arrested.**

**8. Appeal.**

**1. Scope and object.** — (1) The exemption under this section is not for personal benefit of individual, but for furthering of public interest and better administration of justice. AIR 1929 Oudh 426 (426): 5 Luck 302 (FB) * (1890) 13 Mad 150 (158) (FB).

(2) The privilege is really that of Court and the principle on which it is founded is that freedom from fear of arrest encourages willing attendance and thus tends to the advancement of justice. AIR 1931 Bom 175 (175): 55 Bom 612.

(3) Where section does not, in terms, apply, English law should be followed. The English law in this respect is approximately the same as the law under the section. (1880) 5 Cal 106 (108).

(4) Exemption from arrest can be claimed only to a reasonable extent. A reasonable approach on the part of the process server in effecting an arrest is within the ambit of this section. (1960) 26 Cut LT 289.

**2. "While going to or attending such tribunal" etc.** — (1) The parties to a suit and the other persons referred to in the second sub-section are privileged, in going to, attending and returning from such tribunal. AIR 1945 Cal 107 (110): ILR (1944) 1 Cal 489 (SB) * AIR 1929 Oudh 426 (426): 5 Luck 302 (FB) * AIR 1920 Mad 355 (356): 43 Mad 272 (DB).

**Section 135 — Note 2 (contd.)**

(2) The exemption continues during such period as is reasonably and bona fide occupied in acts specified in sub-section (2). AIR 1938 All 356 (357) (DB). (Reasonable time is a question of fact.) * AIR 1931 Bom 175 (178): 55 Bom 612. (Do.)

(3) Where a person has been lingering in the Court compound for one hour after the Court finished its work and the place where he was arrested was not on the way between the Court and his house, he cannot be said to be attending a Court so as to be exempt from arrest. AIR 1933 Cal 11 (12).

(4) Preliminary decree in partition suit — Decree-holder applying for execution by arrest of judgment-debtor — Judgment-debtor bolting away, but on assurance of Court that he would be exempt from arrest while appearing on fixed date before receiver for giving accounts, he coming home and then arrested two days before date fixed for appearing — Section 135 (2) held did not apply. AIR 1938 All 356 (358) (DB).

(5) The principle which would apply to a person living in the place in which the Court is situate must be applied to the person who takes up temporary lodgings in that place, that is to say, protection extends only from his temporary lodgings to the Court or from the Court to his temporary lodgings — Hence an arrest effected when he has left his temporary lodgings and is taking a walk is legal. AIR 1935 Pat 6 (8): 14 Pat 242 (DB).

(6) A person claiming exemption from arrest must return straight from the Court to his home. If he adopts a circuitous route in order to attend some other business on the way he is not exempt from arrest. This does not mean that a deviation of few yards disentitles the person to the protection of S. 135. AIR 1924 All 676 (677): 46 All 663.

(7) Where a party has a clear interest in being present at a trial it is enough to bring him within the protection of this section. It is immaterial that he is precluded from being heard at the trial, as, for instance, in the case of a defendant in a suit under Order 37, who has not obtained leave to defend the suit. (1880) 5 Cal 106 (109).

**3. Arrest of person while in custody or while returning home on release from custody.** — (1) Where a judgment-debtor is arrested and brought before the Court in execution of a decree he cannot be said to be "attending" the Court, as his presence in Court is not voluntary. Hence, he can be arrested in execution of another decree under such circumstances. AIR 1924 Mad 900 (901) (DB).

(2) A judgment-debtor released from jail on the ground of his arrest being illegal and proceeding home on such release cannot be said to be returning from Court. Hence, he is not exempt from arrest under this section. (1890) 13 Mad 150 (158).

**4. "Tribunal" meaning of.** — (1) An arbitrator appointed by High Court to take a reference in a suit pending before it is a "tribunal" within Section 135. (1878) 5 Cal L Rep 170 (171).

(2) An Income-tax Officer is a tribunal. AIR 1933 Lah 214 (215).

(3) The word "tribunal" will include a foreign Court. AIR 1935 Nag 216 (216).

**5. Parties.** — (1) A person coming to appear as an accused before a Criminal Court is entitled to exemption from arrest under this section. AIR 1929 Oudh 426 (426): 5 Luck 302 (FB).

**6. Civil process.** — (1) Section 135 does not preclude the arrest of a person under process issued by a Criminal Court. AIR 1945 Cal 107 (110): ILR (1944) 1 Cal 489 (SB).

(2) The principle of Section 135 was held applicable to arrest under the Presidency Towns Insolvency Act. AIR 1915 Mad 282 (286) (DB).

(3) The essence of a civil process is that it is set in motion at the instance of a private person for the enforcement of his rights against another private person. AIR 1945 Cal 107 (119): ILR (1944) 1 Cal 489 (SB).

**7. Remedies of exempted person on being illegally arrested.** — (1) A person arrested in contravention of this section can apply for his release to the High Court under Section 491 (1) (b) of the Criminal Procedure Code. (1879) 5 Cal L Rep 170 (171).

(2) On being released from illegal arrest, the person is entitled to a refund of the sum paid by him to obtain his release. AIR 1929 Oudh 426 (426): 5 Luck 302 (FB).

(3) A person arrested in contravention of Section 135 cannot maintain a suit for damages for illegal arrest in the absence of proof of malice and want of reasonable and probable cause. AIR 1930 Rang 131 (132): 7 Rang 598 (DB).

(4) A person illegally arrested can prosecute the person causing the arrest for an offence under Section 342 of the Indian Penal Code. AIR 1916 Lah 318 (319, 320).

[But see AIR 1935 Cal 551 (551).]

**8. Appeal.** — (1) An order disallowing a claim to exemption from arrest under this section is one falling under S. 47 and as such is appealable. AIR 1924 Mad 900 (900) (DB) * (1910) 32 All 8 (6) (DB).

**136. Procedure where person to be arrested or property to be attached is outside district.**—(1) Where an application is made that any person shall be arrested or that any property shall be attached under any provision of this Code not relating to the execution of decrees, and such person resides or such property is situate outside the local limits of the jurisdiction of the Court to which the application is made, the Court may, in its discretion, issue a warrant of arrest or make an order of attachment, and send to the District Court within the local limits of whose jurisdiction such person or property resides or is situate a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment.

(2) The District Court shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court which issued or made such warrant or order of the arrest or attachment.

(3) The Court making an arrest under this section shall send the person arrested to the Court by which the warrant of arrest was issued, unless he shows cause to the satisfaction of the former Court why he should not be sent to the latter Court, or unless he furnishes sufficient security for his appearance before the latter Court or for satisfying any decree that may be passed against him by that Court in either of which cases the Court making the arrest shall release him.

(4) Where a person to be arrested or movable property to be attached under this section is within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William in Bengal or at Madras or at Bombay, [a][° ° ° °] the copy of the warrant of arrest or of the order of attachment, and the

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**SECTION 136 — SYNOPSIS**

**1. Arrest or attachment under the Code.**

**2. "Outside the local limits of ..... jurisdiction."**

**3. Jurisdiction of District Court to which the warrant or order is sent.**

**4. Attachment before judgment of property situated outside Court's jurisdiction.**

**1. Arrest or attachment under the Code.** — (1) Section 136 applies to an order for arrest under Order 39, Rule 2 for disobedience of a temporary injunction. AIR 1926 Mad 574 (575) (DB) * AIR 1928 Cal 462 (463): 55 Cal 777 (DB).

(2) An order for arrest for contempt of Court passed by a Judge on the Original Side of the High Court is not one passed under the Code, so as to attract Section 136. AIR 1928 Cal 462 (463): 55 Cal 777 (DB).

(3) A Judge on the Original Side of a High Court has no power to order the arrest of a person in the moffusil for contempt of Court independent of this section. AIR 1928 Cal 462 (463): 55 Cal 777 (DB).

**2. "Outside the local limits of ..... jurisdiction."** — (1) A person residing in the moffusil is outside the local limits of the jurisdiction of High Court in respect of an order under Order 39, Rule 2 passed in the exercise of its original civil jurisdiction. AIR 1928 Cal 462 (463): 55 Cal 777 (DB).

(2) Where an order under Order 39, Rule 2, is passed by the High Court in the exercise of its appellate jurisdiction it is competent to it in the exercise of its powers of supervision and control over the Courts in the moffusil, to adopt the procedure laid down in Section 136 and send the order for arrest to the District Court within whose jurisdiction the person to be arrested resided. AIR 1926 Mad 574 (575) (DB).

(3) A writ of attachment cannot be issued under this section to a foreign Court, e.g., a Court in Pakistan. AIR 1950 Cal 255 (255).

**3. Jurisdiction of District Court to which the warrant or order is sent.** — (1) An order for arrest or attachment must be sent to the District Court within the local limits of whose jurisdiction the person to be arrested resides or the property to be attached is situated. AIR 1951 Madh B 82 (2) (83) * AIR 1941 All 212 (214) * AIR 1937 Pat 603 (605) (DB) * AIR 1968 Punj 461 (463): 70 Pun LR 467 (DB). (A warrant of attachment of property before judgment addressed by the Nasik Court to the Bailiff in the Civil Court at Ludhiana was an order without jurisdiction and was null and void. 65 Punj LR 609, **Reversed.**) * AIR 1963 All 320 (323, 324): 1963 All LJ 204. (DB). (Attachment before judgment under S. 136 — Order of attachment sent direct to civil Court and not to District Court within whose local jurisdiction property is situate — Attachment by such Court is void.)

probable amount of the costs of the arrest or attachment, shall be sent to the Court of Small Causes of Calcutta, Madras, [b][or Bombay] as the case may be, and that Court, on receipt of the copy and amount, shall proceed as if it were the District Court.

[1882 and 1877, S. 648.]

[a] The words "or of the Chief Court of Lower Burma" repealed by the Government of India (Adaptation of Indian Laws) Order, 1937 (1-4-1937).

[b] Substituted by ibid for "Bombay or Rangoon",

**137. Language of subordinate Courts.**—(1) The language which, on the commencement of this Court, is the language of any Court subordinate to a High Court shall continue to be the language of such subordinate Court until the [a][[b][State] Government] otherwise directs.

(2) The [a][ [b][State] Government] may declare what shall be the language of any such Court and in what character applications to and proceedings in such Courts shall be written.

(3) Where this Code requires or allows anything other than the recording of evidence to be done in writing in any such Court, such writing may be in English; but if any party or his pleader is unacquainted with English, a translation into

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**Section 136 — Note 3 (contd.)**

(2) A non-compliance with procedure laid down in sub-section (1) will amount only to an irregularity which can be waived. AIR 1952 Trav-Co 159 (161, 162) (FB) * AIR 1963 Ker 193 (194): 1962 Ker LT 630.

(3) Where an officer proceeding from Burma to England on leave resides for a few days in Madras on his way, that is enough to give jurisdiction to the Madras Court to arrest him under Section 136. (1885) 8 Mad 205 (206, 207).

(4) As soon as a District Court effects the attachment of property and informs the Court who issued the order of attachment it becomes functus officio. AIR 1963 Mys 147 (149): 40 Mys 660.

(5) The District Court, attaching property under this section, does not have the power to release the property from attachment even if security is furnished. AIR 1963 Mys 147 (149): 40 Mys LJ 660.

**4. Attachment before judgment of property situated outside Court's jurisdiction.** — (1) Section 136 read with O. 38, Rule 5 (1) (a) empowers a Court to order the attachment before judgment of property situated outside its jurisdiction. AIR 1952 Trav-Co 159 (161) (FB) * AIR 1931 Rang 279 (280): 9 Rang 561 * AIR 1961 Andh Pra 417 (418, 419, 420): (1961) 1 Andh WR 295.

(2) Attachment before judgment under Section 136 — Claim to property attached — Investigation can be made by Court directing attachment and not by Court attaching property. AIR 1963 Mys 147 (148): 40 Mys LJ 660.

(3) This section provides only a mode of affecting attachment of properties not within the local limits of the jurisdiction of the Court which has seisin of the suit. It only prescribes the procedure and does not affect the competence of a Court to levy attachment. AIR 1961 Andh Pra 417: (1961) Andh LT 200.

**Section 137 — Note 1**

(1) An application which is not in English or in the language of the Court is not a proper application. AIR 1950 East Punj 302 (304) (DB).

(2) The expression "in any such Court" in sub-section (3) of Section 137 only emphasises that what is required or allowed to be done must be in 'any Court subordinate to the High Court' and not in any other Court. What has to be done in the Court either by the Court or by any party is some act which makes the written thing an act of the Court or of a party under the Code and not writing itself by the Court or by the party as a preliminary to the doing of the act required or allowed to be done by the Court. AIR 1957 Madh Pra 1 (4) (DB).

(3) Hindi adopted as official language by a notification under Madhya Bharat Official Languages Act (67 of 1950) — Use of English language by subordinate Courts for purposes mentioned in Section 137 (3) not prohibited — Plaint filed in English is in order. AIR 1957 Madh Pra 1 (4) (DB).

(4) There is no inconsistency between the Madhya Bharat Official Languages Act and Section 137 (3). Even if there is such inconsistency the provisions of Section 137 (3) will prevail. AIR 1957 Madh Pra 1 (4) (DB).

(5) As in the State of Madhya Pradesh English was never adopted as the Court language and was only permitted to be used in certain circumstances its exclusion from the Court work cannot be objected to in matters in which litigants had no right to use it. AIR 1959 Madh Pra 208 (212): 1959 MPLJ 478 (DB).

(6) Except the right given by Section 137 (3), C. P. C. to the opposite parties to have a translation in the

the language of the Court shall, at his request, be supplied to him; and the Court shall make such order as it thinks fit in respect of the payment of the costs of such translation.

[1882, S. 645, and cf. Ss. 49, 200 and 201.]

[a] Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937 (1-4-1937) for "Local Government".

[b] Substituted for "Provincial" by A.L.O., 1950 (26-1-1950).

**138. Power of High Court to require evidence to be recorded in English.**—(1) The High Court may, by notification in the [a][Official Gazette], direct with respect to any Judge specified in the notification, or falling under a description set forth therein, that evidence in cases in which an appeal is allowed shall be taken down by him in the English language and in manner prescribed.

(2) Where a Judge is prevented by any sufficient reason from complying with a direction under sub-section (1), he shall record the reason and cause the evidence to be taken down in writing from his dictation in open Court.

[1882, S. 185A.]

[a] Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "local official Gazette" (1-4-1937).

## STATE AMENDMENT

**Assam and Nagaland**

For Section 138, in its application to Assam and Nagaland, the following section shall be substituted, namely:—

"138. The High Court may, by notification in the Official Gazette, direct with respect to any judge specified in the notification, or falling under a description set forth therein, that in cases in which an appeal is allowed, he shall take down, or cause to be taken down, the evidence in the English language and in the form and manner prescribed."

—The Civil Procedure (Assam Amendment) Act, 1941 (Assam Act 2 of 1941), S. 2, (12-2-1941) and State of Nagaland Act, 1962 (27 of 1962), S. 26 (1-12-1963).

**139. Oath on affidavit by whom to be administered.**—In the case of any affidavit under this Code—

(a) any Court or Magistrate, or

(b) any officer or other person whom a High Court may appoint in this behalf, or

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**Section 137 — Note 1 (contd.)**

language of the Court, there is no provision in C. P. C. or Cr. P. C. which gives a party to a litigation any right to question the language used by the Court. AIR 1959 Madh Pra 208 (212): 1959 MPLJ 478 (DB).

(7) A plaint written in English language and filed in a Civil Court is valid, as the proviso in the Government notification of 8th Oct. 1947, permitted the continued use of such language as were being used on the date of the notification. AIR 1963 All 546 (547): 1963 All LJ 243 (DB).

(8) Under Government notification dated 8-10-1947 Hindi was declared to be the language of the Civil Courts in U. P. AIR 1963 All 546 (547): 1963 All LJ 243.

(9) The meaning and effect of the proviso to the notification of 8th October, 1947, of the U. P. Government under Section 137 (2), Civil P. C., is that subject to such executive instructions as may from time to time be issued by the Provincial Government, any language or script, other than Hindi in the Devnagri script, which is already in use may continue to be used.

Urdu written in Persian script was in use in 1947 in U. P. Hence a written statement filed in Urdu in Persian script can be accepted. AIR 1959 All 459 (460): 1959 All LJ 863.

(10) Even after issue of G. O. M. dated 16-7-62, the subordinate Courts can entertain pleadings and applications in the English language subject to a translation being supplied to the other side, where necessary. AIR 1967 Andh Pra 42 (43): (1966) 1 Andh WR 175 (DB).

(11) The Government of Andhra Pradesh has declared Telgu or Urdu to be the language of the Courts in specified districts. AIR 1967 Andh Pra 42 (43): (1966) 1 Andh WR 175 (DB).

## SECTION 139

**1. "Any Court or Magistrate".** — (1) The person before whom an affidavit is sworn must be acting in the capacity of a Court

(c) any officer appointed by any other Court which the [a][b][State] Government] has generally or specially empowered in this behalf,

may administer the oath to the deponent.

[1882, 1877, S. 197; See O. 19.]

[a] Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government". (1-4-1937.)

[b] Substituted for "Provincial" by A.L.O., 1950. (26-1-1950.)

### OBJECTS AND REASONS

"Clause 139.— The Committee have inserted the words 'or other person' after the word 'officer' in sub-clause (b) in order to give the High Court power to relieve the officers of the Court of the work of administering affidavits in cases in which it may be necessary to do so. It has been represented to them by the Calcutta High Court that this relief is much required."— S.O.R.

**140. Assessors in causes of salvage, etc.**—(1) In any Admiralty or Vice-Admiralty cause of salvage, towage or collision, the Court, whether it be exercising its original or its appellate jurisdiction, may, if it thinks fit, and shall upon request of either party to such cause, summon to its assistance, in such manner as it may direct or as may be prescribed, two competent assessors; and such assessors shall attend and assist accordingly.

(2) Every such assessor shall receive such fees for his attendance, to be paid by such of the parties as the Court may direct or as may be prescribed.

[1882, S. 645A.]

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**Section 139 — Note 1 (contd.)**

or of the officer authorised to administer an oath. (1910) 4 Sind LR 88 (92).

(2) An affidavit sworn in the Bar Library before a pleader who is also an Honorary Magistrate is not admissible under this section. (1910) 5 Ind Cas 537 (538) (Cal).

(3) A Village Munsif under the Madras Village Courts Act (1888) is a Court within the meaning of this clause. (1904) 27 Mad 223 (227) (DB).

(4) Affidavit sworn before District Clerk of Court describing himself as officer for administering oaths on affidavits. **Held** the District Clerk of Court was commissioner of Oaths and affidavit complied with provisions of R. 94A of Conduct of Election Rules. AIR 1966 SC 436 (439) : (1966) 1 SCR 478. (AIR 1964 Madh Pra 273, Reversed; AIR 1965 Madh Pra 15 (DB), **Overruled.**)

(5) Affidavits sworn in before a Notary Public in U. S. A., certified under seal of county clerk and clerk of Supreme Court, New York and forwarded under certificate of Consular General of India in New York were held as authentic and admissible. AIR 1967 Cal 636 (639): 71 Cal WN 430.

**2. Clause (b).**—(1) Rules under R. 13 of General Rules and Circular Orders (Civil), Vol. 1 (Patna High Court) — Rule empowering Seristadars to act as ex-officio Commissioners of affidavits in matters arising within jurisdiction of respective Courts in which they are employed — 'Court' in rule means Court as constituted by S. 3 of Bengal Act 12 of 1887 — Seristadar of one Munsif's Court can act as Commissioner of affidavits for other Munsif's Court. AIR 1947 Pat 54 (56): 25 Pat 273 (DB).

(2) Oaths Commissioners appointed under S. 139 C. P. Code are not authorised to administers oaths and affirmations other than those required under C. P. Code or to do any other judicial act. AIR 1966 Punj 528 (529) : 1966 Cri LJ 1479 : ILR (1967) 1 Punj 604.

(3) This section prescribes by whom oaths are to be administered, not how affidavits may be sworn. Rule 1 of Chapter 16 of Companies Tribunal Regulations 1964 contemplates that affidavits may be sworn before a Court as also before an authority other than a Court. This authority is not necessarily the officer contemplated in Section 139 of C. P. C. (1968) 72 Cal WN 594: (1968) 2 Com LJ 131 (DB).

(4) A notary public is not a person competent to administer the oath to a deponent who is affirming affidavit under this section. AIR 1968 Cal 388 (390): 70 Cal WN 852 * AIR 1967 Cal 636 (637) : 71 Cal WN 430.

(5) Declaration before a notary public is entirely different from a solemn affirmation on which alone an affidavit can be made. AIR 1968 Cal 388 (390) : 70 Cal WN 852.

**3. Officer appointed by any other Court.**—(1) Under cl. (c), in Bihar the District Judges are vested with power to appoint Commissioners to administer oaths on affidavits and such a Commissioner appointed by the District Judge, as is referred to in R. 15 of the General Rules and Circular Orders (Civil, Vol. I, Patna High Court), will have general powers to administer oaths in matters arising within the district. AIR 1947 Pat 54 (56): 25 Pat 273 (DB).

**141. Miscellaneous proceedings.**—The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

[1882, S. 647, para 1; 1877, S. 647; 1861, S. 38; See S. 388, Succession Act, 1925.]

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**SECTOIN 141 — SYNOPSIS**

**1. To what proceedings section applies.**
**1-A. Proceedings arising under Civil P. C.**
**1-B. Proceedings arising under other Acts.**
**2. Proceedings for restitution.**
**3. Letters Patent appeal.**
**4. "Court of civil jurisdiction."**
**5. "Procedure provided in this Code."**
**6. "In regard to suits."**
**7. "As far as it can be made applicable."**

**1. To what proceedings section applies.** — (1) Section 141 is intended to apply only to proceedings which the original matters in the nature of suits. AIR 1957 Cal 688 (691) * AIR 1958 Pat 308 (309): 1958 Cri L Jour 796 (DB). ((1895) 17 All 106: 22 Ind App 44 (PC), Foll.) ** AIR 1967 Cal 390 (393).

(2) Suit is distinct from proceedings. AIR 1967 Cal 390 (393).

(3) Inquiry by Civil Court— Procedure — Applicability of Section 141, C. P. Code — District Judge has power to transfer reference from one civil Court to another. (1968) 34 Cut LT 43 (44).

(4) A notice in an application for a final decree is imperative in view of the provisions of Section 141. It is not therefore necessary that it should be provided in the Code, when an application is provided to be made, that notice should go to the defendant. If no notice is taken before passing the final decree the defendant can get the final decree set aside by applying under O. 9, R. 13, Civil P. C. AIR 1964 Tripura 60 (62).

(5) Under Sections 141, 21, 57, O. 21 the Courts have to issue summonses warrants, notices, attachment warrants etc. The court has discretion to fix dates for the return of these processes and Nazir should carry out the services of these processes and not interfere with them. AIR 1962 Manipur 24 (26).

(6)Though Section 141 uses the expression "as far as possible" it does not mean that while dealing under Section 146 the Court should have pecuniary jurisdiction in relation to property in dispute. AIR 1969 Assam 81 (84) : 1969 Cri LJ 854.

**1-A. Proceedings arising under Civil P. C.** —(1) Section 141 does not apply to any proceedings in execution. AIR 1955 All 353 (359) : ILR (1955) 1 All 500 (FB) ** AIR 1958 Andh Pra 679 (680) (DB). (Dispute arising in execution cannot be referred to arbitration.) ** AIR 1955 Nag 305 (306) : ILR (1956) Nag 390 (DB) ** AIR 1937 Bom 111 (112) : ILR (1937) Bom 144 ** AIR 1931 Sind 97 (98) : 25 Sind LR 475 (FB). (Order 9, R. 9 does not apply.) ** AIR 1925 Cal 510 (511) (DB). (Application under O. 21, R. 90 — **Dissenting from** AIR 1916 Cal 613; AIR 1916 Cal 221 and AIR 1917 Cal 548 and following AIR 1919 Pat 192 (FB).) ** AIR 1919 Pat 192 (193) : 4 Pat LJ 135 (FB). (Proceedings under O. 21, R. 90.) ** AIR 1929 Mad 757 (762): 52 Mad 899 (FB). (Proceedings under O. 21, Rules 97 and 100.)

(2) Proceedings under O. 21, Rules 89, 90, 91, 97 and 100 are proceedings in execution, and S. 141 cannot be applied thereto. AIR 1914 Cal 126 (127) : 41 Cal 1 (DB). (Order 21, Rules 100 and 101.) ** AIR 1926 Cal 773 (777) : 53 Cal 679 (DB). (Order 21, R. 90—AIR 1916 Cal 221: 12 Cal L Jour 6 and AIR 1919 Cal 50 : 45 Cal 950 held wrongly decided.) ** AIR 1929 Mad 757 (762): 52 Mad 899 (FB) ** AIR 1919 Pat 192 (193) : 4 Pat L Jour 135 (FB). (Impliedly **Overruling** AIR 1918 Pat 486 : 3 Pat L Jour 250.)

[See however AIR 1941 Cal 559 (560).]

[But see AIR 1923 Pat 239 (241) : 2 Pat 372 (DB) ** AIR 1920 Oudh 177 (178): 23 Oudh Cas 349.]

(3) Section 141 applies to all matters not being proceedings in execution. Accordingly where an application to restore a suit dismissed for default is itself dismissed for default, an application will lie under O. 9, R. 9 to restore the application, by virtue of S. 141 independent of the question whether it is an original matter or not. AIR 1953 Madh B 272 (272) ** AIR 1941 All 101 (105, 108) : ILR (1941) All 193 (FB) ** (1911) 7 Nag LR 32 (32) ** AIR 1920 Lah 304 (304): 1 Lah 339 ** AIR 1931 Mad 795 (796, 797) ** AIR 1966 Andh Pra 263 (265): (1964) 2 Andh WR 315 ** AIR 1961 Manipur 35 (36).

[But see AIR 1921 Bom 463 (463) (SB) ** AIR 1927 Cal 534 (535): 54 Cal 405 (DB)** AIR 1968 Bom 250 (253) : 69 Bom LR 629 (DB). (AIR 1927 Cal 534 and AIR 1958 Pat 107 & AIR 1966 Ori 24 and AIR 1962 Madh Pra 64 and AIR 1932 Nag 101, Foll.; AIR 1959 Pat 121 (FB) and AIR 1966 Andh Pra 263 and AIR 1917 Cal 548 (1), Not foll. AIR 1923 Bom 386 and **AIR 1965 SC 1144 and AIR 1964 SC 923,** Dist.) ** AIR 1962 Madh Pra 308 (309): 1962 MPLJ 317 ** AIR 1962 Madh Pra 64 (65): 1961 MPLJ 1145 (DB) ** AIR 1962 Raj 107 (108): 1961 Raj LW 218. (Section 151 can however be invoked in appropriate cases.)

(4) Dismissal of revision for default of appearance — Restoration — Proceedings in revision being proceedings in Court of civil jurisdiction within the meaning of this section, O. 9 can be invoked both for dismissal as well as for restoration. AIR 1967 J and K 93 (94): 1967 Kash LJ 220.

**Section 141 — Note 1-A (contd.)**
(AIR 1943 Mad 260 and AIR 1945 Mad 103, **Dissented.**

(5) Applicability — Provisions of O. 9 apply to suits and proceedings in nature of suits and not to execution proceedings. They cannot be made applicable to an application under S. 47 which is a proceeding in execution even with the aid of Section 141. AIR 1961 Raj 59 (62): 1961 Raj LW 506.

(6) An appeal is a substantive right and not a mere matter of procedure and unless it is conferred by O. 43, Civil P. C., it cannot be inferred by implication from Section 141. No appeal therefore, lies from the order dismissing for default an application under O. 9, R. 13. AIR 1961 All 561 (562, 563). (AIR 1937 Oudh 344, Not followed.)

(7) Though proceedings for restitution are not proceedings in execution, they are not original proceedings and so this section does not apply to them. AIR 1942 All 85 (88) : ILR (1941) All 807 (DB).

(8) Section 141 applies to proceedings in revision before the High Court. AIR 1953 Madh B 272 (272) ** 1907 Pun Re No. 97, p. 455 (457). (Order 9, R. 9 applies.) ** (1892) 16 Bom 550 (551) (DB) ** (1891) 13 All 533 (537) ** ('07) 17 Mad L Jour 62 (63). (Memo of cross-objections can be filed.)

[See however AIR 1942 Mad 657 (658).]
[But see AIR 1953 Raj 169 (169) : ILR (1953) 3 Raj 175 (FB) ** AIR 1958 Punj 171 (172) : ILR (1958) Punj 886. (Order 22 does not apply.) ** AIR 1953 Raj 69 (70): ILR (1952) 2 Raj 611 (DB). (Order 22 not applicable.) ** AIR 1951 Him Pra 60 (61). (Order 23 does not apply.) ** AIR 1949 Lah 186 (188, 191): Pak LR (1948) Lah 225 (FB). (Order 22, R. 3 is not applicable.) ** AIR 1946 Bom 201 (202) : ILR (1945) Bom 905.]

(9) Section 141 applies to application to sue in forma pauperis. AIR 1954 Sau 65 (66) ** AIR 1958 Punj 52 (54) : ILR (1957) Punj 1555. (Order 7, Rule 10 applies.) ** AIR 1949 Mad 162 (165) : ILR (1949) Mad 333 ** AIR 1933 Mad 5 (5, 6).

[But see AIR 1950 Pat 309 (310) : 29 Pat 381 (DB) ** AIR 1967 Pat 320 (322).]

(10) Section 141 applies to proceedings in dealing with an application under Order 22, Rule 4. AIR 1950 East Punjab 302 (304) (DB).

(10A) Application before High Court under Section 24, Civil P. C. for transfer of suit to itself and retransfer to subordinate Court. Section 141 applies. AIR 1949 Mad 283 (285).

(11) Proceedings under Order 21, Rule 58 — Section 141 does not apply. AIR 1936 All 378 (380) : 58 All 797 (DB).

(12) Application for making a preliminary decree final — Section 141 does not apply. AIR 1949 Pat 68 (68).

(13) Proceeding in execution can be reviewed under O. 47, R. I by force of its own language and not by virtue of Section 141. (1898) 2 Cal WN 606 (607) (DB).

(14) The provisions of O. 26, R. 4 are not applicable to execution proceedings and have not been made so by S. 141. Section 141 is not applicable to execution proceedings in so far as O. 26, R. 4 relates to the issue of a commission for examination of witnesses. AIR 1964 Pat 147 (149). (AIR 1939 Mad 578, Followed.)

(15) Order 2, R. 2(1) does not apply to execution proceedings because the proceedings contemplated under Section 141, C. P. Code do not include execution proceedings. AIR 1966 Raj 258 (260, 261) : 1966 Raj LW 201.

(16) An application to set aside a sale is a proceeding in execution and Section 141 will not apply, which applies only to original proceedings. **AIR 1962 SC 1886 (1893) :** (1965) 2 SCR 499 ** (1966) 70 Cal WN 949 (959) (DB).

(17) Section 15 read with Section 141 not applicable to execution proceedings — Transfer of decree to District Court for execution — District Court itself can execute decree — Need not transfer it to subordinate Court. AIR 1963 Manipur 45 (46).

(18) If the irregularity has not affected the merits of the case the appellate Court is precluded from interfering in view of Sections 99 and 141 when an objection was not raised at the appropriate stage. AIR 1959 Mys 99 (99) : 36 Mys LJ 865 (DB).

**1.-B. Proceedings arising under other Acts.** — (1) Proceedings for the grant or revocation of probate or letters of administration — Section 141 applies. AIR 1944 Cal 385 (386) (DB)** (1894) 18 Bom 237 (238). (Probate may be obtained in forma pauperis.) ** AIR 1943 Cal 19 (20): ILR (1942) 2 Cal 194. (Section 10, C. P. C. applies to application for letters of administration.)

(2) Section 141 applies to proceedings under the Guardians and Wards Act, 1890. Madh BLJ 1954 HCR 1144 (1147) ** AIR 1947 Lah 409 (409)** AIR 1940 Nag 203 (205): ILR (1942) Nag 45 ** AIR 1961 Punj 17 (18): 63 Punj LR 615.

(3) Ex parte order passed under Section 25, Guardians and Wards Act — Application to set aside such order under Order 9, Rule 13 is governed by S. 141. AIR 1966 All 105 (106).

(4) Section 141 applies to proceedings under the Companies Act. AIR 1950 East Punj 111 (124): ILR (1949) East Punj 421 (FB) ** 1958-28 Com Cas 68 (70) (Punj) ** AIR 1936 All 826 (829): 58 All 742 (FB).

(5) Where a creditor submits a petition under Section 238 Companies Act and later on dies, the procedure prescribed under Order 22, Rule 3 would be applicable by virtue of Section 141. AIR 1963 Madh Pra 120 (121): 1963 Jab LJ 82.

(6) Section 141 applies to application to a District Judge for sanction to lease

**Section 141 — Note 1-B (contd.)**

wakf properties. AIR 1924 Cal 327 (328) (DB).

(7) Section 141 applies to reference to the Court under the Land Acquisition Act, 1894. (1889) 16 Cal 31 (32) (DB) ** (1905) 2 Cal L Jour 359 (368) (DB).

(8) Proceedings to compel registration — Section 141 applies. (1877) 2 Cal 131 (139) (PC).

(9) Section 141 applies to proceeding under the Lunacy Act, 1912. ILR (1955) Andhra 620 (623) * AIR 1918 Cal 353 (355) (DB).

(10) Section 141 applies to proceeding under the Indian Divorce Act, 1869. (1882) 6 Bom 416 (434).

(11) A proceeding for a new trial under Section 38, Presidency Small Cause Courts Act — Section 141 does not apply. AIR 1951 Mad 672 (673).

(12) Application to Civil Court for making complaint of an offence falling under Section 195 (1) (b) or (c), Criminal P. C. is not a proceeding as contemplated by Section 141 — Order 9, Rule 9 does not apply by virtue of Section 141. AIR 1957 Andh Pra 898 (898).

(13) A reference to Civil Court under Section 146 (1), Criminal P. C. is neither a suit nor a proceeding as contemplated by Section 141. AIR 1958 Pat 308 (309): 1958 Cri L Jour 796 (DB) ** AIR 1965 Andh Pra 17 (18): 1965 (1) Cri LJ 8: (1964) 2 Andh WR 129. (AIR 1914 PC 20, Foll.; AIR 1961 Mad 247 and AIR 1961 Mad 385, Not foll.) ** AIR 1961 Raj 245 (247): 1961 (2) Cri LJ 693: 1960 Raj LW 187.

[But see **AIR 1966 SC 1888 (1891):** 1966 Cri LJ 1514: 1966 Supp SCR 393. (Proceeding before Civil Court arising out of reference under Section 146 (1), Cr. P. Code — Proceeding is civil proceeding as contemplated by Section 141, C. P. Code (Obiter).) ** AIR 1963 Mad 338 (341): 1963 (2) Cri LJ 381: (1963) 1 Mad LJ 263 (DB). (The observations in AIR 1961 Mad 384 that the provisions of Order 9 would be applicable to a reference proceeding under S. 146 Criminal P. C. held to be not well founded and cannot be supported.)]

(14) Section 141 of Civil P. C., is not restricted in its applicability to original proceedings only but also applies to a reference under Section 146, Criminal P. C. Section 141, speaks only of a proceeding. It does not restrict itself to a Civil proceeding. Therefore, it cannot be said that Section 141, should be confined to civil proceedings alone and not to references under S. 146 of Criminal P. C., Civil P. C., itself provides a saving clause in Section 4 (1).

The reference under Section 146 of Criminal P. C., is also to Court subordinate within meaning of Section 24 of Civil P. C., and not to a persona designata. Section 146 provides for a reference to a 'Civil Court of competent jurisdiction.' But no such authority or Court has been created under the Code and therefore power under reference is to be exercised only by an existing Court in the course of its ordinary jurisdiction. The Court to which reference is made under Section 146, is a Court subordinate within meaning of Section 24. AIR 1965 All 446 (448, 449, 450): (1965) (2) Cri LJ 342: 1965 All LJ 12. (AIR 1941 All 101 (FB) and AIR 1931 All 29, Foll.; AIR 1959 All 467, **Held** not good law in view of AIR 1941 All 101 (FB); AIR 1927 Cal 534, Criticised.)

(15) Apart from Section 141 some of the provisions of the Code may apply directly and of their own force to matters which do not come within the meaning of the word "proceedings." AIR 1953 Raj 201 (202): ILR (1953) 3 Raj 678 (DB) ** AIR 1952 Assam 93 (94): ILR (1952) 4 Assam 141 (DB).

(16) Contents of the plaint filed in Civil Court showing it to be an application under Section 12 of the U. P. Agriculturists Relief Act (1934) — Application under that section not maintainable in Civil Judge's Court — Provision of O. 7, Rule 10 applies to such application by virtue of Section 141 of the Code. 1964 All LJ 70 (72)..

(17) Institution of proceedings under Section 14 read with Section 17, Arbitration Act against Ruler of former Indian State — Not a suit — Section 86 (1) by its own force or by reason of Section 141, Civil P. C., or Section 41 (a), Arbitration Act does not apply. **AIR 1965 SC 1798 (1801):** (1965) 3 SCR 201.

(18) Provisions of Order 30, Rules 3 and 5 are applicable to notices under Section 14 (2), Arbitration Act, by virtue of provisions of Section 141, C. P. Code and Section 41, Arbitration Act. AIR 1968 Bom 443 (445): 70 Bom LR 219.

(19) Application under Section 4 of Bombay Agricultural Debtors Relief Act by deceased debtor can be continued by heirs — Under Section 141, such an application under Section 4 would be an original proceeding and procedure for suits would be applicable to such a proceeding. AIR 1965 Guj 275 (277): (1964) 5 Guj LR 988 (DB).

(20) Code applies to proceedings under Orissa House Rent Control Act. (1965) 31 Cut LT 798 (799): (1965) 7 OJD 269.

(21) Proceedings under Section 48 of Bihar Hindu Religious Trusts Act 1950 — They are of kind contemplated by Section 141. AIR 1969 Pat 118 (122): 1969 BLJR 224 (DB).

(22) Civil P. C., applies to ex parte decree obtained under Madras Act (VI of 1949). (1960) 1 Andh WR 1 (3) (DB).

(23) Grant of succession certificate — Procedure — Provisions of Civil P. C. applicable. AIR 1964 Pat 272 (274): 1963 BLJR 883.

**Section 141 — Note 1-B (contd.)**

(24) Question to serve interrogatories arising on an interlocutory proceeding under Section 24 of Hindu Marriage Act (1955) — If Section 141 has no application to interlocutory proceedings in a suit Court can issue interrogatories in exercise of its inherent powers under Section 151. AIR 1967 Orissa 19 (22): 31 Cut LT 294.

(25) Judging from the view point of Section 141 a proceeding under S. 159 of the Kerala Agriculturists Debt Relief Act (31 of 1958) is an original proceeding in a Court of Civil jurisdiction. 1966 Ker LT 947: 1967 Ker LJ 23 (DB).

(26) The Jagirdas Debt Settlement Board under Hyderabad Act (12 of 1952) is not a Court of Civil jurisdiction and hence Order 22, Rules 3 and 4 would not apply to proceeding before it by virtue of Section 141. (1963) 1 Andh WR 95 (DB).

(27) Application under Kerala Act 1 of 1964 for fixation of fair rent dismissed in default can be restored under R. 99 of Kerala Land Reforms (Tenancy) Rules (1964) but not under Section 141 read with Order 9 of Civil P. C. AIR 1967 Ker 287 (288): 1967 Ker LT 317 (FB). (1966 Ker LJ 819 and 1967 Ker LT 95 and OP 2245 of 1962 (Ker), **OVERRULED.)**

(28) Application for restoration of holding by tenant under Section 5 (2) of Malabar Tenancy (Amendment) Act (22 of 1956) is in the nature of an original application — Section does not contemplate reopening of suit — Matter has to be decided on material on record but applying the new law. ILR (1961) 2 Ker 62 (66).

(29) Application for stay of execution of decree under Section 3 (1) of M. P. Act (5 of 1956) — Proceedings are not an execution proceeding — Dismissal of application for default — Order 9, Civil P. C. applies — Dismissal of restoration application — Remedy lies by way of appeal and not by fresh application. AIR 1964 Bom 232 (234): 65 Bom LR 417.

(30) Tribunal appointed under S. 55 of West Bengal Estates Acquisition Act (1 of 1954) has been conferred powers of Civil Court for the purpose of dealing under Section 44 of the Act. Assuming that provisions of Section 141 Civil P. C. would be applicable yet Order 39 Rr. 1 and 2 would be applicable only if facts and circumstances of the case so permit. AIR 1959 Cal 386 (387): 63 Cal WN 354 (DB).

(31) Application under Section 18 Land Acquisition Act (1894) is deemed to be a suit and Court hearing it is a Court of Civil jurisdiction. Procedure laid down in Civil P. C. is applicable by virtue of Section 141. ILR (1963) 2 Punj 442 (DB).

(32) Proceedings under Section 11 C. P. Money Lenders Act — Section 141 applies. AIR 1948 Nag 350 (351).

(33) Proceedings under Madras Agriculturists Relief Act — Section 141 applies. AIR 1947 Mad 377 (378) (DB).

**2. Proceedings for restitution.** — (1) Section 141 does not apply to proceedings for restitution as they are not original proceedings. AIR 1953 Nag 153 (154): ILR (1953) Nag 649 ** AIR 1942 All 85 (88): ILR (1941) All 807 (DB).

(2) Section 141 does not make Section 144 of the Code applicable to execution proceedings. AIR 1915 Cal 530 (531) (DB).

**3. Letters Patent appeal.** — (1) Letters Patent appeals are not original proceedings of the kind contemplated by Section 141. (1904) 27 Mad 121 (123).

(2) The provisions of the Code may be followed in Letters Patent appeals by virtue of Section 117. AIR 1917 Cal 626 (626): 43 Cal 243 (SB) ** AIR 1921 PC 80 (82): 48 Cal 481: 48 Ind App 76.

**4. "Court of civil jurisdiction."** — (1) A proceeding under the Lunacy Act, 1912, being a proceeding in a Court of civil jurisdiction, the provisions of the Code as to verification of pleadings or the appointment of a receiver apply to such a proceeding. AIR 1918 Cal 353 (355) (DB). (Verification of pleadings.) ** ILR (1955) Andh 620 (623). (Appointment of receiver.)

(2) A proceeding under Section 235, Companies Act, 1913, is a proceeding in a Court of civil jurisdiction. (1953) 23 Com Cas 474 (479) (Bom).

(3) Disciplinary proceedings under the Legal Practitioner's Act are "proceedings in a Court of civil jurisdiction." (1903) 26 Mad 596 (597) (DB) ** AIR 1919 Cal 474 (475) (DB). (Distinguishing 6 Ind Cas 327 (Cal).) ** (1900) 27 Cal 1023 (1033) (DB).

[But see AIR 1916 Pat 115 (116): 1 Pat L Jour 576 (DB).]

(4) An application under Article 226 of the Constitution of India is a proceeding in a Court of civil jurisdiction. AIR 1958 Andh Pra 16 (17, 19): ILR (1957) Andh Pra 678. (Orders 1 and 2 apply by virtue of Section 141 — AIR 1953 Mad 39 and **AIR 1952 SC 64,** Foll.) ** AIR 1968 Guj 202 (206): 8 Guj LR 793 (DB). (Observations of Raju J. in AIR 1962 Gui 21 **Dissented.)** ** AIR 1967 All 334 (335): 1967 All LJ 232 (DB) ** AIR 1967 Cal 275 (281): ILR (1966) 1 Cal 14 (DB) ** (1965) 67 Punj LR 576 (577) ** AIR 1963 Punj 510 (513): 65 Pun LR 599 (DB).

[But see AIR 1968 Punj 360 (362): 69 Pun LR 1013. (The Court will, however, apply the principles as distinguished from the technical provisions of Order 22, Rules 3 and 4, relating to substitution in appropriate cases in the exercise of its discretion on the ground of justice, equity and good conscience. AIR 1958 Andh Pra 16, **DISSENTED.)** ** AIR 1968 Raj 20 (22): 1967 Raj LW 144 (DB). (The

**Section 141 — Note 4 (contd.)**
provisions contained in Civil P. C. will not be attracted to Special Jurisdiction of issuing writs.) ** AIR 1965 All 517 (518): 1965 All LJ 308 (DB). (Provisions of Civil P. C., do not govern proceeding under Article 226 — One petition for certiorari for quashing four distinct orders made by taxing authority under U. P. Sales-tax Act and Central Sales-tax Act — Petition is not maintainable.) ** AIR 1959 Mad 137 (141): (1959) 1 Mad LJ 53 (DB). (Order 1 does not apply.)
[But see AIR 1957 Cal 702 (709). (Order 27-A does not apply.)]

(5) Proceedings under Section 195 of the Criminal Procedure Code for sanction to prosecute are not civil proceedings although they may be before the Judge of a civil Court. (1907) 30 Mad 311 (313) (DB).

(6) Debt Relief Courts under the Central Provinces and Berar Relief of Indebtedness Act are not civil Courts. They are special tribunals created ad hoc for the special purpose of the Act. AIR 1942 Nag 8 (11): ILR (1941) Nag 588 (DB).

(7) Custodian of evacuee property is not a Court although proceedings held by him are of a quasi-judicial nature. Therefore Section 141 does not apply. AIR 1953 SC 298 (302): 1953 SCR 691.

(8) By reason of Section 25, Displaced Persons (Debts Adjustment) Act, 1951, Section 141, Civil P. C., has been made applicable not only to proceedings in any Court but also to proceeding before the tribunal. Therefore, Order 30 of the Code would apply to proceeding before the tribunal. AIR 1954 Bom 423 (425): ILR (1954) Bom 739 ** AIR 1962 Punj 239 (242): ILR (1962) 1 Punj 190 (FB). (Provisions of O. 9. Rr. 8 and 9, Civil P. C. apply to application under Section 10.) ** AIR 1960 Punj (172): 61 Pun LR 910 (DB).

(9) Section 16 and Sch. B, Rent Control Act, 1950 specifically provide that the Chief Judge or any other judge of the Calcutta Court of Small Causes shall function as a court i.e., as a court of civil judicature. Hence the procedure before the judge trying a suit under Section 16 will be governed by Civil P. C. Accordingly Order 9, Rule 13 is applicable and an order rejecting an application under Order 9, Rule 13 is appealable. AIR 1964 Cal 347 (352): 1964 (2) Cri LJ 151 (DB).

(10) Compensation officer under Himachal Pradesh Act 15 of 1954 is not a "Court". AIR 1966 Him Pra 36 (39).

(11) Commission under J. and K. Commission of Enquiry Act (32 of 1962), is not Civil Court. AIR 1965 J and K 75 (76): 1965 (2) Cri LJ 212: 1965 Kash LJ 160.

(12) Jagir Commissioner under Rajasthan Act VI of 1952, is not a Court — Provisions of Evidence Act and Civil P. C. are not attracted. 1964 Raj LW 83 (89) (DB).

(13) Consolidation authorities under U. P. Act 5 of 1954 are not courts of civil jurisdiction — Section 141, Civil P. C. not attracted. AIR 1967 All 592 (592): 1967 All LJ 471.

**5. "Procedure provided in this Code."** — (1) Section 141 deals with procedure and procedure alone. AIR 1950 East Punj 111 (124): ILR (1949) East Punj 421 (FB) ** AIR 1942 Nag 8 (11): ILR (1941) Nag 588 (DB).

(2) A right of appeal cannot be claimed merely on the strength of Section 141. AIR 1950 East Punj 111 (124): ILR (1949) East Punj 421 (FB) ** AIR 1953 Nag 153 (154): ILR (1953) Nag 649 ** AIR 1948 Cal 77 (77) ** (1904) 27 Mad 504 (508) (DB) ** (1886) 10 Bom 433 (434) (DB).

(3) Section 141 does not confer a right to refer to arbitration, a right to a review or a right to proceed by way of execution against a surety who is not a party to the proceedings, on the analogy of Section 145 of the Code. AIR 1950 East Punj 111 (124): ILR (1949) East Punj 421 (FB) ** AIR 1957 All 67 (70) (DB). (Review.) ** AIR 1957 Manipur 39 (40). (Power of review cannot be invoked in cases of order under Article 226 of the Constitution.)

(4) The remedy under Order 9, Rule 9 is not a matter of procedure and a petition under Section 73 of the Madras Village Courts Act (I of 1889) dismissed for default cannot be restored under Order 9, Rule 9. AIR 1945 Mad 107 (108).

(5) Section 141 does not confer on any Court the power of making a reference to the High Court under Order 46, Rule 1 in any case not coming strictly within the purview of that rule. AIR 1950 East Punj 111 (124): ILR (1949) East Punj 421 (FB) ** AIR 1942 Nag 8 (11): ILR (1941) Nag 588 (DB) ** (1911) 36 Mad 16 (17) (DB).

(6) Order of District Judge on an application under Section 33, Insurance Act — Order can be revised under Section 115 by virtue of Section 141. AIR 1942 Lah 267 (268): ILR (1943) Lah 601.

(7) The provisions contained in Section 90, Order 14, Rule 6 and Order 30, Rules 1 to 5 are not purely matters of procedure they being provisions which deal with the powers of Civil Courts to deal with matters that come up before them. AIR 1950 East Punj 111 (124): ILR (1949) East Punj 421 (FB).

(8) Sections 10 and 11, Order 23, R. 1 and Order 39, Rule 1 of the Code are rules of procedure and may, therefore be applied to "proceedings" within the meaning of Section 141. AIR 1943 Cal 19 (20): ILR (1942) 2 Cal 194. (S. 10.) ** AIR 1922 Sind 6 (8) : 16 Sind LR 79. (S. 11.) ** ('42) AIR 1942 Bom 57 (58): ILR (1942) Bom 94 (DB). (O. 23,

**142. Orders and notices to be in writing.**—All orders and notices served on or given to any person under the provisions of this Code shall be in writing.

[1882, S. 94.]

**143. Postage.**—Postage, where chargeable on a notice, summons or letter issued under this Code and forwarded by post, and the fee for registering the same, shall be paid within a time to be fixed before the communication is made:

Provided that the [a][[b]State] Government] may remit such postage, or fee, or both, or may prescribe a scale of court-fees to be levied in lieu thereof.

[1882, 1877, S. 95.]

[a] Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government". (1-4-1937.)

[b] Substituted for "Provincial" by A.L.O. 1950. (26-1-1950.)

**144. Application for restitution.**—(1) Where and in so far as a decree [a][or an order] is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree [a][or order] or such part thereof as has been varied or reversed; and, for this purpose, the Court may make

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**Section 141 — Note 5 (contd.)**

R. 1.) ** (1909) 3 Sind LR 128 (129). (O. 39, R. 1.)

(9) Compromises following awards by arbitrators — Award filed in Court — Parties entering into compomise modifying its terms — Court has power to pass decree on award as modified by parties. **AIR 1962 SC 903 (910):** 1962 Supp (2) SCR 477.

**6. "In regard to suits."** — (1) Procedure prescribed by Code in regard to appeals governs appeals arising out of miscellaneous proceedings and miscellaneous proceedings in the nature of appeals. AIR 1928 Lah 488 (489).

**7. "As far as it can be made applicable."** — (1) Section 141 does not make the whole of the procedure in regard to suits applicable to proceedings under the section. Such procedure applies only as far as it can be made applicable. AIR 1950 East Punj 111 (118, 124): ILR (1949) East Punj 421 (FB) ** AIR 1954 Bom 121 (125): ILR (1954) Bom 79 (DB) ** AIR 1920 Cal 743 (745) (DB) ** AIR 1935 All 195 (197) ** AIR 1916 Mad 268 (271, 272) (DB).

(2) Appointment of a guardian cannot be referred to arbitration because guardianship is not a matter purely of private right. (1908) 30 All 137 (140) (DB) ** AIR 1924 Mad 484 (484): 47 Mad 459 (DB).

(3) A surety for a guardian cannot be proceeded against in execution under Section 145, Civil P. C., because even the guardian himself cannot be proceeded against in execution in that way. AIR 1927 Sind 262 (262) (DB).

(4) Order 23, Rule 3 can be applied to misfeasance proceedings under Section 235, Companies Act. AIR 1954 Bom 121 (125): ILR (1954) Bom 79 (DB).

(5) Where an express or special procedure is provided for a particular proceeding, Section 141 cannot be applied so as to defeat the operation of such provisions. AIR 1953 Mad 236 (237) ** AIR 1953 Trav-Co 37 (39) (DB) ** AIR 1950 Pat 309 (310): 29 Pat 381 (DB).

**Section 142 — Note 1**

(1) The section requires that all orders under the Code should be in writing. Hence, the general practice in the moffusil Courts not to formally draw up interlocutory orders, e.g., order granting injunction is inconsistent with this section and should be abandoned. If a party desires to appeal from an order which has not been drawn up, his proper course is to ask the Judge to draw up the order and it is the duty of the Judge to comply with such request. An appeal filed against an order which is not formally drawn up cannot be entertained. AIR 1944 Bom 24 (24) (DB).

(2) Provisions of this section are not applicable to a notice given under Section 14 (2) of the Arbitration Act as Section 14 (2) does not prescribe for a notice in writing. 1961 Raj LW 521.

**SECTION 144 — SYNOPSIS**

1. Scope and object.
2. The decree or order must have been varied or reversed.
3. Modes of variation and reversal.
4. Effect of setting aside ex parte decree and passing the same decree on the merits.
5. Effect of reversal of main decree on dependent decrees.
6. Who may apply for restitution.
7. Persons not actually parties.

any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).

[1882, S. 583.]

[a] Inserted by the Code of Civil Procedure (Amendment) Act, 1956 (66 of 1956), S. 13 [1-1-1957].

## OBJECTS AND REASONS

"Clause 144.— Sub-clause (2) has been added on the suggestion of the High Court. We agree that the restitution which may be obtained on application under this clause should not be made the subject of a separate suit."— S. C. R.

## STATE AMENDMENT

**Uttar Pradesh**

In Section 144, for sub-section (1), the following shall be substituted:—

"(1) Where and in so far as a decree or an order is varied or reversed in appeal, revision or otherwise, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made, as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal"—U. P. Act 24 of 1954, S. 2 and Sch., Item 5, entry 7 (30-11-1954).

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**Section 144 — Synopsis (contd.)**

8. Party not in possession.
9. Right of auction purchaser to apply for restitution.
10. Against whom restitution can be granted.
11. Auction-purchaser.
12. Surety — Restitution against.
13. Third persons — Restitution against.
14. Trustee.
15. Jurisdiction of Court to grant restitution — Presence of parties.
16. What Court can grant restitution.
17. "Shall cause restitution to be made."
18. "Place the parties in the position which they would have occupied but for such decree . . . . as has been varied or reversed."
19. "So far as may be."
20. Mesne profits.
21. Interest.
22. Refund of compensation money in land acquisition cases.
23. Possession of property or money obtained otherwise than in execution.
24. Splitting up claim of restitution.
25. Security for restitution.
26. Bar of suit.
27. Nature of proceedings under the section.
28. Appeal — Tenability of.
29. Inherent power of Court to grant restitution.
30. Revenue Court.
31. Rent Controller.
32. Revision.

**1. Scope and object.** — (1) The doctrine of restitution is based upon the principle that the acts of Courts should not be allowed to work injury on the suitors. AIR 1954 Pat 36 (37) (DB) ** ILR (1953) 2 Cal 385 (387) ** AIR 1966 Ker 225 (226): 1966 Ker LT 313 (DB) ** 1966 All LJ 510 ** AIR 1964 Mad 404 (406): 77 Mad LW 233 (DB) ** AIR 1960 Mys 337 (338): 38 Mys LJ 922.

(2) The doctrine of restitution contemplates a case where property has been received by the decree-holder under his decree and the decree is subsequently wholly or partially reversed or varied in other proceedings. AIR 1932 All 239 (240) (DB) ** AIR 1932 Cal 29 (32): 58 Cal 1070 (DB) ** AIR 1933 Lah 791 (792) ** AIR 1939 All 66 (69): ILR (1939) All 103 (DB).

(3) It is the duty of the Court to enforce the obligation on the party who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost unless it is shown that restitution would be clearly contrary to the real justice of the case. **AIR 1953 SC 136 (139):** 1953 SCR 559: ILR (1953) 2 All 367 ** (1900) 23 Mad 306 (310) (DB) ** (1868) 9 Suth WR 402 (407) (FB) ** **AIR 1966 SC 948 (950):** (1966) 3 SCR 24 ** AIR 1969 Ker 31 (34): 1968 Ker LT 442 (DB) ** 1966 All LJ 510.

(4) The doctrine of restitution cannot be applied in a case where it conflicts

**Section 144 — Note 1 (contd.)**

with another rule of equity that a bona fide purchaser for value should not be allowed to suffer on account of the mistakes or irregularities committed in a Court of law. AIR 1954 Pat 36 (37) (DB).

(5) Section 144 does not confer any new substantive rights which a successful party did not possess under the general law. AIR 1951 Mad 804 (806) (DB) ** (1912) 16 Ind Cas 966 (966) (DB) (Cal).

(6) Section 144 merely regulates the exercise of the rights and prescribes a convenient procedure therefor. AIR 1955 Mad 173 (175, 176) ** AIR 1951 Mad 804 (806) (DB) ** AIR 1940 Cal 260 (263): ILR (1940) 1 Cal 486 (DB) ** AIR 1928 All 293 (294): 50 All 767 (DB).

(7) A person applying for restitution under this section by way of possession must base his claim for restitution upon the very same rights as existed on the date on which he was dispossessed under the decree which is subsequently reversed. AIR 1956 All 663 (665) (DB).

(8) The section is a salutary provision of law enacted with a view to shorten litigation and to afford speedy relief and should not, therefore, be narrowly construed. AIR 1948 All 252 (260): ILR (1948) All 62 (FB) ** AIR 1941 Mad 315 (315): ILR (1941) Mad 498 ** (1912) 17 Ind Cas 121 (122, 123) (DB) (Cal) ** AIR 1929 Cal 814 (815): 57 Cal 226 (DB).

(9) In order that this section may apply, three conditions are necessary to be satisfied —

(a) the restitution sought must be in respect of the decree or order which had been varied or reversed. AIR 1941 PC 128 (129): 21 Pat 243: ILR (1941) Kar PC 150 ** AIR 1958 Ker 84 (85) ** ILR (1961) 13 Assam 458 (461, 462).

(b) The party applying for restitution must be entitled to a benefit under a reversing decree or order. (1909) 31 All 364 (366) (DB) ** (1885) 8 Mad 494 (495) (DB) ** (1894) 17 Mad 82 (84) (DB).

(c) The relief claimed must be properly consequential on the reversal or variation of the decree or order. AIR 1922 All 465 (467): 44 All 687 (DB) ** AIR 1925 Oudh 654 (656) (DB) ** AIR 1936 Mad 634 (635) (DB).

(10) Though the section is not exhaustive of the principle of restitution, where a case does not fall within the strict terms of the section it is a matter of discretion with the Court to grant or refuse the relief. AIR 1954 Cal 544 (546) (DB) ** AIR 1946 All 329 (330).

(11) An application for relief of restitution is not an application for execution of a decree or order. (1965) 1 Law Rep 763 (767).

(12) Section 144 is not made applicable to execution proceedings by S. 141 of the Code. AIR 1915 Cal 530 (531) (DB) ** AIR 1957 Punj 307 (309) ** (1965) 1 Law Rep 763 (765).

(13) This section applies to suits under U. P. Tenancy Act (17 of 1939) by virtue Section 243 read with lists 1 and 2 of the second schedule of that Act. AIR 1956 All 663 (664) (DB).

(14) The fact that an application is not labelled as an application under Section 144 is immaterial, for, no amount of technicalities should be allowed to stand in the way of the Court in doing justice to the party aggrieved if he is so entitled. Therefore an application made under Section 47 and O. 21, Rule 90 can be treated as an application under Section 144. 1957 BLJR 534 (536).

(15) When a decree is executed through Court against a person during pendency of the appeal, then in case of variation or reversal of the decree by the superior Court he is entitled to restitution. AIR 1964 Mys 117 (121): (1963) 2 Mys LJ 421 (DB).

(16) Suit by Municipal Board for restraining enforcement of restitution order against it on ground that ownership in property vested in it — Where a suit was not for restitution but for avoiding restitution, it was not barred by Section 144 (2). AIR 1965 All 527 (532): 1965 All LJ 432 (DB).

(17) The provisions of Section 144 apply upon reversal of an order made under Article 226 of the Constitution. AIR 1967 All 272 (273): 1966 All LJ 528 (DB).

(18) Decree for possession of land against lessee — Possession taken — Manure heaped on land seized though decree silent about it — Proceedings by lessee for recovery of property (manure) do not fall under S. 47 — Nor are they covered by S. 144 — Seizure constitutes torts—Remedy is by suit. AIR 1965 All 527 (532, 533): 1965 All LJ 432 (DB).

(19) Act of Court should do no injury to any of the suitors. Here Court means any Court from the primary court upto the highest Court which finally disposes of the case. (1871) LR 3 PC 465.

(20) Question of restitution may arise even though the reversed decree is not executed and even though the relief sought in the restitution proceedings is not specifically claimed in the plaint. AIR 1961 Madh Pra 200 (204): 1961 MPLJ 273.

(21) Restitution is a matter of right whenever Section 144 is applicable. Discretion of Court is only in regard to payment of interest etc. — Section however is not intended to give better position to party entitled to restitution. AIR 1966 Ker 225 (227): 1966 Ker LT 313 (DB).

(22) Attachment of decree before judgment — Execution of attached decree and collection of proceeds by attaching

**Section 144 — Note 1 (contd.)**
creditor without obtaining any decree in suit in which attachment before judgment made — Refund of amount realised can be ordered under Section 151 — Section 144 does not apply. AIR 1963 Ker 195 (197): 1963 Ker LT 1179.

(23) Compensation payable under this section is what is payable to the person asking for restitution and not to the person from whom restitution is asked. AIR 1961 Mys 238 (240): 39 Mys LJ 378.

(24) Right to restitution of courts realised under a decree reversed by the appellate Court is not automatic. Restitution in such case is a matter within the discretion of the Court. AIR 1964 Ker 216 (217): 1963 Ker LT 344.

(25) Restitution will not operate to distinguish rights enacted by law which are not in consequence of the decree reversed. (1966) 70 Cal WN 1027 (1034).

(26) There can be no stay of restitution on account of the pendency of a second appeal in a case where the appellant has got into possession in pursuance of erroneous decree of the trial Court which is reversed in appeal. AIR 1962 Andh Pra 525 (526): (1962) 1 Andh LT 396. (AIR 1959 Bom 409 which is **Reversed** in appeal; AIR 1959 Bom 490, Foll.; AIR 1917 Mad 185, Dist.)

**2. The decree or order must have been varied or reversed.**—(1) Where the original decree or order stands good as against a party no restitution can be had by him under this section. **AIR 1957 SC 577 (584):** 1957 SCR 775 ** AIR 1955 All 526 (527) : ILR (1956) 1 All 209 ** AIR 1944 Bom 264 (265) ** AIR 1923 PC 167 (169) : 50 Ind App 301 : 46 Mad 895 ** (1865) 10 Moo Ind App 203 (211, 212) (PC).

(2) Order for pre-emption in favour of A on basis of his status as a co-sharer — A's status as co-sharer negatived in another suit — Suit by A for refund of pre-emption money from vendee — Held that so long as the pre-emption order stood, no question of refund of the pre-emption money can arise. AIR 1956 Cal 241 (241) (DB).

(3) The variation or reversal must have been by a Court of competent jurisdiction. ('98) 20 All 237 (239, 240) (DB) ** AIR 1937 All 232 (234).

(4) The words 'or an order' have been inserted after the word 'decree' by the Code of Civil Procedure (Amendment) Act, 1956 (66 of 1956). The effect of the amendment is that the section would now apply even where an order has been varied or reversed. AIR 1956 All 663 (664) (DB) ** (1966) 70 Cal WN 1027 (1031).

(5) This section does not in terms require a decree by the Appellate Court to give the Court jurisdiction to grant restitution. All that it requires is that a decree is varied or reversed. AIR 1951 Pat 330 (333) (DB).

(6) For purposes of S. 144 a decree is erroneous where it is varied or reversed. 1962 All LJ 915 (917, 918) : 1962 All WR (HC) 365 (2).

(7) Decisions, in proceedings under Section 47 are decrees as per cl. 2 of S. 2. Hence a decision of the High Court reversing such a decision can be treated as a decision reversing a decree and restitution under Section 144 (before amendment in 1956) is possible. AIR 1965 All 527 (533) : 1965 All LJ 432 (DB).

**3. Modes of variation and reversal.**—(1) This section contains no restriction as to the manner in which a decree should be varied or reversed and none can be legitimately read into it, except, of course, that it should be in "accordance with law." AIR 1956 All 663 (664) (DB) ** AIR 1944 Sind 233 (236) : ILR (1944) Kar 284 ** AIR 1919 Sind 79 (79) : 13 Sind LR 153 (DB).

(2) The operation of this section extends to all cases of variations and reversals, howsoever they may have been effected. AIR 1950 Trav-Co 48 (48, 49) (DB) ** AIR 1948 All 252 (256, 260) : ILR (1948) All 62 (FB) ** AIR 1943 Mad 248 (250): ILR (1943) Mad 411 (DB) ** AIR 1919 Bom 1 (10) : 43 Bom 433 (FB) ** AIR 1966 Mys 112 (113): (1965) 1 Mys LJ 786. (Ex parte decree Reversed under O. 9, R. 13.) ** (1966) 70 Cal WN 1027 (1031).

(3) This section only applies where the decree is reversed or varied in appeal, revision or review and does not apply where the reversal or variation is consequent on a decree in a separate suit. AIR 1937 Bom 173 (174) ** AIR 1931 Cal 42 (43) (DB).

[But see AIR 1948 All 252 (255, 260) : ILR (1948) All 62 (FB). (AIR 1937 All 232 **OVERRULED.**) ** AIR 1956 All 663 (664) (DB) ** AIR 1949 Pat 133 (136) : 27 Pat 873 (FB). (AIR 1916 Pat 299 : 1 Pat L J 43, **OVERRULED.**) ** AIR 1962 Madh Pra 295 (296) : 1962 MPLJ 338.]

(4) The section as amended by U. P. Act 24 of 1954, expressly provides that the section will apply where 'a decree or order is varied or reversed in appeal, revision or otherwise. AIR 1956 All 663 (664) (DB).

(5) This section does not apply to the case of a variation or reversal of a decree under a private compromise entered into between the parties, whether out of Court or in the course of an execution proceeding. AIR 1933 All 743 (744) (DB).

(6) Where a decree is varied by the appellate Court this section will apply though such variation may be based on a compromise between the parties. (1940) 42 Pun LR 429 (431) (DB).

(7) An order for costs made by the executing Court in claim proceedings is not automatically set aside if the party against whom it is made subsequently succeeds in the regular suit under O. 21, R. 63. The executing Court, therefore, has no power to grant a refund either under this section

**Section 144 — Note 3 (contd.)**
or under S. 151 where costs have been recovered. AIR 1943 Bom 129 (131, 132) : ILR (1943) Bom 171.

[But see AIR 1943 Mad 248 (250) : ILR (1943) Mad 411 (DB).]

(8) There is no question of any decree being varied or reversed by any Court within the meaning of S. 144 when an execution sale is set aside by reason of relief given to an agriculturist under S. 23 of the Madras Agriculturists' Relief Act, 1938. AIR 1958 Ker 84 (84, 85).

(9) The variation of a decree may be by the Court which passed the decree, as where it amends the decree because the ministerial staff of the Court has not been able to correctly mention in the decree the amount which has been decreed. 1957 BLJR 534 (536).

(10) Section provides for every case of reversal or variation including reversal by superior Court, by same Court in same proceedings or by different Court in different proceedings. AIR 1968 Bom 57 (64): 69 Bom LR 121.

(11) Decree executed — Reversed in second appeal—(Reversing decree, whether wrong or even illegal is binding on parties unless set aside in manner prescribed by law — Defendants held entitled to restitution. 1966 KLT 632 : 1966 Ker LJ 896.

**4. Effect of setting aside ex parte decree and passing the same decree on the merits.** —(1) Where an ex parte decree is set aside the defendant is ipso facto entitled to the restitution of any property which has passed to the decree-holder in execution of such decree. AIR 1954 Andhra 5 (6) ** AIR 1949 All 730 (732) : ILR (1949) All 313 (DB) ** AIR 1947 Mad 54 (55) ** (1907) 6 Cal L Jour 92 (94) (DB).

(2) Where an ex parte decree is set aside on the application of the defendant and a sale in execution thereof is also set aside consequent on the setting aside of the decree, the sale cannot be revived on the passing of the same decree on the merits. (1909) 3 Ind Cas 30 (31) (DB) (Cal).

(3) The right to claim restitution is based on the existence or otherwise of a decree in favour of the applicant at the time of application for restitution; notwithstanding anything which happened subsequently. Thus where a decree is set aside and case remanded for fresh disposal, judgment-debtor is entitled to restitution, though ultimately decree is passed against him. AIR 1966 SC 948 (950) : (1966) 3 SCR 24. (AIR 1962 Orissa 11 (DB). **REVERSED.**)

**5. Effect of reversal of main decree on dependent decrees.**—(1) It is a general rule of law that upon a reversal of a judgment. order or decree all connected or dependent judgments, orders or decrees fall with it. AIR 1943 All 267 (269): ILR (1943) All 510 (DB) ** AIR 1917 Cal 188 (191) (DB) ** AIR 1933 Pat 209 (209) (DB).

(2) A obtains a preliminary decree for partition against B. Pending appeal by B therefrom, A obtains a final decree, executes it and recovers money from B. The preliminary decree is then set aside by the Appellate Court. B is entitled to claim restitution from A of the amount recovered from him. AIR 1918 Cal 457 (457) (DB) ** AIR 1931 All 655 (656) (DB).

**6. Who may apply for restitution.**— (1) In order to entitle a person to apply under this section two conditions must be satisfied:

(a) He must be a party to the decree or order varied or reversed. AIR 1952 Nag 275 (278) : ILR (1952) Nag 534 (DB) ** AIR 1919 Cal 503 (504) (504) (DB) ** AIR 1929 Lah 657 (658) ** AIR 1937 Bom 101 (103) : ILR (1937) Bom 150.

(b) He must have become "entitled to any benefit by way of restitution or otherwise" under the reversing decree or order. AIR 1952 Nag 275 (277) : ILR (1952) Nag 534 (DB) ** AIR 1925 Rang 215 (216) : 3 Rang 251 (DB) ** AIR 1937 Bom 101 (103) : ILR (1937) Bom 150.

(2) Where the effect of the decree of the Appellate Court is to reverse that of the lower Court, the party against whom the lower Court's erroneous decree has been enforced and who has lost possession of the property is entitled to apply for restitution. AIR 1935 Mad 476 (477) ** AIR 1937 Bom 101 (103) : ILR (1937) Bom 150.

(3) Restitution under Section 144 would not come as a matter of course on variation or reversal of decree — Person applying must also be entitled to any benefit by way of restitution. AIR 1961 Cal 70 (74).

(4) Restitution can be obtained only on application made for that purpose. AIR 1961 Mys 238 (239) : 39 Mys LJ 378.

**7. Persons not actually parties.**—(1) The party claiming restitution need not have been a party to the appeal in which the decree was varied or reversed. (1908) 12 Cal WN 642 (643) (DB) ** AIR 1937 Bom 101 (103) : ILR (1937) Bom 150.

(2) The party claiming restitution must have been a party to the original decree so varied or reversed. AIR 1952 Nag 275 (278): ILR (1952) Nag 534 (DB) ** AIR 1919 Cal 503 (504) (DB).

[But see AIR 1922 All 238 (238) : 44 All 555 (DB).]

(3) The appellate decree must have been in effect and substance in favour of a person who was a party to the original decree. (1908) 18 Mad L Jour 39 (41) (DB) ** (1908) 12 Cal WN 642 (643) (DB) ** AIR 1937 Bom 173 (174).

(4) A decree is passed in favour of X against A, B and C based on a ground common to all the defendants. A appeals without impleading B and C as parties and the decree is reversed under O. 41, R. 4 in favour of all the defendants. B and C

**Section 144 — Note 7 (contd.)**
though not parties to the appeal can claim restitution under this section of the property that had been taken from them in execution of the decree which was reversed. (1900) 24 Mad 341 (344) (DB) ** AIR 1927 All 182 (183) (DB) ** AIR 1937 Bom 101 (103, 104) : ILR (1937) Bom 150.

(5) The word "party" will include his representative. AIR 1943 All 202 (203) : ILR (1943) All 312 (DB) ** AIR 1918 Pat 306 (307) (DB) ** AIR 1932 All 239 (240) (DB) ** AIR 1924 Sind 101 (102) : 17 Sind LR 73 (DB).

(6) The transferee of the appellate decree is entitled to apply under this section for restitution of what his transferor was entitled to claim. AIR 1941 Mad 480 (480) (DB) ** (1906) 33 Cal 857 (860) (DB) ** AIR 1918 Pat 306 (307) (DB).

(7) The word 'party' includes any person who is entitled to any benefit by way of restitution or otherwise and includes any beneficiary under the final judgment be he in the technical sense a party or not in the suit or appeal. AIR 1966 Cal 637 (640) (DB).

**8. Party not in possession.**—(1) A party is not entitled under this section to the restitution of property which was not in his possession before suit. AIR 1924 Cal 769 (771) : 51 Cal 324 (DB) ** AIR 1932 Pat 317 (318) : 11 Pat 553 (DB) ** 1966 All LJ 938 : ILR (1966) 2 All 566. (A preemptor or mortgagor in a usufructuary mortgage.)

(2) Where the property in dispute is placed in the hands of the Receiver, the latter's possession will be on behalf of the rightful owner as ultimately found by the Court. Such owner, therefore, is entitled to the benefit of the section as soon as his title is established, where the Receiver's possession has been disturbed in the meanwhile under the reversed decree. AIR 1941 Lah 343 (344) (DB) ** AIR 1940 Mad 850 (870, 871) (DB) ** AIR 1928 Pat 260 (262, 263) : 7 Pat 319 (DB) ** AIR 1931 Rang 21 (22, 23) (DB).

(3) Application under Sec. 144 is necessary only when the person successful in appeal has been dispossessed of certain property and he has to take it back on success. 1966 All LJ 938 : ILR (1966) 2 All 566 (DB).

(4) The mere circumstance that plaintiff was in possession through her tenants is not sufficient justification for dismissing her application under Section 144 for restoration of possession to her. The application could have been treated as one for discharge of the receiver and constructive possession as at the initiation of the suit. (1967) 1 Andh WR 94.

(5) Decree-holder obtaining possession in execution and evicting defendant's tenants — Decree for possession reversed in appeal. On application for restitution defendant is entitled to actual possession and not merely symbolic possession of the premises although it was not in his occupation when he lost possession of it under the trial Court's decree. AIR 1961 Bom 288 (290) : 63 Bom LR 163.

**9. Right of auction purchaser to apply for restitution.** — (1) Where an auction sale is set aside it is incumbent upon the Court to make the recovery of possession by the judgment-debtor conditional on his paying up to the purchaser the purchase money. AIR 1953 Punj 133 (133) ** AIR 1922 PC 269 (271) : 49 Ind App 351 : 2 Pat 10.

(2) Where no conditional order is passed requiring the judgment-debtor to pay the purchase money to the purchaser before recovering possession, the auction purchaser cannot apply under this section for the return of the purchase money. AIR 1922 Mad 228 (229, 230) (DB) ** AIR 1925 Rang 215 (216) : 3 Rang 251 (DB).

(3) Where an auction sale is set aside as a result of a decree passed in another suit to which the auction purchaser is a party he can claim restitution by way of refund of the purchase price from the decree-holder. AIR 1944 Sind 233 (236) : ILR (1944) Kar 284.

(4) After a Court sale in execution of a decree is confirmed, the judgment-debtor was found to have no saleable interest in the property as a result of suit filed by third party.

**Held** the auction purchaser being dispossessed, his remedy for recovery of his money is not by application in execution or under Section 144 or 151 but by an independent suit. AIR 1964 Raj 140 (146, 147): 1964 Raj LW 178 (DB). (AIR 1961 Raj 193 **REVERSED** on the ground of maintainability of suit to set aside the sale.)

**10. Against whom restitution can be granted.** —(1) A right to claim restitution may be enforced against a party or his representative or assignee even if he is not a party to the appeal. AIR 1952 Assam 111 (114) : ILR (1952) 4 Assam 247 ** AIR 1942 Mad 472 (473) : ILR (1942) Mad 949 (DB) ** AIR 1924 Sind 101 (102) : 17 Sind LR 73 (DB) ** AIR 1938 Oudh 169 (170): 14 Luck 106 (DB) ** (1965) 69 Cal WN 117 (118). (S getting decree against N and evicting him and inducting H. Decree reversed. H suing for injunction.)

[But see AIR 1932 Rang 148 (150) : 10 Rang 480 (DB) ** AIR 1930 All 415 (416) (DB).]

(2) A mortgages to C certain property and then sues B, who is in possession thereof, in ejectment, and obtains a decree and gets delivery of possession in execution. Pending appeal by B, C sues on his mortgage, obtains a decree and purchases the property in execution of his decree and obtains possession. A's decree is reversed in appeal. B can claim restitution from C of the property taken from him. AIR 1923 Pat 371 (373) : 2 Pat 277 (DB) ** AIR 1957 Bom 117 (119) (DB) ** AIR 1932 Lah 527 (528, 529) ** AIR 1929 Cal 590 (591) (DB).

**Section 144 — Note 10 (contd.)**

(3) Restitution can be ordered under this section only against a party who has benefited under the reversed decree. AIR 1936 Mad 634 (635) (DB).

(4) Where a decree is assigned and the assignee realises the decretal amount. the right of restitution on the reversal of the decree arises not only against the assignee of the decree but also against the original decree-holder. AIR 1941 Mad 315 (316) : ILR (1941) Mad 498.

(5) No question of defeasance of title of bona fide purchaser by restitution can arise when the decree-holder purchaser has sold and parted with the property to a bona fide stranger purchaser for value. AIR 1964 Mad 404 (406, 407, 411) : 77 Mad LW 233 (DB). (AIR 1963 Mad 243, **REVERSED.**)

(6) A sub-tenant introduced immediately after ejection of previous sub-tenant by the tenant decree-holder is a representative of the erstwhile decree-holder and if restitution can be granted against him it can also be granted against the sub-tenant. (1966) 70 Cal WN 1027 (1034, 1035) ** AIR 1961 Bom 288 (292) : 63 Bom LR 163. (Tenant claiming under Bombay Rent Act.)

(7) The doctrine of lis pendens would apply in case where sub-tenant is upgraded by order of controller in proceeding under Section 16(3) of W. B. Premises Tenancy Act during pendency of proceeding under Section 144. (1966) 70 Cal WN 1027 (1037).

**11. Auction-purchaser.**— (1) The question whether restitution can be claimed against an auction-purchaser depends upon the question whether he is a bona fide purchaser. By the phrase "bona fide purchaser" the Courts imply the test of knowledge of the pending proceedings to set aside the decree, and opportunity to defend his own interest in those proceedings. AIR 1943 Pat 325 (327) : 22 Pat 315 (DB) ** AIR 1924 Sind 101 (103) : 17 Sind LR 73 (DB).

[But see AIR 1917 Mad 250 (253, 254) (DB).]

(2) In the case of bona fide purchasers, the rule is that the sale will be upheld notwithstanding the reversal of the decree. AIR 1954 Pat 36 (37) (DB) ** 1957-1 Mad L Jour 59 (60) ** AIR 1951 All 832 (833) (DB) ** AIR 1951 Orissa 148 (149) : ILR (1950) Cut 168 (DB) ** AIR 1964 Mad 252 (253) : (1965) 1 Mad LJ 444.

(3) There is no distinction in principle between the case of a third party auction purchaser at a sale in execution of a decree on merits and one in execution of an ex parte decree. AIR 1954 Andhra 5 (6): ILR (1955) Andhra 39.

(4) The rule that a bona fide purchaser is not affected by reversal of the decree has no application to cases where through a mistake or material irregularity of the Court the property has been sold. In such cases restitution is ordered not strictly under Section 144 but under Section 151. AIR 1937 Mad 694 (695) ** ILR (1965) 1 Mad 756 (785) (DB).

(5) Execution sale set aside on application by judgment-debtor after depositing decretal amount as scaled down — Application for mesne profits by judgment-debtor against stranger auction purchaser by way of restitution for period of his possession — Restitution can be granted under Section 151 and not under Section 144. AIR 1953 Mad 930 (931).

(6) The reason of the rule upholding an execution sale in favour of a bona fide purchaser disappears where the decree-holder is himself the purchaser, and has notice of all the proceedings in the suit. The decree-holder purchaser will therefore, be bound on the reversal of the decree, to make restitution to the person entitled thereto. (1904) 31 Cal 499 (501, 502) (DB) ** AIR 1916 Mad 706 (707) (DB) ** (1888) 10 All 166 (172) : 15 Ind App 12 (PC) ** AIR 1916 Pat 299 (300) : 1 Pat L Jour 43 (DB) ** AIR 1964 Mad 404 (406) : 77 Mad LW 233 (DB).

(7) An assignee from the decree-holder purchaser will be in no better position than his assignor though he is a bona fide purchaser from the decree-holder and will be bound to make restitution. AIR 1920 Cal 550 (551, 552) (DB) ** AIR 1916 Cal 710 (711) (DB).

[See however (1903) 13 Mad LJ 231 (236) (DB) ** (1890) 30 Mad 295 (297) (DB).]

[But see AIR 1950 Mad 640 (642) (DB).]

(8) Where the decree-holder has parted with his interest in the property and thereafter he enters into a compromise with the judgment-debtor, behind the back of the transferee who has come on the property in good faith and gets the decree set aside, the rights of the transferee will not be affected. AIR 1925 Cal 1074 (1076) (DB).

(9) Purchase made after merely looking into mortgage decree (which was wholly at variance with the terms of the judgment— Auction purchaser cannot be held to be a bona fide purchaser — Restitution can be granted against him. AIR 1964 Mad 252 (253, 254, 255): (1965) 1 Mad LJ 444.

(10) Where a stranger purchaser at an auction sale was not a party to the proceedings to set aside the sale no restitution could be ordered against him. (1966) 1 Andh WR 47 (DB).

**12. Surety — Restitution against. — (1)** No restitution can be claimed under this section as against sureties. AIR 1940 Mad 850 (852)(DB) ** AIR 1919 PC 55 (58): 42 All 158: 46 Ind App 228 ** AIR 1938 Nag 101 (102): ILR (1938) Nag 354 (DB).

**13. Third persons — Restitution against** —(1) This section does not apply to third persons who are neither parties nor their representatives. AIR 1941 All 28 (29) ** AIR 1919 PC 55 (58) : 42 All 158 : 46 Ind App 228 ** AIR 1963 Pat 333 (334) : 1963 BLJR 399 (DB).

**14. Trustee.**—(1) Where a trustee of a temple obtains a decree and in execution

**Section 144 — Note 14 (contd.)**
thereof recovers money and hands it over to the temple and then the decree is reversed in appeal, restitution can be had only against the temple and not against the trustee personally. (1904) 14 Mad L J 377 (378) (DB).

**15. Jurisdiction of Court to grant restitution — Presence of parties.** — (1) The functions of the Court under this section require the presence of those parties who are affected by the variation or reversal of the decree. AIR 1952 Nag 275 (278) : ILR (1952) Nag 534 (DB).

(2) Decree reversed — Restitution proceedings started — Court has to decide whether party is entitled to any benefit before it can pass an order for restitution. AIR 1966 Pat 254 (256) (DB).

(3) Applicant claiming possession from tenants put in possession of the suit premises by the decree-holder — Mere fact that tenants assert that they are tenants of the suit house and are willing to pay rent to any person as decided by Court would not oust jurisdiction of civil Court to grant restitution. AIR 1961 Bom 288 (292) : 63 Bom LR 163.

**16. What Court can grant restitution.**— (1) An application for restitution should be made in all cases to "the Court of first instance" that is, the primary Court that passed the decree in the suit. ILR (1951) 2 Cal 315 (321) ** AIR 1967 All 272 (273) : 1966 All LJ 528 (DB) ** (1962) 66 Cal WN 1068.

(2) It is only the Court which executes the decree that has jurisdiction to order restitution to the parties. AIR 1943 PC 189 (190) : ILR (1944) Kar (PC) 16 ** AIR 1953 Trav-Co 318 (319) : ILR (1953) Trav-Co 143 ** AIR 1927 Mad 898 (899) (DB) ** AIR 1937 All 515 (523, 524) : ILR (1937) All 670 (DB) ** ILR (1963) 1 Ker 533 (535) : 1963 Ker LT 386.

(3) Where the Court of first instance loses its territorial jurisdiction or ceases to exist, the Court which gets such jurisdiction will be "the Court of first instance". AIR 1926 Mad 813 (814) ** AIR 1921 Mad 103 (104) (DB) ** AIR 1937 All 515 (520) : ILR (1937) All 670 (DB) ** AIR 1960 Mys 273 (274, 275) : 38 Mys LJ 617.

(4) Where a decree is transferred for execution to another Court the latter Court can exercise the same powers as the Court of first instance. AIR 1954 Trav-Co 390 (391) : ILR (1954) Trav-Co 346 ** (1913) 7 Sind LR 19 (21). ** AIR 1960 Mys 337 (338) : 38 Mys LJ 922. (District Munsiff executing decree of Court of Village Panchayat under Madras Village Courts Act.)

(5) Transferee Court executing decree — Transferor Court subsequently holding that certificate was wrongly granted, execution being barred — It cannot order restitution. AIR 1961 All 636 (636, 637).

(6) Where a Subordinate Judge in the Madras State reverses in appeal the decree for eviction passed by a Rent Controller under the Madras Act 15 of 1946, the Subordinate Judge can order restitution of possession to the tenant if the landlord has in the meanwhile obtained possession under the Rent Controller's decree. AIR 1951 Mad 804 (805, 806) (DB).

(7) Where a person is ejected by the executing authority on the orders of the trial Court under provisions of West Bengal Land Reforms Act (1955), the application for restitution should be made before the executing authority and not before the trial Court. ('62) 66 Cal WN 1068.

(8) The expression 'the court of the first instance' means the Court which can effectively give the relief by way of restitution to the party making the application. Such a Court need not in all cases be identical with the trial Court since the Court which made the payment or delivered the property may be some other Court. AIR 1964 Mys 117 (118) : (1963) 2 Mys LJ 421 (DB).

**17. "Shall cause restitution to be made".**—(1) This section is mandatory.. AIR 1944 Nag 59 (62) : ILR (1944) Nag 451 (DB) ** AIR 1922 PC 269 (271) : 2 Pat 10 : 49 Ind App 351 ** (1965) 1 Law Rep 763 (766).

(2) The Court has no discretion to refuse restitution in matters falling within the terms of the section. AIR 1920 All 127 (128) ** AIR 1928 Rang 293 (294) (DB). ** AIR 1959 Bom 490 (491) : 60 Bom LR 487 ** AIR 1968 Bom 57 (64) : 69 Bom LR 121 ** AIR 1965 Andh Pra 398 (400) : (1965) 1 Andh WR 335.

(3) It is the legal effect of a decree of reversal that a party against whom the decree reversed was given is to have restitution of all that he had been deprived of under it. AIR 1932 Cal 313 (315) (DB) ** AIR 1920 All 127 (128) ** AIR 1917 Cal 188 (192) (DB) ** AIR 1937 Mad 229 (230) ** AIR 1965 Andh Pra 398 (400) : (1965) 1 Andh WR 335.

(4) It is not necessary that the reversing decree should contain any direction or provision for restitution. AIR 1943 PC 189 (190): ILR (1944) Kar PC 16 ** AIR 1915 PC 92 (93): 38 All 163: 43 Ind App 43 ** AIR 1916 Mad 1204 (1205) (DB) ** AIR 1969 Mad 212 (213). (Right of restitution is a right created by the statute — Specific direction from appellate court not necessary.)

(5) Where the reversing decree contains a direction for restitution, the Court in proceedings for restitution cannot go behind that order which is binding on the parties. AIR 1952 Assam 111 (113): ILR (1952) 4 Assam 247.

(6) Where an application under S. 144 is filed, issue of notice to the respondent, a recording of evidence if necessary and consideration of oral and documentary evidence and the hearing of the arguments for the parties would be normal procedure to the followed by Court. (1965) 1 Law Rep 763 (768).

**Section 144 — Note 17 (contd.)**

(7) In cases not falling within the terms of the section restitution is not a matter of right but depends upon the discretion of the Court and will be ordered only when the justice of the case demands it. AIR 1917 Cal 188 (192) (DB).

(8) Where the property involved was in the possession of one party and went into the possession of another by reason of a judgment and decree, which judgment or decree was reversed in appeal, stay asked for in the second appeal would not be granted to the plaintiff, since if stay were granted it would negative the defendant's right of restitution. AIR 1959 Bom 490 (490, 491): 60 Bom LR 487.

(9) An order for restitution of costs under Section 144 is a decree for payment of money and can be attached. AIR 1960 Andh Pra 544 (545): (1960) 1 Andh WR 29.

**18. "Place the parties in the position which they would have occupied but for such decree . . . as has been varied or reversed."** — (1) The object of restitution is to restore the status quo ante between the parties. AIR 1917 Mad 185 (185): 40 Mad 780 (DB) ** AIR 1918 Mad 1293 (1294) (DB) ** AIR 1920 Cal 919 (920) (DB).

(2) Under sub-section (1) the Court is limited, in granting restitution, to place the parties "in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed". AIR 1937 Mad 229 (230) ** AIR 1935 Cal 206 (208): 62 Cal 217 (DB) ** AIR 1938 Oudh 169 (170): 14 Luck 106 ** AIR 1966 Ker 225 (226, 227): 1966 Ker LT 313 (DB).

(3) The prejudice to be removed by restitution must be the result of the erroneous terms of the original decree. AIR 1949 Oudh 69 (73): 23 Luck 126 (DB) ** AIR 1945 Mad 133 (134) ** AIR 1922 Mad 96 (96) (DB).

(4) Where the judgment-debtor fails to show that the sale of his property was in substance and truth a consequence of the error in the decree that was reversed he cannot invoke the aid of this section. AIR 1953 SC 136 (139): 1953 SCR 559: ILR (1953) 2 All 367.

(5) Where A obtains a decree against B for Rs. 8000 and the same is modified in appeal into a decree for Rs. 7500 and in the meanwhile B's properties X and Y are sold for Rs. 7000 and Rs. 3000 respectively in execution of the original decree to the decree-holder himself, B is not prejudiced by the sale and the sale ought not to be set aside. AIR 1946 Mad 258 (260) (DB) ** AIR 1922 Mad 96 (96) (DB) ** AIR 1932 Cal 303 (307): 59 Cal 647 (DB) ** AIR 1941 Pat 130 (132) (DB).

[But see (1904) 27 Mad 98 (101) (DB) ** AIR 1920 Cal 550 (552) (DB).]

(6) Where the decree subsequently passed in appeal is for a larger amount than the amount due under the original decree, this section will have no application. AIR 1942 PC 30 (31): ILR (1942) Kar (PC) 14: 69 Ind App 10.

(7) Where a decree which was partly satisfied in execution was transferred to another Court for execution but the certificate of non-satisfaction sent along with the decree did not mention that any amount was realised towards the decree and the transferee Court sold the property in execution, it was held that the sale in favour of the decree-holder auction-purchaser could not be set aside by way of restitution. AIR 1952 Trav-Co 72 (74) (DB).

(8) The restoration is to be as nearly as possible to the positions of the parties at the time the erroneous order was passed and not to later positions taken up by them of their own accord as resulting from that order. AIR 1917 Pat 55 (58) (DB) ** AIR 1929 All 527 (528) ** AIR 1929 Oudh 426 (426): 5 Luck 302 (FB).

(9) Restoration may be ordered after taking evidence in the matter, if necessary. AIR 1920 Cal 919 (919, 920) (DB) ** (1898) 8 Mad L Jour 276 (278).

(10) Where a party has obtained possession or recovered money under an erroneous decree, the party deprived of it would have lost the profit of the property or the interest on the money, of which he had been deprived. The Court has therefore been empowered to pass "any orders including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits" consequential on the variation or reversal of the decree. (1912) 14 Ind Cas 456 (457) (DB) (Cal) ** AIR 1934 All 626 (631) (FB) ** AIR 1935 PC 12 (13).

(11) The restitution claimed must have been properly consequential on the reversal or variation. AIR 1943 All 202 (203): ILR (1943) All 312 (DB) ** AIR 1941 Lah 343 (344) (DB) ** AIR 1940 Oudh 1 (7): 15 Luck 43.

(12) Where an objection on the ground of limitation was overruled and a sale was held in execution in spite of the objection it was held that on the Appellate Court reversing this decision the judgment-debtor, who had got the sale set aside by making a deposit under Order 21, Rule 89, was entitled to a refund of the money deposited, under this section. AIR 1943 All 267 (269, 270): ILR (1943) All 510 (DB). (AIR 1942 All 14, **REVERSED.**)

(13) Decree for possession of land in favour of plaintiff reversed — Defendant starting restitution proceeding — Plaintiff cannot plead that he has given possession of land to State Government under Bihar Land Reforms Act — As no ac-

**Section 144 — Note 18 (contd.)**
tion under Section 4 (g) of Bihar Land Reforms Act is taken State Government also cannot claim possession of land —Redelivery of land to defendant ordered with mesne profits. AIR 1966 Pat 254 (256, 257, 258) ** AIR 1961 Mys 238 (239, 240): 39 Mys LJ 378. (Where injury is attributable to act of Court — Improvement made to property by non-applicant cannot be claimed in restitution proceeding.)

**19. "So far as may be."** — (1) Where it is not possible to restore the exact status quo ante between the parties, the Court can grant damages. (1911) 12 Ind Cas 105 (105) (DB) (Mad) ** (1889) 13 Bom 485 (488).

(2) Where A who has obtained possession of land from B under a decree, digs out earth from the land, manufactures bricks therefrom and sells them at a profit but the decree is subsequently set aside on appeal, the fair basis on which restitution should be allowed to B would be to award him the value of depreciation in the land due to the action of A. AIR 1952 Mad 656 (658).

(3) Where each party is found entitled to restitution from the other, the restitution should, as nearly as possible be simultaneous. AIR 1917 Pat 55 (57) (DB) ** AIR 1929 Rang 157 (158): 7 Rang 107 (DB).

(4) Where a decree for pre-emption obtained by a plaintiff is reversed in appeal, the plaintiff is entitled to restitution of the money deposited by him and which had been taken by the defendant vendee. AIR 1934 All 13 (14) (DB).

(5) Restitution cannot be ordered so as to prejudice the rights of third parties. AIR 1950 Mad 199 (200) ** AIR 1937 Lah 169 (170).

(6) On an application for restitution of property the Court may, if it is necessary, appoint a receiver and make over the property to him until the claims of the parties are finally decided. AIR 1941 Lah 343 (344, 345) (DB) ** AIR 1957 Ker 37 (38).

(7) Where, in a suit for possession of land cash allowance was not the subject-matter of the suit and as such no amount was recovered by the decree-holder in execution of his decree but in second appeal a consent decree was passed providing for cash allowance and in subsequent proceedings for restitution of possession the judgment-debtors claimed also the cash allowance:

**Held,** that the order for payment of cash allowance could not be passed in the restitution proceedings. AIR 1957 Bom 117 (119) (DB).

(8) Where a portion of the leased property is demolished by the corporation as being in a dilapidated condition, the tenant is entitled to be restituted to possession of the demised property other than the structure demolished. AIR 1961 Cal 70 (75).

(9) In restitution status quo ante not to be achieved blindly. The Court should ascertain that the benefit claimed has not been extinguished or mitigated by supervening events. 1966 All LJ 510.

(10) It cannot be said that suitable terms have to be imposed on the party before restitution is ordered and money allowed to be withdrawn. AIR 1966 Ker 225 (227): 1966 Ker LT 313 (DB).

**20. Mesne profits.** — (1) The use of the words 'damages', 'compensation' and 'mesne profits' indicates that the possession obtained under an erroneous decree subsequently reversed is wrongful possession. AIR 1915 Mad 1133 (1134) (DB) ** AIR 1930 Cal 89 (91, 92): 56 Cal 550 (DB) ** AIR 1939 All 66 (69): ILR (1939) All 103 (DB).

(2) On the reversal of the decree, the judgment-debtor will be not only entitled to the possession of the property taken from him but also to mesne profits during the period he was kept out of possession. AIR 1953 Trav-Co 612 (613) (FB) ** AIR 1940 Mad 850 (861) (DB) ** AIR 1929 Cal 590 (591) (DB) ** AIR 1939 All 66 (69): ILR (1939) All 103 (DB) ** 1960 Andh LT 303 (304).

(3) Where the Appellate Court sets aside the decree and remands the case for fresh or further enquiry, an application for mesne profits by the successful appellant will be premature and cannot be granted, though the possession taken from him will be restored. AIR 1940 Bom 30 (32) ** AIR 1923 Nag 101 (101): 18 Nag LR 200.

(4) The criterion for the calculation of mesne profits is what the person in wrongful possession actually realized or could have, with due diligence, realized. AIR 1948 PC 178 (179) ** AIR 1937 Cal 478 (480) (DB) ** AIR 1935 Cal 206 (207): 62 Cal 217 ** AIR 1959 Andh Pra 182 (184, 185): (1958) 2 Andh WR 641 (DB).

[But see (1872) 17 Suth WR 257 (258) (DB).]

(5) The person in wrongful possession is not liable for the gross profits but for the net profits after making all legitimate deductions, such as collection charges, etc. AIR 1941 Mad 36 (37): ILR (1941) Mad 212 (FB). (AIR 1917 Mad 314. **OVERRULED.**) ** AIR 1937 Cal 478 (480) (DB).

(6) Where a judgment-debtor is granted restitution by way of mesne profits against the decree-holder auction-purchaser the former is entitled to set off the mesne profits awarded against the decretal amount due. (1912) 14 Ind Cas 456 (457) (DB) (Cal).

(7) Although a claim for mesne profits is not made by a party in the suit, the Court would be able to grant mesne profits, if requirements of this section

**Section 144 — Note 20 (contd.)**
are fulfilled. AIR 1961 Madh Pra 200 (203, 204): 1961 MPLJ 273.

(8) Interest on mesne profits is a matter resting in the sound discretion of the Court. 1962 Ker LJ 1063.

(9) Mesne profits is not what the person out of possession could have realised if he had not been dispossessed. It is what the person in wrongful possession actually realised or could have realised with due diligence. 1966 Ker LT 939: 1966 Ker LJ 844.

(10) Restitution of property on reversal of decree for eviction — Possession of plaintiff before restitution held wrongful from the inception in view of retrospective operation of Act amending the Malabar Tenancy Act—Mesne profits allowed were properly consequential on reversal of decree. 1962 Ker LJ 1063. (That the interest on mesne profits, was a matter resting in the sound discretion of the Court — AIR 1940 Bom 30 Disting.)

(11) Defendants held entitled to claim interest on mesne profits decreed to them from end of each year. 1966 Ker LT 939: 1966 Ker LJ 844.

(12) The party dispossessed could only get mesne profits for the period during which he was out of possession when he gets restitution. AIR 1959 Andh Pra 182 (182, 184): (1958) 2 Andh WR 641 (DB).

(13) The expression 'mesne profits' as used in Section 144 has the same connotation as that in Section 2 (2). AIR 1959 Andh Pra 182 (184): (1958) 2 Andh WR 641 ** 1966 Ker LT 939: 1966 Ker LJ 844.

**21. Interest.** — (1) Where money is paid under the erroneous decree to the decree-holder, the decree-holder would be bound to pay interest on the amount which he is obliged to repay from date of payment. AIR 1963 Mad 45 (49): (1962) 2 Mad LJ 362 (FB) ** (1854) 6 Moo Ind App 1 (26, 27) (PC) ** AIR 1935 PC 12 (13) ** AIR 1962 Ker 297 (297, 298): 1961 Ker LT 871 ** AIR 1961 Mad 160 (162): (1961) 1 Mad LJ 370.

(2) The interest is payable not only up to the date of the application for restitution but also up to the date of realisation. AIR 1941 Mad 36 (37): ILR (1941) Mad 212 (FB) ** AIR 1965 Andh Pra 398 (402): (1965) 1 Andh WR 335.

(3) Where the Court gives a specific direction for refund of a certain amount without giving any direction as to interest, no interest will be allowed. AIR 1940 Cal 260 (264): ILR (1940) 1 Cal 486 (DB).

(4) The rate of interest allowable is in the judicial discretion of the Court which will not be interfered with in appeal. AIR 1922 PC 233 (234): 44 Mad 570: 48 Ind App 150 ** AIR 1961 Mad 160 (162): (1961) 1 Mad LJ 370.

(5) Ordinarily, unless special circumstances are shown, the court rate of interest is to be allowed. AIR 1943 All 267 (270): ILR (1943) All 510 (DB) ** AIR 1943 Pat 427 (430) (DB) ** AIR 1941 Nag 195 (196): ILR (1942) Nag 273 (DB)

(6) In granting restitution, it is the injury which has been caused to the party who is ultimately successful, that the Court seeks to remedy. The Court is not concerned with the actual benefit which may or may not have been gained by the other party. AIR 1933 Mad 33 (35, 37): 55 Mad 1025 (DB) ** AIR 1925 Bom 313 (314) (DB) ** AIR 1929 Pat 593 (594) (DB) ** AIR 1968 Raj 327 (329, 330) (DB).

[But see AIR 1925 Rang 215 (217): 3 Rang 251 (DB) ** (1913) 19 Ind Cas 1 (1) (DB) (All).]

(7) The position of both the parties is to be considered and interest is not to be ordered in such cases unless the party from whom interest is claimed has in some way benefited by the money deposited in Court or is in some way to blame. AIR 1943 Pat 427 (429) (DB) ** AIR 1942 Mad 166 (167) (DB) ** AIR 1940 Pesh 44 (47).

(8) Where money is deposited in Court in satisfaction of the decree and no restitution is placed on the decree-holder drawing the amount, he would be bound to pay interest on the amount which he is obliged to repay from the date of deposit. AIR 1963 Mad 45 (49): (1962) 2 Mad LJ 362 (FB).

(9) Where money deposited towards the decree and there is an obstacle placed like furnishing of security, but the decree-holder furnishes such security and draws the amount, the decree-holder will be bound to pay interest on such amount from the date the obstacle is removed (albeit by the act of the decree-holder). AIR 1963 Mad 45 (49): (1962) 2 Mad LJ 362 (FB) ** AIR 1968 Raj 327 (330) (DB).

(10) Where money is deposited towards the decree with an obstacle like furnishing security, and the decree-holder (either because he is unwilling to or is unable to furnish security) allows the money to remain in Court and does not use it the decree-holder normally would not be liable to pay interest on the money. AIR 1963 Mad 45 (49) : (1962) 2 Mad LJ 362 (FB). (ILR 23 Mad 306, AIR 1943 Pat 427; AIR 1961 Mad 160, Rel. on; AIR 1933 Mad 33 (2); AIR 1940 Mad 15; AIR 1960 Mad 278, **OVERRULED;** AIR 1959 Mad 558 **REVERSED.)** ** AIR 1969 Ker 31 (33, 34): 1968 Ker LT 442 (DB) ** AIR 1965 Andh Pra 398 (402): (1965) 1 Andh WR 335 ** AIR 1961 Mad 160 (161): (1961) 1 Mad LJ 370.

(11) Pre-emptor obtaining possession of land in execution by depositing sale-price in Court — Decree reversed in appeal — Vendees not withdrawing money deposited by pre-emptor though they

**Section 144 — Note 21 (contd.)**
were not debarred from doing so. Hence vendees liable to pay interest on deposited amount — Interest on deposit exceeding compensation due — Compensation though due, not admissible as interest on deposit exceeded compensation. AIR 1964 Punj 470 (471, 472): 66 Pun LR 241 (DB).

(12) Right of party to claim interest by way of restitution is not confined to the award of interest only on the money paid by the party. Interest can be awarded on the cost paid by the party. AIR 1969 Mad 212 (213).

**22. Refund of compensation money in land acquisition cases.**— (1) Where Government deposits money in a land acquisition case and that is taken by a party and on appeal to the High Court the amount payable is reduced, the party must refund the excess amount to the Government with interest in accordance with the principle of restitution. (1911) 35 Bom 255 (257) (DB) ** AIR 1930 Mad 577 (578): 53 Mad 708 (DB).

**23. Possession of property or money obtained otherwise than in execution.** — (1) For the application of the section the possession of the property or money need not have been obtained in execution of the decree which was subsequently reversed. AIR 1951 Trav-Co 226 (1) (226) (DB) ** (1913) 21 Ind Cas 84 (85) (DB) (Cal).

(2) The section would apply even if the possession of the property or money was taken otherwise than in execution provided it was obtained under colour of or in consequence of, the decree. AIR 1951 Trav-Co 226 (1) (226) (DB) ** AIR 1941 Pat 577 (581): 20 Pat 346 (DB) ** AIR 1920 All 190 (191): 42 All 568 (DB).

(3) Where possession is obtained by the decree-holder independent of, and in opposition to, the decree, this section does not apply. AIR 1918 Mad 1293 (1294) (DB) ** AIR 1937 Mad 315 (316).

**24. Splitting up claim of restitution.** — (1) The principle of constructive res judicata, whether Section 11, Explanation IV or Order 2, Rule 2 of the Code is invoked in its aid, cannot be applied to proceedings under this section. AIR 1917 Mad 185 (185): 40 Mad 780 (DB) ** AIR 1919 Sind 79 (79): 13 Sind LR 153 (DB) ** AIR 1935 All 195 (197).

(2) Where A is entitled to the restoration of a property and mesne profits, a first application for the restitution of the property does not bar a subsequent application for the mesne profits. AIR 1918 Pat 396 (397): 3 Pat L Jour 367 (DB) ** AIR 1921 Nag 112 (113): 17 Nag LR 62 ** AIR 1935 Cal 206 (208): 62 Cal 217 (DB).

(3) An application for interest on damages or an amount paid to a decree-holder under a decree subsequently reversed in appeal and of which restitution was obtained in a prior application is not barred as res judicata. AIR 1917 Mad 185 (185) : 40 Mad 780 (DB) ** AIR 1935 All 195 (197).

(4) Application for restitution under Section 144 — Dismissal for default can not bar subsequent application for same purpose. AIR 1962 Madh Pra 295 (296): 1962 MPLJ 338.

(5) The principle of constructive res judicata applies to an execution proceeding under Section 144 in respect of a matter which was decided expressly or by implication in a proceeding but not where the previous application was dismissed for default. AIR 1968 Pat 270 (271).

**25. Security for restitution.** — (1) The Appellate Court has an inherent power to call upon the respondent to furnish security for the due performance of any decree that might be made in appeal. (1905) 33 Cal 927 (934, 942) (DB).

(2) Where a decree-holder, at the time of the withdrawal of money, executes a security bond by which the principal alone is secured, the Court is not deprived thereby of the power to award interest also under this section, if the decree is subsequently reversed. AIR 1917 Pat 696 (696): 2 Pat L Jour 149 (DB) ** AIR 1930 Mad 577 (578): 53 Mad 708 (DB).

[But see AIR 1932 Bom 326 (327) (DB).]

(3) The word "restitution" in O. 41, Rule 6 has no reference at all to the restitution proper in Section 144. Therefore, a party who seeks to draw out his own money put in by the other side, by way of restitution need not furnish any security under Order 41, Rule 6 simply because a Letters Patent appeal has been filed by the other side. AIR 1958 Mad 366 (367, 368).

**26. Bar of suit.** — (1) Sub-section (2) makes it clear that "no suit shall be instituted" for any relief which could be claimed by way of application under sub-section (1). AIR 1943 PC 189 (191): ILR (1944) Kar (PC) 16 ** AIR 1951 Mad 804 (806) (DB) ** AIR 1961 Madh Pra 200 (204): 1961 MPLJ 273. (Where mesne profits could but were not, claimed.)

(2) Even if a case does not fall within the strict terms of this section, the Court will not, in the interests of justice, be astute to force the parties to a separate suit. AIR 1938 Pat 468 (470) ** 17 Ind Cas 121 (123) (DB) (Cal).

(3) The bar of suit under sub-s. (2) arises only in cases where it can be strictly shown to come within the scope of sub-section (1) and arising as a direct result of a variance or reversal of the decree and not in other cases. AIR 1955 Mad 173 (176).

**Section 144 — Note 26 (contd.)**

(4) Where restitution cannot be obtained by an application under S. 144 (1) a suit will not be barred. AIR 1955 All 526 (527): ILR (1956) 1 All 209 (DB) ** AIR 1958 Ker 84 (85) ** AIR 1955 Mad 173 (176).

(5) A suit will not be barred under sub-section (2) where the relief claimed is not properly consequential on the variation or reversal of the decree. AIR 1922 All 465 (467): 44 All 687 (DB) ** AIR 1931 Cal 517 (517): 58 Cal 465 ** AIR 1939 All 66 (69): ILR (1939) All 103 (DB).

**27. Nature of proceedings under the section.** — (1) Prior to the decision in Mahijibhai v. Manibhai, **AIR 1965 SC 1477,** it was held that proceedings under Section 144 are not proceedings in execution. AIR 1956 Nag 129 (130): ILR (1956) Nag 305 (DB) ** AIR 1942 All 85 (87, 88): ILR (1941) All 807 (DB) ** AIR 1964 Mys 117 (119): (1963) 2 Mys LJ 421 (DB.

[But see AIR 1923 Nag 101 (101): 18 Nag LR 200.]

(2) It was also held in some cases that proceedings under Section 144 are in the nature of execution proceedings. AIR 1922 All 238 (238): 44 All 555 (DB) ** AIR 1918 Lah 378 (379, 380): 1918 Pun Re No. 67 (DB).

(3) In some other cases it was held that an application under this section is to be treated as a miscellaneous judicial case arising out of the suit. ILR (1951) 2 Cal 315 (321) ** AIR 1958 Punj 132 (135): ILR (1958) Punj 407 (FB).

(4) It is now settled by the Supreme Court in Mahijibhai v. Manibhai, **AIR 1965 SC 1477** that an application for restitution is an application for execution of a decree. **AIR 1965 SC 1477 (1486):** (1965) 2 SCR 929. (AIR 1934 All 626 (FB) and AIR 1932 Cal 308 and AIR 1928 Cal 646 and AIR 1947 Nag 239 and AIR 1958 Punj 132 (FB), **OVERRULED;** AIR 1922 PC 269, Rel. on.)

[See also AIR 1952 Trav-Co 40 (41) (DB) ** 1957 BLJR 534 (536) ** AIR 1926 Mad 813 (814) ** AIR 1934 Pat 246 (248, 251, 253): 13 Pat 411 (FB). **(OVERRULING** AIR 1925 Pat 1: 3 Pat 371 (FB) and AIR 1928 Pat 598: 7 Pat 794.) ** AIR 1966 SC 1194 (1195, 1196): (1966) 3 SCR 479. (Principle of res judicata applies to it—**AIR 1965 SC 1477** Foll.) ** (1965) 31 Cut LT 798: (1965) 7 OJD 269.]

[But see AIR 1941 Oudh 297 (298): 16 Luck 591 (DB) ** AIR 1939 Rang 32 (34): 1938 Rang LR 635 (DB) ** AIR 1915 Low Bur 141 (142): 8 Low Bur Rul 262 ** AIR 1930 Rang 241 (242, 243): 8 Rang 271.]

(5) As the application is one in execution, then Section 141 would not apply thereto. AIR 1922 All 223 (226): 44 All 407 (DB) ** AIR 1957 Bom 117 (119) (DB).

[But see AIR 1953 Nag 153 (154): ILR (1953) Nag 649.]

(6) In respect of a claim for restitution no Court-fee will be payable. (1962) 1 Mad LJ 381.

(7) Restitution proceedings under this section are essentially proceedings in execution and can only be between parties on the same array. AIR 1963 Ker 195 (197): 1963 Ker LT 1179.

**28. Appeal — Tenability of.** — (1) The determination of a question under this section has been expressly declared to be a decree under Section 2 (2) and is appealable as such under Section 96. AIR 1953 Trav-Co 318 (319): ILR (1953) Trav-Co 143 ** AIR 1949 All 730 (732): ILR (1949) All 313 (DB) ** AIR 1941 Nag 313 (313): ILR (1941) Nag 662 (DB) ** AIR 1934 Pat 109 (109): 13 Pat 108 (DB).

(2) An adjudication in an application for restitution not falling within S. 144 amounts to a decree. AIR 1948 Cal 37 (38) ** AIR 1927 Cal 285 (286) (DB) ** AIR 1918 Pat 52 (53): 2 Pat L Jour 206 (DB).

[But see AIR 1937 Cal 152 (155, 156): ILR (1937) 1 Cal 637 (DB) ** AIR 1954 Pat 36 (37) (DB).]

(3) An order for restitution under Section 151 is appealable on the analogy of an order under this section. AIR 1943 Nag 172 (174): ILR (1943) Nag 699 ** AIR 1940 Nag 349 (352): ILR (1940) Nag 538 (DB) ** AIR 1938 Nag 326 (328): ILR (1939) Nag 350 (DB).

(4) An order for restitution made as between the parties to the suit would be appealable as falling under S. 47 though it is not covered by this section. AIR 1936 Mad 636 (638).

(5) An order passed under Section 151 is not appealable either as a decree or an appealable order if it does not fall either under Section 47 or under this section. AIR 1950 Mad 463 (468, 471) (FB). (AIR 1941 Mad 564, **OVERRULED.)** ** AIR 1958 Pat 547 (548).

(6) An order for restitution under Section 151 is not appealable. AIR 1940 Lah 59 (61) (DB) ** AIR 1939 Lah 508 (508) (DB) ** Madh BLJ 1954 HCR 286 (287) ** AIR 1939 Oudh 273 (275) (DB) ** 1963 Ker LJ 424: 1963 Ker LT 531.

(7) The decision in order to constitute a determination of a question under this section and therefore a decree, must have been one on the merits of the application and must not relate to matters incidentally connected with or collateral to the decision of any such question. AIR 1914 Lah 415 (416): 1913 Pun Re No. 110 (DB) ** AIR 1933 Pat 498 (499) (DB).

(8) An order on an application on the Original Side of the High Court under this section is not a "judgment" within the meaning of Clause 13 of the Letters Patent of the Rangoon High

**Section 144 — Note 28 (contd.)**
Court and hence is not appealable. AIR 1938 Rang 446 (446) (DB).

(9) An order determining a question under Section 144 being a decree a second appeal will be maintainable. 1957 BLJR 534 (536).

(10) Application for restitution of profits under Sections 144 and 151 — Appeal and second appeal held maintainable. 1960 Andh LT 303 (304).

**29. Inherent power of Court to grant restitution.** — (1) The jurisdiction to make restitution is inherent in every Court and will be exercised whenever the justice of the case demands it. AIR 1948 All 252 (254): ILR (1948) All 62 (FB) ** AIR 1954 Cal 544 (547) (DB) ** AIR 1952 Nag 190 (192): ILR (1951) Nag 780 (DB) ** AIR 1941 PC 128 (129): 21 Pat 243: ILR (1941) Kar PC 150 ** AIR 1922 PC 269 (271): 49 Ind App 351: 2 Pat 10 ** AIR 1952 Assam 42 (42, 43): ILR (1951) 3 Assam 246 (DB) ** 1965 Raj LW 5: ILR (1965) 15 Raj 170 ** AIR 1969 J and K 8 (9). (Mistake of the Court or of its officer.)

(2) Inherent powers will be exercised, where an application is not strictly within this section. AIR 1956 Madh B 226 (228): ILR (1956) Madh B 280 ** AIR 1958 Ker 84 (85) ** AIR 1955 Mad 173 (175, 176) ** AIR 1931 Cal 779 (780) (DB) ** (1966) 2 Andh WR 144 (148) (DB).

(3) Where a party is deprived of the fruits of his decree by order of the Court the executing Court has power to make restitution under Section 151 read with Section 47. AIR 1955 Nag 29 (31): ILR (1955) Nag 425 (DB) ** AIR 1953 All 573 (576) ** AIR 1953 Mad 930 (931) ** AIR 1961 Madh Pra 200 (203): 1961 MPLJ 273 ** 1965 Raj LW 5: ILR (1965) 15 Raj 170.

(4) While the section is mandatory the exercise of the power under S. 151 depends upon the discretion of the Court which will be used only in the interests of justice. AIR 1954 Cal 544 (546) (DB) ** AIR 1952 Nag 190 (192): ILR (1951) Nag 780 (DB) ** AIR 1937 Mad 178 (179) (DB).

(5) Where the applicant for restitution having another remedy open to him has failed to avail himself of the same, the Court will not grant restitution under its inherent powers. AIR 1953 All 573 (574) ** ILR (1953) 2 Cal 385 (388) ** AIR 1946 All 329 (331).

[But see AIR 1951 Punj 106 (108).]

(6) Where there is no other remedy, it is not only necessary, but it is the bounden duty of the Court to exercise its inherent powers to set matters right. ILR (1953) 2 Cal 385 (388).

(7) The Court will not refuse an application which on the merits the Court can grant, simply because the application is made under this section which is not applicable to the case. ILR (1953) 2 Cal 385 (386, 387).

(8) The inherent powers of a Court do not extend to convert an application which has nothing to do with restitution into one for restitution. AIR 1917 Mad 453 (453) (DB).

(9) The inherent powers of a Court do not extend to ordering restitution against a person who is neither a party to nor bound by any order of the appellate or revising Court. AIR 1919 Mad 581 (581): 41 Mad 467 (DB).

(10) Where a suit challenging the defendant's title and praying for declaration of possession is decreed by the trial Court but is dismissed by the Privy Council, the defendant will not be entitled to get possession by way of restitution under Sections 144 and 151 if his title to the property has been extinguished by twelve years' adverse possession by the plaintiff. AIR 1945 PC 5 (8): ILR (1945) Kar (PC) 43.

(11) Inherent jurisdiction to order restitution can be exercised by persona designata entrusted with duties of Court. AIR 1960 Mys 337 (338): 38 Mys LJ 922.

(12) Where payments were made as a result of an interim stay order which ultimately turned out to be wrong.

**Held,** that under the provisions of Section 144 as well as under the inherent powers of the Court, the High Court had power to direct the repayment of the amounts drawn by the respondent. The Court had also power in its inherent jurisdiction to direct payment of interest on the amounts utilised by the respondent. 1960-2 Lab LJ 281 (Andh Pra).

(13) Where judgment-debtor's clerk, by mistake, paid money to a wrong person instead of depositing into Court, held that restitution could not be granted. In view of definite provision under S. 144, powers under Section 151 would not be exercised. AIR 1969 Guj 55 (62).

**30. Revenue Court.** — (1) The jurisdiction to make restitution being inherent in all Courts, the principles of Section 144 will apply to Revenue Courts also. (1904) 26 All 149 (151, 152) (DB) ** AIR 1922 All 71 (72): 44 All 283 (DB) ** (1918) 46 Ind Cas 475 (476) (Rev) (Bur) ** AIR 1966 Andh Pra 4 (7): (1965) 2 Andh WR 197 (DB) ** (1967) 1 Mad LJ 287 (288): 80 Mad LW 42.

(2) As per Rule 10 framed under Section 85 of Punjab Tenancy Act 1887, proceedings before a Revenue Officer would be governed by C. P. C. and he can exercise powers under Section 144. ILR (1963) 2 Punj 701 (705, 706).

(3) Decree in favour of pre-emptor and delivery of possession to him being not in accordance with provisions of Punjab Security of Land Tenures Act (1953), Section 17-A, executing Court could entertain application of tenants for

**145. Enforcement of liability of surety.**—Where any person has become liable as surety—

(a) for the performance of any decree or any part thereof, or

(b) for the restitution of any property taken in execution of a decree, or

(c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceedings consequent thereon,

the decree or order may be executed against him, to the extent to which he has rendered himself personally liable in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of Section 47:

Provided that such notice as the Court in each case thinks sufficient has been given to the surety.

[1877, S. 253; 1859, S. 204; See S. 55 (4); O. 25, R. 1; O. 38, Rr. 2 and 5; O. 41, R. 10; O. 45, R. 7.]

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**Section 144 — Note 30 (contd.)**
restoration of possession. (1964) 66 Pun LR 24.

**31. Rent Controller.** — (1) The section does not in terms apply to a case where the order of the Rent Controller fixing a higher standard rent is reversed in appeal. But the principle underlying this section applies. AIR 1954 Cal 13 (13) (DB).

(2) Where appellant was dispossessed from disputed land by virtue of order of Rent Controller executed by the Munsif, restitution could be ordered by the Court. AIR 1963 Pat 333 (335): 1963 BLJR 399 (DB).

(3) An application for restitution being an application in execution is maintainable only in the Court of the Munsif and not before the Rent Controller. (1966) 31 Cut LT 798.

**32. Revision.** — (1) No revision lies from an order on an application falling under Section 144, for such an order is appealable as a decree under S. 2 (2). AIR 1949 Pat 133 (137): 27 Pat 873 (FB) ** AIR 1935 All 873 (875) ** AIR 1966 Mys 112 (115): (1965) 1 Mys LJ 786 ** (1966) 32 Cut LT 393 (395): ILR (1965) Cut 943.

(2) Where the Court refuses to order restitution in the exercise of its discretion in a case not falling within S. 144, the order is not open to revision. AIR 1914 Lah 9 (11): 1914 Pun Re No. 10 (DB).

(3) Where the order is held not to amount to a decree and no other remedy is open, a revision will lie. 1902 Pun Re No. 76, p. 301 (304) ** AIR 1934 Lah 108 (108) ** (1885) 8 Mad 494 (495).

## SECTION 145 — SYNOPSIS

1. Scope, applicability and object.
2. Security by person primarily responsible.
3. Security in favour of the Court.
4. "Has become liable as surety."
5. Security for the performance of decree.
6. Security for restitution of property.
7. Security for fulfilment of condition.
8. "Under an order of the Court."
9. Suit or proceedings.
10. Execution against surety.
11. Extent of execution.
12. Manner of execution.
13. Discharge of surety.
14. Recovery of sum forfeited.
15. Form of surety bond.
16. Enforceability of surety bond apart from the section.
17. Separate suit by or against surety.
18. Appeal.
19. Notice to surety.

**1. Scope, applicability and object.**— (1) This section dispenses with the necessity of a suit and enables the party for whose benefit the security has been given to enforce the security by execution proceedings in the same manner as if the surety was a party to the decree or order in respect of which security has been given. AIR 1945 Mad 288 (291): ILR (1943) Mad 509 (DB) **(1874) 2 Ind App 219 (233) (PC) ** (1968) 2 Mys LJ 124 (125): 15 Law Rep 388.

[See also AIR 1952 Trav-Co 40 (42) (DB).]

(2) It cannot be laid down as a general proposition that the provisions of Section 145 and Order 32, Rule 6 (2) are mutually exclusive. The nature of the bond is what really matters in determining the question whether it is one falling under Section 145 or under Order 32, R. 6 (2). AIR 1957 Trav-Co 151 (152): ILR (1956) Trav-Co 1156 (DB).

(3) If otherwise the security bond is in order and valid, there need be no re-attachment of the released properties merely to enable the parties to rectify the mistake in that bond. It is open to the parties to rectify the mistake if the validity of the bond is not otherwise affected. AIR 1958 Assam 15 (16) (DB).

## STATE AMENDMENT

**Uttar Pradesh**

For the existing Section 145, the following shall be substituted:—

"145. Where any person has become liable as surety or given any property as security—

(a) for the performance of any decree or any part thereof, or

(b) for the restitution of any property taken in execution of any decree, or

(c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon,

the decree or order may be executed in the manner herein provided for the execution of decrees;

(i) if he has rendered himself personally liable, against him to that extent, and

(ii) if he has given any property as security, by sale of such property to the extent of the security;

and such person shall, for the purposes of appeal, be deemed to be a party within the meaning of Section 47:

Provided that such notice as the Court in each case thinks sufficient has been given to the surety.

Explanation.—For the purposes of this section a person entrusted by a Court with custody of any property attached in execution of any decree or order shall be deemed to have become liable as surety for the restitution of such property within the meaning of clause (b)." — U. P. Act 24 of 1954, S. 2 and Sch., Item 5, entry 8 (30-11-1954).

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**Section 145 — Note 1 (contd.)**

(4) If a property is seized in execution of a decree and made over to a custodian, and the custodian commits default, that decree may be executed in the prescribed manner. The provision in Section 145, Civil P. C., however, is meant for the protection of the decree-holder, at whose instance the property is attached and made over to a custodian. The provision is not meant for the benefit of all the persons, who hold various decrees against the same judgment-debtor. Explanation to the section merely points out the true effect of Clause (b) and does not materially alter the general plan of the section. AIR 1966 All 250 (252): 1965 All LJ 604 (DB).

(5) A surety would not be liable merely because by the surety bond he has made himself liable to pay a certain sum to the plaintiff if the defendant lost the suit. What can be executed against the surety is the decree or order passed by the Court and it can be executed to the extent to which the surety has rendered himself personally liable. Unless there is an order capable of execution for the recovery of a sum of money for which the security bond had been furnished, Section 145 can have no application. AIR 1961 Cal 43 (44, 45, 46): ILR (1961) 1 Cal 658 (DB). (AIR 1943 PC 189: (1943) 2 MLJ 460 and AIR 1934 Cal 569 and AIR 1957 Madh Pra 98, Dist.)

(6) The obligations of the surety are different from those of the receiver, and are governed by Section 145 of the Civil P. C., whereas the obligations of the receiver are governed by Order 48 of the Code. Any obligation of the surety under Sec. 145 has to be enforced within 3 years of the cause of action as per Article 182 of the Limitation Act. AIR 1962 Ker 105 (106): 1961 Ker LT 765.

(7) Section 145 does not expressly bar the suit against the surety. The procedure laid down in that section is clearly intended to be a summary procedure without in any manner taking away or curtailing a right which a citizen possesses under ordinary law of the land of having civil disputes adjudicated upon by a suit under Section 9. The Legislature did not intend to bar a suit for the purposes of enforcing the liability of the surety. AIR 1961 Punj 8 (10, 11): 63 Pun LR 107.

(8) Surety of a judgment-debtor cannot be said to be a judgment-debtor. Liability of a surety is however not a distinct and separate liability. It arises because the judgment-debtor has failed to discharge the claim against him, as such Section 73, Civil P. C. would not apply. AIR 1966 Raj 194 (197): 1966 Raj LW 175. (AIR 1942 Oudh 491 and AIR 1940 Nag 79, **DISSENTED.**)

**2. Security by person primarily responsible.**— (1) The section has no application unless the person sought to be proceeded against has taken upon himself the liability of another. AIR 1939 Cal 316 (319) (DB) ** AIR 1933 Mad 691 (693): 56 Mad 989 (DB).

(2) The liability need not be that of either the judgment-debtor or the decree-holder but it may be the liability of an officer of the Court. AIR 1939 Cal 316 (319) (DB).

[See AIR 1928 Nag 294 (294) ** AIR 1916 Mad 521 (522): 39 Mad 584 (DB).]

**Section 145 — Note 2 (contd.)**

(3) This section applies to the enforcement of the liability of a person who has stood surety for a receiver. AIR 1940 Rang 151 (151) (DB) ** AIR 1915 Cal 331 (334) (DB).

(4) Security means and includes the filing into Court of an enforceable document for the purpose of giving assurance to the decree-holder about payment of the money due to him under the decree. Such a purpose can be achieved only if the bond put into Court by the obligor could be converted into a legally enforceable security without any further act to be performed by him. ILR (1958) Mad 590 (593).

(5) Bond providing for payment of balance due after sale of hypothecated properties — Bond is personal. AIR 1960 Mad 324 (325): (1960) 1 Mad LJ 148.

**3. Security in favour of the Court.**— (1) The security under this section is intended to be given to some named officer or other individual and not to be a mere undertaking to the Court. The Court is not a juridical person. It cannot be sued. It cannot take property and as it cannot take property it cannot assign it. AIR 1945 Sind 146 (148): ILR (1945) Kar 116 ** AIR 1942 Lah 6 (10) (DB) ** AIR 1955 Hyd 261 (263): ILR (1955) Hyd 754 (DB) ** AIR 1949 Mad 152 (153) (DB) ** AIR 1961 Andh Pra 339 (341): (1964) 1 Andh WR 374 (DB).

[But see AIR 1958 Assam 15 (16) (DB). (The document is not illegal, merely because the name of the presiding officer of the Court or any other officer thereof has not been mentioned therein.)]

(2) Independently of this section a security bond in favour of the Court can be enforced by an order on an application to which the sureties are parties that the properties charged be sold unless, before a day named, the sureties find the money. AIR 1955 Hyd 261 (263): ILR (1955) Hyd 754 (DB) ** AIR 1957 Madh Pra 98 (104, 105) (DB) ** ILR (1954) Cut 556 (560) (DB) ** AIR 1943 PC 189 (191, 192): ILR (1944) Kar PC 16.

[See also AIR 1936 Mad 589 (591).]

(3) A security bond was executed in favour of a certificate officer under the Bengal Public Demands Recovery Act in respect of a debt due by a certificate-debtor to a certificate-holder. It was held that the certificate officer who was deemed to be a Court under Section 57 of the Act, could not maintain a suit on the surety bond, and that the certificate holder as the beneficiary under the bond could sue on it. AIR 1937 Cal 625 (630): ILR (1937) 2 Cal 698 (DB).

(4) No tripartite contractual obligation is created between the parties to the suit and the surety when the latter gives his surety bond to the Court. AIR 1957 Madh Pra 98 (104, 105) (DB).

(5) Bond for enforcement of decree — Bond filed in Court of District Munsif — Plaint returned for presentation to proper Court and re-presented in Court of Sub-Judge — It can be enforced in Court of Sub-Judge if the terms of the bond were sufficiently wide to cover the case of a decree passed in a suit in a Court other than that of the District Munsif. The validity of the bond and the liability under it did not require the acceptance of the bond by a Court having jurisdiction as a condition precedent. AIR 1960 Andh Pra 507 (508, 509) (DB).

(6) Sections 135 to 139 of the Contract Act do not apply in terms to a surety bond executed in favour of a Court. But the principles contained in these sections continue to apply to a surety bond executed in favour of a Court. AIR 1962 J and K 72 (74): 1962 Kash LJ 23 (DB). (AIR 1944 Lah 428 and AIR 1957 Cal 645, Rel. on.) ** AIR 1959 Bom 516 (517): 1958 Nag LJ 72.

(7) Section 145 is an enabling provision and does not bar the ordinary rights of suit. Assignment of a security bond cannot be insisted upon. Though a security bond is executed in the name of a Court its holder can enforce it, the benefit under the bond being secured to him. 1965 Ker LT 10 (12).

**4. "Has become liable as surety."**— (1) A person executed a surety bond in pursuance of an order of Court under Order 38, Rule 5 in order to avoid an attachment before judgment making himself personally liable to the extent of the decretal amount in case the suit was decreed against the defendant. The bond was delivered to the Nazir and the property was not attached. Shortly after, however, the surety took the bond by force from the possession of the peon accompanying the Nazir and tore it off. It was held that the surety bond had become complete as soon as it was delivered to the Nazir and it could be enforced against the surety under this section by executing the decree against him. 1955 Raj LW 208 (209, 210) ** AIR 1964 Guj 260 (261): (1964) 5 Guj LR 1074. (Decree cannot be executed against surety without complying with provisions of Section 145.)

(2) Where there was no undertaking by the defendants that they bound themselves to pay the mesne profits as a condition for obtaining the stay order, defendants could not be said to have become liable as sureties under Clauses (a), (b) and (c) of Section 145. AIR 1953 Pat 289 (292).

(3) Where in an application for payment of money due to him the party executes a bond in favour of the Court tendering the properties described therein as security for the amount and undertaking that he would pay the amount to the minor defendants on their attaining majority and on demand being made for that amount he would deposit the same in the Court and in

**Section 145 — Note 4 (contd.)**
case of default the same might be recovered from himself and the properties secured, the party is acting as a surety in respect of the amount belonging to the minors and is not executing a bond as contemplated by Order 32, Rule 6. The bond can therefore be enforced in execution under Section 145. AIR 1957 Trav-Co 151 (152, 153): ILR (1956) Trav-Co 1156 (DB).

(4) Section 145 applies when person has become liable as surety — Where merely prohibitory order is issued under Order 21, Rule 46 (1) and attachment made in that manner, person to whom prohibitory order is issued does not become surety for performance of decree — Section 145 does not apply. **AIR 1967 SC 1080 (1081): (1967) 1 SCR 207.** (AIR 1961 Assam 121, Affirmed.) ** AIR 1961 Assam 121 (122) (DB). (AIR 1936 All 555, Distinguished.)

(5) The words 'become liable' in Section 145 (a) do not indicate that the surety should become liable at the time when he gives the surety bond. (1961) 1 Andh WR 147 (149) (DB).

(6) Section 145 is not confined to surety as such; on the other hand it purports to determine the liability of a person who has become liable as a surety. The words 'has become liable as a surety' should not be confined to surety in the strict sense of the term as used in the Contract Act. A supurdar who receives properties from an officer of the Court and undertakes to produce the property in Court should not be permitted to evade his liability on a requisition by the Court under Section 145 and to insist that he can only be proceeded against in a regular suit. He can be proceeded against under Section 145. 1961 Raj LW 31 (32): ILR (1961) 11 Raj 818.

**5. Security for the performance of decree.**— (1) The present section applies to securities for the performance of any decree whether original or appellate, and to all securities whether given before or subsequent to the passing of a decree. AIR 1935 Lah 189 (190).

(2) The words of the section are wide enough to cover a case where an ex parte decree is set aside on security being given for the performance of the decree that may be passed at the re-hearing. See (1889) 26 Cal 222 (224).

(3) Judgment-debtor released from arrest on execution of surety bond by surety that on failure of judgment-debtor to pay within certain period, he would be liable for it — Execution can be taken out against surety. AIR 1934 Mad 186 (189): 57 Mad 688 (DB).

(4) The words 'any decree' in Sec. 145, Clause (a) of the Civil P. C. are wide enough to include a decree that may be passed after a person becomes a surety. The present Section 145, has made a substantial alteration and is more comprehensive than the old Code of 1882. This section includes the cases of sureties either before or after the decree, whether original or appellate, by the use of the words 'any decree.' The words of the section 'where any person has become liable as a surety, (a) for the purposes of any decree or any part thereof are clear enough to cover the case of a surety who has given security prior to the decree for the enforcement of any decree when passed.

Laches as such do not impair the remedy of the decree-holder, unless any act of his falls within Section 139 of the Contract Act. The surety can always apply in the Insolvency proceedings as any other creditor for payment of his debts; as such, it cannot be said that the debt against the creditor has been extinguished or that he is unable to recover it. (1961) 1 Andh WR 147 (151) (DB).

**6. Security for restitution of property.**— (1) Where moveable property is attached under Order 21, Rule 43 of the Code, and the attaching officer makes over such property to a third person on his passing a security bond for the production of such property in Court when called upon, Section 145, Clause (b) has no application to the case. The reason is that this clause is prima facie intended for cases in which restitution is sought against a party who has taken the property in execution of the decree or order in his favour and the custodian of attached property under Order 21, Rule 43 cannot be said to be person who has "taken the property in execution of a decree." AIR 1956 Mad 201 (206, 207) ** AIR 1935 All 767 (769) ** AIR 1921 Nag 130 (131) ** AIR 1920 All 245 (245): 42 All 894.

[But see AIR 1933 Mad 219 (220) ** AIR 1924 Nag 258 (262, 263): 20 Nag LR 93 (DB). (**OVERRULING** AIR 1919 Nag 25: 16 Nag LR 178 and 13 CPLR 104.) ** AIR 1949 All 306 (308): ILR (1949) All 869 (DB) ** AIR 1931 All 567 (568, 571): 54 All 263 (FB). (Impliedly Overruling AIR 1926 All 406: 48 All 510.) ** AIR 1928 Lah 181 (183) (DB).]

(2) Where property is entrusted by an attaching officer to a watchman from whom no bond is taken for the safe custody and safe return of the property attached and the arrangement is not approved of by the Court, the custodian is not liable as a surety under this section. But when a bond is taken from the custodian which is approved of by the Court the custodian renders himself liable under this section. AIR 1950 All 699 (700).

(3) A surety is a person who guarantees the performance of an obligation by another and a person to whom moveable property attached in execution is handed over for safe custody will be liable to be proceeded against under this section as a surety only if the primary responsibility for producing the thing when required rests on

**Section 145 — Note 6 (contd.)**

another person, say the officer of the Court who has attached it, and not where the responsibility is only that of the person giving security for the safe custody of the property. AIR 1939 Cal 316 (319) (DB).

(4) A supurdar really takes property which has been taken out in connection with the execution of a decree and when he is called upon to produce the property he is arranging for its production or restitution. A supurdar's case does fall within the language of Clause (b) of Sec. 145. Further the supurdar's liability can also be enforced under Section 145 (c). Bearing in mind that the properties attached in execution of a decree are entrusted to a supurdar according to a practice approved by Courts and that the bonds executed by him are produced in and accepted and acted upon by Courts, it may safely be held that supurdars take the properties and agree to produce them when required by the Court under an implied order of the Court. 1961 Raj LW 31 (32): ILR (1961) 11 Raj 818.

(5) A surety bond executed by the Supurdar (custodian of attached live-stock) for the restitution of the property taken in execution of the decree against the judgment-debtor, is not affected in any way by the subsequent contract for the performance of the decree which was entered into between the appellate Court, the judgment-debtor and another surety, as a condition for stay of execution granted by the appellate Court pending the disposed of appeal filed by the judgment-debtor against an order dismissing his objection to attachment. 1962 Raj LW 711 (712): ILR (1963) 13 Raj 391. (AIR 1939 Bom 23, Disting.)

**7. Security for fulfilment of condition.**— (1) The section applies to securities for the fulfilment of a condition imposed upon a person under an order of the Court. AIR 1917 Mad 237 (238).

(2) This section is applicable to a person who is a surety for himself just as much as to one who is a surety for some one else. AIR 1931 Rang 65 (65).

(3) Clause (a) of Section 145 of C. P. Code is of a general nature and was designed to set at rest the conflict under Section 263 of the Code of 1882 and to make it wide enough to cover a decree that has already been passed as well as a decree that may be passed after the person concerned has become liable as surety, as also to suretyship given for the performance of appellate decrees.

Three conditions are necessary for the applicability of Clause (c) of Section 145, namely, that the person should be liable as a surety, that he undertakes the performance of the decree and that there is a personal liability. AIR 1967 Andh Pra 234 (235): (1967) 1 Andh WR 118 (DB).

**8. "Under an order of the Court."**— (1) Clause (c) will apply only where there is an order of the Court for the payment of money or for the fulfilment of any condition imposed on any person. Where the proceedings against the surety are not to enforce any decree or order of the Court, the section will not apply. AIR 1952 Trav Co 237 (238): ILR (1952) Trav-Co 144 (DB) ** AIR 1933 All 269 (272): 55 All 346 (FB).

(2) Where, under Order 21, Rule 43, moveable property is attached and made over by the attaching officer to a third person on his passing a bond undertaking to produce the property in Court whenever required, the liability of the surety arises not under any order of the Court but from an act of the attaching officer under an authority conferred on him by law, and therefore the section did not apply to such cases. AIR 1926 Mad 1005 (1006) (DB).

[But see AIR 1933 Mad 219 (220).]

(3) The 'order' referred to is one enforceable through execution by one party to the suit or proceeding against another party thereto: where therefore security is given on behalf of the next friend of a minor under Order 32, Rule 6 for withdrawing the latter's money from Court, it is not done under any order of the Court in favour of one party enforceable against another party, but under an order passed for the protection of the minor's interest against that minor's own next friend and therefore Section 145 does not apply to the case. AIR 1918 Mad 661 (663): 41 Mad 40 (DB) ** AIR 1934 Mad 262 (263): 57 Mad 803 (DB).

(4) Where a next friend of a minor plaintiff applied for withdrawing the minor's money from Court to be utilized for purchasing Government Promissory Notes and depositing the same in Court and he was allowed to do so on security, it was held that Section 145 would apply and the security could be enforced in execution. AIR 1933 Mad 678 (679): 56 Mad 687 (FB).

**9. Suit or proceedings.**— (1) The order imposing the condition must be passed "in any suit or any proceedings consequent thereon." AIR 1928 Rang 249 (252): 6 Rang 474 ** AIR 1926 Sind 35 (36): 19 Sind LR 390 (DB).

[See also AIR 1925 Sind 25 (26): 17 Sind LR 257.]

(2) A proceeding for the grant of letters of administration though it may take the form of a suit is not a "suit or a proceeding consequent thereon." Hence, a surety under an administration bond does not come within the purview of this section. AIR 1928 Rang 249 (252): 6 Rang 474.

[See however AIR 1926 Sind 35 (36): 19 Sind LR 390 (DB). (Can section be applied to such case by virtue of Section 141? — Per Kennedy J. C., Yes — Per Rupchand Bilaram A. J. C., No.)]

(3) Where the judgment-debtor deposited the decree amount into Court and the next friend of the minor decree-holder applied

**Section 145 — Note 9 (contd.)**

for withdrawing the money and for re-depositing it in the form of Government Promissory Notes, it was held that such an application was a "proceeding consequent on the suit" and that a surety for such re-deposit can be proceeded against under this section. AIR 1933 Mad 678 (678, 679): 56 Mad 687.

(4) Where after a writ petition challenging allotment of some land in petitioner's favour was dismissed, the respondents (writ petitioners) moved the High Court for leave to appeal to the Supreme Court and obtained stay of delivery of possession after furnishing security for mesne profits, the surety making himself personally liable as well as hypothecating his property under the surety bond, and after dismissal of the appeal by the Supreme Court, the petitioner moved the High Court for giving effect to the stay order by enforcing the security for mesne profits either under Section 145 or Section 151 :

**Held,** that as the proceedings in civil writs were analogous and akin to proceedings in civil suits, the matter was covered by Section 145. In any event, there could be no bar to the application of Section 151. AIR 1960 Punj 16 (18): ILR (1959) Punj 532. (AIR 1928 Rang 249 and AIR 1926 Sind 35 and AIR 1950 EP 111, Dist.)

**10. Execution against surety.**— (1) This section provides for the enforcement of the surety's liability by execution against the surety of the decree or order in connection with which the security was given. AIR 1956 All 32 (33).

(2) To enforce surety's liability the Court is not bound to issue execution against the surety. It has a discretion to refuse such execution. AIR 1922 Bom 340 (341): 46 Bom 702 ** AIR 1957 Madh Pra 98 (104, 105) (DB) ** AIR 1925 Rang 135 (137): 2 Rang 567 (DB).

(3) If execution is issued the Court cannot declare a forfeiture in favour of the Government but the security money should be paid to the decree-holder. (1912) 39 Cal 1048 (1050) (DB) ** AIR 1936 Sind 244 (246): 30 Sind LR 177.

(4) The legality of the order for security cannot be questioned by the surety in the execution proceedings against him under this section. AIR 1936 Cal 143 (145).

(5) For the purpose of determining the jurisdiction of the Court to proceed against the surety, the same considerations will apply as if he were a judgment-debtor against whom a decree was being executed. 1940 Nag L Jour 244 (246, 247) (DB).

(6) The section does not mean that the application for execution against the surety must necessarily be in the form set out in Order 21, Rule 11. The section only means that the security can be enforced in any manner provided for the execution of decrees, that is, by arrest, attachment, etc. AIR 1942 Sind 134 (135): ILR (1942) Kar 79 (DB).

(7) If an order staying the execution of the decree is granted by a Court, it is restricted in its operation to the actual parties to the decree and it will not deter the decree-holder from seeking execution against the surety. AIR 1953 Hyd 111 (112): ILR (1953) Hyd 51 (DB).

(8) Where the sureties execute a security bond to enable the judgment-debtor to get the money from the military authorities for payment to the decree-holder and the judgment-debtor obtains the money from the military authorities, the sureties ought to see that the judgment-debtor deposits the money in the Court. But where they did not care to see as to what happened to the money received by the judgment-debtor, an order of the executing Court to the judgment-debtor to produce the bills or the value of the same is not necessary. It cannot be said that the liability of the sureties would arise only when the Court required the property from the judgment-debtor and he did not produce it. AIR 1957 Madh Pra 98 (106) (DB).

(9) Where the bonds showed that the condition precedent for the enforcement of surety's liability is an adjudication by a Civil Court on matters referred to it in the surety bond, if the suit is dismissed in consequence of a tenancy decision going against the plaintiff and accepted by him, it is an adjudication by a Civil Court on merits, and sureties, would be liable to be proceeded against in execution. (1968) 1 Mys LJ 195 (197): 14 Law Rep 88.

(10) Where in a bond executed by a surety he undertook to pay a certain sum on failure of the judgment-debtor to comply with an ejectment decree passed against him, even though the plaintiff could not enforce the decree due to provisions of Rent Act yet he could enforce the same in execution proceedings against the surety, without filing a separate suit. (1968) 70 Pun LR 237 (240): 1968 Cur LJ 199.

**11. Extent of execution.**— (1) The section applies only where the surety has rendered himself personally liable. AIR 1956 All 32 (33)** AIR 1954 Pepsu 3 (4): ILR (1953) Patiala 59** ILR (1954) Cut 556 (561) (DB)** AIR 1916 Cal 30 (30) (DB)** AIR 1934 Mad 262 (263): 57 Mad 863 (DB).

[See also AIR 1953 Pat 289 (292).]

(2) Where a surety bond does not create a personal liability but merely creates a charge or mortgage on the surety's property, it cannot be enforced by proceedings under this section. AIR 1954 Pepsu 3 (4): ILR (1953) Patiala 59** ILR (1954) Cut 556 (560) (DB)** AIR 1943 PC 189 (191): ILR (1944) Kar PC 16** AIR 1928 Bom 42 (48): 52 Bom 72 (DB)** AIR 1934 Lah 138 (139): 15 Lah 282 (FB).

[See also AIR 1945 PC 91 (93): 72 Ind App 165: ILR (1945) Lah 411: ILR (1945) Kar (PC) 269.]

**Section 145 — Note 11 (contd.)**

(3) Where the charge on the surety's property is declared by the decree itself, the liability can be enforced by executing the decree and no suit on the mortgage is necessary. The reason is that in such a case the surety is virtually in the position of a judgment-debtor. AIR 1926 Cal 889 (891, 892): 54 Cal 1 (DB) ** AIR 1928 Lah 209 (210, 212).

(4) Where the surety makes himself personally liable and, in addition, charges his property, it is only the personal liability that can be enforced under this section. AIR 1934 Oudh 139 (140): 9 Luck 534 (DB) ** AIR 1935 Oudh 510 (514, 515): 11 Luck 449 ** AIR 1964 Andh Pra 339 (341): (1964) 1 Andh WR 374 (DB) ** AIR 1961 Andh Pra 413 (415): (1960) 2 Andh WR 510 (DB). (If the decree-holder is trying to enforce the charge created, he could not do so under Section 145, Civil P. C., and his only remedy would be by way of suit.)

(5) The decree-holder may give up the mortgage and enforce the personal liability of the surety by attachment and sale of the property charged. AIR 1926 Bom 279 (280): 50 Bom 339 (DB) ** AIR 1927 Mad 416 (420) (DB) ** AIR 1916 All 57 (59): 38 All 327 (DB) ** AIR 1917 Pat 596 (596): 2 Pat L Jour 197 (DB).

[See also AIR 1917 All 104 (106): 39 All 225 ** AIR 1928 Lah 802 (803, 804) ** AIR 1917 Cal 82 (83, 84).]

(6) A compromise petition filed in the execution case recited that the surety shall remain liable to the decree-holder for the stipulated sum of Rs. 9,000 and her property described in the schedule thereunder would be subject to attachment until the said amount had been duly paid to the decree-holder. It was held that it created a personal liability against the surety to the extent of the amount mentioned and the decree-holder was therefore, entitled to execute the decree as against the surety and proceed to attach and sell her property. AIR 1957 Assam 153 (155) (DB).

(7) Where a judgment-debtor himself gives his property as security, the property can be sold in execution under Section 47. AIR 1953 Trav-Co 364 (367) (DB) ** AIR 1924 Cal 485 (487): 51 Cal 150 (DB) ** (1875) 2 Ind App 219 (233) (PC).

(8) A surety for costs payable by a party to a suit is personally liable for the costs and the mere fact that he deposits a certain amount by way of security does not exclude his personal liability. AIR 1932 Mad 188 (188) (DB).

(9) The surety's liability is co-extensive with that of the judgment-debtor and he is jointly and severally liable with the judgment-debtor for the decree amount. A decree against the principal can, in fact, be treated as a decree against him. AIR 1954 Pepsu 3 (3): ILR (1953) Patiala 59 ** AIR 1934 Bom 252 (254): 58 Bom 485 (DB) ** AIR 1960 Raj 319 (320): 1960 Raj LW 375 (DB).

(10) The party for whose benefit security has been given is not bound to execute the decree against the judgment-debtor before proceeding against the surety, except where the decree otherwise provides. AIR 1954 Pepsu 3 (3): ILR (1953) Patiala 59 ** AIR 1933 Nag 287 (289) ** AIR 1929 Lah 393 (394) ** AIR 1926 All 657 (657) (DB).

(11) Within the limits prescribed by the security bond, the surety's liability extends to any amount recoverable from the judgment-debtor. AIR 1929 All 905 (906) (DB) ** (1907) 30 Mad 167 (168) (DB) ** (1899) 23 Bom 478 (483, 484) (DB).

(12) Where under a surety bond a person undertakes to discharge the decree-liability of the defendant to the extent of a particular amount the surety cannot be held liable to pay interest on the sum mentioned in the bond when there is nothing in the bond to make him liable for interest. AIR 1957 Trav-Co 233 (234) ** 1959 Ker LT 419 (420): 1959 Ker LJ 380.

(13) Where a surety undertakes a liability not contained in the decree, he cannot afterwards dispute it. AIR 1927 Mad 416 (421) (DB).

[See also AIR 1952 Trav-Co 237 (239): ILR (1952) Trav-Co 144 (DB).]

[But see AIR 1925 Pat 128 (129) (DB).]

(14) The fact that security has been given does not take away any legal rights which the decree-holder may otherwise have. He is not bound to proceed only against the properties specified in the security bond but is entitled to attach and sell the property of the judgment-debtor which he could otherwise have proceeded against. AIR 1918 Pat 384 (385) (DB).

(15) The provision in the security bond for a deposit of twice the value of the goods on default of the production is clearly in the nature of a penalty and inserted in terrorism. In such case the Court has undoubted powers, in the exercise of its equitable jurisdiction to relieve the party and confine his liability to the extent of a reasonable compensation to the other side not exceeding the penalty stipulated for. AIR 1959 Ker 273 (275): 1958 Ker LT 801.

(16) Where a Hindu father has become liable as a surety under this section, the liability can be enforced by execution proceedings under this section against the sons' share in the joint family property to the same extent as if a decree had been passed against the father. AIR 1938 Nag 148 (149): ILR (1939) Nag 536 (DB).

(17) Stay of execution pending appeal by judgment-debtors on furnishing security -- Surety bond stating that judgment-debtors would act in accordance with decree of appellate Court and that if they did not he (surety) would pay personally specified amount to decree-holders — The decree

**Section 145 — Note 11 (contd.)**
holder was not entitled to proceed against the surety unless and until he first exhausted his remedy against the property of the deceased in the hands of the judgment-debtors and unless the judgment-debtors were held under Section 52 (2), Civil P. C. (1908), to be personally liable to pay any amount to the decree-holder. AIR 1960 Madh Pra 68 (69, 70): 1960 MPLJ 81.

(18) Property attached and in custody of sapurdar ordered to be sold — Appeal by defendants against order — Defendants obtaining stay of execution pending on appeal — Property becoming unmarketable during appeal period — Appeal dismissed — Defendants are liable for the deterioration of the property. AIR 1958 Punj 348 (350).

(19) On a decree on a negotiable instrument the maker alone will be liable. But where the decree is against another person also as guarantor, the decree must be treated as separate decree and the plaintiff has first to proceed in execution against the maker of the negotiable instrument and only if that execution fails the decree may be executed against the guarantor. (1965) 2 Mad LJ 502 (503) ** AIR 1964 Mad 233 (234): (1963) 2 Mad LJ 552 (DB).

**12. Manner of execution.** — (1) The expression "in the manner herein provided for the execution of decrees" in this section attracts the provisions of Section 48. AIR 1949 Mad 285 (287): ILR (1948) Mad 504 (DB).

(2) Where the attached vehicles in the custody of the sapurdar were damaged due to his negligence, a petition for an order against him to restore the vehicles in the same condition in which they were is maintainable. No suit need be instituted against him. AIR 1958 Punj 348 (349).

**13. Discharge of surety.**

(a) Construction of Bond. — (1) The question whether a surety has incurred liability under his bond depends upon the terms of the bond. AIR 1945 PC 91 (93): 72 Ind App 165: ILR (1945) Lah 411: ILR (1945) Kar (PC) 269 ** AIR 1957 Assam 71 (73): ILR (1957) 9 Assam 183 (DB).

(2) Where there is a doubt about the construction of the surety bond, it must be considered in the light of the order directing security to be given. AIR 1965 Cal 242 (244, 245) (DB) ** 1960 MPLJ 293 (297): 1959 Jab LJ 764. (Where words are equally applicable to two or more persons or to two or more things, it is a latent ambiguity and in such a case extrinsic evidence is admissible to resolve it.) ** AIR 1934 Mad 186 (188): 57 Mad 688 (DB) ** AIR 1934 Cal 569 (570): 61 Cal 890 (DB) ** AIR 1932 PC 131 (132).

(3) A security bond must be construed strictly. AIR 1967 Mys 147 (149): (1965) 2 Mys 87 ** 1942 Nag L Jour 39 (40, 41) ** AIR 1957 Trav-Co 233 (234) ** AIR 1941 Mad 151 (152).

(4) A surety cannot be held liable except to the extent to which he is clearly bound. AIR 1947 Nag 91 (92): ILR (1946) Nag 666 (DB) ** AIR 1957 Trav-Co 233 (234) ** AIR 1928 Bom 42 (46): 50 Bom 72 (DB).

[See also 1953 AMLJ 80 (81).]

(5) If it is reasonably clear that the contingency in which the bond is sought to be enforced would not fall within the language of the condition, it is not permissible to override that language in the light of what the parties intended, if they did not succeed in expressing that intention in suitable language. If, on the other hand, on a fair reading of the bond in the light of the surrounding circumstances, the most important of such circumstances being the order pursuant to which the security is given, the Court considers that the contingency in which the security is sought to be availed of falls reasonably within the language of the condition which is sufficiently wide to comprehend it, there is no rule compelling the Court to adopt the stricter of the two constructions to both of which the language may be susceptible AIR 1948 Mad 302 (305) (DB).

(6) Where a surety guarantees the performance of any decree that might be passed against a party, and the bond is not expressly limited to the Court's decree, the bond must be taken to have reference to the ultimate issue of the suit. Thus, it will extend to a decree passed on appeal, or on remand by the Appellate Court, or on a restoration of the suit dismissed once for default. AIR 1932 Cal 858 (860): 59 Cal 1450 (DB) ** AIR 1953 Madh B 77 (79): ILR (1953) Madh B 57. (Bond will extend to decree passed on appeal.) ** AIR 1919 PC 55 (57): 42 All 158: 46 Ind App 228: 22 Oudh Cas 212. (Do.) ** (1878) 3 Bom 204 (206) (FB). (Decree on remand.) ** AIR 1941 Nag 61 (63): ILR (1942) Nag 189. (Decree upon restoration of suit.) ** AIR 1935 Mad 365 (367): 58 Mad 721 (FB). (Do.)

(b) Consent and compromise. — (1) The surety bond will apply even to a consent decree provided there is no fraud or collusion in obtaining it; and provided that such decree is not excluded by or is not outside the scope of the security bond. AIR 1961 Ker 312 (314): 1960 Ker LT 866 (DB) ** AIR 1957 Assam 71 (73): ILR (1957) 9 Assam 183 (DB) ** (1950) 55 Mys HCR 7 (9, 10) (DB).

(2) A contract between the creditor and principal debtor, by which the creditor promises to give time to, or not to sue, the principal debtor, discharges the surety unless the surety assents to such contract. AIR 1958 Andh Pra 512 (513) (DB). (Discharge of principal debtor (judgment-debtor) by compromise between him and decree-holder.) ** AIR 1927 Cal 239 (240) (DB). (Creditor promising to give time.) ** AIR 1926 All 657 (658). (Creditor promising

**Section 145 — Note 13 (contd.)**

not to sue.) ** (1901) 23 All 137 (147): 27 Ind App 168 (PC).

[See however ('39) AIR 1939 Mad 76 (76).]

[But see (1900) 22 All 351 (352) (DB).]

(3) Whether the surety under this section is discharged by the creditor entering into a compromise with the principal debtor depends on the terms of the security bond. (1963) 3 SCR 921 (926) ** 1964 Ker LJ 198 (200): ILR (1964) 1 Ker 503 (DB) ** AIR 1962 J and K 72 (75): 1962 Kash LJ 23 (DB) ** AIR 1931 Bom 55 (56): 55 Bom 97 (DB) ** AIR 1928 Cal 177 (178): 55 Cal 91 (DB) ** AIR 1920 Mad 355 (357): 43 Mad 272 (DB).

[But see 1967 All LJ 273 (274). (AIR 1931 Bom 55, **DISSENT.**)]

(c) Co-extensive liability. — (1) The surety's liability being co-extensive with that of the principal debtor, the extinction or diminution of the latter's liability operates as a discharge of the surety to a corresponding extent. AIR 1951 Pat 602 (606): 30 Pat 784 (DB) ** (1888) 12 Bom 71 (76) (DB) ** AIR 1923 Mad 340 (341, 344) (DB).

[See AIR 1940 Bom 247 (249): ILR (1940) Bom 387 (DB).]

[See however AIR 1944 Nag 277 (277).]

(2) A surety is bound as long as the judgment-debtor is bound. Hence, when the decree is sought to be executed against the surety, no uncertified payment by the judgment-debtor can be recognized by the executing Court. AIR 1923 Cal 313 (313) (DB) ** AIR 1926 Mad 674 (675): 49 Mad 325 (DB).

[But see AIR 1926 Sind 105 (107): 20 Sind LR 362.]

(3) Sureties for satisfaction of decree — Enforcement of surety bond against one or release of one does not operate as discharge of others — Their liability though joint and several is not distinct. AIR 1966 SC 1427 (1431): (1966) 3 SCR 451.

(d) General. — (1) Where the security bond guarantees performance of any money decree that might be passed, the decree continues to be a decree for payment of money though it is made payable in instalments. AIR 1957 Assam 71 (73): ILR (1957) 9 Assam 183 (DB).

(2) Where an attachment before judgment is removed on security being furnished under Order 38, Rule 5, the surety's liability comes to an end on the dismissal of the suit by the original Court. AIR 1915 Mad 653 (654) (DB) ** AIR 1915 Lah 217 (218).

(3) It has been held that though the suit is dismissed by the trial Court, but is decreed in appeal, the liability of the surety under Order 38, Rule 5, extends to the appellate decree also. AIR 1937 All 682 (684) ** AIR 1937 Sind 272 (272): 31 Sind LR 165 (DB) ** AIR 1927 Bom 84 (85): 51 Bom 31 (DB).

[See also AIR 1953 Mys 68 (70, 71): ILR (1953) Mys 277 (DB).]

(4) The liability cannot apply to a different proceeding altogether. Where a person gives security for production of property in one suit, he cannot be called upon to produce it in another. AIR 1941 Nag 339 (342): ILR (1942) Nag 198 ** AIR 1924 All 64 (65).

(5) Under the law the surety bond has to be given irrespective of any conditional order of attachment and even without the existence of any such order. Surety cannot, therefore, take advantage of the removal by the defendant or somebody on his behalf or by person who was for the time being in custody of the property of the defendant conditionally attached under Order 38, Rule 5. Such removal does not affect the surety's liability under the bond. AIR 1957 Assam 71 (73): ILR (1957) 9 Assam 183 (DB).

(6) Where the defendant applying to set aside an ex parte decree furnishes security under Section 17 of the Provincial Small Causes Courts Act, for the performance of the decree, the security only applies to the ex parte decree itself in case the application should fail. Hence where the ex parte decree is set aside the surety is discharged and he is not liable in respect of the decree that may be passed subsequently. AIR 1968 Andh Pra 306: (1967) 2 Andh WR 15 ** AIR 1954 Hyd 24 (25): ILR (1953) Hyd 526 ** ILR (1957) Andh Pra 162 (164) ** AIR 1936 All 593 (593).

(7) A surety for the appearance of judgment-debtor is discharged if the judgment-debtor is in jail for a criminal offence and cannot be produced on the required date. AIR 1923 Rang 26 (26): 4 Upp Bur Rul 99.

[But see AIR 1922 All 390 (390). 44 All 174 (DB).]

(8) A surety for the appearance of the judgment-debtor if a particular pending proceeding is dismissed, is discharged if on the dismissal of such proceeding the judgment-debtor surrenders himself before the Court. AIR 1933 Cal 337 (338) (DB).

(9) Where a judgment-debtor is released on security, but owing to the default of the decree-holder the execution petition is dismissed and the surety discharged, the liability is not automatically revived by the mere restoration of the execution petition. AIR 1934 Lah 349 (351).

[See AIR 1937 Mad 721 (723).]

(10) Where the surety has bound himself to make the judgment-debtor pay the decree amount on a specified date, or, in default, to pay it himself, the judgment-debtor's death before the prescribed date does not end the surety's liability. (1910) 8 Ind Cas 985 (986) (Low Bur).

[But see AIR 1923 Rang 26 (26): 4 Upp Bur Rul 99.]

(11) A surety under Order 38, Rule 5 (attachment before judgment) is not dis-

**Section 145 — Note 13 (contd.)**

charged by the death of the defendant pending the suit where the cause of action survives against the legal representative and the legal representative is brought on the record. But where a person who is not the legal representative is brought on the record and a decree is passed against the estate of the deceased, neither the legal representative nor the surety is bound by the decree. AIR 1916 Bom 55 (56): 41 Bom 402 (DB) ** AIR 1924 Lah 428 (429) ** AIR 1927 Bom 63 (65): 50 Bom 802 (DB) (Person not legal representative brought on record.)

(12) Where the Court varies the terms of the security bond without the surety's consent, the surety is discharged. AIR 1926 Bom 565 (566) (DB).

(13) Where the variation of the terms of the security bond is obviously for the benefit of the surety, he is not discharged. AIR 1926 Sind 105 (108): 20 Sind LR 362.

(14) If the Court in whose favour the surety bond is executed is not in the least responsible for the change in the situation of the surety, the surety is not entitled to ask the Court to relieve him of his obligation under the bond on the ground that the decree-holder has arrived at a certain arrangement with the debtor. AIR 1967 Mys 147 (149): (1965) 2 Mys LJ 87 ** AIR 1962 Orissa 54 (56 and 59): ILR (1961) Cut 356 (DB). (The principles of Sections 133 to 139, Contract Act do apply where the creditor compounds and grants time to the debtor without surety's consent. In such a case the equitable principle is applicable and the surety is relieved of his liability.) ** AIR 1935 Nag 258 (263, 264): 31 Nag LR (Sup) 83 (DB).

[See also AIR 1936 Lah 470 (471).]

(15) The surety is discharged by the failure of the creditor to sue the principal debtor within the period of limitation. (1902) 24 All 504 (508) (DB) ** (1889) 11 All 310 (313) (DB) ** (1896) 2 Upp Bur Rul 308 (310) ** (1906) 2 Nag LR 42 (44).

[But see AIR 1925 Bom 244 (245): 49 Bom 202 (DB) ** (1886) 12 Cal 330 (333) (DB) ** (1910) 33 Mad 308 (310) (DB) ** AIR 1936 All 549 (552) (DB).]

(16) A surety is discharged by the failure of the consideration for his bond. AIR 1929 Lah 770 (771): 11 Lah 77 (DB).

(17) Where the surety has not performed his obligation because the decree-holder has expressly dispensed with its performance the surety is not liable to be proceeded against under his bond. AIR 1925 All 5 (6) ** AIR 1924 Mad 241 (242) (DB).

[See also AIR 1937 Nag 269 (269, 270): ILR (1939) Nag 497.]

(18) Where a surety dies after the accrual of his liability under the bond, the liability can be enforced against his legal representatives to the extent of his estate in their hands. AIR 1914 Mad 328 (329): 38 Mad 1120 (DB) ** AIR 1926 Sind 294 (295): 19 Sind LR 165.

(19) Where the surety is not otherwise discharged from his liability the Court has no power to make an order for his discharge except in the case provided for by Order 38, Rule 3 (arrest before judgment). AIR 1927 Mad 294 (295) (DB) ** AIR 1929 Lah 435 (436).

[But see (1870) 13 Suth WR 403 (405) (DB).]

(20) The Court to which a guarantee is given has power in a proper case to exonerate the surety from all future transactions. AIR 1932 All 262 (262, 263): 54 All 293 (DB).

[See also AIR 1940 Mad 730 (730).]

(21) A surety may be precluded by estoppel or res judicata, from disputing his liability under the bond. (1906) 4 Cal L Jour 311 (315, 316) (DB). (Estoppel.) ** AIR 1936 Mad 990 (991). (Do.) ** (1907) 31 Bom 128 (135, 136) (DB). (Res judicata.) ** AIR 1930 Lah 80 (80). (Res judicata.)

[But see AIR 1964 Raj 1 (3): 1963 Raj LW 473 (DB). (There is nothing in the language of Section 145 or 47 which may bar a surety from filing a suit to negative a liability which is sought to be fastened on him by a decree-holder. The surety can straightway file a suit or choose to contest his liability on execution side.)]

(22) Where a bond is given to the Court, the liability of the surety cannot be determined by the surety by giving notice as in the case of a continuing guarantee. AIR 1940 Mad 730 (731) ** AIR 1936 Mad 576 (578) (DB).

(23) Where security for the appearance of a judgment-debtor in the course of certain execution proceedings has been given, the termination of such proceedings will not absolve the surety from a liability already incurred by him before such termination. AIR 1939 Sind 270 (272): ILR (1939) Kar 401 (DB).

(24) Surety bond in favour of District Court for satisfaction of trial Court's decree — Second bond undertaking to discharge liability under High Court's decree if appeal is filed to High Court — Second appeal not filed — Surety is not discharged from the liability under the earlier bond by mere execution of second bond. (1953) 6 Sau LR 368 (370).

(25) Where a surety bond was filed in one Court but as the plaint was returned for its being filed in proper Court, on presentation of the plaint in proper Court, the bond still remains valid. AIR 1968 Andh Pra 272 (273) (DB). (AIR 1960 Andh Pra 507, Foll.; Order in A. A. O. No. 55 of 1959, dated 12-7-1963 (Andh. Pra.), **REVERSED.)**

(26) Attachment of movable property before judgment — Property attached kept in custody of third party on his executing bond to return goods and to pay price of

**Section 145 — Note 13 (contd.)**

goods if he failed to do so — Goods destroyed by fire — Enforcement of liability under bond by application — Section 145, is not attracted — Surety can plead in defence that he was not liable as goods were destroyed by act of God and that the contract which was not a special contract stood discharged on account of the destruction. AIR 1962 Assam 23 (26, 27): (1960) 1 Assam LR 243 (DB).

(27) Whether particular decree is within scope of surety bond or not depends upon terms of surety bond and decree and consequently is question of fact — Where, a compromise decree containing agreement between creditor and debtor for receiving decretal amount in instalments was outside surety bond surety was discharged. AIR 1968 Delhi 108 (110). (AIR 1957 Cal 645 and AIR 1944 Lah 428, Foll.)

(28) Where the bond executed by the surety mentions that he will be liable only if a decree is passed against all the defendants and if all of them (defendants) are unable to pay the amount the compromise by the decree-holder restricting claim only to the principal defendant, being inconsistent with the rights of the surety, impairing the remedy of the surety against the other defendants who were dismissed from action the principle in Section 139. Contract Act applies and the surety stands discharged. AIR 1962 J & K 72 (76): 1962 Kash LJ 23 (DB). (AIR 1938 Mad 422, Rel. on.)

(29) It is a general rule that upon the reversal of an order, all connected or dependent orders or acts in the law fall with it. Once such dependence is clear, the reversal of the parent order without qualification means and implies that the orders or acts in the law dependent thereon stand competely wiped out. In the case in question the surety bond executed by the surety was manifestly an act in the law within the meaning of the above rule so that when the decree-holder induced the Court by exercise of its review jurisdiction, to revoke the stay order on the ground that the security originally ordered was inadequate, the consequence necessarily followed that the surety bond stood discharged altogether. AIR 1960 Ker 11 (12): 1958 Ker LT 545.

(30) Where an order dismissing the suit for default is set aside, the suit is revived as it was on the date of dismissal and the surety bond, given under Order 38, Rule 2, Civil P. C., is also restored and the decree-holder is entitled to enforce it. AIR 1960 Madh Pra 221 (222): 1960 MPLJ 21. (AIR 1941 Nag 61 and AIR 1952 Pepsu 22, Rel. on.)

**14. Recovery of sum forfeited.** — (1) Where a man stands surety for the appearance of another, he should take every precaution to ensure the carrying out of his undertaking and he cannot be allowed on grounds of public policy to recover any sum forfeited under the bond from the principal or from any one else; for, if he is so allowed, it would only tend to render the surety callous and the whole object of demanding the bond would be defeated. AIR 1932 Lah 23 (23).

**15. Form of surety bond.** — (1) A surety bond may be in favour of the Court or the decree-holder. No particular form is necessary. AIR 1926 Cal 877 (879): 53 Cal 515 (DB) ** AIR 1933 Lah 913 (914): 15 Lah 44 ** AIR 1935 Mad 209 (210): 58 Mad 777 (DB) ** AIR 1936 Lah 463 (464).

[See also AIR 1955 Hyd 261 (263): ILR (1955) Hyd 754 (DB).]

(2) Form No. 6, App. 'F', does not show that the name of the Court is required to be mentioned. The document is not illegal, merely because the name of the presiding officer or any other officer has not been mentioned therein. AIR 1958 Assam 15 (16) (DB).

(3) To make the section applicable it is not necessary that the surety's liability must have accrued upon an application presented to the Court or a security bond filed in the proceedings. (1912) 16 Ind Cas 859 (860) (DB) (Cal) ** AIR 1935 Mad 209 (210): 58 Mad 777 (DB).

[See also AIR 1939 All 517 (517).]

(4) The section does not apply to surety bonds executed outside Court. AIR 1919 Mad 813 (815) (DB).

[But see AIR 1935 Mad 209 (210): 58 Mad 777 (DB).]

(5) A surety bond charging immovable property with a sum exceeding one hundred rupees is compulsorily registrable. (1899) 26 Cal 222 (224) (DB) ** AIR 1958 All 820 (823) (DB) ** (1908) 31 Mad 330 (332) ** AIR 1925 Rang 55 (58): 2 Rang 429 (DB).

[But see AIR 1928 Bom 42 (44, 46): 52 Bom 72 (DB) ** AIR 1934 Lah 138 (141, 142): 15 Lah 282 (FB). (**OVERRULING** AIR 1919 Lah 8: 1919 Pun Re No. 122.) ** AIR 1949 Ajmer 60 (60) ** AIR 1960 Punj 517 (518): 62 Pun LR 456. (AIR 1958 All 820, **DISSENTED.**)]

(6) Prior to the acceptance of the security bond, it must be carefully scrutinized, especially when it relates to charges upon specific immovable property, and intention of personal liability must be clearly contained in the bond to balance the risk of executant not having power of disposal over the specified property in the bond. AIR 1942 Lah 6 (9) (DB).

(7) A security bond executed to enable the decree-holder to withdraw the decretal amount deposited in Court and to secure repayment of the money withdrawn in case the decree is reversed on appeal is not exempt from registration under Section 17 (2) (vi), Registration Act, but is registrable under Section 17 (1) (b) of that Act. AIR 1957 Assam 157 (159) (DB). (AIR 1928 Bom 42 and AIR 1934 Lah 138 (FB), Not followed.) ** AIR 1960 Pat 305: 1959 BLJR 561 (DB).

**Section 145 — Note 15 (contd.)**

(8) A bond like all instruments creating a liability must be construed strictly. Where instead of adopting form No. 2 in App F relating to the bond to be executed under Order 38, Rule 2, the bond was as follows. "I stand surety for the defendant . . . . . and I agree that I will see that the defendant shall be present in the Court on every day of the hearing till the final disposal of the suit ("dave ka akhari nikal hone tak") I shall produce him if he fails to attend. If I fail to do so I shall satisfy from my own property the decree, if any, that might be passed in favour of the plaintiff . . . . . ."

**Held,** (1) that the word "suit" in O 38. Rule 2, Civil Procedure Code and 'dava' in the security bond could not be interpreted so as to include execution proceedings as well;

(2) that the surety had not undertaken to do anything beyond guaranteeing the appearance of the defendant till disposal of the suit which he had done;

(3) that the surety could not be proceeded against on the security bond in execution of the decree against the judgment-debtor. AIR 1960 Madh Pra 221 (221, 222): 1960 MPLJ 21.

(9) Form No. 3 in Appendix G of the First Schedule to the Civil P. C., does not mention whether the security bond is to be executed in favour of any particular officer or Court. Therefore from the mere fact that at the top of the bond there were words 'to the Subordinate Judge, Coimbatore' it could not be said that the bond was executed in favour of a person. Such a bond is not assignable. In such a case the party who had deposited the amount during the pendency of appeal and who stood successful in the appeal should not be left without a remedy to realise the amount deposited by him. Even if Section 145, Civil P. C. will not apply, the Court has ample jurisdiction in its inherent power to enforce the bond by way of execution in the same proceedings. AIR 1960 Mad 324 (325): (1960) 1 Mad LJ 148. (AIR 1936 Mad 953, Disting).

**16. Enforceability of surety bond apart from the section.**— (1) A security can be enforced in execution under the inherent powers of the Court apart from the provisions of this section. AIR 1955 Hyd 261 (263): ILR (1955) Hyd 754 (DB) ** ILR (1954) Cut 556 (560) (DB) ** AIR 1952 Trav-Co 237 (238, 239): ILR (1952) Trav-Co 144 (DB) ** AIR 1949 Mad 152 (154) (DB) ** AIR 1943 PC 189 (191): ILR (1944) Kar (PC) 16 ** AIR 1966 Andh Pra 151 (152): (1965) 1 Andh LT 245 (DB) ** AIR 1964 Andh Pra 339 (341): (1964) 1 Andh WR 374 (DB).

**17. Separate suit by or against surety.**— (1) The fact that under the section the surety "shall, for the purposes of appeal, be deemed a party within the meaning of Section 47," does not make the surety a party to the suit for all purposes. He is a party only for the limited purpose of appeal. Hence, a suit to enforce the security is not barred under the section. AIR 1949 All 306 (308): ILR (1949) All 869 (DB) ** AIR 1937 Cal 625 (627): ILR (1937) 2 Cal 698 (DB) ** AIR 1938 Nag 148 (149): ILR (1939) Nag 536 (DB).

[See also AIR 1949 All 260 (261).]

[But see AIR 1929 All 266 (266).]

(2) A suit by the surety to negative his liability is not barred. AIR 1927 Bom 63 (66): 50 Bom 802 (DB) ** AIR 1937 Lah 658 (660): ILR (1938) Lah 140 (DB).

[But see (1905) 28 Mad 117 (118) (DB) ** AIR 1929 All 263 (266).]

(3) A suit for injunction restraining the executing Court from executing the decree against the surety cannot be maintained. AIR 1925 Lah 618 (618).

(4) Where the attached vehicles in the custody of the Sapurdar were damaged due to his negligence a petition for order against him to restore the vehicles in the same condition in which they were, is maintainable. No suit need be instituted against him. AIR 1958 Punj 348 (349).

(5) Assuming that a sapurdar to whom goods attached are entrusted for safe custody is a surety within the meaning of this section, if no proceedings under the section are taken against the surety and he himself voluntarily returns the property to the defendant without claiming expenses as a condition for the return, he cannot claim the expenses by merely presenting an application in execution. The surety is no doubt entitled under Section 158, Contract Act, to get the expenses incurred for maintaining the property, but his remedy is by a separate suit and not by an application. Madh BLJ 1954 HCR 735 (737).

(6) Until an application is made for execution against the surety he does not become a "party." Hence, he cannot apply to the executing Court for cancellation of his bond. Nor will the rejection of such application made by him, where he makes one, constitute res judicata. AIR 1943 Mad 288 (291): ILR (1943) Mad 509 (DB) ** AIR 1920 Mad 75 (77): 43 Mad 325 (DB) ** AIR 1925 Lah 552 (553).

(7) Where the surety does not impugn the validity of the bond when it was executed but only states that by reason of subsequent events, the bond has become discharged, he can approach the Court in whose favour the bond was executed and apply for its cancellation though proceedings to enforce the bond may not have yet been taken. AIR 1943 Mad 288 (291): ILR (1943) Mad 509 (DB).

(8) When it is sought to enforce the decree against the surety, he becomes a "party" and his objections therefore have to be determined in the proceedings and he cannot be compelled to file a separate

**146. Proceedings by or against representatives.**—Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.

[1882, cf. S. 582A; See Order 22.]

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**Section 145 — Note 17 (contd.)**

suit to vindicate his objections. His omission to raise any objection in proceedings against him under this section will make the decision as to his liability res judicata and he cannot dispute it afterwards. AIR 1925 Lah 552 (553) ** AIR 1923 Mad 340 (342) (DB) ** AIR 1928 All 527 (530): 51 All 346 (DB) ** AIR 1930 Lah 399 (400).

(9) A surety cannot have a sale set aside by separate suit, where it is vitiated only by irregularities and not for want of jurisdiction. AIR 1928 All 527 (529): 51 All 346 (DB).

**18. Appeal.**— (1) An order enforcing or refusing to enforce a security under this section is appealable as a decree. AIR 1953 Hyd 111 (113): ILR (1953) Hyd 51 (DB). (Enforcing security.) ** AIR 1915 Cal 688 (688) (DB). (Do.) ** AIR 1932 Bom 77 (78). (Do.) ** AIR 1915 Mad 653 (654) (DB). (Refusing to enforce.) ** AIR 1933 Nag 287 (288). (Do.)

(2) Even where Section 145 does not apply, and yet the surety bond is enforced without recourse to suit in the manner mentioned by the Privy Council in AIR 1919 PC 55 (59): 42 All 158: 46 Ind App 228, there is a right of appeal. AIR 1953 Assam 15 (15, 16): ILR (1952) 4 Assam 447 (DB) ** AIR 1933 Mad 780 (781): 56 Mad 909 (DB).

[See also AIR 1943 Nag 172 (174): ILR (1943) Nag 699.)]

[But see AIR 1945 Cal 193 (194): ILR (1944) 1 Cal 563 ** AIR 1933 Mad 342 (342).]

(3) Until an application is filed for execution against a surety under this section, he is not a party and hence an order discharging him before such application is made is not appealable. AIR 1920 Mad 75 (77): 43 Mad 325 (DB) ** AIR 1933 All 382 (383, 384): 55 All 548 (DB) ** AIR 1931 Lah 503 (503).

[But see AIR 1925 All 344 (345) (DB).]

(4) Where the Court below has held that Section 145 (c) clearly applies to the facts of the case, the order is covered by Section 47 and an appeal would lie, and if a proper case is made out, there is no bar to the High Court exercising its powers under Section 115. AIR 1962 Assam 23 (24): (1960) 1 Assam LR 243 (DB).

**19. Notice to surety.**— (1) Notice to the surety is a condition precedent to the validity of the proceedings against him under this section. (1878) 3 Cal 318 (319) (DB) ** ILR (1958) Cut 309 (312) ** AIR 1931 Mad 828 (829) ** (1936) 40 Cal WN 465 (467).

(2) The surety may waive the notice, in which case it need not be given. (1916) 19 Mad L Tim (Jour) 81 (82) (DB) ** AIR 1937 Lah 772 (777).

(3) The notice need not be "in writing". AIR 1937 Lah 772 (776).

(4) Notice need not be given by the Court. (1905) 29 Bom 29 (33) (DB).

(5) Notice may be given by the decree-holder. (1905) 29 Bom 29 (34) (DB).

(6) Notice may also be given by the Court to which the decree is sent for execution. (1905) 29 Bom 29 (34) (DB).

[See AIR 1938 Lah 593 (593): ILR (1938) Lah 624.]

(7) Only one notice is required by this section and where such notice has been given, a fresh notice is not necessary each time an application for execution is made against the surety. (1936) 40 Cal WN 465 (466).

(8) A general notice on the execution application issued to him along with judgment-debtor is not the notice contemplated under Section 145. ILR (1958) Cut 309 (312).

(9) The mere arrest of the surety does not constitute the execution of the decree but detention in prison does constitute it. Where notice is given to the surety at the same time as the order for arrest, but before the order for imprisonment (which is really the order for execution) the notice is valid. AIR 1927 Lah 131 (132).

(10) The question of sufficiency of notice to a surety for production of a person has to be determined according to the principles of justice, equity and good conscience and in all cases where the period of notice required to be given is not specified that notice must be a reasonable notice. AIR 1953 Madh B 77 (79): ILR (1953) Madh B 57.

## SECTION 146 — SYNOPSIS

**1. Scope and object.**
**2. Application for execution.**
**3. Proceeding or application.**
**4. Setting aside ex parte decree** — See Note 1.
**5. "Claiming under."**
**6. Legal representatives need not be brought on the record.**
**7. Representation of person who is still alive.**
**8. Appeal.**

**1. Scope and object.**— (1) Section 146 was introduced for the first time in the Civil Procedure Code, 1908, with the object of facilitating the exercise of rights by

**Section 146 — Note 1 (contd.)**

persons in whom they come to be vested by devolution or assignment. **AIR 1958 SC 394 (397): 1958 SCR 1287** ** (1966) 32 Cut LT 570 (573): ILR (1965) Cut 523.

(2) A legal representative can file an application to set aside an ex parte decree before he is actually brought on the record. AIR 1954 Mys 32 (34): ILR (1953) Mys 544. (Ex parte decree passed by Small Cause Court.) ** 1962 BLJR 695 (697).

[See also Order 9, Rule 13.]

(3) This section should receive beneficial interpretation and be read as supplementing the rules. **AIR 1958 SC 394 (397): 1958 SCR 1287** ** AIR 1921 Mad 599 (601): 44 Mad 919 (FB) ** AIR 1965 Andh Pra 81 (83): (1964) 2 Andh WR 81.

(4) The scope of the section should not be whittled down by placing a too limited and narrow construction upon it. AIR 1926 Mad 371 (372) (DB) ** **AIR 1958 SC 394 (397): 1958 SCR 1287** ** (1966) 32 Cut LT 570 (573): ILR (1965) Cut 523 ** AIR 1965 Andh Pra 81 (83): (1964) 2 Andh WR 81.

(5) The section is wide enough to entitle a person to continue a proceeding started by another under whom he claims. AIR 1955 Punj 255 (256) ** AIR 1952 Pat 72 (73) ** AIR 1921 Mad 599 (603, 605): 44 Mad 919 (FB) ** AIR 1965 Andh Pra 81 (83): (1964) 2 Andh WR 81.

[But see AIR 1927 Mad 507 (508).]

(6) This section cannot enable A as claiming under B, to maintain an application which B himself could not have maintained. Thus, an assignee from the heir of a deceased plaintiff who was not himself brought on the record, cannot apply under Order 22, Rule 10 inasmuch as the heir could not himself have applied under O. 22, R. 10, but could only have applied under O. 22, R. 3. AIR 1954 Pat 61 (61, 62) ** AIR 1925 Mad 1166 (1167) ** AIR 1936 Pat 123 (125): 15 Pat 82 (DB).

(7) Death of A while proceedings in progress — Application for substitution of B and C as legal representatives of A — Death of B — Registrar allowing substitution of legal representatives of B when B was not brought on record — Order held illegal. AIR 1965 Pat 279 (282) (DB).

(8) Where A whose suit is dismissed assigns his interest in the subject-matter of the suit to X and then files an appeal, the appeal is not maintainable as A has no longer any interest in the subject-matter of the suit. Nor can X be made the appellant in the appeal under this section as this section will not apply to the case because A himself had no right to file the appeal. AIR 1935 Lah 119 (120).

(9) A claim suit under Order 21, Rule 63 is maintainable under Section 146 at the instance of a person claiming the property under the person against whom a claim order has been made. (1968) Ker LJ 475.

(10) An assignee of a person who was not brought on record but who had applied to be added as legal representative of a deceased party, but who had died before the decision on his application, can put in an application under this section for being substituted. AIR 1954 Hyd 12 (14): ILR (1953) Hyd 703 (FB).

[See also AIR 1950 Cal 376 (377): ILR (1951) 1 Cal 578 (DB).]

(11) Mortgage property purchased by mortgagee in execution of his decree — Confirmation of sale and issue of sale certificate pending on payment of landlord's fees — Creditor of mortgagee-purchaser purchasing his right, title and interest is the mortgagee's successor-in-interest and not the assignee of any decree — He need not apply under Order 21, Rule 16 to be substituted in the execution case — Order 22, Rule 10 applies to such case and the order passed on application of the transferee to be substituted in the place of transferor and for receipt of payment of landlord's fees from him and to confirm sale and issue sale certificate to him is one which falls under that rule. ILR (1947) 1 Cal 22 (28, 29).

(12) A person deriving title through the plaintiff can apply under Order 9, Rule 9, to set aside an order passed under Order 9, Rule 8, dismissing the suit for default — But he is debarred from filing a subsequent suit — The word "plaintiff" in Order 9, Rule 9, includes his heirs and representatives-in-interest. AIR 1957 Andra Pra 364 (367) (DB).

(13) The opening words of the section expressly make it subject to the other provisions of the Code. See AIR 1954 Hyd 12 (12): ILR (1953) Hyd 703 (FB) ** AIR 1942 Mad 21 (22, 23) (DB).

(14) See the following cases. AIR 1924 Mad 470 (472). (Dicta of Philips J.) ** AIR 1934 Mad 485 (489) ** AIR 1935 Cal 738 (739) (DB).

**2. Application for execution.**— (1) Order 21, Rule 16 makes it clear that besides the decree-holder any person to whom the decree has been transferred by assignment in writing or by operation of law, may execute the decree. AIR 1950 Mys 18 (19): 55 Mys HCR 272 (DB) ** AIR 1947 Nag 116 (119): ILR (1946) Nag 895 (DB) ** 1966 Jab LJ 452 (460). (One of heirs of deceased decree-holder can apply for execution and do so for benefit of all in view of Order 21, Rule 16 read with R. 15 or the principle underlying it and Sec. 146).

[See also 1967 MPLJ 231 (236): 1967 Jab LJ 96. (Transfer of decree by operation of law — Belated application by legal representatives for continuation of execution proceedings — Application held to be under Order 21, Rule 16 and not Sec. 146 and hence Article 181 of Limitation Act would apply.)]

(2) Section 146 cannot be read as extending the scope of Order 21, Rule 16 as the former is expressly made subject to the

**Section 146 — Note 2 (contd.)**

other provisions of the Code. Hence, a transferee of property which is the subject-matter of a suit or which is covered by a decree is not entitled to apply for the execution of a decree in favour of the transferor, although he may be a person "claiming under" the decree-holder within the meaning of this section. Such a transferee is not a transferee of the decree within the meaning of Order 21, Rule 16. AIR 1952 Trav-Co 254 (254, 255): ILR (1951) Trav Co 743 (DB). (Transfer of subject-matter of suit.) ** AIR 1927 Mad 240 (241). (Transfer of property covered by decree.) ** ILR (1947) 1 Cal 22 (26) (DB) ** **AIR 1955 SC 376 (383, 393): (1955) 1 SCR 1369** ** (1964) 2 Mad LJ 563 (567): 77 Mad LW 249.

(3) The transferee pendente lite of certain debts for which the suit was brought could apply for execution of the decree in the suit, by virtue of this section, though not under Order 21, Rule 16. AIR 1942 Mad 21 (22, 23) (DB). (AIR 1921 Mad 599: 44 Mad 919, Expl. and Relied on.) ** **AIR 1955 SC 376 (394, 395): (1955) 1 SCR 1369** ** AIR 1957 Cal 72 (78) (DB) ** **AIR 1969 SC 73 (77): (1968) 2 SCJ 851.** (Equitable assignee of decree can execute it under S. 146.) ** AIR 1969 Mad 271 (272): (1968) 2 Mad LJ 610. (Legatee of subject-matter of suit executed by decree-holder prior to obtaining decree — Can execute decree under Section 146 — Order 21, Rule 16 does not apply — ILR (1964) 2 Mad 363, **DISSENTED FROM.)** ** AIR 1968 Cal 242 (244) (DB) ** AIR 1968 Mad 190 (192): (1965) 2 Mad LJ 281 ** AIR 1967 Punj 268 (270) ** AIR 1965 Andh Pra 81 (83): (1964) 2 Andh WR 81 ** AIR 1964 Andh Pra 28 (30, 31): (1963) 2 Andh WR 179 ** AIR 1964 Pat 311 (314) ** 1966 Ker LT 1077 (1079) ** AIR 1959 Ker 180 (181): 1958 Ker LT 787 (DB).

(4) The expression "transferee" in Order 21, Rule 16 is not confined to a transferee of the whole decree, but includes a transferee of a portion of the decree and hence such a person can apply to execute the decree. AIR 1926 All 346 (348): 48 All 432 (DB) ** AIR 1928 Lah 70 (71) ** AIR 1921 Mad 599 (601): 44 Mad 919 (FB).

(5) The transferee of a decree is a person "claiming under" the decree-holder, and steps into his shoes for all purposes If the assignment of the decree is jointly in favour of more than one person, then the assignees may be deemed as joint decree-holders for the purposes of O. 21, Rule 15. AIR 1945 Bom 380 (381): ILR (1945) Bom 463 (DB).

(6) A decree may be executed against the property in the hands of a transferee thereof pending the suit. AIR 1946 Lah 142 (146): ILR (1946) Lah 467 (FB) ** AIR 1921 Mad 126 (132).

(7) Where a decree-holder dies during the pendency of an execution application, his legal representatives may be substituted in the execution application and be allowed to continue the execution proceedings without a fresh application for execution. The same principle applies where the execution has to proceed against the legal representatives of a judgment-debtor who dies during the pendency of an execution application. AIR 1955 Punj 255 (256) ** AIR 1954 Trav-Co 57 (58). (Death of decree-holder.) ** AIR 1932 Mad 73 (80, 82, 83): 55 Mad 352 (FB). (Do.) ** AIR 1936 Bom 453 (457). (Death of judgment-debtor.) ** AIR 1928 PC 162 (164): 55 Ind App 227: 3 Luck 314. (Do.) ** AIR 1965 Pat 85 (86) ** ILR (1960) 10 Raj 1472 (1475) ** AIR 1959 Mys 41 (43): 36 Mys LJ 411 (DB).

(8) Death of decree-holder during the course of execution case — His heir continuing the case — Section 214 (1) (b), Succession Act does not apply and succession certificate not necessary. AIR 1965 Pat 296 (296).

[But see AIR 1968 Raj 273 (276): 1968 Raj LW 519 (DB). (Application by L. R for continuing pending execution application presented by deceased decree-holder—Succession certificate necessary.)]

**3. Proceeding or application.**— (1) An appeal is a "proceeding" contemplated by the section. Hence a person claiming under a party to the suit may prefer an appeal from the decree in the suit although he was not himself a party to the suit. **AIR 1958 SC 394 (397): 1958 SCR 1287** ** AIR 1962 Andh Pra 140 (142): (1961) 2 Andh WR 204 (FB).

(2) The right to file an appeal must be held to carry with it the right to continue an appeal which had been filed by the person under whom the applicant claims and the petition of the appellant to be brought on record as an appellant in an appeal must be held to be maintainable under Sec. 146. **AIR 1958 SC 394 (397): 1958 SCR 1287** ** **AIR 1961 SC 137 (141): (1961) 1 SCR 680.** (Execution appeal pending before Supreme Court — Subject-matter of appeal mortgaged by judgment-debtor — Mortgagee obtaining mortgage decree and executing same subsequent to execution appeal — Auction purchaser can be impleaded in appeal on the principle laid down by AIR 1958 SC 394) ** (1966) 32 Cut LT 570 (573): ILR (1965) Cut 523. (Application for being brought on record as respondent — Same principle applies.)

(3) Where the party dies during the pendency of an appeal in execution proceedings, it is not necessary in order to enable his heirs to continue the appeal by being substituted in the place of the deceased decree-holder, to take out a succession certificate. Section 214 of the Succession Act, has no application to such a case. ILR (1957) Punj 234 (237).

(4) Applications under Section 144 or under Order 21, Rule 2, or under Order 21, Rule 94, or under Order 21, Rules 95 and 98, or under Order 34, Rule 5, are all ex-

**Section 146 — Note 3 (contd.)**

amples of applications contemplated by the section. AIR 1941 Mad 480 (480) (DB). (Application under Section 144.) ** (1912) 17 Ind Cas 617 (618) (DB) (Mad). (Application under Order 21, Rule 2.) ** AIR 1936 Bom 137 (138). (Application under Order 21, Rule 94) ** AIR 1918 All 405 (405): 40 All 216 (DB). (Application under Order 21, Rule 95.) ** (1911) 34 Mad 450 (452) (DB). (Application under Order 21, Rule 98.) ** AIR 1927 Mad 560 (561). (Application under Order 34, Rule 5.)

(5) A decree for injunction obtained against the defendant in a representative suit can be executed under Order 21, R. 32. against those defendants who were not eo nomine parties to the suit. Though such defendants are neither the legal representatives nor the transferees within the meaning of Order 21, Rules 16 and 22, yet as the execution proceeding is a proceeding within the meaning of Section 146, it can proceed against such defendants as they claim the same title under or are equally interested as the defendants who were parties on record of the suit. AIR 1960 Cal 623 (625, 626): 64 Cal WN 439.

(6) Proceeding under Section 15, Kerala Agriculturists Debt Relief Act, 1958 — Death of debtor applicant — His legal representatives are entitled to prosecute the application under Section 146, Civil P. C. read with Section 141 as the proceeding is an original proceeding in a Court of Civil jurisdiction and the right to reliefs obtainable on filing the application becomes a vested right of the applicant passes to his legal representatives on his death. 1966 Ker LT 947 (948, 949): 1967 Ker LJ 23.

(7) A transferee pendente lite is entitled to apply for relief under Section 22 (1) of the Kerala Agriculturists Debt Relief Act, 1958, even if the term 'judgment-debtor' in that section is governed by the definition given in Civil P. C., as he would be in view of Section 146 covered by that expression. 1965 Ker LT 1138 (1142): 1965 Ker LJ 1001 (DB).

**4. Setting aside ex parte decree** — See Note 1.

**5. "Claiming under."**— (1) A person "claiming under" a party to a litigation is one who has succeeded to the position of the latter in the litigation, or has acquired from him, subsequently to the commencement of the litigation, an interest in its subject-matter. (1912) 17 Ind Cas 512 (513) (All) ** AIR 1937 Oudh 488 (490): 13 Luck 554 (DB) ** AIR 1965 Andh Pra 81 (83): (1964) 2 Andh WR 81.

(2) Where a person has acquired from the party subsequent to the commencement of litigation an interest in the subject-matter of the litigation, he can be said to claim under the party only in respect of the rights and interests in property which he has so acquired. (1910) 33 Mad 459 (462) (DB) ** AIR 1957 Cal 72 (73) (DB).

(3) The person claiming under the original party must be one who by a title derived from or under the party has himself the right to take the proceeding or make the application and not merely one who has a derivative interest in the property (like that of a mortgagee subsequent to suit) which may in some manner, be affected by the result of the proceeding. AIR 1934 Mad 485 (490).

(4) The expression "claiming under" is wide enough to include cases of devolution and assignment mentioned in Order 22, Rule 10. **AIR 1958 SC 394 (397): 1958 SCR 1287** ** AIR 1966 All 474 (476) (DB). (Interest of Life Insurance Company devolving on Life Insurance Corporation while suit is pending — Corporation can pursue claim as successor-in-interest.)

(5) An ex parte decree is passed against A a defendant in a suit. Subsequently A dies. B, his legal representative, may apply to set aside the ex parte decree. AIR 1915 Mad 1204 (1205): 38 Mad 442 (DB); ** AIR 1923 All 30 (30) (DB).

(6) A who has obtained a preliminary decree in a mortgage suit, assigns the decree to B. B as a person claiming under A, may apply for a final decree. AIR 1927 Mad 560 (561).

(7) A an auction-purchaser, transfers the property purchased by him to B. B may apply to the Court under Order 21, Rule 95 for possession of the property transferred. AIR 1918 All 404 (405): 40 All 216 (DB).

(8) The purchaser from the auction purchaser is a person claiming under the auction-purchaser and hence every remedy which Order 34, Rule 5 has provided against the auction-purchaser can be claimed against the purchaser from him in the same proceedings. (1967) 1 Mad LJ 260 (265): 80 Mad LW 124 (DB).

(9) A sues B to establish his right to certain property. While the suit is pending, B mortgages the property to C. The suit is decreed against B. B does not appeal from the decree. C, as a person claiming under B, may appeal from the decree. AIR 1952 Pat 323 (324): 29 Pat 160 (DB) ** AIR 1941 Mad 245 (245, 246) (DB).

(10) A, a mortgagee of immovable property, sues B, the mortgagor, for the enforcement of the mortgage. Prior to the suit, B has granted to C, a puisne mortgage of the property. C is not made a party to the suit. An ex parte decree is passed against B in the suit. C cannot apply to set aside the ex parte decree as a person claiming under B, because C's interest was not acquired subsequently to the institution of the suit but was acquired before. AIR 1926 Cal 1015 (1015) (DB).

[See also AIR 1937 Oudh 488 (490): 13 Luck 554 (DB).]

(11) A transfers the suit property to B after an ex parte decree has been passed and then files an application to set aside the ex parte decree. The application is

**Section 146 — Note 5 (contd.)**
dismissed. As the transfer to B was subsequent to the decree he is a person interested in setting aside that decree and therefore entitled to continue A's application. That being so when that application is rejected B is entitled to file an appeal against the order rejecting the application. AIR 1952 Pat 72 (73).

(12) Disruption of joint Hindu family by partition — Subject-matter of suit instituted by the joint family devolving on partition on an individual or branch of that family — Such individual or branch is entitled to continue the suit under Sec. 146. AIR 1964 Ker 144 (148): ILR (1963) 2 Ker 238.

(13) A, a member of a Hindu joint family, obtains a preliminary decree for partition of his share of the family property Then he transfers his rights in the family property to B. B takes no steps to be impleaded in the suit, but after the final decree, applies to execute it as a person claiming under A. B is not entitled to do so. AIR 1926 Mad 1129 (1129) (DB).

(14) A sues B and attaches before judgment a debt due to B from C. The suit is decreed in A's favour. Upon this, under Order 38, Rule 11, A's attachment before judgment ripens into attachment in execution. Then B sues C and obtains a decree on the debt. A does not attach this decree but applies for its execution as a person claiming under B. It was held by Venkatasubba Rao, J. that A was entitled to do so and by Reilly, J., that he was not. AIR 1926 Mad 371 (372, 376) (DB).

(15) Under Order 21, Rule 53 (3), a decree-holder, who attaches another decree of the nature specified in the said Rule, becomes a representative of the holder of the latter decree for the purposes of execution. AIR 1930 All 659 (661) (DB).

(16) Under Order 21, Rule 53, where A attaches in execution of his decree against B, a decree obtained by B against C, A becomes the representative of B. But A becomes the representative of B only for the limited purpose of executing the decree against C. He has no right to adjust the attached decree and release C from his liability under the decree. AIR 1937 Cal 468 (472, 473) (DB).

(17) Receiver appointed under Order 40, Rule 1 is a representative of decree-holder and can apply for execution under S. 146. AIR 1952 Mad 51 (53): ILR (1952) Mad 622 (DB) ** AIR 1967 Ker 118 (120): 1966 Ker LT 960 (DB). (Receiver appointed by foreign Court — Reciprocity of arrangement for execution of decrees passed in each of the area in the other — Receiver can apply for execution of decree.)

(18) On the insolvency of the decree holder the official receiver as the transferee of the decree by operation of law is entitled to apply for execution of the decree or to continue any pending application. AIR 1947 Mad 34 (35): ILR (1947) Mad 307 (DB).

(19) Assignee from legal representative of deceased party cannot apply for substitution under Order 22, Rule 10 as that rule requires that the person claiming to be representative or assignee must derive his right directly and not through an intermediary from the party to the suit or proceeding. Section 146 cannot be relied on as it cannot be read divorced from Order 22, Rule 10. AIR 1946 Nag 164 (165): ILR (1946) Nag 43.

(20) That defendants 3 and 5 had purchased the property in suit for the plaintiff after the suit would be sufficient basis or foundation for an appeal by defendants 3 and 5 against the decree of the trial Court. AIR 1945 Bom 69 (73).

(21) Suit for sale on mortgage — Preliminary decree — Sub-mortgagee made party defendant to suit — Sub-mortgagee as a person claiming under, the original mortgagee can, on the general principles recognized under Section 146, apply for final decree where the original mortgagee plaintiff fails to do so. AIR 1945 Mad 463 (465).

(22) A Hindu coparcener is not a person 'claiming under' the manager of the joint family against whom a suit is filed. AIR 1937 Sind 94 (95): 30 Sind LR 467 (DB).

[See also AIR 1940 Mad 876 (877) ** AIR 1968 Andh Pra 353 (358): (1968) 2 Andh WR 246 (FB). (Death of P, cultivating tenant under R — C and H, son and widow of P surrendering tenancy rights — Tahasildar allowing application and ordering R to be put in possession — C and J claiming to be members of joint family with P and jointly cultivating the land and filing appeal are not claiming under parties to the proceedings and Section 146 may not apply.)]

(23) Application for issue of writ of certiorari by dismissed Government servant against order of dismissal — Death of applicant — Relief sought is purely personal to delinquent officer and such personal right which involves the continuance in service or otherwise of a person cannot survive to legal representatives — They cannot continue the proceedings to agitate the matter. AIR 1966 Mad 260 (262): (1965) 2 Mad LJ 302.

**6. Legal representatives need not be brought on the record.**— (1) To entitle a person to take a proceeding under Section 146 as a person claiming under a party to a litigation it is not necessary that he should have been brought on the record as such. AIR 1947 Mad 34 (36): ILR (1947) Mad 307 (DB) ** AIR 1925 Oudh 370 (371): 27 Oudh Cas 299 ** AIR 1964 Ker 144 (148): ILR (1963) 2 Ker 238.

(2) Where A, B, C and D are entitled as persons claiming under E to make an application and A alone presents the application within limitation, B, C and D being brought on the record subsequently, the

**147. Consent or agreement by persons under disability.**—In all suits to which any person under disability is a party, any consent or agreement, as to any proceeding shall, if given or made with the express leave of the Court by the next friend or guardian for the suit, have the same force and effect as if such person were under no disability and had given such consent or made such agreement.

[R.S.C., Order 16, Rule 21; See Order 32.]

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**Section 146 —Note 6 (contd.)**

presentation of the application by A alone is not invalid in view of this section though it may be defective and the Court may not proceed with it. AIR 1927 Bom 123 (124): 51 Bom 143 (DB).

**7. Representation of person who is still alive.**— (1) Where a person is alive but is detained in enemy country, a person who is looking after his interests and property in India, cannot be added as a representative of such a person in a suit against him. The proper procedure would be to issue processes for substituted service under Order 5, Rule 20, and then to proceed with the trial of the suit. AIR 1945 All 45 (46): ILR (1945) All 18.

**8. Appeal.**— (1) There is no right of appeal against an order under this section. AIR 1950 Cal 376 (376): ILR (1951) 1 Cal 578 (DB).

## SECTION 147 — SYNOPSIS

**1. Scope.**

**2. "As to any proceeding."**

**3. Leave must be express.**

**1. Scope.**— (1) The section enacts the substantive rule that a minor shall be bound by a compromise entered into by his guardian in the prescribed manner. But it does not place a consent decree obtained against a minor on a higher footing than a decree obtained after contest and such a decree can be avoided by the minor on the ground of fraud, collusion or gross negligence of the guardian. AIR 1946 Lah 233 (237): ILR (1946) Lah 515 (FB).

(2) Where a next friend or guardian ad litem of a minor enters into a compromise on his behalf with the permission of the Court under Order 23, Rule 7 the compromise and the decree based thereon would be as much binding on the minor as it is on the adult parties, unless the minor can show that the next friend or his guardian ad-litem was guilty of fraud or negligence. The onus of proving fraud or negligence on the part of the next friend or guardian ad-litem would be upon the minor and for his purpose he has to make clear and distinct allegations in his pleadings and to substantiate them. AIR 1967 Delhi 137 (140, 141) (DB).

**2. "As to any proceedings."**— (1) The section does not apply to an agreement merely relating to a conduct of a suit, e.g. an agreement that an issue in a suit (not the suit itself) should be determined by the oath of the defendant. AIR 1927 All 584 (584): 49 All 842 (DB) ** (1889) 12 Mad 483 (485) (DB) ** (1900) 27 Cal 229 (231) (DB).

(2) But an agreement as to a matter beyond the mere conduct of a litigation is not binding on the minor unless made with the leave of the Court. The following are some examples of such agreements:

(a) Agreement to compromise a suit AIR 1946 Lah 233 (237): ILR (1946) Lah 515 (FB).

(b) Agreement to withdraw a suit (1889) 13 Bom 137 (146) ** (1904) 27 Mad 377 (380).

(c) Agreement to refer a suit to arbitration. See Order 32, R. 7.

(d) Agreement not to appeal. (1889) 22 QBD 577 (578). (Cited in 17 Bom 299.)

(e) Waiver of objection to competency of Judge on account of his personal interest in the litigation. (1893) 17 Bom 299 (302) (DB).

(f) Waiver of objection to irregular procedure. AIR 1923 Mad 301 (302): 47 Mad 30 (DB).

(g) Waiver of right of minor to compensation in land acquisition case. (1891) 18 Cal 99 (106): 17 Ind App 90 (PC).

**3. Leave must be express.**— (1) The leave of the Court must be expressly given. (1898) 21 Mad 91 (93) (DB) ** (1903) 7 Cal WN 90 (92) (DB) ** (1906) 28 All 585 (588, 589): 33 Ind App 128: 9 Oudh Cas 219 (PC) ** (1883) 9 Cal 810 (812) (DB).

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# A. I. R. Commentaries Judicially Appreciated

A.I.R. 1948 Patna 460 (462) (Pr. 9) [V 35 C 161] (D.B.)—Per *Meredith J.*—"I will make two quotations from Chitaley and Annaji Rao's annotated edition of the Civil Procedure Code, 4th Edn. Vol. III, because those learned commentators have, in my opinion, correctly summed up the position in language which cannot be bettered."

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## CONSTITUTION OF INDIA.

1961 Manipur 1 (4) (Pr. 11) [A.I.R. V 48 C 1]—*Tirumalpad J. C.*—"What is prohibited (in Art. 23 (1)) is begar and other similar forms of forced labour. The A. I. R. Commentaries on the Constitution of India at page 635 define 'begar' as a system under which persons are pressed to carry burdens for individuals or public or to perform other forms of menial service under compulsion".

1961 All. 341 (345) (Pr. 33) [(S) A.I.R. V 43 C 126] (DB).—*Desai J.*—"Shri Jagdish Sahai could not cite any authority in support of his contention that the right given to the Court to draw an adverse inference is equal to compelling the accused to be a witness against himself. We notice that Chitaley in his Commentary on Consti. tution, Vol. I, pp. 497-498, does not see any conflict between the provisions of Art. 20 (3) and those of S. 342, Cr. P. C."

1956 J. & K. 1 (10) (Pr. 34) [(S) A.I.R. V 43 C 1] (F.B.)—*Kilam J.*—"The learned author Chitaley in his luminous commentary on the Constitution has, after discussing almost the whole case law on the subject, enunciated some principles which I might give more or less in his own language. According to the learned author . . . ." (Points from Note 8 (g) under Art. 21, p. 588 quoted.)

## CIVIL PROCEDURE CODE, 1908.

1953 S.C. 23 (27) [A.I.R. V 40 C 7]—[Touching the revisional jurisdiction of the High Court set out in S. 115, Civil P. C.] "A large number of cases have been collected in Edn. 4 of Chitaley & Rao's Code of Civil Procedure (Vol. I) which only serve to show that the High Courts have not always appreciated the limits of the jurisdiction conferred by this section."

1949 P. C. 156 (158) (Pr. 19) [A. I. R. V 36 C 48] — *Sir John Beaumont* — "There have been no doubt, decisions in some High Courts in India which lend support to the view upon which the Judges acted. The cases are corrected in Edn. 4 of Chitaley and Rao on the Code of Civil Procedure, Vol. I, p. 1105."

P. L. D. 1965 (W. P.) Lahore 590 (594, 595) (DB). — *Sajjad Ahmad J.*—"There has been a conflict of judicial opinion on the question of the applicability of this section to decrees in appeals under the Letters Patent. The High Courts of Bombay, Punjab, Madhya Pradesh and Madras have held that the section applies. The High Court of Patna took a contrary view (*See* Chitaley's Commentary on S. 114 of the Civil P. C.—headnote 1, at page 1507, Vol. II, 1963, Edition.) In a recent Full Bench decision reported in *Jwala Prasad* v. *Jwala Bank Ltd.*, A. I. R. 1961 All. 881, the Allahabad High Court has held that . . . . and has overruled an earlier decision to the contrary given by another Full Bench of the same Court reported in *Mst. Abhilakhi* v. *Sada Nand*, A. I. R. 1931 All. 244."

1968 J. & K. 13 (14) (Pr. 7) [A. I. R. V 55 C 4] — *J. N. Bhat J.* — "The principle as laid down in certain authorities as summarized in the Commentary on Chitaley's Civil P. C. (7th Edn., Vol. 2, Page 1927) is that the Court has to see whether the suit cannot be determined in the absence of the person who applies to be made party or whether his interests will not be prejudiced by not being joined as a party".

1968 Mad. 1 (21) (Pr. 59) [A. I. R. V 55 C 1] (FB) — *Venkataraman J.*—"Pointing out that S. 105, C. P. C. must be read harmoniously with S. 99, C. P. C., the decisions have held that the phrase 'affecting the decision of the case' in S. 105 must be interpreted to mean 'affecting the decision of the case on merits'. The deci. sions will be found collected in any text book, for example, in the Commentary of A. I. R. Section 105, Note 8. . . . . "

1965 All. 527 (531) (Pr. 28) [A. I. R. V 52 C 148] — *Oak J.* — "Mr. Brij Lal Gupta pointed out that the Court dealing with the matter in April 1947 was a Munsif. The present suit was tried by a Civil Judge. The valuation of the suit was Rs. 35,000. The Munsif had no jurisdiction to try the present suit. Under S. 11, C. P. C., the Court trying the former suit should have been competent to try the subsequent suit itself. (See Chitaley's Commentary on the Code of Civil Procedure Volume I, Page 415). (Now see 1968 (7th Edn.) pp. 879-880)."

1965 Punj. 494 (496) [A.I.R. V 52 C 157 Pr. 7]—*Shamsher Bahadur J.*—"The words 'for any other substantial cause' (in O. 41, R. 27 (b)) must be read with the word 'requires' in the beginning of the sentence and need not be construed in the narrow sense suggested by the doctrine of ejusdem generis . . . . . Reference may be made to Chitaley's Commentary on the Code of Civil Procedure, Vol. IV, at page 4819".

1965 Kerala 104 (105) (Pr. 3) — *S. Velu Pillai J.* — "The rights inter se of rival purchasers in sales in execution of decrees on mortgages, have been the subject of consideration in several decided cases. The result of these has been summarised as follows in A. I. R Commentaries on Civil Procedure Code, Vol. 8, 1957 (6th) Edn., pp. 3791 and 3792. (Now see 1963 (7th Edn.), pp. 3807, 3808, O. 34, R. 1, N. 39, Pts. 26 to 34) . . . . . ."

('64) I. L. R. (1964) 1 Ker. 320 (322) — *Madhavan Nair J.* — "The A. I. R. Commentaries on the Code of Civil Procedure in Note No. 4 to O. 34, R. 7 put the position succinctly thus . . . . . ."

## COURT-FEES ACT, 1870 & SUITS VALUATION ACT, 1887.

1968 Manipur 52 (53, 54) (Prs. 5, 12) [A. I. R. V 55 C 18]—*C. Jagannadhacharyulu J. C.* — "There is consensus of opinion in most of the High Courts that S. 7 (iv) (b) of the Court-fees Act does not apply to a suit for partition by a person in joint possession for partition of his share but that Art. 17 (vi) of Sch. II of the Court-fees Act applies. Vide pages 111, 112, 113, 114 and 115 of the Court-fees and Suits Valuation Act (A. I. R. Commentaries) Second Edition. . . . ."

1965 Punj. 1 (11) (Pr. 25) [A. I. R. V 52 C 1] (FB) — *P. C. Pandit J.* — "With regard to this definition (of 'consequential relief'), Chitaley in his Commentaries on the 'Court-fees Act and the Suits Valuation Act (Second Edition)', on page 135 has observed thus—".

## CRIMINAL PROCEDURE CODE, 1898.

A.I.R. 1969 Orissa 56 (57) (Pr. 5) [V 56 C 23] — *S. Acharya J.* — "Their Lordships of the Madras High Court in their decision reported in . . . . . A. I. R. 1954 Mad. 214 in quoting a passage from Chitaley and Annaji Rao's Criminal Procedure Code, observed as follows: 'But a Criminal Court, as well pointed in the exhaustive analysis in Chitaley and Annaji Rao's Criminal Procedure Code, Vol. III, 4th (1950) Edn. at page 2862, is not expected, under the provisions of S. 517 to 'try' civil cases . . . . . .' This view has been reiterated in a decision of this Court in . . . . . (1967) 33 Cut. L. T. 868."

1967 Current L. J. 717 (719) — *Shamsher Bahadur J.*—"Prior to the enactment of this amendment (S. 189-A), the Court had by judicial decisions engrafted a law which, according to Chitaley's Commentary on the Code of Criminal Procedure, Vol. I, Page 590, was this . . . . . ."

## LIMITATION ACT, 1908.

1968 Mad. 226 (229) (Pr. 5) [A. I. R. V 55 C 50] — *Natesan J.*—"Quoting from Chitaley and K. N. Annaji Rao on Limitation Act, it is observed therein. . . . ."

1963 Punj. 457 (459) (Pr. 7) [A. I R. V 50 C 127] — *Grover J.* — "As stated in Chitaley's Limitation Act, (3rd Edition), Volume 1, Page 524, the words 'Stayed by an injunction or order' have reference to an order of a Court and not to a disability to sue or to apply arising from other causes."

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1961 Pat. 134 (137) (Pr. 18) [A.I.R. V 48 C 36]—*Raj Kishore Prasad J.*—"The question under consideration has been thoroughly and clearly dealt with in A.I.R. Commentaries on the Indian Limitation Act, 3rd Edition, Vol. I, Note 11, page 595, Note 18, pages 601-604 and Note 32, page 688."

1960 Kerala 306 (308) (Pr. 17) [A.I.R. V 47 C 144]—*M. S. Menon and T. K. Joseph JJ.* — "As pointed out by Chitaley : 'Where no time is fixed for delivery, if the correspondence between the parties shows that the matter was being enquired into and that there was no refusal to deliver up to well within a year of the suit, this article (Art. 31) cannot be pleaded as a bar . . . . . .' (Limitation Act, Vol. 2, Page 1187)."

## REGISTRATION ACT, 1908.

1960 Madh. Pra. 3 (Pr. 8) [A. I. R. V 47 C 2] — *Dixit J.*—"The principle laid down in I. L. R. 4 Bom. 126 has been followed in many cases which have been noted in Chitaley's Registration Act (Second Edition) at page 867. . . . . ."

1960 Mad. 244 (Pr. 9) [A.I.R. V 47 C 77] — *Ramaswami J.*—"It is interesting in this connection to note that the A. I. R. Commentaries on the Registration Act (Second Edition) at pages 526 to 530, after an elaborate discussion of the entire case-law and the principles of S. 77 of the Registration Act, mention at p. 530 that the view expressed by Abdur Rahman J. is correct."

## STAMP ACT, 1899.

1967 Him. Pra. 29 (31) (Pr. 11) [A. I. R. V 54 C 9]—*Om Prakash J. C.*—"From the language used in the document, it is capable of falling within the definition of a bond, as defined in sub-s. (5) (b) of S. 2, Stamp Act, and also within the definition of a promissory note, under sub-s. (22) of that section. The maxim being, specialia generalibus derogant, an instrument which satisfies the definition under sub-s. (5) (b) must be held to be taken out of the more general definition in sub-s. (22), vide A. I. R. Commentaries on the Stamp Act, p. 70."

## TRANSFER OF PROPERTY ACT, 1882.

1964 Punj. 210 (211) (Pr. 4) [A.I.R. V 51 C 52]—*S. S. Dulat Actg. C. J. and D. K. Mahajan J.* — "It is significant that the provisions of this section (S. 111 T. P. Act) have never been applied as a rule of equity, justice or good conscience by any of the High Courts in the territories to which this provision is not made applicable under S. 1 of the T. P. Act, whereas a number of cases will be found at page 178, Note 4, of Chitaley's Transfer of Property Act, Vol. I, where principles underlying the provisions of the Transfer of Property Act have been so applied . . . . . ."

1961 Mad. 28 (30) (Pr 7) [A. I. R. V 48 C 7] — *Ramaswami J.* — "In this connection the learned District Munsif has pertinently pointed out the implications of the decision in *Gopal Chandra Das* v. *Harendra Nath Datta*, 63 Ind. Cas. 483 (Cal.) . . . . This decision has been cited with approval in the well-known commentaries on the Transfer of Property Act by Chitaley and Annaji Rao, Third Edition (1950) page 1861".

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# A. I. R. MANUAL (2ND EDN.) JUDICIALLY APPRECIATED

JAGANNADHACHARYULU J. C.—"Article 14 (of the Constitution) protects all persons from discrimination by the legislative as well as executive organs of the State. Vide Note 8, Page 2673 of A. I. R Manual Vol. 3, 2nd Edn. . . . . ."—*1968 Manipur 58 (63) (Pr. 16) [A. I. R. V 55 C 21].*

P. N. RAMASWAMI J. :—"For an exhaustive citation of the relevant cases (on S. 10, Cattle Trespass Act, 1871), see the most welcome 2nd (1960) Edn. of the A. I. R. Manual Vol. I referring to A. I. R. 1947 Pat. 172 = 47 Cri. L. J. 986 ; A. I. R. 1943 Sind 152 = 44 Cri. L. J. 761 ; A. I. R. 1916 Lah. 281=17 Cri. L. J. 63 ; A. I. R. 1919 Cal. 93=20 Cri. L. J. 398."—*A. I. R. 1960 Mad. 331 (332)=1960 Cri. L. J. 932 (933)*

—*See also A. I. R. 1960 Mad. 443 (446) = 1960 Cri. L. J. 1340 (1344)*

*[Vol. 4 of the A. I. R. Manual (2nd Edn.) referred to.]*

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